AMERICAN CONSTITUTIONAL LAW:
AN E-COURSEBOOK

By

Charles D. Kelso
Emeritus Professor of Law
University of the Pacific,
McGeorge School of Law

R. Randall Kelso
Spurgeon E. Bell Distinguished Professor of Law, South Texas College of Law Houston

VOLUME 3

THE FIRST AMENDMENT

SUMMARY OF CONTENTS

AUTHOR INFORMATION AND NOTES ON E-COURSEBOOK ................... 2
DETAILED TABLE OF CONTENTS: VOLUME 3 .................................... 3
TABLE OF SUPREME COURT JUSTICES ....................................... 10
ANNOTATED CONSTITUTION (Links to specific sections of the Constitution) ........ 12
TEXT OF THE CONSTITUTION .................................................. 16
SIGNATORIES TO THE CONSTITUTION ....................................... 25
AMENDMENTS TO THE CONSTITUTION ....................................... 27
[For links to specific Articles of the Constitution, or Chapter Headings, use Bookmarks]
[Links, Bookmarks, and Page Navigation features work best using Adobe Reader]

PART IX: STANDARD FREE SPEECH DOCTRINE ............................. 35
PART X: EXCEPTIONS TO STANDARD FREE SPEECH DOCTRINE ........... 283
PART XI: FREEDOM OF ASSEMBLY AND ASSOCIATION ................... 549
PART XII: THE RELIGION CLAUSES OF THE FIRST AMENDMENT ......... 603


AUTHOR INFORMATION

Charles D. Kelso is an Emeritus Professor at University of the Pacific, McGeorge School of Law. He received an A.B., 1946, and J.D., 1950, from the University of Chicago; an LL.M., 1962, and J.S.D., 1968, from Columbia University, and an LL.D., in 1966, from John Marshall. He clerked for Justice Minton on the United States Supreme Court from 1950-51. He was a Professor at Indiana School of Law – Indianapolis from 1951-80, and has been a Professor at McGeorge School of Law since 1980. During 1966-68, he served as a Professor and Associate Dean at the University of Miami School of Law. He was the Director of the AALS Study of Part-Time Legal Education from 1963-72; Chair of the ABA Section of Legal Education & Admissions to the Bar in 1973-74; Editor of Learning and the Law magazine from 1974-78; and President of the Law & Society Association in 1979. He is the author of numerous monographs and over 70 articles. He is also the co-author of CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW (2007) (with 2018 Supplement) (E-Treatise on the Constitution); and R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION (2d ed. 2010). Like CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2 (2018 ORIG. ED. 2014), these books are available online at: http://libguides.stcl.edu/kelsomaterials

R. Randall Kelso is the Spurgeon E. Bell Distinguished Professor of Law at South Texas College of Law Houston. He received a B.A., 1976, Univ. of Chicago; and a J.D., 1979, Univ. of Wisconsin-Madison. He was an Instructor, Univ. of Miami School of Law, 1979-80; an Associate at Columbia Univ. School of Law,1980-82; and has taught at South Texas College of Law Houston since 1983. He is the author of many articles on Constitutional Law, Jurisprudence, and other topics. He is the co-author of CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW (2007) (with 2018 Supplement) (E-Treatise on the Constitution); and R. RANDALL KELSO & CHARLES D. KELSO, STUDYING LAW: AN INTRODUCTION (2d ed. 2010). Like CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUME 3 (2018 ORIG. ED. 2014), these books are available online at: http://libguides.stcl.edu/kelsomaterials

NOTES ON E-COURSEBOOK

This E-Coursebook is divided into 3 Volumes, each covering 2 credits of material in a standard law school course. Volume 1 is entitled: THE STRUCTURAL CONSTITUTION: SEPARATION OF POWERS AND FEDERALISM. Volume 2 is entitled: INDIVIDUAL ECONOMIC, CIVIL AND POLITICAL RIGHTS IN THE CONSTITUTION EXCLUSIVE OF THE FIRST AMENDMENT. Volume 3 is entitled: THE FIRST AMENDMENT. Each are available at: http://libguides.stcl.edu/kelsomaterials. Each Volume comprises 14 Chapters, with each Chapter representing material typically addressed in a 2-hour class session.

Within cases, case names are italicized when used in a sentence. All citations to cases, and citation references (such as “id.” or “see, e.g.”) are non-italicized. As is typical in Coursebooks, no indication is given when paragraphs have been excised from Court opinions. Relevant footnotes in cases are moved directly into the case text and indicated as such. Occasionally, “[Ed.]:” is used when material is added into a case reflecting a comment from the authors, not from the Court. The standard phrase now used at the end of Court opinions (“It is so ordered.”) typically is removed.
## DETAILED TABLE OF CONTENTS

### PART IX: STANDARD FREE SPEECH DOCTRINE

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 1.1</td>
<td>Introduction to the First Amendment and Constitutional Interpretation</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td>1. Introduction to the First Amendment</td>
<td>35</td>
</tr>
<tr>
<td></td>
<td>2. Introduction to Constitutional Interpretation</td>
<td>36</td>
</tr>
<tr>
<td>§ 1.2</td>
<td>Introduction to the Freedom of Speech, and of the Press</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>1. The Original Natural Law Era: 1789-1873</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>2. The Formalist Era: 1873-1937</td>
<td>42</td>
</tr>
<tr>
<td></td>
<td>3. The Holmesian Era: 1937-1954</td>
<td>47</td>
</tr>
<tr>
<td></td>
<td>4. The Instrumentalist Era: 1954-1986</td>
<td>51</td>
</tr>
<tr>
<td></td>
<td>5. Policies Affecting Development of Free Speech Doctrine</td>
<td>53</td>
</tr>
<tr>
<td>§ 1.3</td>
<td>Freedom of Speech and Strict Scrutiny</td>
<td>58</td>
</tr>
<tr>
<td></td>
<td><em>Simon &amp; Schuster, Inc. v. Members of the New York State Crime Victims Board</em></td>
<td>58</td>
</tr>
<tr>
<td>§ 1.4</td>
<td>Less Rigorous Standards of Review: Intermediate Review and Rational Review</td>
<td>66</td>
</tr>
<tr>
<td></td>
<td>1. Freedom of Speech and Intermediate Review</td>
<td>66</td>
</tr>
<tr>
<td></td>
<td><em>Ward v. Rock Against Racism</em></td>
<td>67</td>
</tr>
<tr>
<td></td>
<td>2. Freedom of Speech and Rational Review</td>
<td>73</td>
</tr>
<tr>
<td></td>
<td><em>Hazelwood School District v. Kuhlmeier</em></td>
<td>74</td>
</tr>
</tbody>
</table>

### CHAPTER 2: CONTENT-BASED VERSUS CONTENT-NEUTRAL REGULATIONS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 2.1</td>
<td>Introduction to Content-Based versus Content-Neutral Regulations</td>
<td>83</td>
</tr>
<tr>
<td></td>
<td><em>United States v. O’Brien</em></td>
<td>85</td>
</tr>
<tr>
<td></td>
<td><em>Texas v. Johnson</em></td>
<td>90</td>
</tr>
<tr>
<td>§ 2.2</td>
<td>Content-Based Regulations Involving Viewpoint Discrimination</td>
<td>97</td>
</tr>
<tr>
<td></td>
<td><em>Rosenberger v. Rector and Visitors of the University of Virginia</em></td>
<td>98</td>
</tr>
<tr>
<td>§ 2.3</td>
<td>Content-Based Regulations Involving Subject-Matter Discrimination</td>
<td>104</td>
</tr>
<tr>
<td></td>
<td>1. General Concerns with Subject-Matter Discrimination</td>
<td>104</td>
</tr>
<tr>
<td></td>
<td><em>United States v. Alvarez</em></td>
<td>104</td>
</tr>
<tr>
<td></td>
<td>2. Protecting the Press from Taxation That Threatens to Suppress Ideas</td>
<td>112</td>
</tr>
<tr>
<td>§ 2.4.</td>
<td>Content-Neutral Regulations and Intermediate Review</td>
<td>114</td>
</tr>
<tr>
<td></td>
<td>1. Content-Neutral Regulations Involving Elements of Content-Based Regulation</td>
<td>114</td>
</tr>
<tr>
<td></td>
<td>2. Content-Neutral Secondary Effects Cases</td>
<td>114</td>
</tr>
<tr>
<td></td>
<td><em>Members of the City Council of Los Angeles v. Taxpayers for Vincent</em></td>
<td>115</td>
</tr>
<tr>
<td></td>
<td>3. Content-Neutral Time, Place, or Manner Cases</td>
<td>119</td>
</tr>
<tr>
<td></td>
<td><em>Clark v. Community for Creative Non-Violence</em></td>
<td>120</td>
</tr>
<tr>
<td></td>
<td>4. Considerations Regarding Applying Intermediate Scrutiny in Content-Neutral Cases and How to Determine if the Regulation is Content-Neutral or Content-Based</td>
<td>125</td>
</tr>
</tbody>
</table>
CHAPTER 3: PUBLIC FORUM VERSUS NONPUBLIC FORUM ANALYSIS ...... 129
  § 3.1 Classic Statement of the Public/Nonpublic Forum Distinction ............. 129
    Perry Education Association v. Perry Local Educators’ Association ........... 129
  § 3.2 Modern Development of the Public/Nonpublic Forum Distinction ............. 137
    International Society for Krishna Consciousness v. Lee ......................... 138
  § 3.3 Classic Cases of Nonpublic Fora Analysis ..................................... 151
    1. Prisons .......................................................... 151
      Thornburgh v. Abbott ........................................... 151
    2. Military Bases .................................................. 158
      United States v. Apel ........................................... 158
    3. Government Buildings ............................................. 162
    4. Other Kinds of Government-Owned Nonpublic Fora ............................ 163
  § 3.4 Specialized Case of Government as Educator Running Public Schools ........ 164
    Morse v. Frederick .................................................. 167

CHAPTER 4: GOVERNMENT FUNDING OR GOVERNMENT DIRECTED SPEECH .......................................... 181
  § 4.1 Introduction to Government Funding or Government Speech Cases .......... 181
    Rust v. Sullivan ..................................................... 183
  § 4.2 Government Grants, Subsidies, or Other Aid to Speakers .................. 190
    Legal Services v. Velasquez ........................................ 191
    National Endowment for the Arts v. Finley ..................................... 193
    Agency for International Development v. Alliance for Open Society
      International, Inc. ................................................ 202
  § 4.3 Government Directed Speech: Coerced Speech ................................ 207
    1. Classic Cases of Coerced Speech ................................ 207
      West Virginia State Board of Education v. Barnette .......................... 207
    2. Coerced Membership in a Group Cases ........... 211
      Janus v. Amer. Fed. of State, Cty., and Municipal Employees, Council 31 .... 213
  § 4.4 Government Directed Speech: Advertising Cases ................................ 222
    Johanns v. Livestock Marketing Association ...................................... 224

CHAPTER 5: PROCEDURAL ASPECTS OF FREE SPEECH DOCTRINE ................. 231
  § 5.1 Prior Restraints on Speech: Permits or Licensing Systems ................ 231
    Freedman v. Maryland ............................................... 231
    Thomas v. Chicago Park District ...................................... 238
  § 5.2 Government Fees and Injunctions on Speech .................................. 241
    1. Government Fees for Permits to Speak ................................ 241
      Forsyth County, Georgia v. Nationalist Movement ............. 242
    2. Government Injunctions on Speech .................................. 249
      Madsen v. Women’s Health Center, Inc. ................................ 249
  § 5.3 Vagueness and Overbreadth Doctrine ........................................... 256
    1. Vagueness Doctrine ................................................ 256
      Holder v. Humanitarian Law Project .................................... 257
2. Substantial Overbreadth Doctrine ................................................. 264
   United States v. Stevens ................................................. 266
§ 5.4 Balancing Speech and Fair Trial Rights ................................. 273
   Globe Newspaper Co. v. Superior Court .................................. 275

PART X: EXCEPTIONS TO STANDARD FREE SPEECH DOCTRINE .............. 283

CHAPTER 6: SPEECH TRIGGERING LIMITED FIRST AMENDMENT REVIEW:
ADVOCACY OF ILLEGAL CONDUCT AND FIGHTING WORDS CASES ............. 283
§ 6.1 No Free Speech Review, Except for Viewpoint Discrimination ....... 283
   R.A.V. v. City of St. Paul .............................................. 284
§ 6.2 Advocacy of Illegal Conduct and True Threats ......................... 292
  1. Advocacy of Illegal Conduct ...................................... 292
     Brandenburg v. Ohio .................................................. 294
  2. True Threats .......................................................... 300
     Virginia v. Black .................................................... 300
§ 6.3 Fighting Words versus Hostile Audience Cases........................ 315
   Chaplinsky v. New Hampshire .......................................... 315
§ 6.4 Hate Speech Legislation
  1. Hate Speech Used to Enhance Sentencing versus Hate Speech as a Crime . 319
     Wisconsin v. Mitchell .............................................. 321
  2. “Pure” Hate Speech Legislation ..................................... 324
     Transit Auth. ......................................................... 326

CHAPTER 7: SPEECH TRIGGERING LIMITED FIRST AMENDMENT REVIEW:
OBSCENITY AND INDECENCY INVOLVING USE OF CHILDREN ................. 333
§ 7.1 Obscenity Doctrine ................................................... 333
     Miller v. California .................................................. 336
§ 7.2 Regulation of Adult Material That is Not Obscene ..................... 343
   Renton v. Playtime Theatres, Inc. .................................... 344
   City of Erie v. Pap’s A.M. ........................................... 351
§ 7.3 Indecency Involving Use of Children .................................. 361
   New York v. Ferber .................................................... 362
§ 7.4 Indecency Not Involving Use of Children, But Children May Be in Audience . 371
   United States v. Playboy Entertainment Group, Inc. ..................... 374

CHAPTER 8: CONTENT-BASED REGULATIONS OF SPEECH TRIGGERING
VERSIONS OF RATIONAL REVIEW, NOT STRICT SCRUTINY ................. 387
§ 8.1 Defamation ............................................................. 387
   Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. ..................... 395
§ 8.2 Related Torts ................................................................. 403
1. False Light Cases .......................................................... 403
2. Invasion of Privacy by Truth .............................................. 404
   Florida Star v. B.J.F. ...................................................... 405
3. Unlawful Appropriation of Name or Likeness ......................... 412
4. Miscellaneous Other Tort or Contract Theories ...................... 412

§ 8.3 Government Regulation of Speech of Public Employees .......... 413
1. The Pickering Balancing Test .......................................... 413
   Pickering v. Board of Education of Will County, Illinois. .......... 414
2. Early Applications of Pickering ....................................... 417
3. Speech on a Matter of Public Concern .................................. 419
4. Garcetti and Work-Related Speech ..................................... 421
   Garcetti v. Ceballos. ..................................................... 421

§ 8.4 Government Regulation of Political Activities of Government Employees .......... 432
United States Civil Service v. National Association of Letter Carriers ................. 432

CHAPTER 9: CONTENT-BASED REGULATIONS OF SPEECH TRIGGERING
VERSIONS OF INTERMEDIATE REVIEW, NOT STRICT SCRUTINY .......... 439
§ 9.1 Intermediate Review: The Government as Trustee of the Airwaves
Regarding Broadcast Radio and Television Regulation ................... 439
Red Lion Broadcasting Co. v. FCC ........................................ 440
FCC v. Pacifica Foundation .................................................... 443

§ 9.2 Intermediate Review with Bite: Commercial Speech Regulation Under
Central Hudson Gas: 1976-1986 .............................................. 452
Central Hudson Gas & Electric Co. v. Public Service Comm’n ............. 454


§ 9.4 Commercial Speech Cases Rejecting Posadas: 1996-Today ........... 474
44 Liquormart, Inc. v. Rhode Island ....................................... 475
R.J. Reynolds Tobacco Co. v. Food & Drug Administration ................. 484

CHAPTER 10: CONTENT-BASED REGULATIONS OF SPEECH TRIGGERING
THEIR OWN VERSIONS OF STRICT SCRUTINY ............................. 493
§ 10.1 Loose Strict Scrutiny: Cable/Satellite Television and Radio Regulation ............ 493
Denver Area Educational Telecommunications Consortium v. FCC .............. 494

§ 10.2 Not Completely Strict Scrutiny: Campaign Finance Regulation in 1976
   in Buckley v. Valeo ..................................................... 507
   Buckley v. Valeo ......................................................... 508

§ 10.3 Its Own Version of Strict Scrutiny: Campaign Finance Regulation
   From Buckley v. Valeo Through Citizens’ United ..................... 517
1. Strict Scrutiny for Campaign Financing Expenditures after Buckley ........ 517
   Citizens’ United v. Federal Election Commission .................... 521
2. Gradual Implicit, and Eventually Explicit, Intermediate Review for
3. Strict Intermediate Review for Campaign Finance Regulations
   Regarding Contributions: 2006-Today ........................................530
4. Disclosure Requirements After Buckley ......................................533
   John Doe No. 1 v. Reed ....................................................535
§ 10.4 Regulation of Political Speech by Judges ..............................542
   Republican Party of Minnesota v. White ..................................543

PART XI: FREEDOM OF ASSEMBLY AND ASSOCIATION .........................549

CHAPTER 11: FREEDOM OF ASSEMBLY AND ASSOCIATION RIGHTS .............549
§ 11.1 Freedom to Assemble and Petition the Government for Grievances ....549
   Borough of Duryea, Pa. v. Guarnieri .....................................550
§ 11.2 Freedom of Association in the Content of Political Parties and Elections .557
  1. Patronage Cases ...........................................................558
     Rutan v. Republican Party of Illinois ....................................560
  2. Election Cases .............................................................569
     Burdick v. Takashi ................................................................570
§ 11.3 Freedom of Association Applied to Social Organizations ............576
   Board of Directors of Rotary International v. Rotary Club of Duarte ....576
   Boy Scouts of America v. Dale ..............................................581
§ 11.4 Freedom of Association Applied to Groups Alleged to Pose a Threat of
   Violent Action or Other Harmful Conduct ..................................594
  1. Violent Action .................................................................594
  2. Other Kinds of Harm ..........................................................596
     NAACP v. Button .............................................................596

PART XII: THE RELIGION CLAUSES OF THE FIRST AMENDMENT ..............603

CHAPTER 12: BASIC ESTABLISHMENT CLAUSE DOCTRINE ......................603
§ 12.1 Introduction to Establishment Clause Doctrine ..........................603
§ 12.2 Four Approaches to Establishment Clause Doctrine Generally ........604
  1. The Natural Law Approach .................................................604
     Wallace v. Jaffree (Majority Opinion) ....................................607
  2. The Formalist Approach .....................................................611
     Wallace v. Jaffree (Dissenting Opinions) ..................................611
  3. The Holmesian Approach ....................................................617
     Everson v. Board of Education .............................................618
  4. The Instrumentalist Approach ..............................................625
     Lemon v. Kurtzman ...........................................................625
§ 12.3 Post-1954 Cases Involving Religious Influences Within Public Schools .629
   Lee v. Weisman ....................................................................634
§ 12.4 Post-1954 Cases Involving Government Aid to Private Religious Schools .643
   Agostini v. Felton ..............................................................645
CHAPTER 13: ESTABLISHMENT CLAUSE DOCTRINE IN THE PUBLIC ARENA 659

§ 13.1 Post-1954 Cases Involving Public Displays with Some Religious Content ........ 659
  1. The Instrumentalist Era: 1954-1986 .................................................. 659
     *Lynch v. Donnelly* .......................................................... 659
  2. The Modern Natural Law Era: 1986-2005 ........................................ 666
     *County of Allegheny v. American Civil Liberties Union* ............... 666
     *Van Orden v. Perry* .................................................. 680

§ 13.2 Post-1954 Cases Involving Interplay Between Free Speech and Establishment
  Clause Concerns in the Public Domain ........................................... 683

§ 13.3 Post-1954 Cases Involving Religious Speech in the Public Fora ............... 686
  *Marsh v. Chambers* .................................................. 686
  *Town of Greece, New York v. Galloway* ...................... 690

§ 13.4 The Establishment Clause and Thoughts for the Future ..................... 705
  *Larsen v. Valente* ................................................. 705

CHAPTER 14: FREE EXERCISE CLAUSE DOCTRINE ............................. 713

§ 14.1 Traditional Free Exercise Clause Doctrine: 1789-1963 ...................... 713
  1. Introduction .......................................................... 713
  2. Historical Development of Free Exercise Doctrine .......................... 716
     A. The Original Natural Law Era: 1789-1873 .................................................. 716
     B. The Formalist Era: 1873-1937 ........................................ 717
     C. The Holmesian Era: 1937-1954 ........................................ 717
     D. The Instrumentalist Era: 1954-1963 ................................ 718
        *Braunfeld v. Brown* ........................................... 718

  *Sherbert v. Verner* .................................................. 724
  *United States v. Lee* ........................................ 729
  *Lyng v. Northwest Indian Cemetery Protective Association* .......... 733

  *Employment Division v. Smith* ........................................ 740

§ 14.4 Free Exercise Doctrine and Statutory Complements of RFRA and RLUIPA .... 747
  1. The Religious Freedom Restoration Act (RFRA) ........................................ 747
     *Burwell v. Hobby Lobby Stores, Inc.* ........................................ 749
  2. Religious Land Use and Institutionalized Persons Act (RLUIPA) ........... 754
  3. Accommodation Between Free Exercise and Establishment Clause
     Doctrines .......................................................... 755
     *Locke v. Davey* .................................................. 755
  4. The Ministerial Exception to Government Regulatory Laws .................. 759
     *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* .... 759
## TABLE OF SUPREME COURT JUSTICES

<table>
<thead>
<tr>
<th>Position 1</th>
<th>Position 2</th>
<th>Position 3</th>
<th>Position 4</th>
<th>Position 5</th>
<th>Position 6</th>
<th>Position 7</th>
<th>Position 8</th>
<th>Position 9</th>
<th>Position 10</th>
</tr>
</thead>
<tbody>
<tr>
<td>1789</td>
<td>Jay</td>
<td>Rutledge, J.</td>
<td>Cushing</td>
<td>Wilson</td>
<td>Blair</td>
<td>Iredell</td>
<td>***</td>
<td>***</td>
<td></td>
</tr>
<tr>
<td>1790</td>
<td>Johnson, T.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1791</td>
<td>Patterson</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1795</td>
<td>Rutledge, J.*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1796</td>
<td>Ellsworth</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1798</td>
<td>Washington</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1799</td>
<td>Marshall, J.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1801</td>
<td>Johnson, W.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1804</td>
<td>Livingston</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1806</td>
<td>Story</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1807</td>
<td>Duval</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1808</td>
<td>Trimble</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1811</td>
<td>Todd</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1823</td>
<td>Baldwin</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1826</td>
<td>Wayne</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1829</td>
<td>campbell</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1830</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1835</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1836</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1837</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1841</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1845</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1846</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1851</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1853</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1858</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1862</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1863</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1864</td>
<td>Chase, Salmon</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1865</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1867</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1868</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1869</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1870</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1874</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1877</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1880</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1881</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1882</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1888</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1889</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1890</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1892</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1893</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1894</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1895</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1898</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1902</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1903</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1906</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1909</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1910</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1912</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1914</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1916</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1921</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1922</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1923</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1925</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1930</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1932</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1937*****</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Chief Justice Rutledge returned to the Court after serving previously as an Associate Justice. Chief Justice Hughes returned to the Court after serving previously as an Associate Justice.

** Chief Justice White was confirmed as Chief Justice, moving from his existing position as an Associate Justice.

*** To prevent President Johnson from filling the position left by Justice Catron’s death in 1865, or filling any other vacancies that might occur, such as Justice Wayne’s death in 1867, Congress reduced the size of the Court from 10 Justices to 7 in 1866. In 1869, once Johnson was no longer President, Congress increased the size of the Court back to 9. In these moves, Justice Catron’s position 8 is typically viewed as removed; Justice Davis’ position 9 is renumbered as position 8, and filled by Justice Harlan on Davis’ death; Justice Field’s position 10 is renumbered as position 9. Justice Bradley’s appointment is typically viewed as recreating Wayne’s seat.

**** Make-up of the Court during the Spring of 1937, during the “Court-packing Plan” and Justice Roberts’ “switch in time.”
### TABLE OF SUPREME COURT JUSTICES
#### (CONTINUED)

<table>
<thead>
<tr>
<th>Year</th>
<th>Position 1</th>
<th>Position 2</th>
<th>Position 3</th>
<th>Position 4</th>
<th>Position 5</th>
<th>Position 6</th>
<th>Position 7</th>
<th>Position 8</th>
<th>Position 9</th>
</tr>
</thead>
<tbody>
<tr>
<td>1937****</td>
<td>Hughes</td>
<td>Van Devanter</td>
<td>Cardozo</td>
<td>McReynolds</td>
<td>Brandeis</td>
<td>Butler</td>
<td>Sutherland</td>
<td>Roberts,O. Stone</td>
<td></td>
</tr>
<tr>
<td>1937</td>
<td>Black</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1938</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1939</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1940</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1941</td>
<td>Stone**</td>
<td>Byrnes</td>
<td>Rutledge, W.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1943</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1945</td>
<td>Vinson</td>
<td></td>
<td>Minton</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1946</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1949</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1953</td>
<td>Warren</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1955</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1956</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1957</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1958</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1959</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1962</td>
<td>Goldberg</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1965</td>
<td>Fortas</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1966</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1969</td>
<td>Burger</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1970</td>
<td>Powell</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1972</td>
<td>Stevens</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1975</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td>Rehnquist**</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1978</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1981</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>Rehnquist**</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1987</td>
<td>Kennedy</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1991</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1993</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1994</td>
<td>Breyer</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td>Roberts, J.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>Sotomayor</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2016</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2017</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2018</td>
<td>Kavanaugh******</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

** Chief Justice Stone was confirmed as Chief Justice, moving from his existing position as an Associate Justice. Chief Justice Rehnquist was confirmed as Chief Justice, moving from his existing position as an Associate Justice.

**** Make-up of the Court during the Spring of 1937, during the “Court-packing Plan” and Justice Roberts’ “switch in time.” Justice Black replaced Justice Van Devanter at the end of that Term of the Court.

***** When Chief Justice Warren announced an intention to retire from the Court in 1968, President Johnson's nomination of Associate Justice Fortas to replace him was eventually withdrawn. President Nixon successfully nominated Judge Warren Burger. After his nomination to be Chief Justice failed, Justice Fortas retired in 1969, but his position was not filled by Judge Blackmun until 1970, following the failed nominations of Judge Clement Haynesworth and Judge G. Harrold Carswell.

Justice Powell resigned at the end of the Court’s Term in 1987, but Justice Kennedy was not confirmed until 1988, following the failed nominations of Judge Robert Bork and Judge Douglas Ginsburg.

****** Justice Scalia died on February 13, 2016. Judge Merrick Garland's nomination by President Obama was not considered by the Republican-controlled Senate.

Following the election of President Trump, his nomination of Judge Neil Gorsuch was confirmed by the Senate and he was sworn in on April 10, 2017.

******* Justice Kennedy resigned effective July 31, 2018. President Trump nominated Judge Brett Kavanaugh. After a 51-49 vote, he was sworn in on October 6, 2018.

The listing of “positions” of Supreme Court Justices used here is the standard account. The ordering of positions 1-6 in this Table conforms to the date when each of the initial Justices were confirmed by the Senate and thus received their commissions, consistent with the Judiciary Act of 1789, which provided that “the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.”
<table>
<thead>
<tr>
<th>Clause</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amendments Clause</td>
<td>25</td>
</tr>
<tr>
<td>Appointments Clause</td>
<td>23</td>
</tr>
<tr>
<td>Article I, § 8</td>
<td>19</td>
</tr>
<tr>
<td>Article II</td>
<td>21</td>
</tr>
<tr>
<td>Article III</td>
<td>23</td>
</tr>
<tr>
<td>Article IV, § 2 Privileges and Immunities Clause</td>
<td>24</td>
</tr>
<tr>
<td>Bicameralism Clause</td>
<td>18</td>
</tr>
<tr>
<td>Bill of Attainder and Ex Post Factor Clauses</td>
<td>20</td>
</tr>
<tr>
<td>Commerce Clause</td>
<td>19</td>
</tr>
<tr>
<td>Contract Clause</td>
<td>21</td>
</tr>
<tr>
<td>Due Process Clause – of the Fifth Amendment</td>
<td>27</td>
</tr>
<tr>
<td>Fifth Amendment</td>
<td>27</td>
</tr>
<tr>
<td>First Amendment</td>
<td>27</td>
</tr>
<tr>
<td>Fourteenth Amendment – Due Process Clause</td>
<td>29</td>
</tr>
<tr>
<td>Fourteenth Amendment – Equal Protection Clause</td>
<td>29</td>
</tr>
<tr>
<td>Fourteenth Amendment – Privileges or Immunities Clause</td>
<td>29</td>
</tr>
<tr>
<td>Full Faith and Credit Clause</td>
<td>24</td>
</tr>
<tr>
<td>General Welfare Clause</td>
<td>19</td>
</tr>
<tr>
<td>Guarantee Clause</td>
<td>25</td>
</tr>
<tr>
<td>Habeas Corpus Clause</td>
<td>20</td>
</tr>
<tr>
<td>Necessary and Proper Clause</td>
<td>20</td>
</tr>
<tr>
<td>Ninth Amendment</td>
<td>28</td>
</tr>
<tr>
<td>Preamble</td>
<td>16</td>
</tr>
<tr>
<td>Presentment Clause</td>
<td>19</td>
</tr>
<tr>
<td>President, Commander-in-Chief Clause</td>
<td>22</td>
</tr>
<tr>
<td>President’s Duty to Preserve, Protect, and Defend the Constitution</td>
<td>22</td>
</tr>
<tr>
<td>President’s Duty to Take Care the Laws are Faithfully Executed</td>
<td>23</td>
</tr>
<tr>
<td>President’s Veto Power</td>
<td>19</td>
</tr>
<tr>
<td>President’s Pardon Power</td>
<td>22</td>
</tr>
<tr>
<td>Property Clause</td>
<td>24</td>
</tr>
<tr>
<td>Speech or Debate Clause</td>
<td>18</td>
</tr>
<tr>
<td>Spending Clause</td>
<td>19</td>
</tr>
<tr>
<td>Supremacy Clause</td>
<td>25</td>
</tr>
<tr>
<td>Takings Clause</td>
<td>27</td>
</tr>
<tr>
<td>Tenth Amendment</td>
<td>28</td>
</tr>
<tr>
<td>War Powers of Congress</td>
<td>20</td>
</tr>
</tbody>
</table>

**ARTICLES AND SECTIONS (see next page)**
ARTICLES AND SECTIONS

Preamble

Article I  Federal Legislative Power
Section 1: Grant of legislative power to Congress
Section 2: Composition of the House
Section 3: (1-5) Composition of the Senate
(6-7) Trying impeachments and judgments in those cases
Section 4: (1) Election of Senators and Representatives – state power
(2) When Congress assembles
Section 5: Rules on meetings of Congress
Section 6: Salaries and protection from Arrest and for Speech or Debate
Section 7: Procedures for passage of bills
Section 8: Congressional Powers
(1) Taxing and Spending power
(2) Borrowing money
(3) Commerce clause
(4) Naturalization and Bankruptcies
(5) Coin money and Fix weights and measures
(6) Punishment for counterfeiting
(7) Post office and roads
(8) Patent and copyright clause
(9) Inferior tribunals
(10) High seas crimes and offenses against the Law of Nations
(11) Declare War and rules on captures
(12) Raise and support armies
(13) Navy
(14) Rules for land and naval forces
(15) Calling the state militias
(16) Provide for organizing and disciplining state militias
(17) Exclusive power of the seat of government and U.S. forts and other needful buildings
(18) Necessary and Proper clause
Section 9: Limitations on Congressional Power
(1) Prohibition on banning slave importation prior to 1808
(2) Limits on suspending writ of habeas corpus
(3) Ban on Bill of Attainder or Ex Post Facto law
(4) Ban on direct tax unless in proportion to census
(5) Ban on taxes and duties on exports from states
(6) Ban on preferring ports of one state
(7) Requirement of appropriation and accounting
(8) Ban on titles of nobility and accepting presents
Section 10: Limitations on State Powers

(1) Ban on laws on treaties, certain financial matters, bills of attainder, ex post facto laws, impairing contracts, or granting titles of nobility

(2) Regulation of duties on imports or exports

(3) Ban, without Congress’ consent, on troops or ships of war or compact with another state or foreign power, with exceptions

Article II Federal Executive Power

Section 1: The Executive Power

(1) Vested in President elected for four years

(2-3) Election procedure (amended by 12th Amendment)

(4) Congressional power to set elections

(5) Qualifications

(6) Disability

(7) Compensation

(8) Oath or Affirmation

Section 2: Enumerated Presidential Powers

(1) Commander in Chief, requested opinion, and pardon power

(2) Treaty and appointments powers

(3) Recess appointments

Section 3: Presidential Responsibilities: State of the Union report, adjournment, receive ministers, take Care that the laws by Faithfully Executed, commission officers

Section 4: Removal on impeachment

Article III Federal Judicial Power

Section 1: Judicial power vested in Supreme Court and inferior courts established by Congress; judges hold office during good behavior; compensation not diminished in office

Section 2: Federal Jurisdiction

(1) Cases to which federal judicial power extends

(2) Supreme Court’s original and appellate jurisdiction, the latter subject to Congress’ exceptions and regulation power

(3) Right to trial by jury

Section 3: (1) Definition of treason; requirements regarding proof of treason

(2) Congressional power to declare punishment for treason

Article IV Provisions Regarding States

Section 1: Full Faith and Credit clause

Section 2: Rights and Duties regarding state law

(1) Privileges and Immunities for state citizens

(2) Extradition between states

(3) Extradition of persons held to service or labor
Section 3: New States and United States territory
   (1) Limits on creation of new states
   (2) Congress’ power over territory or other U.S. property
Section 4: Guarantee to states of a republican form of government

Article V Process for Amending the Constitution

Article VI Miscellaneous Provisions
   (1) Guarantee of debt validity
   (2) Supremacy Clause
   (3) Oath or Affirmation for federal and state officials, but no religious test for federal offices

Article VII Process for Ratification
Signatories of the Constitution Sent to State Conventions for Ratification

AMENDMENTS

I. Congress banned from establishing religion, prohibiting its free exercise, or abridging the freedom of speech or the press, or right peaceably to assemble and petition government
II. Well-regulated militia being necessary, right to keep and bear arms
III. Limitations on Quartering of soldiers in houses
IV. Protection against unreasonable search and seizure
V. Grand jury indictment required, bars on double jeopardy, self-incrimination, deprivation of life, liberty or property without due process, taking property without just compensation
VI. Right to speedy and public trial, notice of charges, confrontation, compulsory process, and assistance of counsel
VII. Right to trial by jury in suits for over twenty dollars
VIII. No excessive bail or fines or cruel and unusual punishment
IX. Enumeration of rights does not deny or disparage others retained by the people
X. Powers are reserved to the state, or the people, if not delegated to the United States
XI. Federal judicial power does not extend to suits by citizens of one state or aliens against another state
XII. Amended procedures for electing President and Vice-President
XIII. Slavery or involuntary servitude banned in U.S. jurisdiction, except as punishment for crime
XIV. Range of Civil Rights protections

Section 1: Citizenship Clause: No state may deny privileges or immunities of U.S. citizenship; deprive any person of life, liberty, or property without due process of law; deprive any person of equal protection of the laws

Section 2: Apportionment of Representatives, with penalties for denial of right to vote

Section 3: Disqualification of service in federal or state offices for previous office holders for having engaged in insurrection or rebellion

Section 4: Validation of public debt U.S. and voiding debts incurred in aid of rebellion

Section 5: Congress given power to enforce this amendment by appropriate legislation
XV. No denial of right to vote on account of race, color, or previous condition of servitude
XVI. Congress given power to levy an income tax without apportionment
XVII. Direct public election for Senators, provisions for filling of vacancies
XVIII. Ban on intoxicating liquors (Prohibition)
XIX. Right to vote cannot be denied on ground of sex
XX. Terms of federal officials and time for assembly by Congress; procedures regarding death of the President
XXI. Eighteenth amendment repealed; power of states to bar transportation or import of liquor
XXII. Ban on electing the same person President more than twice
XXIII. Appointment of electors from the District of Columbia
XXIV. Right to vote cannot be denied for failing to pay a poll tax
XXV. Procedures for dealing with removal, death, or disability of the President
XXVI. Right to vote if 18 or older
XXVII No variation in compensation of Senators or Representatives until an election for Representatives shall have intervened

THE CONSTITUTION OF
THE UNITED STATES OF AMERICA

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made with three Years after the first Meeting of the Congress of the United States.
States, and within every subsequent Term of ten Years, in such Manner as they shall by law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the Second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice-President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.
Section 4. [1] The Times, Place and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. [1] Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, not to any other Place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If
after such Reconsideration two third of that House shall agree to pass the Bill, it shall be sent
together with the Objections, to the other House, but which it shall likewise be reconsidered, and
if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of
both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and
against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be
returned by the President within ten Days (Sundays excepted) after it shall have been presented to
him, the Same shall become a Law, in like Manner as if he signed it, unless the Congress by their
Adjournment prevent its Return in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote, to Which the concurrence of the Senate and House
of Representatives may be necessary (except on a question of Adjournment) shall be presented to
the President of the United States; and before the Same shall take Effect, shall be approved by him,
or being disapproved by him, shall be repassed by two thirds of the Senate and House of
Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8.  
[1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts
and Excises, to pay the Debts and provide for the common Defence and general Welfare of the
United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with
the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of
Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard
of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of
the United States;

[7] To establish Post Offices and post Roads;

[8] To promote the Progress of Science and useful Arts, by securing for limited Times
to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9] To constitute Tribunals inferior to the supreme Court;

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offenses
against the Law of Nations;
[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cessation of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislatures of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; – And

[18] 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.

Section 9.  [1] The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on Articles exported from any State.
[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another;

[7] No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account on the Receipts and Expenditures on all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10.  [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post factor Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1.  [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

[2] 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 Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and
House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greater Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6] In case of the removal of the President from Office, or of his Death, Resignation or Inability to discharge the Powers and Duties of said Office, the Same shall devolve on the Vice President, and the Congress may be Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice-President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, as stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States; he 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, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.
[2] He shall have Power, by and with the Advice and Consent of the Senate, to make
Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with
the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and
Consuls, Judges of the supreme Court, and all other Officers of the United States, whose
Appointments are not herein otherwise provided for, and which shall be established by Law; but the
Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the
President alone, in the Courts of Law, or in the Heads of Departments.

[3] The President shall have Power to fill up all Vacancies that may happen during the
Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of
the Union, and recommend to their Consideration such Measures as he shall judge necessary and
expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case
of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to
such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he
shall take Care that the Laws be faithfully executes, and shall Commission all the Officers of the
United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall
be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high
Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court,
and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges,
both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall,
at stated Times, receive for their Services a Compensation, which shall not be diminished during
their Continuance in Office.

Section 2. [1] The judicial Power shall extend to all Cases, in Law and Equity,
arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be
made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and
Consuls; – to all Cases of admiralty and maritime Jurisdiction, – to Controversies to which the
United States shall be a Party; – to Controversies between two or more States; – between a State and
Citizens of another State; – between Citizens of different States; – between Citizens of the same
State claiming Lands under the Grants of different States, and between a State, or the Citizens
thereof, and foreign States, Citizens, or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those
in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other
Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and
Fact, with such Exceptions, and under such Regulations as the Congress shall make.
The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses of the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in the Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on Application of the
Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

**ARTICLE V**

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one of the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

**ARTICLE VI**

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judge in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever by required as a Qualification to any Office or public Trust under the United States.

**ARTICLE VII**

The Ratification of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

In Witness whereof We have hereunto subscribed our Names,

George Washington – President and Deputy from Virginia

Attest, William Jackson – Secretary
New Hampshire
John Langdon Nicholas Gilman

Massachusetts
Nathaniel Gordan Rufus King

Connecticut
William Samue. Johnson Roger Sherman

New York
Alexander Hamilton

New Jersey
William Livingston William Paterson
David Brearly Jonathan Dayton

Pennsylvania
Benjamin Franklin Thomas Fitzsimons
Thomas Mifflin Jared Ingersoll
Robert Morris James Wilson
Gerge. Clymer Gouverneur Morris

Delaware
George Read Richard Bassett
Gunning Bedford,Jr. Jacob Broom
John Dickinson

Maryland
James McHenry Daniel Carroll
Daniel of St. Thomas Jenifer

Virginia
John Blair James Madison, Jr.

North Carolina
William Blount Hugh Williamson
Richard Dobbs Spaight

South Carolina
John Rutledge Charles Pickney
Charles Cotesworth Pinckney Pierce Butler

Georgia
William Few Abraham Baldwin
ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF
THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED
BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH
ARTICLE OF THE ORIGINAL CONSTITUTION

Amendment I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free
exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people
peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the
people to keep and bear Arms, shall not be infringed.

Amendment III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the
Owner, nor in time or war, but in a manner to be prescribed by law.

Amendment IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against
unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon
probable cause, supported by Oath or affirmation, and particularly describing the place to be
searched, and the persons of things to be seized.

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a
presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in
the Militia, when in actual service in time of War or public danger; nor shall any person be subject
for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any
criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without
due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by
an impartial jury of the State and district wherein the crime shall have been committed, which
district shall have been previously ascertained by law, and to be informed of the nature and cause
of the accusation; to be confronted with the witnesses against him; to have compulsory process for
obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
Amendment VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right or trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII [1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; 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 person voted for as President, and of all person voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; – the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; – The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member of members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of
Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President; – The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.
**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

---

**Amendment XV [1870]**

**Section 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

**Section 2.** The Congress shall have power to enforce this article by appropriate legislation.

---

**Amendment XVI [1913]**

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

---

**Amendment XVII [1913]**

[1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be construed as to affect the election or term of any Senator chosen before it become valid as part of the Constitution.

---

**Amendment XVIII [1919]**

**Section 1.** After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof,
from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX [1920]

[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

[2] Congress shall have power to enforce this article by appropriate legislation.

Amendment XX [1933]

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If the President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act ad President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may be law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons form whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.
Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who had held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII [1961]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representative in Congress to which the District would be entitled if it were a State, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be
electors appointed by a state; and they shall meet in the District and perform such duties as provided
by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV [1964]

Section 1. The right of citizens of the United States to vote in any primary or other
election for President or Vice President, for electors for President or Vice President, or for Senator
or Representative in Congress, shall not be denied or abridged by the United States or any State by
reason of failure to pay any poll or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV [1967]

Section 1. In case of removal of the President from office or of his death or resignation,
the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President
shall nominate a Vice President who shall take office upon confirmation by a majority vote of both
Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate
and the Speaker of the House of Representatives his written declaration that he is unable to
discharge the powers and duties of his office, and until he transmits to them a written declaration
to the contrary, such powers and duties shall be discharged by the Vice President as Acting
President.

Section 4. Whenever the Vice President and a majority of either the principal officers
of the executive departments or of such other body as Congress may be law provide, transmit to the
President pro tempore of the Senate and the Speaker of the House of Representatives their written
declaration that the President is unable to discharge the powers and duties of his office, the Vice
President shall immediately assume the powers and duties of the office of Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the
Speaker of the House of Representatives his written declaration that no inability exists, he shall
resume the powers and duties of his office unless the Vice President and a majority of either the
principal officers of the executive departments or of such other body as Congress may be law
provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the
House of Representatives their written declaration that the President is unable to discharge the
powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-
eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI [1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXVII [1992]

No law, varying the compensation for the services of Senators or Representatives, shall take effect, until an election for Representatives shall have intervened.

RELATED DOCUMENTS

The Declaration of Independence (1776): “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 – That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed.”

The Articles of Confederation (1781): “To all whom these Presents shall come, we the undersigned Delegates of the States affixed to our Names send greeting. Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. Article I. The Stile of this Confederacy shall be “The United States of America.” Article II. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”

The Constitution of the Confederate States of America (1861): “We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessing of liberty to ourselves and our posterity – invoking the favor and guidance of Almighty God – do ordain and establish this Constitution for the Confederate States of America.”

Full text for all three documents is available, among other places, at: www.usconstitution.net
§ 1.1 Introduction to the First Amendment and Constitutional Interpretation

The First Amendment to the Constitution provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” This text encompasses three basic protections.

One protection involves “the freedom of speech, or of the press.” In these cases, discussed in Chapters 1-5, the Court applies levels of review familiar from Equal Protection, Due Process, and other constitutional doctrines: strict scrutiny, intermediate review, and rational review. As a reminder, these levels of review are summarized at § 1.2.6. As discussed there, a different level of scrutiny is used depending upon whether the regulated speech: (1) occurs in (a) a public forum or (b) a nonpublic forum; and (2) whether the regulation is (a) a content-based regulation of speech, focusing on (i) the viewpoint of the speech or (ii) the subject-matter or topic of the speech, or (b) a content-neutral regulation of speech based upon the (i) the secondary effects of the speech or (ii) a concern with only the time, place, or manner of the speech. In a public forum, content-based regulations of speech trigger strict scrutiny, while content-neutral regulations trigger intermediate review. In a nonpublic forum, viewpoint regulations trigger strict scrutiny; content-based regulations of subject-matter and content-neutral regulations trigger a version of rational review.

A number of special categories of speech get less than standard First Amendment protection. These categories are discussed in Chapters 6-10. In some cases, like for speech advocating unlawful violence, fighting words, obscenity, or childhood indecency, the speech receives no First Amendment protection, except for regulations of viewpoint discrimination that always trigger strict scrutiny, as discussed at § 6.1. For other kinds of speech, like defamatory speech or regulation of the speech of government employees on matters of public concern, a version of rational review is applied. For regulations of broadcast television and radio, or regulations of commercial speech, a version of intermediate review is applied. For regulations of cable or satellite television and radio, or in campaign finance cases, typically a version of strict scrutiny is applied.
A second protection of the First Amendment involves the right “to assemble” and “petition the Government for a redress of grievances,” which has been held include a “freedom of association.” These cases involve application of strict scrutiny to substantial burdens on these rights, with less than substantial burdens triggering a version of rational review, as discussed in Chapter 11.

The third protection of the First Amendment involves two clauses dealing with religion: the Establishment Clause and the Free Exercise Clause. Four tests have been used by different Justices to determine an “establishment of religion.” They are: (1) whether the government action has as its purpose to advance religion, or a principal or primary effect to advance religion, or creates an excessive entanglement between church and state, the so-called Lemon test; (2) whether an objective observer would think the government action was an endorsement of religion; (3) whether the government action is coercing or proselytizing religion; or (4) whether the government action is an unreasonable accommodation of religion given our Nation’s history and traditions. Establishment Clause doctrine is discussed in Chapters 12-13. Under the Free Exercise Clause, government action discriminating against religion triggers strict scrutiny. Non-discriminatory, neutral government regulations burdening religious practices trigger at most only minimum rationality review. Free Exercise doctrine is discussed in Chapter 14.

All First Amendment rights, including “freedom of speech” and “of the press,” are viewed as “fundamental rights” and thus equally applicable against the states as they are against the federal government. See generally Wallace v. Jaffree, 472 U.S. 38, 49 n.34 (1985), and cases cited therein; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (“free exercise of religion” fundamental); Gitlow v. New York, 268 U.S. 652, 666 (1925) (assuming freedom of speech and press fundamental); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to “Worship God” part of 14th Amendment). On incorporating “fundamental” federal Bill of Rights provisions as aspects of “liberty” protected under the 14th Amendment Due Process Clause, thereby making them applicable against the states, see § 14.3 of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2 (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials).

2. Introduction to Constitutional Interpretation

As discussed in more depth at § 1.1 of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2 (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials), constitutional law in the United States is understood and studied today primarily in terms of interpretations and applications of the United States Constitution by the United States Supreme Court. Other government officials and lower courts make initial determinations on constitutionality. But the final and authoritative say is that of the Supreme Court when deciding cases that involve judicial review of the constitutionality of governmental action.

In deciding these cases, different Justices have adopted different styles of interpretation to resolve the issues presented in the cases. Four basic styles of interpretation have characterized the approach of Supreme Court Justices to the interpretation and application of the Constitution during five basic eras of constitutional interpretation. The four styles of interpretation are natural law, formalism, Holmesian, and instrumentalism. The five eras are represented in Table 1:
Table 1  
Eras of United States Constitutional Interpretation

<table>
<thead>
<tr>
<th>Styles of Interpretation</th>
<th>Years Adopted by Controlling Votes on the Supreme Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Original Natural Law</td>
<td>1789-1873</td>
</tr>
<tr>
<td>Formalism</td>
<td>1873-1937</td>
</tr>
<tr>
<td>Holmesian</td>
<td>1937-1954</td>
</tr>
<tr>
<td>Instrumentalism</td>
<td>1954-1986</td>
</tr>
<tr>
<td>Modern Natural Law</td>
<td>1986-Today</td>
</tr>
</tbody>
</table>

Over the past 30 years, there has been a transformation from precedents decided by Justices who adhered to one style of interpretation – the instrumentalist, policy-driven, perspective that flourished on the Supreme Court in the 1960s, and predominated generally on the Court from 1954-86 – to law designed by a group of non-instrumentalist Justices. In contrast to the instrumentalist approach, popular usage is that a non-instrumentalist judge rejects policy-driven judicial activism and will not legislate from the bench. Instead, the judge adheres to a policy of “strict construction” of the “plain meaning of text” consistent with the “original intent” of a doctrine’s framers and ratifiers. A more precise formulation would note there are three different concepts used in the preceding sentence – plain meaning of text, strict construction, and original intent – and thus at least three different kinds of non-instrumentalist judges.¹

One kind of non-instrumentalist judge focuses on a doctrine’s text, whether the literal text of prior judicial decisions for common-law decisionmaking, the plain meaning of a statute for statutory construction, or the plain meaning of the text of the Constitution for constitutional interpretation. Since the text of the Constitution does not change absent formal constitutional amendment, this “textualist” approach concludes that the meaning of any provision is fixed at the time of ratification. Because the meaning is “fixed,” or as is sometimes stated “static,” the term “originalism” has also been used to describe this approach. However, since this approach does not likely reflect the “original intent” of the framers and ratifiers, the term “originalism” is not used in this Coursebook to describe this approach. The approach has also been called a “formalist” or “textualist” approach, and was most popular on the Supreme Court from 1873-1937. The term “formalism” is used in this Coursebook, not “textualism,” since each approach to constitutional interpretation starts with the constitutional text. The various approaches differ on what sources in addition to “text” are used to complete the process of constitutional interpretation, and how much weight to give those sources. In his 1997 book, A MATTER OF INTERPRETATION, Justice Scalia has embraced the term “formalism” when noting, “Of all the criticisms leveled against textualism, the most mindless is that it is ‘formalistic.’ This answer to that is, of course it’s formalistic! The rule of law is about form. . . . Long live formalism. It is what makes a government a government of laws and not of men.”²

¹ See, e.g., Morell E. Mullins, Sr., Coming to Terms with Strict and Liberal Construction, 64 Alb. L. Rev. 9 (2000) (contrasting “strict construction”; “plain meaning”; and “original intent”).

A second kind of non-instrumentalist judge focuses on “strict construction” of doctrine. With respect to the Constitution, the emphasis of “strict construction” is on a presumption of constitutionality given to legislative and executive action, and thus great deference to legislative and executive purposes and practice, as they reflect society’s “dominant forces.” A judge following this approach will find governmental action unconstitutional only if the action is clearly unconstitutional.

In this Coursebook, this approach is called a Holmesian approach, after Justice Oliver Wendell Holmes, Jr., who popularized this approach while on the Supreme Court from 1902-32. This approach is also associated with Professor James Bradley Thayer, and his view that courts should defer to governmental action out of respect for the other branches of government, unless the unconstitutionality of the governmental action is "so clear that it is not open to rational question."3 This approach was most popular among a majority of Supreme Court Justices from 1937-54. The Holmesian approach is a “strict construction” approach only for cases involving individual rights challenges to the constitutionality of governmental action. For structural issues of federalism or separation of powers, the Holmesian deference-to-government approach does not call for “strict construction” of governmental powers, but rather for deference to governmental powers.

A third kind of non-instrumentalist judge focuses attention on the “original intent” of a doctrine’s framers and ratifiers, and therefore asks in the context of the constitutional law how the framers and ratifiers would have gone about interpreting the provision in question. In this Coursebook, this approach is called a natural law approach to interpretation, since the Constitution’s framers and ratifiers, at least from the Constitution’s drafting through the Civil War Amendments, were guided by 18th- and 19th-century theories of natural law. It has been noted:

> Beginning in the 1760's, Americans separated ideas about the principles of government from the product of its actions; the law. They did so by tying the idea of a written constitution to two related notions, natural law and social contract. . . . Natural law theory and the social contract gave American public law its emphasis on limiting governmental power. If government violated the social contract and if it denied natural rights and abused public trust, the people retained a right to overthrow it.4

Under this approach, which predominated on the Supreme Court from 1789-1873, and is reflected in Chief Justice John Marshall’s approach from 1801-35, a judge follows principles associated with reasoned elaboration of the law, giving due weight to constitutional text, purpose, structure, and


history of the drafting and ratification of the Constitution, including the framers’ belief in certain
natural law moral principles like the “inalienable rights to life, liberty, and the pursuit of happiness”
mentioned in the Declaration of Independence, and the 5th Amendment’s due process protections
for “life, liberty, and property,” as well as some deference to legislative and executive practice, and
derference to judicial precedents. The natural law great respect for precedent is discussed at § 2.4.6
of Charles D. Kelso & R. Randall Kelso, American Constitutional Law: An E-

Since Justice Thurgood Marshall’s retirement from the Supreme Court in 1991, there have been no
Justices on the Court who have embodied the robust instrumentalist approach of Chief Justice Earl
Warren, and Justices William Douglas, William Brennan, Abe Fortas, and Thurgood Marshall of
the Warren Court of the 1960s. To a lesser extent, however, a more moderate instrumentalist
approach has survived on the Court in the personages of Justices John Paul Stevens, Ruth Bader
Ginsburg, and Stephen Breyer. At least since 1986, however, a majority of Justices have not
adopted an instrumentalist perspective on constitutional interpretation.

Instead, the other Justices on the Court have opted for one of the non-instrumentalist approaches.
Chief Justice William Rehnquist usually adhered to Justice Holmes’ philosophy of giving great
deerence to legislative and executive action. Justices Antonin Scalia and Clarence Thomas have
usually applied an interpretation theory characteristic of a formalist approach. This led them often
to join with Chief Justice Rehnquist, but not always.5 Since 1991, the typical swing votes on the
Court were held by Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter. They
usually adhered to a natural law style of interpretation, although each sometimes adopted a different
style: Kennedy, formalist; O’Connor, Holmesian; and Souter, instrumentalist.

Constitutional law today reflects the clash and accommodation of these four interpretation styles.
As stated above in Table 1, each of these interpretation styles was adopted by a majority of Justices
at some earlier time: natural law, 1789-1873; formalism, 1873-1937; Holmesian, 1937-54; and
instrumentalism, 1954-86. None are adopted by a majority of Justices today, although each has had
at least one adherent since 1972. This clash among the approaches is likely to continue in the near
future. For Justices appointed since 2005, Chief Justice Roberts has tended to follow a Holmesian
interpretation style similar to Chief Justice Rehnquist, whom he replaced. Justices Alito and
Gorsuch have tended to follow a formalist style similar to Justices Scalia and Thomas, while having
an occasional affinity for Holmesian deference. Justices Sotomayor and Kagan have tended to
follow a liberal moderate instrumentalist style similar to Justices Ginsburg and Stevens. Given
recent membership, the controlling swing vote on the Court from 2005-2018 was usually Justice
Kennedy who, like Justices O’Connor and Souter, tended to follow a modern version of Chief
Justice Marshall’s natural law style of interpretation. With Justice Kennedy’s retirement, effective
July 31, 2018, the decisionmaking style of his replacement awaits successful confirmation.

5 See, e.g., Locke v. Davey, 540 U.S. 712 (2004) (Free Exercise Clause); Wiggins v. Smith,
539 U.S. 510 (2003) (6th Amendment right to counsel); Dickerson v. United States, 530 U.S. 428
(2000) (Miranda warning constitutional) (All 7-2 cases, with Justices Scalia and Thomas in dissent).
A short-hand reference for the major differences among the four interpretation styles is the following: formalist judges tend to emphasize the logical or literal elaboration of existing legal categories; Holmesian judges add to this focus a functional emphasis on deference to legislative and executive action, which typically reflects the purposes intended to be advanced by the existing legal categories; natural law judges add to this positivist focus on the logic and purpose of existing legal categories a normative emphasis on just evolution of the law through considering background moral principles embedded in the law and reasoned elaboration of judicial precedents; instrumentalist judges add to this more analytic just evolution of the law an emphasis on functional case-by-case consideration of social policies embedded in the law, which become particularly relevant when existing legal categories yield indeterminate results. These differences are summarized in Table 2:

**Table 2: Styles of Judicial Decisionmaking**

<table>
<thead>
<tr>
<th>Nature of the Judicial Task</th>
<th>Emphasis of Judicial Decisionmaking</th>
<th>Categorization of Supreme Court Justices From 1968 - Today</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Neutral Declarer of Existing Law</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nature of Law</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law as Logical; Analytic or Conceptualist Attitude</td>
<td>Formalism/Logic; Analytic Analogy; Symmetry</td>
<td>Scalia, Thomas, Black, C.J., Alito</td>
</tr>
<tr>
<td>Law as Library Science</td>
<td>Positivism</td>
<td>All of the Above Plus</td>
</tr>
<tr>
<td>Law as Means to Ends;</td>
<td>Holmesian/History of Rule;</td>
<td>Harlan, Roberts, C.J.</td>
</tr>
<tr>
<td>Functional or Pragmatic</td>
<td>Functional Convenience</td>
<td>Stewart, White, Rehnquist, C.J.</td>
</tr>
<tr>
<td>Approach;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law as Empirical Science</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Nature of Law</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Normative: Judge as Normative Actor</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nature of Law</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law as Logical; Analytic or Conceptualist Attitude</td>
<td>Natural Law Moral Principles; Customary Norms; Justice</td>
<td>Powell, O'Connor, Kennedy, Souter</td>
</tr>
<tr>
<td>Law as Library Science</td>
<td>Positivism</td>
<td>All of the Above Plus</td>
</tr>
<tr>
<td>Law as Means to Ends;</td>
<td>Instrumentalism Social Policies;</td>
<td>Blackmun, Breyer, Stevens, Kagan, Warren, C.J., Ginsburg</td>
</tr>
<tr>
<td>Functional or Pragmatic</td>
<td>Social Welfare; Social Conscience</td>
<td>Brennan/Marshall, Sotomayor, Douglas/ Fortas</td>
</tr>
<tr>
<td>Approach;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law as Empirical Science</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

On these four decisionmaking styles, see generally Charles D. Kelso & R. Randall Kelso, The Path of Constitutional Law Ch. 2, 3 (2007) (http://libguides.stcl.edu/kelsomaterials). On these styles and United States constitutional interpretation, see id. at Ch. 9-12 (Chapter 9: Formalism; Chapter 10: Holmesian; Chapter 11: Instrumentalism; Chapter 12: Natural Law). For categorization of all Justices since 1937, see id. at Ch. 13.4. On natural law representing the framers and ratifiers’ decisionmaking style, see R. Randall Kelso, Contra Scalia, Thomas, and Gorsuch: Originalists Should Adopt a Living Constitution, 72 U. Miami L, Rev, 112 (2017), and sources cited therein.
§ 1.2 Introduction to the Freedom of Speech, and of the Press

The standards of review regarding “the freedom of speech” and “of the press” have been the same under each approach to First Amendment doctrine: natural law, formalism, Holmesian, and instrumentalism. “Freedom of the press” doctrine thus involves application of standard “free speech” doctrine to circumstances involving the press, such as cases discussed at § 2.3.2 & 5.4. For this reason, the term “freedom of speech” will be used in this Coursebook to encompass the standards relating to both “freedom of speech” and “of the press” clauses of the First Amendment.

1. The Original Natural Law Era: 1789-1873

In the original natural law era, there were no major Supreme Court decisions involving protection of the freedom of speech. The issue regarding freedom of speech was raised, however, with the passage of the Alien and Sedition Acts of 1798. Among other things, the Sedition Act criminalized certain forms of politically partisan speech, which the Act termed “sedition.” Compared with existing English law the Act was progressive, in that it did make “truth” a defense to the Act, which was not true of the English sedition laws of the time.\(^6\) The notion that truth should be a defense was reflected in colonial attitudes, such as the famous libel trial of John Peter Zenger in 1735 for publishing criticisms of the Governor of New York. In that case, Zenger’s defense counsel, Andrew Hamilton, argued to the jury that they had the power to determine both law and facts, resulting in Zenger’s acquittal based upon jury nullification of the English law where truth was not a defense.\(^7\)

During the campaign of 1800, a number of Jefferson partisans were arrested under the Act, and Jefferson and his allies used the passage and enforcement of the Act to brand President Adams and his administration as hostile to the rights of free speech. After Jefferson’s election in 1800, the Sedition Act was repealed, in part because of the understanding of Jefferson and his supporters that the Act constituted an infringement on the rights of free speech, even though truth was a defense under the Act. As the Supreme Court noted many years later in *New York Times Co. v. Sullivan*:

> Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress.

---


on the ground that it was unconstitutional. . . . Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter “which no one now doubts.” . . . Jefferson, as President, pardoned those who had been convicted and sentenced under the Act. . . . The invalidity of the Act has also been assumed by Justices of this Court. . . . These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.8

2. The Formalist Era: 1873-1937

Despite this general understanding of the First Amendment during the original natural law era, the first “freedom of speech” cases of the formalist era downplayed this legislative and executive practice surrounding the Sedition Act. Instead, following the formalist predisposition toward literal interpretation, the cases concluded that the First Amendment was directed primarily at the literal meaning of “free” speech, that is, the right to speak freely and not be limited by prior restraints.

For example, in Patterson v. Colorado,9 a 1907 case, the Court focused on literal text, as well as 18th century historical sources specifically addressing the freedom of speech, such as Blackstone, to conclude that protection against prior restraints was the full extent of the Free Speech Clause of the First Amendment. Leaving undecided whether the 14th Amendment Due Process Clause incorporated the First Amendment, thus making it applicable against the states, Justice Holmes wrote for the Court in Patterson that such incorporation would make no difference in the power of a state trial court to impose punishment for contempt on a publisher who had questioned the judge’s reasoning in a pending case, so long as the judge’s determination that the statements tended to obstruct the administration of justice was not an arbitrary pretense or an arbitrary punishment.10 Justifying that conclusion, Justice Holmes began by saying, “In the first place, the main purpose of such constitutional provisions is ‘to prevent all such previous restraints upon publications as had been practiced by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.”11

Even concerning prior restraints, the initial formalist-era cases gave First Amendment protection a limited reading. For example, the Court confronted in Davis v. Commonwealth of Massachusetts,12 decided in 1897, a case dealing with government power to regulate speech on public grounds. The Court held that forbidding speech absolutely, or on condition of obtaining a license, was no more an infringement of the rights of a member of the public “than for the owner of a private house to

9 205 U.S. 454 (1907).
10 Id. at 461-62.
11 Id. at 462.
12 167 U.S. 43 (1897).
forbid it in his house.” Thus, the *Davis* Court refused to strike down a permit requirement for speaking on a highway or public park, and was unconcerned that the law gave the mayor unbounded discretion to grant or deny applications.

Between 1909 and 1917, various social groups, and most prominently the International Workers of the World, the Wobblies, pressed for greater free speech rights than mere limitation on prior restraints. As noted by Professor Bradley Bobertz:

> In this turbulent atmosphere, efforts to understand the meaning and function of free speech took on greater urgency. The proceedings of the U.S. Commission on Industrial Relations provide one illuminating source of discussion about free speech. . . . The hearings of the Commission, published in eleven volumes in 1916, contain tens of thousands of pages of testimony from an extraordinarily wide range of witnesses, including Clarence Darrow, Louis Brandeis, Mother Jones, Theodore Schroeder, William "Big Bill" Haywood, scores of ordinary workers, and the celebrated icons of capitalism, including Daniel Guggenheim, George Walbridge Perkins (of U.S. Steel), Henry Ford, and Andrew Carnegie. . . .

One witness above all others impressed the Commission with his approach to controlling protests. Arthur Woods, a longtime friend of Theodore Roosevelt, had taken over as New York City Police Commissioner in April 1914, following weeks of violent confrontations between police and protesters. Shortly before Woods took office, more than a thousand protesters had clashed with police after a march up Fifth Avenue, during which several innocent bystanders were injured. Woods testified that, immediately upon taking office, he "quite changed the policy, the methods, and the orders given to the police" in dealing with protesters. Anticipating another large meeting in Union Square the next Saturday, Woods ordered the police "to afford to the assemblage its full rights; [and] to interfere only if the traffic was seriously impeded, and if incitement to immediate violence was present." As a result of the new hands-off policy, the demonstration did not lead to bloodshed and the police made no arrests. . . .

In the Commission's final report to Congress, it praised Woods's methods for dealing with public dissent . . . . "One of the greatest sources of social unrest and bitterness has been the attitude of the police toward public speaking," the Commission reported. Public officials commonly reacted to radical speech by attempting to suppress it. "There could be no greater error" than using force in this manner, the Commission concluded, not only because it clashed with the principles of a democratic society, but also because it was ultimately self-defeating. As the Commission expressed this idea, "it is the lesson of history that attempts to suppress ideas [result] only in their more rapid propagation." . . .

The idea that suppression of radical speech tended to intensify popular dissent continued to receive attention in the years leading up to America's entry into the European war. As much as any other person, Arthur Woods was a national "expert" on the subject. But Woods's tolerant

---

13 *Id.* at 47.
approach to dissent was by no means the dominant one in the mid-1910s. The specter of an increasingly fanatical left gathering strength under the banner of "free speech" prompted many to argue that a firm hand should silence radical views for the sake of domestic security. This attitude manifested itself with special force against European immigrants, who were disparagingly but commonly referred to as "hyphenated Americans." [Ed.: e.g., Italian-Americans, Irish-Americans, etc.] In his annual address to Congress in 1915, President Woodrow Wilson warned that there were some immigrants "born under other flags but welcomed under our generous naturalization laws to the full freedom and opportunity of America, who have poured the poison of disloyalty into the very arteries of our national life." "Such creatures of passion, disloyalty, and anarchy," Wilson declared, "must be crushed out."

America's entry into the European conflict in April 1917 further inflamed these nativistic impulses.14

By 1919, the formalist Court reflected this mix of social attitudes by granting greater protection to freedom of speech than a mere concern with prior restraints, but adopting a limited doctrine deferential to government attempts to deal with perceived threats to national security. In 1919, the formalist Court invented the clear and present danger test in

*Schenck v. United States*15. In the first of a series of cases in which defendants were prosecuted for having advocated unlawful actions, Justice Holmes wrote for a unanimous Court that upheld a federal conviction for publications intended to encourage draft evasion. Holmes admitted that in ordinary times the defendant could have said all that was said in his circular, but he added that the character of every act depends upon the circumstances. At this time, the Nation was at war. Justice Holmes said:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance would not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.16

Justice Holmes and Brandeis first moved away from the majority later that year in

*Abrams v. United States*,17 where the Court affirmed a conviction for publishing an attempt to defeat the war plans of the United States. Justice Holmes, dissenting, joined by Justice Brandeis, said that the expression of opinions we loath should not be checked unless there is an emergency because they imminently

---


16 Id. at 52.

17 250 U.S. 616 (1919).
threaten immediate interference with the law. Turning to the facts, he added that the publication in question was intended to stop American intervention in Russia, rather than to impede a war. This opinion reflected an evolution in Holmes’ thinking about free speech from his more restrictive interpretation in Schenck to his broader view in Abrams, a change typically attributed to Holmes’ interactions in the intervening months with Justice Louis Brandeis, Judge Learned Hand, and Harvard Law School Professor Zechariah Chafee, including Holmes’ rejection of Blackstone’s views as an authoritative account of the Framers’ intent regarding free speech. Turning to considering the purpose behind the free speech clause, Holmes observed:

When man have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

The classic statements of this view appear in 17th century John Milton’s Areopagitica, wherein it is stated, “let her [truth] and falsehood grapple; whoever knew truth put to the worse in a free and open encounter,” and in 19th century philosopher John Stuart Mill’s On Liberty, wherein it is stated, “[If] any opinion is compelled to silence, that opinion for aught we can certainly know, be true. To deny this is to assume our own infallibility.” Of course, reflecting the limitations of his thinking in the 17th century, like the limitations of the framing and ratifying generation on issues such as slavery and women’s rights, Milton was not prepared to grant free speech rights for “popery, open superstition, impiety, or evil.”

In Gitlow v. People of New York, the Court “assumed” for the first time, and it has continued to hold ever since, that the rights of free speech protected by the First Amendment are part of the fundamental personal rights and liberties protected by the Due Process Clause of the 14th Amendment from impairment by the states. However, the majority applied only rational basis scrutiny in upholding New York’s criminal anarchy statute because the legislature had reasonably decided that there was a danger in advocating overthrow of the government by force and violence. Justices Holmes and Brandeis dissented, saying that the clear and present danger test should be applied in all cases and it was manifest that there was no present danger of an attempt to overthrow

---

18 Id. at 626-28 (Holmes, J., joined by Brandeis, J., dissenting).


20 250 U.S. at 630.

21 The passages from Milton and Mill are cited in NOWAK & ROTUNDA, supra note 6, at 1148.

22 268 U.S. 652, 666-70 (1925); id. at 672-73 (Holmes, J., joined by Brandeis, J., dissenting).
the government in sixteen thousand copies of a “Manifesto” published in a magazine entitled “The Revolutionary Age,” there being no evidence of any “present conflagration” resulting from the publication and circulation of the Manifesto. The majority responded by saying that a single revolutionary spark may kindle a fire that may sweep into a destructive conflagration.

The debate on the Court continued in Whitney v. California, decided in 1927. The majority affirmed a conviction for organizing a group dedicated to teaching and abetting criminal syndicalism. The majority said that the power to punish such behavior was beyond question, once the state legislature had made a determination that it created a danger to the public peace. Justice Brandeis, joined by Holmes, said that the Court should set a standard for determining when a danger should be deemed clear, and added that there should be a reasonable ground to fear that a serious evil is imminent and would occur if free speech is practiced. Although Brandeis and Holmes thus disagreed with the reasoning of the majority, they concurred because the defendant, Charlotte Anita Whitney, had not contended that there was no clear and present danger.

In his concurrence, Justice Brandeis grounded free speech doctrine even more explicitly than Holmes in a concern with ensuring robust political debate. Justice Brandeis stated in Whitney:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

The most elaborate theory to ground free speech doctrine in this concern with political speech and protecting the “democratic process” is that advanced by Alexander Meiklejohn. This theory also supports a view that a “central value of free press, speech, and assembly lies in checking the abuse of power by government officials.”

23 274 U.S. 357 (1927).
24 Id. at 379-80 (Brandeis, J., joined by Holmes, J., concurring).
25 Id. at 375.
26 ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).
27 NOWAK & ROTUNDA, supra note 6, at 1149 & n.9, citing, inter alia, William T. Coleman, Jr., A Free Press: The Need to Ensure an Unfettered Check on Democratic Government Between Elections, 59 Tulane L. Rev. 243 (1984); Vincent Blasi, The Checking Value in First Amendment
Justice Brandeis also noted a third reason for protection of free speech in *Whitney*. Reflecting the views of the 1916 Commission on Industrial Relations, Brandeis observed:

> order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. . . . Compare Thomas Jefferson: “We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge.” Quoted by Charles A. Beard, *The Nation*, July 7, 1926, Vol. 123, P. 8.28

The upshot of this series of cases is that a majority of the Court during the formalist era allowed both state and federal governments great freedom to rein in speech and association. At the same time, the Court was confining federal power by a narrow interpretation of the Commerce Clause, as noted at § 6.1 of Charles D. Kelso & R. Randall Kelso, *American Constitutional Law: An E-Coursebook Volumes I & 2* (2018 Orig. Ed. 2014) (http://libguides.stcl.edu/kelsomaterials), and a broad interpretation of Substantive Due Process to include the *Lochner v. New York*29 doctrine of liberty of contract, discussed *id.* at §§ 17.1-17.2. In addition, the Court confined state regulatory power by use of the Dormant Commerce Clause doctrine, discussed *id.* at § 13.3, and the broad interpretation of *Lochner v. New York*, discussed *id.* at § 17.1-17.2. Freedom of speech was thus given far less weight by the formalist Court than implementing what was thought to be fundamental economic principles, *i.e.*, that prosperity results from freedom to contract in the market, with federal and state governments having their own independent, but limited, spheres of regulation. Of course, Holmes disagreed that this theory was hard-wired into the Constitution. Dissenting in *Lochner v. New York*,30 Holmes stated, “The Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”

### 3. The Holmesian Era: 1937-1954

When the Court in 1937 repudiated its previous holdings on Substantive Due Process, discussed at § 17.3 of Charles D. Kelso & R. Randall Kelso, *American Constitutional Law: An E-Coursebook Volumes I & 2* (2018 Orig. Ed. 2014) (http://libguides.stcl.edu/kelsomaterials), and the Commerce Clause, discussed *id.* at § 6.2, and thus upheld New Deal economic regulation, it also began to revisit its previous perspectives on the importance of free speech. In 1937, a unanimous

---

28 *Whitney*, 274 U.S. at 375 & n.3.

29 198 U.S. 45 (1905).

30 *Id.* at 75 (1905) (Holmes, J., dissenting).
Court reversed a conviction under Oregon’s criminal syndicalism law in *DeJonge v. Oregon*\(^{31}\) where the charge was that the defendant had assisted in the conduct of a public meeting held under auspices of the Communist Party. Describing what was protected by the First Amendment, Chief Justice Hughes wrote that “the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions – principles which the Fourteenth Amendment embodies in the general terms of its due process clause.”

A change in determining the power of government as property owner began in 1939 with *Hague v. Committee for Industrial Organization*.\(^{32}\) The Court there held that the right of individual citizens to use city streets and parks for communication of views on national questions is part of the privileges and immunities of citizens of the United States that are protected by the Privileges or Immunities Clause of the 14th Amendment. The Court held that an ordinance requiring a permit to use city streets and parks for these purposes was void on its face. The reason was that “wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Justice Stone, concurring, would have placed the decision on the Due Process Clause of the 14th Amendment, so that the relevant rights would be those of all persons and not just citizens.\(^{33}\) Subsequent cases have adopted this viewpoint.

Shortly after *Hague*, the Court decided *Schneider v. State*.\(^{34}\) In *Schneider*, the Court moderated the 1897 holding in *Davis v. Commonwealth* by requiring sufficient justification for barring speech in traditional public forums, such as streets and parks. Speech regulations applicable to a nonpublic forum, whether content-based or content-neutral, were given a form of rational basis scrutiny, *i.e.*, they must be reasonable, and they may not involve viewpoint discrimination. Thus, the *Davis* form of discretion was no longer allowed. Specifically, the Court held that four ordinances were invalid on their face that did not allow any person to distribute a handbill or advertisement to pedestrians on the street or on their cars, or to circulate any handbill on any sidewalk, wharf, boat landing, or dock. The courts below had held that the motive of the legislature was to prevent littering on the streets. The Court replied that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." This was so even if the persons who receive the literature throw it on the street. The Court suggested that cities could punish those who actually throw papers on the street. The case suggested that whenever the government seeks to bar speech on government-owned public property it must bear the burden of justifying what it has done.

\(^{31}\) 299 U.S. 353, 364 (1937).

\(^{32}\) 307 U.S. 496, 515 (1939).

\(^{33}\) *Id.* at 527-29 (Stone, J., concurring in the judgment).

The impact on the Court of Justice Holmes and Brandeis’ ideas was most apparent in the 1941 case of *Bridges v. California*[^35^]. Justice Black there wrote for the Court, “What finally emerges from the ‘clear and present’ danger cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.” Applying this principle, the Court reversed a conviction for contempt of court where the defendants had published opinions about a pending case that arguably had a reasonable tendency to interfere with the orderly administration of justice. The facts were that the Los Angeles Times had written that the judge in a pending case would be making a serious mistake if he granted probation to the defendants. Harry Bridges, another defendant, had sent a telegram, while a motion for a new trial was pending, in which Bridges said that enforcement of the judge’s decision would tie up the Pacific Coast with strikes. Justice Black said that the judge would have already been aware of these possibilities. If he was not intimidated by the facts themselves, the most explicit statement of them could not have sidetracked the course of justice. Justice Black said that this was not enough to justify a restriction of free expression, although he also said that to speak of such a “reasonable tendency” was an exaggeration in describing the facts of this case.

In 1951, the Court held in *Kunz v. New York*[^36^] that a content-based law could not grant discretionary power to withhold a permit to speak on the streets and sidewalks. The Court there invalidated a New York ordinance that made it unlawful to hold public worship proceedings on the streets without first obtaining a permit, there being no mention in the ordinance of reasons for which such a permit application could be refused. Chief Justice Vinson explained that an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on the streets of New York, without appropriate standards to guide his action, is unconstitutional on its face as a prior restraint on the exercise of First Amendment rights. The Chief Justice did not state any criteria by which to determine what standards included in the ordinance might have made it valid.

Justice Jackson, dissenting, sought to preserve part of the older perspective found in *Davis*. He began by stating that the applicant was turned down for the reason that there was no assurance that he wanted the permit for uses different from what he had done under a previous permit, *i.e.*, to make scurrilous attacks on Catholics and Jews. In his second point, Jackson distinguished the situation from one in which Kunz wanted to speak in his own pulpit or hall. On the streets, people become, in a sense, a captive audience, and there is a genuine likelihood that someone will get hurt when Kunz makes his insults, such as suggesting that all Jews should have been burned in Nazi incinerators. Third, Justice Jackson thought that the Court should have considered all the facts in the case, as did the New York courts, which said that a permit need not be issued when the applicant claims a constitutional right to incite riots. He said that "the vulnerability of various forms of communication to community control must be proportioned to their impact upon other community interests."[^37^]

[^35^]: 314 U.S. 252, 263, 278 (1941).


[^37^]: Id. at 307-08 (Jackson, J., dissenting).
The Court has never adopted the perspective evidenced in Justice Jackson’s dissent except insofar as he expressed a concern about not allowing a speaker to incite a riot. The same day *Kunz* was decided, the Court held in *Feiner v. New York*\(^{38}\) that a speaker had been constitutionally convicted of disorderly conduct where his speech had created what the majority considered to be an imminence of disorder, and where he had defied police officers who requested that he stop speaking in order to avoid what Chief Justice Vinson said was “incitement to riot.” To show an imminence of disorder, the Court emphasized that the crowd was restless; there was some pushing, shoving, and milling around; and at least one person threatened violence if the police did not act. Here, the Court said, the speaker had passed the bounds of argument and was undertaking an incitement to riot.

Apparently from concern that content-based regulations might be held to trigger higher than rational basis review, the city contended that there was no intent here to suppress speech because of its content. Instead, the city said that its purposes were to prevent a breach of the peace and prevent injury to pedestrians. Agreeing, the lower courts had found that the arrests were motivated solely by a proper concern for the preservation of order and the protection of the general welfare. The Chief Justice said that these findings were supported by the record and he added that there was no evidence that the police actions were a cover for suppression of petitioner's views and opinions. Petitioner had been arrested for the reaction generated by his speech.\(^{39}\)

Justice Black, dissenting, said the evidence did not show any imminence of riot or uncontrollable disorder. Here there was only the normal behavior of an outdoor crowd. The man who mentioned violence was accompanied by a wife and two children and was never close enough to carry out the threat. If the police can ever interfere with a lawful public speaker to preserve order, they first must make all reasonable efforts to protect the speaker. Justice Black said it was unfortunate that the three cases being decided that day—*Bridges*, *Kunz*, and *Feiner*—meant when read together that while previous restraints probably cannot be imposed on an unpopular speaker, the police have discretion to silence him as soon as the customary hostility to his views develop. Justices Douglas and Minton also dissented in *Feiner* on the ground that when “unpopular causes are sponsored from the public platform, there will commonly be mutterings and unrest and heckling from the crowd. When a speaker mounts a platform it is not unusual to find him resorting to exaggeration, to vilification of ideas and men, to the making of false charges. But those extravagances ... do not justify penalizing the speaker by depriving him of the platform or by punishing him for his conduct.”\(^{40}\)

Despite the nation-wide concern with communism that swept through the country in the early 1950s,\(^{41}\) Justices Black and Douglas did not retreat from the views they expressed in *Bridges* and


\(^{39}\) *Id.* at 317-21.

\(^{40}\) *Id.* at 328-29 (Black, J., dissenting); *id.* at 331 (Douglas, J., joined by Minton, J., dissenting).

Feiner. However, a majority of the Court was unwilling to give a similar unqualified endorsement to vigorous application of the “clear and present danger” test when deciding Dennis v. United States. In that case the Court upheld an application of the Smith Act which made it unlawful knowingly or wilfully to advocate destroying any government in the United States by force or violence. The Court characterized the situation as one involving a party designed and dedicated to the overthrow of the Government, the Communist Party, in the context of a world crises. The plurality opinion of Chief Justice Vinson, joined by Justices Reed, Burton, and Minton, said that the situation with which Justices Brandeis and Holmes were concerned in Gitlow was a comparatively isolated event. Here, however, the government was dealing with a highly organized conspiracy, with rigidly disciplined members subject to call when leaders felt the time was ripe, all in the context of world crisis after crises. For that situation the plurality accepted the interpretation of clear and present danger adopted in the court below by Chief Judge Learned Hand, namely, “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” It should be noted that while Judge Hand’s views on criminal libel and free speech were relatively progressive back in 1917, when he first applied this balancing test in Masses Pub. Co. v. Patten, they had become timid by 1950.

Although this was a watered-down version of the clear and present danger test, the plurality agreed with Holmes’ position in Gitlow that the test must be applied by courts in every First Amendment case. In terms of who decides if a “clear and present danger” exists, the plurality noted, “The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent is a judicial rule to be applied as a matter of law by the Courts.” Justices Black and Douglas disagreed with this view in dissent, stating that the question should be one for a jury. Concurring in Dennis, Justice Jackson said that he would save the clear and present danger test, unmodified, for application as a “rule of reason” in the kind of case for which it was devised, i.e., street corner speech or a few incendiary pamphlets. Similarly reflecting a Holmesian deference to government view, Justice Frankfurter, concurring in the judgment, noted, “Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress.” This issue was not revisited during the Holmesian era.

4. The Instrumentalist Era: 1954-1986

The instrumentalist Court dramatically changed the legal landscape regarding the freedom of speech. As in other areas, such as Equal Protection doctrine, discussed at § 20.3 & Ch. 21-24, and Due Process doctrine, discussed at § 25.4 & Ch. 26-27, of CHARLES D. KELSO & R. RANDALL KELSO,
During this era, Justice Black came to embrace a categorical view of the freedom of speech. Moving beyond a vigorous use of the clear and present danger test that he had applied in the 1940s and 1950s, Justice Black came to embrace a liberal formalist view. This view is much more protective of free speech than the conservative formalist view of the formalist era, which was based on a literal reading of Blackstone, with a limited exception for speech that was not a “clear and present danger.” Justice Black concluded that the literal text of the First Amendment, which provides that “Congress shall make no law abridging the freedom of speech,” should be read as an absolute protection for freedom of speech to which no balancing of interests should be applied. As stated by Justice Black in 1961 in Konigsberg v. State Bar of California,\(^{48}\) in a dissent joined by Chief Justice Warren and Justice Douglas, “[T]he First Amendment’s unequivocal command that there shall be no abridgement of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.”

In contrast, the position of Holmesian Justice Harlan in Konigsberg, which has commanded a majority of Holmesian, natural law, and instrumentalist Justices in the modern era, is that the First Amendment always calls for a balancing test – the differences among the Justices relating to which balancing test should be applied in different circumstances. Justice Harlan stated for the majority in Konigsberg, “[W]e reject the view that the freedom of speech and association, as protected by the First and Fourteenth Amendments, are ‘absolute.’”\(^{49}\) Among other cases, Justice Harlan cited Schenck v. United States,\(^{50}\) where Justice Holmes had noted that “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” Rejecting Justice Black’s absolutist approach, modern First Amendment doctrine has borrowed Equal Protection and Substantive Due Process standards of strict scrutiny, intermediate review, and rational review to decide whether government regulations violate free speech, discussed at § 1.2.6.

\(^{46}\) 408 U.S. 92, 95 (1972).


\(^{49}\) Id. at 49.

\(^{50}\) Id. at 50, citing Schenck v. United States, 249 U.S. 47, 52 (1919).
5. Policies Affecting Development of Free Speech Doctrine

Three reasons were noted during the Formalist era to support a vigorous free speech doctrine. These were: (1) the Commission on Industrial Relations’ view that radical action is best restrained by granting free speech, discussed at § 1.2.1 nn.14, 28; (2) the “marketplace of ideas” metaphor of Holmes in Abrams, discussed at § 1.2.1 n.20; and (3) the advancement of political democracy reason of Brandeis in Whitney, discussed at § 1.2.1 nn.25-27. In addition, instrumentalist jurists have noted three additional reasons. Justice Marshall noted in Procunier v. Martinez that (4) the “First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression” and “self-realization.” Justice Brennan noted that (5) “the Constitution is . . . a bold commitment by a people to the ideal of libertarian dignity protected through law. . . . As augmented by the Bill of Rights and the Civil War amendments, this text is a sparkling vision of the supremacy of the human dignity of every individual.” A final reason, stated by Professor Lee Bollinger in 1986, is (6) that freedom of speech promotes tolerance of others and thus helps to shape “the intellectual character of society.” These six reasons supporting the freedom of speech are naturally not completely independent of each other. For example, Justice Marshall’s concerns with “self-expression” and “self-realization” are related to Justice Holmes’ “marketplace of ideas” metaphor, which can be supported through Justice Brandeis’ advancement of political democracy in both its core “democratic process” value and its “checking” function.


Reflecting the modern natural law predisposition to follow precedent, very few instrumentalist-era precedents regarding the First Amendment have been overturned or limited. The doctrine of the modern natural law era reflects the relatively robust protection of the instrumentalist era, embracing all six reasons in favor of protection of free speech discussed above, at § 1.2.5. Consistent with Court precedents, the Court continues to apply to same standards of review to free speech and free press cases. Consistent with the more analytic predisposition of natural law interpretation than under Holmesian or instrumentalist interpretation, noted at § 1.1.2 Table 2, the Court has been more precise about the relevant standards of review applied in free speech cases in the modern era.


As with Equal Protection and Substantive Due Process doctrine, the preliminary decision that must be made in First Amendment cases today is what level of review to apply. In reaching this decision, the first question to ask is whether the case involves a governmental regulation of speech, in which case standard First Amendment doctrine applies, discussed in Chapters 2-3 & 5, or involves either governmental regulation of conduct, discussed at § 2.1, or governmental spending on speech, discussed in Chapter 4, in which case standard First Amendment doctrine does not apply.

If standard First Amendment doctrine applies, the second question to ask is whether the speech is regarded as fully protected (e.g., literary, artistic, political or scientific speech, or symbolic speech), or is regarded as not fully protected. Symbolic speech exists where conduct is not “pure speech,” such as talking, writing, or wearing informative clothing, but is nevertheless intended to be expressive and conveys a message, as discussed at § 2.1. Symbolic speech is given the same protection as regular full-protected speech under the Court’s First Amendment free speech doctrine. In the case of unprotected speech (e.g., fighting words or obscene speech), or somewhat protected speech (e.g., speech regulations imposed upon government employees, or government regulation of commercial speech), full First Amendment protection is not given. The First Amendment standards for speech that is fully protected are discussed in Chapters 2-3 & 5. The doctrines for speech that receive less than full First Amendment protection are discussed in Chapters 6-10.

The third question asked under First Amendment review is whether the regulation of speech is content-based or content-neutral, and if content-based, whether the regulation involves viewpoint discrimination (i.e., the regulation is focused on which side of a topic the individual supports), discussed at § 2.2, or subject-matter discrimination (i.e., the regulation applies if a topic or subject-matter is discussed without regard to the person’s views on that subject-matter), discussed at § 2.3.

The fourth question asked is whether the speech being regulated occurs on private property or in a public forum, or in a nonpublic forum owned by the government. Government attempts to regulate speech on individuals’ private property or on public forums are much more difficult to justify, and typically trigger a heightened standard of scrutiny, than government regulations on property owned by the government that is not generally open to the public. This issue is discussed at § 3.1.

---

Regulations of speech involving viewpoint discrimination are given strict scrutiny no matter where the speech occurs. (As discussed at § 2.2, in a public forum perhaps viewpoint discrimination is absolutely prohibited without regard to a strict scrutiny test). Strict scrutiny also applies in a public forum or on private property for content-based, subject-matter regulations not involving viewpoint discrimination. Regulations of speech in a public forum or on private property that are content-neutral trigger intermediate review, as in Ward v. Rock Against Racism, \(^{61}\) excerpted at § 1.4.1:

These standards track strict scrutiny and intermediate review under Equal Protection and Due Process Clause doctrine. As discussed at § 20.1 nn.1-28, of Charles D. Kelso & R. Randall Kelso, American Constitutional Law: An E-Coursebook Volumes 1 & 2 (2018 Orig. Ed. 2014) [http://libguides.stcl.edu/kelsomaterials], under intermediate review, the legislation must (1) advance important/significant/substantial government ends, (2) be substantially related to advancing these ends, and (3) not be substantially more burdensome than necessary to advance these ends. Under strict scrutiny the statute must (1) advance compelling/overriding government ends, (2) be substantially and directly related to advancing these ends, and (3) be the least restrictive effective means to advance the ends. The Court often phrases the last two parts of strict scrutiny as requiring the statute be “precisely tailored” or “necessary”; of intermediate review be “narrowly drawn.”\(^ {62}\) But sometimes the Court has used the phrase “narrowly drawn” even under strict scrutiny.\(^ {63}\)

In contrast to strict scrutiny or intermediate review, on government-owned, nonpublic forum property (that is, government property not generally open to the public), content-based, subject-matter regulations of speech, or content-neutral regulations of speech, are given only some version of rational review. The Court has not been clear whether this is minimum rationality review, such as under the Equal Protection Clause, as discussed id. at § 19.1, or 2nd-order reasonableness balancing, which the Court applies to less than substantial burdens on fundamental rights, such as the fundamental right to vote, discussed id. at § 24.3 nn.13-20. Since all First Amendment rights are viewed as fundamental, as noted at § 1.1, the better view is that in these cases the Court should be using 2nd-order reasonableness balancing. Cf. District of Columbia v. Heller, 554 U.S. 570, 628 & n.27 (2008) (Scalia, J., opinion for the Court) (review for Second Amendment right to “keep and bear arms” has to be higher than minimum rationality review because, like freedom of speech, a fundamental right is involved). As discussed at § 1.4.2, this appears to be what the Court is doing.


The difference between the two approaches is the following. As discussed id. at § 19.1 nn.27-42, under minimum rationality review, the legislation must (1) advance legitimate government ends, (2) be rationally related to advancing these ends (not be irrationally underinclusive), and (3) not impose irrational burdens (not be irrationally overinclusive). This test only ensures that the government is not engaged in illegitimate or arbitrary/irrational action. As the Court stated in *Heller v. Doe*: “A classification ‘must be upheld [under minimum rationality review] if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’ . . . “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” A statute is presumed constitutional, and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” whether or not the basis has a foundation in the record. . . . A classification does not fail rational-basis review because it “is not made with mathematical nicety or because in practice it results in some inequality.” . . . [On the other hand,] even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation.”

Under 2nd-order reasonableness balancing, the challenger still has the burden to prove the regulation is unconstitutional. But the Court makes its own “independent judgment” on the strengths of the government’s legitimate interests and the burden on the individual, and then weighs the two to determine if the burden, even if not irrational, is nevertheless “unreasonableness” or “excessive” because the burden is too great given the minimal interests supporting the regulation. As phrased in the fundamental right to vote case of *Burdick v. Takashi*, the Court said, “A court . . . must weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’"

Despite the Court determining for itself the extent to which the alleged governmental interests are actually supported by fact, some deference to governmental judgment is still given at 2nd-order reasonableness balancing. For example, in *Thornburgh v. Abbott*, reviewing the burden on a prisoner’s fundamental right to marry, the Court said that while *Turner v. Safley*’s “reasonableness” standard for determining marriage rights of prisoners “is not toothless [Ed.: i.e., not minimum rationality review],” “[i]n the volatile prison environment, it is essential that prison officials be given broad discretion to prevent . . . disorder.” In *Gonzales v. Carhart*, considering a less than undue

64 509 U.S. 312, 320-21 (1993), and cases cited therein.

65 See., e.g., *Burdick v. Takashi*, 504 U.S. 428, 434, 441-42, 437-38 (1992) (burden of proof on challenger, as Court “rejected the petitioner’s argument.”).

66 *Id.* at 433-34, *quoting* *Anderson v. Celebrezze*, 460 U.S. at 788-89.


burden on the fundamental right of privacy of access to an abortion, the Court stated, “Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress’ findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.” As this quote indicates, under 2nd-order reasonableness balancing, a court, not a legislature, must make the ultimate constitutional conclusion, making an “independent examination of the whole record” to determine whether a law exceeds constitutional boundaries.⁶⁹ But some deference still remains.⁷⁰

Table 3 may help make these levels of review clearer:

<table>
<thead>
<tr>
<th>Public Forum or Nonpublic Forum Owned by the Government</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Content-Based Regulation of Speech</strong></td>
</tr>
<tr>
<td>Viewpoint Discrimination</td>
</tr>
<tr>
<td>Strict Scrutiny or Absolute Prohibition (See infra § 2.2)</td>
</tr>
<tr>
<td>Subject-Matter Discrimination</td>
</tr>
<tr>
<td>Strict Scrutiny</td>
</tr>
<tr>
<td>Some Version of Rational Review*</td>
</tr>
<tr>
<td><strong>Content-Neutral Regulation of Speech</strong></td>
</tr>
<tr>
<td>Intermediate Review</td>
</tr>
<tr>
<td>Some Version of Rational Review*</td>
</tr>
</tbody>
</table>

* Currently not completely clear whether this review is minimum rationality review or 2nd-order reasonableness balancing. The better view, consistent with more recent Supreme Court doctrine discussed at § 1.4.2, is that it is 2nd-order reasonableness balancing review.


⁷⁰ See also District of Columbia v. Heller, 554 U.S. 570, 690 (Breyer, J., joined by Stevens, Souter & Ginsburg, dissenting) (discussing less than substantial burdens on the fundamental Second Amendment right to keep and bear arms, Justice Breyer noted, “In applying this kind of standard the Court normally defers to a legislature's empirical judgment in matters where a legislature is likely to have greater expertise and greater institutional factfinding capacity.”). Under the similar “reasonableness” balancing test of Mathews v. Eldridge, 424 U.S. 319, 439 (1976), which is used to determine what process is due under procedural due process analysis, the Court noted, “[S]ubstantial weight [will] be given to the good-faith judgments of the individuals charged by Congress with the administration of . . . programs.”
§ 1.3 Freedom of Speech and Strict Scrutiny

Three cases provide good examples of modern free speech doctrine in terms of the levels of scrutiny in Equal Protection and Substantive Due Process cases. In 1991, in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Court adopted a strict scrutiny approach to content-based regulations of speech. As the Court stated in *Simon & Schuster*, to justify its “content-based” regulation of speech “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” Concurring in the case, Justice Kennedy noted that this adoption of the Equal Protection strict scrutiny approach in a First Amendment case was not required by prior precedents, and that while “the compelling interest inquiry has found its way into our First Amendment jurisprudence of late . . . the Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment.” In contrast to this approach, Justice Kennedy preferred Justice Black’s absolutist approach, which would prevent the state from any content-based regulation of fully-protected speech, without regard to a compelling governmental interest analysis. The majority of the Court has consistently rejected Justice Kennedy’s views, and applied a strict scrutiny analysis to content-based regulations of speech.

*Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*


Justice O’CONNOR delivered the opinion of the Court.

New York's “Son of Sam” law requires that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account. These funds are then made available to the victims of the crime and the criminal's other creditors. We consider whether this statute is consistent with the First Amendment.

In the summer of 1977, New York was terrorized by a serial killer popularly known as the Son of Sam. The hunt for the Son of Sam received considerable publicity, and by the time David Berkowitz was identified as the killer and apprehended, the rights to his story were worth a substantial amount. Berkowitz's chance to profit from his notoriety while his victims and their families remained uncompensated did not escape the notice of New York's Legislature. The State quickly enacted the statute at issue, N.Y. Exec. Law § 632-a (McKinney 1982 and Supp.1991).

---


72 *Id.* at 124-25 (Kennedy, J., concurring).

73 See, e.g., Republican Party of Minnesota v. White, 536 U.S. 765, 774-75 (2002); *id.* at 793 (Kennedy, J., concurring) (“I adhere to my view, however, that content-based speech restrictions that do not fall within any traditional exception should be invalidated without any inquiry into narrow tailoring or compelling governmental interests.”).

Page 58
The statute was intended to “ensure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.” Assembly Bill Memorandum Re: A 9019, July 22, 1977, reprinted in Legislative Bill Jacket, 1977 N.Y. Laws, ch. 823. As the author of the statute explained: “It is abhorrent to one's sense of justice and decency that an individual . . . can expect to receive large sums of money for his story once he is captured – while five people are dead, [and] other people were injured as a result of his conduct.” Memorandum of Sen. Emanuel R. Gold, reprinted in New York State Legislative Annual, 1977, p. 267.

The Son of Sam law, as later amended, requires any entity contracting with an accused or convicted person for a depiction of the crime to submit a copy of the contract to respondent New York State Crime Victims Board (Board), and to turn over any income under that contract to the Board. This requirement applies to all such contracts in any medium of communication . . .

The Board is then required to deposit the payment in an escrow account “for the benefit of and payable to any victim . . . provided that such victim, within five years of the date of the establishment of such escrow account, brings a civil action in a court of competent jurisdiction and recovers a money judgment for damages against such [accused or convicted] person or his representatives.” Ibid. After five years, if no actions are pending, “the board shall immediately pay over any moneys in the escrow account to such person or his legal representatives.” § 632-a(4). This 5-year period in which to bring a civil action against the convicted person begins to run when the escrow account is established, and supersedes any limitations period that expires earlier. § 632-a(7).

Subsection (8) grants priority to two classes of claims against the escrow account. First, upon a court order, the Board must release assets “for the exclusive purpose of retaining legal representation.” § 632-a(8). In addition, the Board has the discretion, after giving notice to the victims of the crime, to “make payments from the escrow account to a representative of any person accused or convicted of a crime for the necessary expenses of the production of the moneys paid into the escrow account.” Ibid. This provision permits payments to literary agents and other such representatives. Payments under subsection (8) may not exceed one-fifth of the amount collected in the account. Ibid.

Claims against the account are given the following priorities: (a) payments ordered by the Board under subsection (8); (b) subrogation claims of the State for payments made to victims of the crime; (c) civil judgments obtained by victims of the crime; and (d) claims of other creditors of the accused or convicted person, including state and local tax authorities. N.Y. Exec. Law § 632-a(11) (McKinney Supp.1991).

Subsection (10) broadly defines “person convicted of a crime” to include “any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted.” § 632-a(10)(b) (emphasis added). Thus a person who has never been accused or convicted of a crime in the ordinary sense, but who admits in a book or other work to having committed a crime, is within the statute's coverage.
As recently construed by the New York Court of Appeals, however, the statute does not apply to victimless crimes. Children of Bedford, Inc. v. Petromelis, 573 N.E.2d 541, 548 (N.Y. 1991).

Since its enactment in 1977, the Son of Sam law has been invoked only a handful of times. As might be expected, the individuals whose profits the Board has sought to escrow have all become well known for having committed highly publicized crimes. These include Jean Harris, the convicted killer of “Scarsdale Diet” Doctor Herman Tarnower; Mark David Chapman, the man convicted of assassinating John Lennon; and R. Foster Winans, the former Wall Street Journal columnist convicted of insider trading. Ironically, the statute was never applied to the Son of Sam himself; David Berkowitz was found incompetent to stand trial, and the statute at that time applied only to criminals who had actually been convicted. N.Y. Times, Feb. 20, 1991, p. B8, col. 4. According to the Board, Berkowitz voluntarily paid his share of the royalties from the book Son of Sam, published in 1981, to his victims or their estates. Brief for Respondents 8, n.13.

A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. Leathers v. Medlock, 499 U.S. 439, 447 (1991). As we emphasized in invalidating a content-based magazine tax: “[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.” Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987).

This is a notion so engrained in our First Amendment jurisprudence that last Term we found it so “obvious” as to not require explanation. Leathers, supra, 499 U.S., at 447. It is but one manifestation of a far broader principle: “Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.” Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984). See also Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). In the context of financial regulation, it bears repeating, as we did in Leathers, that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. 499 U.S., at 448-449. The First Amendment presumptively places this sort of discrimination beyond the power of the government. As we reiterated in Leathers: “‘The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.’” Id., at 448-449 (quoting Cohen v. California, 403 U.S. 15, 24 (1971)).

The Son of Sam law is such a content-based statute. It singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content. Whether the First Amendment “speaker” is considered to be Henry Hill, whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content.
The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that “[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment.” Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983). Simon & Schuster need adduce “no evidence of an improper censorial motive.” Arkansas Writers' Project, supra, 481 U.S., at 228. As we concluded in Minneapolis Star: “We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.” 460 U.S., at 592.

The Son of Sam law establishes a financial disincentive to create or publish works with a particular content. In order to justify such differential treatment, “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” Arkansas Writers' Project, 481 U.S., at 231.

The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers. See Brief for Respondents 38, n. 38. As we have often had occasion to repeat: “[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.” Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (quoting FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978)). “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.” United States v. Eichman, 496 U.S. 310, 319 (1990) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)). The Board thus does not assert any interest in limiting whatever anguish Henry Hill's victims may suffer from reliving their victimization.

There can be little doubt, on the other hand, that the State has a compelling interest in ensuring that victims of crime are compensated by those who harm them. Every State has a body of tort law serving exactly this interest. The State's interest in preventing wrongdoers from dissipating their assets before victims can recover explains the existence of the State's statutory provisions for prejudgment remedies and orders of restitution. See N.Y. Civ. Prac. Law §§ 6201-6226 (McKinney 1980 and Supp.1991); N.Y. Penal Law § 60.27 (McKinney 1987). We have recognized the importance of this interest, in the Sixth Amendment context. See Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 629 (1989).

The State likewise has an undisputed compelling interest in ensuring that criminals do not profit from their crimes. Like most if not all States, New York has long recognized the “fundamental equitable principle,” Children of Bedford v. Petromelis, 573 N.E.2d, at 548, that “[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to find any claim upon his own iniquity, or to acquire property by his own crime.” Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889). The force of this interest is evidenced by the State's statutory provisions for the forfeiture of the proceeds and instrumentalities of crime. See N.Y. Civ. Prac. Law §§ 1310-1352 (McKinney Supp.1991).
The parties debate whether book royalties can properly be termed the profits of crime, but that is a question we need not address here. For the purposes of this case, we can assume without deciding that the income escrowed by the Son of Sam law represents the fruits of crime. We need only conclude that the State has a compelling interest in depriving criminals of the profits of their crimes, and in using these funds to compensate victims.

[Despite this interest, the] Board cannot explain why the State should have any greater interest in compensating victims from the proceeds of such “storytelling” than from any of the criminal's other assets. Nor can the Board offer any justification for a distinction between this expressive activity and any other activity in connection with its interest in transferring the fruits of crime from criminals to their victims. Thus even if the State can be said to have an interest in classifying a criminal's assets in this manner, that interest is hardly compelling.

We have rejected similar assertions of a compelling interest in the past. In *Arkansas Writers' Project* and *Minneapolis Star*, we observed that while the State certainly has an important interest in raising revenue through taxation, that interest hardly justified selective taxation of the press, as it was completely unrelated to a press/non-press distinction. *Arkansas Writers' Project*, supra, 481 U.S., at 231; *Minneapolis Star*, 460 U.S., at 586.

In short, the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime. We must therefore determine whether the Son of Sam law is narrowly tailored to advance the former, not the latter, objective.

As a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly overinclusive [Ed.: and thus not the least burdensome effective alternative under the third prong of strict scrutiny review]. As counsel for the Board conceded at oral argument, the statute applies to works on any subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally. See Tr. of Oral Arg. 30, 38; see also App. 109. In addition, the statute's broad definition of “person convicted of a crime” enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted. § 632-a(10)(b).

These two provisions combine to encompass a potentially very large number of works. Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as *The Autobiography of Malcolm X*, which describes crimes committed by the civil rights leader before he became a public figure; *Civil Disobedience*, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the Confessions of Saint Augustine, in which the author laments “my past foulness and the carnal corruptions of my soul,” one instance of which involved the theft of pears from a neighboring vineyard. See A. Haley & Malcolm X, *The Autobiography of Malcolm X* 108-125 (1964); H. Thoreau, *Civil Disobedience* 18-22 (1849, reprinted 1969); The Confessions of Saint Augustine 31, 36-37 (Franklin Library ed. 1980). Amicus Association of American Publishers, Inc., has submitted a sobering bibliography listing hundreds of works by American prisoners and ex-prisoners, many of which contain
descriptions of the crimes for which the authors were incarcerated, including works by such authors as Emma Goldman and Martin Luther King, Jr. A list of prominent figures whose autobiographies would be subject to the statute if written is not difficult to construct: The list could include Sir Walter Raleigh, who was convicted of treason after a dubiously conducted 1603 trial; Jesse Jackson, who was arrested in 1963 for trespass and resisting arrest after attempting to be served at a lunch counter in North Carolina; and Bertrand Russell, who was jailed for seven days at the age of 89 for participating in a sit-down protest against nuclear weapons. The argument that a statute like the Son of Sam law would prevent publication of all of these works is hyperbole – some would have been written without compensation – but the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated.

Should a prominent figure write his autobiography at the end of his career, and include in an early chapter a brief recollection of having stolen (in New York) a nearly worthless item as a youthful prank, the Board would control his entire income from the book for five years [Ed.: and thus in no sense the least burdensome effective alternative to ensure criminals do not profit from their crimes], and would make that income available to all of the author's creditors, despite the fact that the statute of limitations for this minor incident had long since run. That the Son of Sam law can produce such an outcome indicates that the statute is, to say the least, not narrowly tailored to achieve the State's [Ed.: other] objective of compensating crime victims from the profits of crime.

The Federal Government and many of the States have enacted statutes designed to serve purposes similar to that served by the Son of Sam law. Some of these statutes may be quite different from New York's, and we have no occasion to determine the constitutionality of these other laws. We conclude simply that in the Son of Sam law, New York has singled out speech on a particular subject for a financial burden that it places on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective.

Justice THOMAS took no part in the consideration or decision of this case.

Justice KENNEDY, concurring in the judgment.

The New York statute we now consider imposes severe restrictions on authors and publishers, using as its sole criterion the content of what is written. The regulated content has the full protection of the First Amendment and this, I submit, is itself a full and sufficient reason for holding the statute unconstitutional. In my view it is both unnecessary and incorrect to ask whether the State can show that the statute “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” Ante, at 509 (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987)). That test or formulation derives from our equal protection jurisprudence, see, e.g., Wygant v. Jackson Board of Ed., 476 U.S. 267, 273-274 (1986) (opinion of Powell, J.); Hirabayashi v. United States, 320 U.S. 81, 100 (1943), and has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only, apart from any considerations of time, place, and manner or the use of public forums.
Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State's argument that the statute should be upheld.

Borrowing the compelling interest and narrow tailoring analysis is ill advised when all that is at issue is a content-based restriction, for resort to the test might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so. Our precedents and traditions allow no such inference.

This said, it must be acknowledged that the compelling interest inquiry has found its way into our First Amendment jurisprudence of late, even where the sole question is, or ought to be, whether the restriction is in fact content based. Although the notion that protected speech may be restricted on the basis of content if the restriction survives what has sometimes been termed “the most exacting scrutiny,” Texas v. Johnson, 491 U.S. 397, 412 (1989), may seem familiar, the Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment. In Johnson, for example, we cited Boos v. Barry, 485 U.S. 312, 321 (1988), as support for the approach. Boos v. Barry in turn cited Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983), for the proposition that to justify a content-based restriction on political speech in a public forum, the State must show that “the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” Boos v. Barry, supra, 485 U.S., at 321. Turning to the appropriate page in Perry, we discover that the statement was supported with a citation of Carey v. Brown, 447 U.S. 455, 461 (1980). Looking at last to Carey, it turns out the Court was making a statement about equal protection: “When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the regulation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.” Id., at 461-462. Thus was a principle of equal protection transformed into one about the government's power to regulate the content of speech in a public forum, and from this to a more general First Amendment statement about the government's power to regulate the content of speech.

The inapplicability of the compelling interest test to content-based restrictions on speech is demonstrated by our repeated statement that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). See also Ragland, 481 U.S., at 229-230 (citing Mosley); Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984) (“Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment”). These general statements about the government's lack of power to engage in content discrimination reflect a surer basis for protecting speech than does the test used by the Court today.

There are a few legal categories in which content-based regulation has been permitted or at least contemplated. These include obscenity, see, e.g., Miller v. California, 413 U.S. 15 (1973),
defamation, see, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985),
iccitement, see, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969), or situations presenting some grave
and imminent danger the government has the power to prevent, see, e.g., Near v. Minnesota ex rel.
Olson, 283 U.S. 697, 716 (1931). These are, however, historic and traditional categories long
familiar to the bar, although with respect to the last category it is most difficult for the government
to prevail. See New York Times Co. v. United States, 403 U.S. 713 (1971). While it cannot be said
with certainty that the foregoing types of expression are or will remain the only ones that are without
First Amendment protection, as evidenced by the proscription of some visual depictions of sexual
conduct by children, see New York v. Ferber, 458 U.S. 747 (1982), the use of these traditional legal
categories is preferable to the sort of ad hoc balancing that the Court henceforth must perform in
every case if the analysis here used becomes our standard test.

As a practical matter, perhaps we will interpret the compelling interest test in cases involving
content regulation so that the results become parallel to the historic categories I have discussed,
although an enterprise such as today's tends not to remain pro forma but to take on a life of its own.
When we leave open the possibility that various sorts of content regulations are appropriate, we
discard the value of our precedents and invite experiments that in fact present clear violations of
the First Amendment, as is true in the case before us.

To forgo the compelling interest test in cases involving direct content-based burdens on speech
would not, of course, eliminate the need for difficult judgments respecting First Amendment issues.
Among the questions we cannot avoid the necessity of deciding are: Whether the restricted
expression falls within one of the unprotected categories discussed above; whether some other
constitutional right is impaired, see Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976); whether,
in the case of a regulation of activity which combines expressive with nonexpressive elements, the
regulation aims at the activity or the expression, compare United States v. O'Brien, 391 U.S. 367
(1968), with Texas v. Johnson, 491 U.S., at 406-410; whether the regulation restricts speech itself
or only the time, place, or manner of speech, see Ward v. Rock Against Racism, 491 U.S. 781
(1989); and whether the regulation is in fact content based or content neutral. See Boos v. Barry, 485
U.S., at 319-321. However difficult the lines may be to draw in some cases, here the answer to each
of these questions is clear.

The case before us presents the opportunity to adhere to a surer test for content-based cases and to
avoid using an unnecessary formulation, one with the capacity to weaken central protections of the
First Amendment. I would recognize this opportunity to confirm our past holdings and to rule that
the New York statute amounts to raw censorship based on content, censorship forbidden by the text
of the First Amendment and well-settled principles protecting speech and the press. That ought to
end the matter.

With these observations, I concur in the judgment of the Court holding the statute invalid.
§ 1.4 Less Rigorous Standards of Review: Intermediate Review and Rational Review

1. Freedom of Speech and Intermediate Review

The use of intermediate scrutiny for content-neutral regulations of symbolic speech or reasonable time, place, or manner regulations of speech is best illustrated in the 1989 case of Ward v. Rock Against Racism.\(^\text{74}\) Previously, in 1968 in United States v. O’Brien,\(^\text{75}\) excerpted at § 2.1, the Court had upheld the conviction of a protester who had violated federal law by burning his draft card on the steps of a courthouse as part of a demonstration against the Vietnam war. Chief Justice Warren stated: “[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”\(^\text{76}\)

The O’Brien principle, although framed in the context of a regulation applied to a content-neutral regulation of symbolic speech, was extended in 1984 by Members of the City Council of Los Angeles v. Taxpayers for Vincent,\(^\text{77}\) excerpted at §2.4.2, to time, place, or manner regulations. The Court upheld a Los Angeles ordinance that prohibited the posting of signs on public property. The challengers were supporters of a candidate for the City Council whose posters were removed from utility poles by city employees. To justify the ordinance, the city said the law protected its interests in beauty, the safety of workers who must climb poles, and eliminating traffic hazards. The Court pointed out that the ordinance was a viewpoint-neutral regulation of a certain manner of communication, and the relevant standard for review was thus set forth in United States v. O’Brien. In both O’Brien and Vincent, however, the O’Brien test was not explicitly phrased as an intermediate standard of review.

In Ward, the Court defined the O’Brien test more explicitly in intermediate terms. The Court held in Ward that New York City did not deprive musicians of First Amendment rights by insisting that bandshell performers in Central Park use sound-amplification equipment and a sound technician provided by the city. For the Court, Justice Kennedy first held that the regulation was content-neutral because two of its justifications (controlling noise in the park and avoiding undue intrusion into residential areas) had nothing to do with content.\(^\text{78}\) Having concluded that the regulation was indeed a content-neutral time, place, or manner regulation rather than a regulation of content, Justice Kennedy applied the O’Brien rule to the facts by concluding that (1) the city’s interest was

\(^{74}\) 491 U.S. 781 (1989).

\(^{75}\) 391 U.S. 367 (1968).

\(^{76}\) Id. at 377.


substantial in that inadequate sound application had an adverse effect on the audience, and (2) the city had a substantial interest in limiting the sound emanating from the bandshell. Next, Justice Kennedy held that the Court of Appeals erred in drawing on O'Brien for a least intrusive means requirement, which the Court uses at strict scrutiny, since the Supreme Court had already made clear that there is little, if any, difference between the O'Brien test and the usual rule for time, place, or manner regulations, which does not require the least intrusive means. To underscore the point he said, "A regulation of time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but it need not be the least-restrictive or least-intrusive means of doing so." Instead of the strict scrutiny least burdensome effective alternative requirement, the Court used the intermediate standard of review that asks whether the regulation is substantially more burdensome than necessary. As phrased by Justice Kennedy in Ward, “[R]egulation is constitutional if] justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information.”79 It has become a commonplace observation, as stated in the 2002 case of City of Los Angeles v. Alameda Books, Inc.,80 that regulations of speech “require only intermediate scrutiny if they are content neutral.”

Ward v. Rock Against Racism
491 U.S. 781 (1989)

Justice KENNEDY delivered the opinion of the Court.

In the southeast portion of New York City's Central Park, about 10 blocks upward from the park's beginning point at 59th Street, there is an amphitheater and stage structure known as the Naumberg Acoustic Bandshell. The bandshell faces west across the remaining width of the park. In close proximity to the bandshell, and lying within the directional path of its sound, is a grassy open area called the Sheep Meadow. The city has designated the Sheep Meadow as a quiet area for passive recreations like reclining, walking, and reading. Just beyond the park, and also within the potential sound range of the bandshell, are the apartments and residences of Central Park West.

This case arises from the city's attempt to regulate the volume of amplified music at the bandshell so the performances are satisfactory to the audience without intruding upon those who use the Sheep Meadow or live on Central Park West and in its vicinity.

The city's regulation requires bandshell performers to use sound-amplification equipment and a sound technician provided by the city. The challenge to this volume control technique comes from the sponsor of a rock concert. The trial court sustained the noise control measures, but the Court of Appeals for the Second Circuit reversed. We granted certiorari to resolve the important First Amendment issues presented by the case.


The city considered various solutions to the sound-amplification problem. The idea of a fixed decibel limit for all performers using the bandshell was rejected because the impact on listeners of a single decibel level is not constant, but varies in response to changes in air temperature, foliage, audience size, and like factors. Id., at 31, 220, 285-286. The city also rejected the possibility of employing a sound technician to operate the equipment provided by the various sponsors of bandshell events, because the city's technician might have had difficulty satisfying the needs of sponsors while operating unfamiliar, and perhaps inadequate, sound equipment. Id., at 220. Instead, the city concluded that the most effective way to achieve adequate but not excessive sound amplification would be for the city to furnish high quality sound equipment and retain an independent, experienced sound technician for all performances at the bandshell. After an extensive search the city hired a private sound company capable of meeting the needs of all the varied users of the bandshell.

Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. See 2 Dialogues of Plato, Republic, bk. 3, pp. 231, 245-248 (B. Jowett transl., 4th ed. 1953) (“Our poets must sing in another and a nobler strain”); Musical Freedom and Why Dictators Fear It, N.Y. Times, Aug. 23, 1981, section 2, p. 1, col. 5; Soviet Schizophrenia toward Stravinsky, N.Y. Times, June 26, 1982, section 1, p. 25, col. 2; Symphonic Voice from China Is Heard Again, N.Y. Times, Oct. 11, 1987, section 2, p. 27, col. 1. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment.

Here the bandshell was open, apparently, to all performers; and we decide the case as one in which the bandshell is a public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment. United States v. Grace, 461 U.S. 171, 177 (1983). Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); see Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) (quoting Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). We consider these requirements in turn.

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. Community for Creative Non-Violence, supra, 468 U.S., at 295. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. See Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48 (1986). Government regulation of expressive activity is content neutral so long as it is “justified without reference to the content of the regulated speech.” Community for Creative Non-Violence, supra, 468 U.S., at 293 (emphasis added).
The principal justification for the sound-amplification guideline is the city's desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline “ha[s] nothing to do with content,” Boos v. Barry, supra, at 320, and it satisfies the requirement that time, place, or manner regulations be content neutral.

The city's regulation is also “narrowly tailored to serve a significant governmental interest.” Community for Creative Non-Violence, 468 U.S., at 293. Despite respondent's protestations to the contrary, it can no longer be doubted that government “ha[s] a substantial interest in protecting its citizens from unwelcome noise.” City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984) (citing Kovacs v. Cooper, supra ); see Grayned, supra, 408 U.S., at 116. This interest is perhaps at its greatest when government seeks to protect “‘the well-being, tranquility, and privacy of the home,’” Frisby v. Schultz, 487 U.S., at 484 (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)), but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise. Kovacs v. Cooper, 336 U.S., at 86-87 (opinion of Reed, J.); id., at 96-97 (Frankfurter, J., concurring); id., at 97 (Jackson, J., concurring); see Community for Creative Non-Violence, supra, 468 U.S., at 296 (recognizing the government's “substantial interest in maintaining the parks . . . in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them”).

We think it also apparent that the city's interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one. The record indicates that inadequate sound amplification has had an adverse affect on the ability of some audiences to hear and enjoy performances at the bandshell. The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation. See Community for Creative Non-Violence, supra, at 296.

The Court of Appeals recognized the city's substantial interest in limiting the sound emanating from the bandshell. See 848 F.2d, at 370. The court concluded, however, that the city's sound-amplification guideline was not narrowly tailored to further this interest, because “it has not [been] shown . . . that the requirement of the use of the city's sound system and technician was the least intrusive means of regulating the volume.” Id., at 371 (emphasis added). In the court's judgment, there were several alternative methods of achieving the desired end that would have been less restrictive of respondent's First Amendment rights.

The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was “the least intrusive means” of achieving the desired end. This “less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation.” Regan v. Time, Inc., 468 U.S. 641, 657 (1984) (opinion of White, J.). Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid “simply because there is some imaginable alternative that might be less burdensome on speech.” United States v. Albertini, 472 U.S. 675, 689 (1985).
The Court of Appeals apparently drew its least-intrusive-means requirement from United States v. O'Brien, 391 U.S., at 377, the case in which we established the standard for judging the validity of restrictions on expressive conduct. See 848 F.2d, at 370. The court's reliance was misplaced, however, for we have held that the O'Brien test “in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.” Community for Creative Non-Violence, supra, 468 U.S., at 298.

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” United States v. Albertini, 472 U.S. 675, 689 (1985); see also Community for Creative Non-Violence, supra, 468 U.S., at 297. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. See Frisby v. Schultz, 487 U.S., at 685 (“A complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil”). So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative. “The validity of [time, place, or manner] regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests” or the degree to which those interests should be promoted. United States v. Albertini, 472 U.S., at 689; see Community for Creative Non-Violence, supra, 468 U.S., at 299.

It is undeniable that the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city's sound technician control the mixing board during performances. Absent this requirement, the city's interest would have been served less well, as is evidenced by the complaints about excessive volume generated by respondent's past concerts. The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved. See Community for Creative Non-Violence, supra, at 299. The Court of Appeals erred in failing to defer to the city's reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city's sound technician.

Respondent nonetheless argues that the sound-amplification guideline is not narrowly tailored because, by placing control of sound mix in the hands of the city's technician, the guideline sweeps far more broadly than is necessary to further the city's legitimate concern with sound volume. According to respondent, the guideline “targets . . . more than the exact source of the ‘evil’ it seeks to remedy.” Frisby v. Schultz, supra, 487 U.S., at 485.
If the city's regulatory scheme had a substantial deleterious effect on the ability of bandshell performers to achieve the quality of sound they desired, respondent's concerns would have considerable force. The District Court found, however, that pursuant to city policy, the city's sound technician “give[s] the sponsor autonomy with respect to the sound mix . . . [and] does all that he can to accommodate the sponsor's desires in those regards.” 658 F.Supp., at 1352. The court squarely rejected respondent's claim that the city's “technician is not able properly to implement a sponsor's instructions as to sound quality or mix,” finding that “[n]o evidence to that effect was offered at trial; as noted, the evidence is to the contrary.” App. to Pet. for Cert. 89. In view of these findings, which were not disturbed by the Court of Appeals, we must conclude that the city's guideline has no material impact on any performer's ability to exercise complete artistic control over sound quality. Since the guideline allows the city to control volume without interfering with the performer's desired sound mix, it is not “substantially broader than necessary” to achieve the city's legitimate ends, City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S., at 808, and thus it satisfies the requirement of narrow tailoring.

The final requirement, that the guideline leave open ample alternative channels of communication, is easily met. Indeed, in this respect the guideline is far less restrictive than regulations we have upheld in other cases, for it does not attempt to ban any particular manner or type of expression at a given place or time. Cf. Frisby, supra, 487 U.S., at 482-484; Community for Creative Non-Violence, supra, 468 U.S., at 295; Renton v. Playtime Theatres, Inc., 475 U.S., at 53-54. Rather, the guideline continues to permit expressive activity in the bandshell, and has no effect on the quantity or content of that expression beyond regulating the extent of amplification. That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate. See Taxpayers for Vincent, supra, 466 U.S., at 803 and n.23, 812 and n.30; Kovacs, 336 U.S., at 88-89 (opinion of Reed, J.).

The city's sound-amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication. Accordingly, it is valid under the First Amendment.

Justice BLACKMUN concurs in the result.

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

No one can doubt that government has a substantial interest in regulating the barrage of excessive sound that can plague urban life. Unfortunately, the majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights. Until today, a key safeguard of free speech has been government's obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference. The majority's willingness to give government officials a free hand in achieving their policy ends extends so far as to permit, in this case, government control of speech in advance of its
dissemination. Because New York City's Use Guidelines (Guidelines) are not narrowly tailored to
serve its interest in regulating loud noise, and because they constitute an impermissible prior
restraint, I dissent.

The majority sets forth the appropriate standard for assessing the constitutionality of the Guidelines.
A time, place, and manner regulation of expression must be content neutral, serve a significant
government interest, be narrowly tailored to serve that interest, and leave open ample alternative
indisputably are content neutral as they apply to all bandshell users irrespective of the message of
They also serve government's significant interest in limiting loud noise in public places, see Grayned
v. Rockford, 408 U.S. 104, 116 (1972), by giving the city exclusive control of all sound equipment.

My complaint is with the majority's serious distortion of the narrow tailoring requirement. Our cases
have not, as the majority asserts, “clearly” rejected a less-restrictive-alternative test. Ante, at 2757.
On the contrary, just last Term, we held that a statute is narrowly tailored only “if it targets and
eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” Frisby v. Schultz, supra,
487 U.S., at 485. While there is language in a few opinions which, taken out of context, supports the
majority's position, in practice, the Court has interpreted the narrow tailoring requirement to
mandate an examination of alternative methods of serving the asserted governmental interest and
a determination whether the greater efficacy of the challenged regulation outweighs the increased
burden it places on protected speech. See, e.g., Martin v. Struthers, 319 U.S. 141, 147-148 (1943);
Schneider v. State, 308 U.S. 147, 162 (1939). In Schneider, for example, the Court invalidated a ban
on handbill distribution on public streets, notwithstanding that it was the most effective means of
serving government's legitimate interest in minimizing litter, noise, and traffic congestion, and in
preventing fraud. The Court concluded that punishing those who actually litter or perpetrate frauds
was a much less intrusive, albeit not quite as effective, means to serve those significant interests. Id.,
at 162, 164; see also Martin, supra, 319 U.S., at 148 (invalidating ban on door-to-door distribution
of handbills because directly punishing fraudulent solicitation was a less intrusive, yet still effective,
means of serving government's interest in preventing fraud).

Had the majority not abandoned the narrow tailoring requirement, the Guidelines could not possibly
survive constitutional scrutiny. Government's interest in avoiding loud sounds cannot justify giving
government total control over sound equipment, any more than its interest in avoiding litter could
justify a ban on handbill distribution. In both cases, government's legitimate goals can be effectively
and less intrusively served by directly punishing the evil—the persons responsible for excessive
sounds and the persons who litter. Indeed, the city concedes that it has an ordinance generally
limiting noise but has chosen not to enforce it. See Tr. of Oral. Arg. 5-6.

By holding that the Guidelines are valid time, place, and manner restrictions, notwithstanding the
availability of less intrusive but effective means of controlling volume, the majority deprives the
narrow tailoring requirement of all meaning. Today, the majority enshrines efficacy but sacrifices
free speech.
In applying strict scrutiny or intermediate review in First Amendment cases, the Court considers both kinds of questions addressed under Equal Protection and Due Process cases. Thus, in analyzing how the government is advancing its interests under the second prong of the strict scrutiny and intermediate review, the Court considers both the Equal Protection Clause question of the extent to which the government action fails to regulate all individuals who are part of some problem (the *underinclusiveness* inquiry), discussed at § 26.1.1.nn.25-27 of CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW Ch. 2, 3 (2007) (E-Treatise on the Constitution) (http://libguides.stcl.edu/kelsomaterials), and the Due Process Clause question of the way in which the government action serves to achieve its benefits on those whom the action does regulate (the *service* inquiry), discussed *id.* at § 27.1.2.nn.43, 45. Similarly, under the third prong of strict scrutiny and intermediate review, the Court considers both the Equal Protection question of the extent to which the government action imposes burdens on individuals who are not intended to be regulated (the *overinclusiveness* inquiry), discussed *id.* at § 26.1.1.nn.28-31, and the Due Process question of the amount of the burden on individuals who are the focus of the regulation (the *restrictiveness* inquiry), discussed *id.* at § 27.1.2.nn.44-45. For example, regarding burdens on speech, the Court stated in *Ward* that the government action cannot burden substantially more speech than necessary (the *overinclusiveness* inquiry), nor can it place a substantial burden on speech by failing to leave open ample alternatives channels of communication (the *restrictiveness* inquiry). On each of these inquiries, see generally R. Randall Kelso, Considerations of Legislative Fit Under Equal Protection, Substantive Due Process, and Free Speech Doctrine: Separating Questions of Advancement, Relationship, and Burden, 28 U. Richmond L. Rev. 1279 (1994).

### 2. Freedom of Speech and Rational Review

A third case of interest in terms of contemporary levels of scrutiny in free speech doctrine is *Hazelwood School District v. Kuhlmeier*.81 *Kuhlmeier* indicates that the proper standard of scrutiny in a nonpublic forum case which does not involve viewpoint discrimination is some version of rational review. In *Kuhlmeier*, the Court upheld the exercise of editorial judgment by a high school principal with respect to several articles proposed for inclusion in a school-financed student newspaper. The two main concerns were: (1) the name of a pregnant student might be identifiable from the text, and (2) references to sexual activity and birth control were inappropriate for some of the younger students in the school. Because of the pressures of time, the principal simply eliminated the two pages on which the articles appeared, resulting in several other stories being excluded.

In his majority opinion, Justice White said that the student paper was not a public forum because it was developed within the school curriculum. The test for being within the curriculum was whether there was supervision by faculty members and whether the activity was designed to impart particular knowledge or skills to student participants and audiences. In such a forum, school officials were entitled to regulate the contents in any reasonable manner.82


82 *Id.* at 273-76.
Note that while courts normally review a lower court's factual findings for clear error and its conclusions of law de novo, an appellate court's review is different in the context of a First Amendment claim. As one court has noted, “Following a bench trial involving a First Amendment claim, an independent review of the facts is not necessarily a de novo review of all the facts relevant to the ultimate judgment entered. Facts irrelevant to the free speech issue remain subject to the clear error standard, but we make a ‘fresh examination’ of those facts that are crucial to the First Amendment inquiry. In doing so, we are not bound by the district court's witness-credibility determinations, yet we remain cognizant that the district court is in the best seat to observe the demeanor of the witnesses.”

Thus, as indicated in Planned Parenthood of Columbia/Willamette v. American Coalition of Life Activists, “historical facts” are for juries, but “core constitutional facts” critical to resolving a First Amendment free speech issue are for de novo review by the court.

Hazelwood School District v. Kuhlmeier
484 U.S. 260 (1988)

Justice WHITE delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper. The printing expenses during the 1982–1983 school year totaled $4,668.50; revenue from sales was $1,166.84. The other costs associated with the newspaper – such as supplies, textbooks, and a portion of the journalism teacher's salary – were borne entirely by the Board.
The Journalism II course was taught by Robert Stergos for most of the 1982-1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names “to keep the identity of these girls a secret,” the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father “wasn't spending enough time with my mom, my sister and I” prior to the divorce, “was always out of town on business or out late playing cards with the guys,” and “always argued about everything” with her mother. App. to Pet. for Cert. 38. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. He informed his superiors of the decision, and they concurred.

Students in the public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Tinker, supra, 393 U.S., at 506. They cannot be punished merely for expressing their personal views on the school premises – whether “in the cafeteria, or on the playing field, or on the campus during the authorized hours,” [id.] at 512-513 – unless school authorities have reason to believe that such expression will “substantially interfere with the work of the school or impinge upon the rights of other students.” Id., at 509. [Ed.: As discussed at § 3.4, the Tinker test requirement of a “substantial” government interest to regulate, based on “substantial” interference, is a form of intermediate review, used for content-neutral regulation in a public forum].

We have nonetheless recognized that the First Amendment rights of students in the public schools “are not automatically coextensive with the rights of adults in other settings,” Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682 (1986), and must be “applied in light of the special characteristics of the school environment.” Tinker, supra, 393 U.S., at 506; cf. New Jersey v. T.L.O.,
469 U.S. 325, 341-343 (1985). A school need not tolerate student speech that is inconsistent with its “basic educational mission,” *Fraser*, supra, 478 U.S., at 685, even though the government could not censor similar speech outside the school. Accordingly, we held in *Fraser* that a student could be disciplined for having delivered a speech that was “sexually explicit” but not legally obscene at an official school assembly, because the school was entitled to “disassociate itself” from the speech in a manner that would demonstrate to others that such vulgarity is “wholly inconsistent with the ‘fundamental values' of public school education.” 478 U.S., at 685-686. We thus recognized that “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,” id., at 683, rather than with the federal courts.

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that “time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939). Cf. *Widmar v. Vincent*, 454 U.S. 263, 267-268, n.5 (1981). Hence, school facilities may be deemed to be public forums only if school authorities have “by policy or by practice” opened those facilities “for indiscriminate use by the general public,” *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 (1983), or by some segment of the public, such as student organizations. Id., at 46, n.7 (citing *Widmar v. Vincent*). If the facilities have instead been reserved for other intended purposes, “communicative or otherwise,” then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. 460 U.S., at 46, n.7. “The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985).

The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that “[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities.” App. 22. The Hazelwood East Curriculum Guide described the Journalism II course as a “laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I.” Id., at 11. The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, “the legal, moral, and ethical restrictions imposed upon journalists within the school community,” and “responsibility and acceptance of criticism for articles of opinion.” *Ibid*. Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a “regular classroom activit[y].” The District Court found that Robert Stergos, the journalism teacher during most of the 1982-1983 school year, “both had the authority to exercise and in fact exercised a great deal of control over Spectrum.” 607 F. Supp., at 1453. For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students
on the development of their stories, reviewed the use of quotations, edited the letters to the editor, and dealt with the printing company. Many of these decisions were made without consultation with the Journalism II students. The District Court thus found it “clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of Spectrum, including its content.” Ibid. Moreover, after each Spectrum issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication. Respondents' assertion that they had believed that they could publish “practically anything” in Spectrum was therefore dismissed by the District Court as simply “not credible.” Id., at 1456. These factual findings are amply supported by the record, and were not rejected as clearly erroneous by the Court of Appeals.

Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that “Spectrum, as a student-press publication, accepts all rights implied by the First Amendment,” this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum. [ FN2: The Statement also cited Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), for the proposition that “[o]nly speech that ‘materially and substantially interferes with the requirements of appropriate discipline’ can be found unacceptable and therefore be prohibited.” App. 26. This portion of the Statement does not, of course, even accurately reflect our holding in Tinker. Furthermore, the Statement nowhere expressly extended the Tinker standard to the news and feature articles contained in a school-sponsored newspaper. The dissent apparently finds as a fact that the Statement was published annually in Spectrum; however, the District Court was unable to conclude that the Statement appeared on more than one occasion. In any event, even if the Statement says what the dissent believes that it says, the evidence that school officials never intended to designate Spectrum as a public forum remains overwhelming.] Finally, that students were permitted to exercise some authority over the contents of Spectrum was fully consistent with the Curriculum Guide objective of teaching the Journalism II students “leadership responsibilities as issue and page editors.” App. 11. A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. . . . School officials did not evince either “by policy or by practice,” Perry Education Assn., 460 U.S., at 47, any intent to open the pages of Spectrum to “indiscriminate use,” ibid., by its student reporters and editors, or by the student body generally. Instead, they “reserve[d] the forum for its intended purpos[e].” id., at 46, as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. Ibid. It is this standard, rather than our decision in Tinker, that governs this case.

The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in Tinker – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and
members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play “disassociate itself,” Fraser, 478 U.S., at 685, not only from speech that would “substantially interfere with [its] work . . . or impinge upon the rights of other students,” Tinker, 393 U.S., at 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices – standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the “real” world – and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.

Accordingly, we conclude that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

The initial paragraph of the pregnancy article declared that “[a]ll names have been changed to keep the identity of these girls a secret.” The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.
The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent – indeed, as one who chose “playing cards with the guys” over home and family – was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982-1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. Spectrum, the newspaper they were to publish, “was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution. . . .” 795 F.2d 1368, 1373 (CA8 1986). “[A]t the beginning of each school year,” id., at 1372, the student journalists published a Statement of Policy – tacitly approved each year by school authorities – announcing their expectation that “Spectrum, as a student-press publication, accepts all rights implied by the First Amendment. . . . Only speech that ‘materially and substantially interferes with the requirements of appropriate discipline’ can be found unacceptable and therefore prohibited.” App. 26 (quoting Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503, 513 (1969)). The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. “School sponsored student publications,” it vowed, “will not restrict free expression or diverse viewpoints within the rules of responsible journalism.” App. 22 (Board Policy 348.51).

The Court suggests that the passage quoted in the text did not “extend[d] the Tinker standard to the news and feature articles contained in a school-sponsored newspaper” because the passage did not expressly mention them. Ante, at 569, n.2. It is hard to imagine why the Court (or anyone else) might expect a passage that applies categorically to “a student-press publication,” composed almost exclusively of “news and feature articles,” to mention those categories expressly. Understandably, neither court below so limited the passage.

This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles – comprising two full pages – of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would “materially and substantially interfere with the requirements of appropriate discipline,” but simply because he considered two of the six “inappropriate, personal, sensitive, and unsuitable” for student consumption. 795 F.2d, at 1371.

In my view the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.
As indicated by the Court’s discussion in *Hazelwood School District v. Kuhlmeier*, the Court examined fully the justifications for the principal’s decision to remove certain articles from the school’s newspaper. This was done in order to determine whether the challenger could establish that the principal’s decision was unreasonable. That is the proper inquiry, since under 2nd-order reasonableness balancing the challenger has the burden to prove the government action is unconstitutional, noted at § 1.2.6 n.65. On the other hand, the Court did not just ask in *Hazelwood* whether the principal had a “rational basis” for acting, as would have been the test if minimum rationality review had been employed, noted in the quote from *Heller v. Doe*, cited at § 1.2.6 n.64.

Similar examples of 2nd-order reasonableness balancing will be seen when considering other subject-matter or content-neutral regulations of speech in a government-owned nonpublic forum, as for regulations at airports considered in *International Society for Krishna Consciousness v. Lee*, excerpted at § 3.2; regulations of free speech rights of individuals in prison, as in *Thornburgh v. Abbott*, excerpted at § 3.3.1, and *Beard v. Banks*, discussed at § 3.3.1 n.16; for regulations of speech on military bases, as in *Greer v. Spock*, discussed at § 3.3.2 n.17; regulations of clothing at polling booths, as in *Minnesota Voters Alliance v. Mansky*, discussed at § 3.3; or regulations of speech in the context of school sponsored events, as in *Morse v. Frederick*, excerpted at § 3.4. The language in all these cases eschews any “rational basis” deference to the government, such as in *Heller v. Doe*, and instead does a full review for reasonableness.

As noted at § 24.1 of Charles D. Kelso & R. Randall Kelso, *American Constitutional Law: An E-Coursebook Volumes 1 & 2* (2018 Orig. Ed. 2014)(http://libguides.stcl.edu/kelsomaterials), the Court uses a similar 2nd-order reasonableness balancing test in deciding whether a burden is: “clearly excessive” under the *Pike v. Bruce Church* test for Dormant Commerce Clause review, discussed *id.* at § 13.3.4; “grossly excessive” under the *BMW v. Gore* test for unconstitutionality of punitive damage awards, discussed *id.* at § 17.4; not “reasonable and necessary” under the *U.S. Trust v. New Jersey* test in Contract Clause review, discussed *id.* at § 18.2; or goes “too far” and thus is not “reasonable” under the *Penn Central* test for Takings Clause review, discussed *id.* at § 18.3.3.

In some cases, the burden does shift to the government to justify its action as reasonable, like in *Maine v. Taylor* test for Dormant Commerce Clause review, discussed *id.* at § 13.3.3; or *Dolan v. Tigard* for Takings Clause review, discussed *id.* at § 18.3.4. The burden also shifts in some free speech cases, such as involving the free speech rights of government employees to speak on matters of public concern under *Pickering v. Board of Education of Will County, Illinois*, excerpted in this Coursebook at § 8.3. Perhaps the term “3rd-order reasonableness” review is appropriate for this higher kind of reasonableness balancing where the government must justify its actions.

Certain members of the Court, and some commentators, have used the phrase “second-order” rational review to describe a level of scrutiny higher than minimum rationality review but less than strict scrutiny.85 Other members of the Court have referred to “reasonableness” or “proportionality”

---

85 See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 458 (1985) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment in part and dissenting in part)
balancing. Whatever term is used, it would aid predictability for the Court to acknowledge that all the above tests really represent similar kinds of reasonableness balancing inquiries.

One additional level of review appears when determining the constitutionality of commercial speech regulations. In these cases, under Central Hudson Gas & Electric Corp. v. Public Service Comm’n, excerpted in this Coursebook at § 9.2, and 44 Liquormart, Inc. v. Rhode Island, excerpted at § 9.4, the Court adds the “directly related” (direct and substantial relationship) test of strict scrutiny to an otherwise intermediate test. This level of review can be called “intermediate review with bite.”

A second additional level of review uses both the strict scrutiny requirements of a “compelling government interest” and “direct relationship,” but continues the intermediate level of scrutiny requiring only that the government not adopt an alternative “substantially more burdensome than necessary,” not the strict scrutiny least burdensome effective alternative requirement. This review is perhaps reflected in the kind of ad hoc balancing currently used for content-based regulations of cable and satellite television and radio, as applied in Denver Area Educational Telecommunications Consortium v. FCC, excerpted in this Coursebook at § 10.1. A recent use of this “loose strict scrutiny” standard of review occurred in the racial redistricting case, Bush v. Vera, discussed at § 21.4 n.79-80 of Charles D. Kelso & R. Randall Kelso, American Constitutional Law: An E-Coursebook Volumes 1 & 2 (2018 Orig. Ed. 2014) (http://libguides.stcl.edu/kelsomaterials), and in dissent by four instrumentalist Justices in some race-based affirmative action cases, such as Parents Involved in Comm. Schools v. Seattle School District No. 1, discussed id. at § 21.3 n.72.

Taken together, this discussion suggests there are seven different tests used by the Supreme Court in various cases. These seven tests – the “base” of minimum rational review, “plus six” other standards of higher review – are summarized in Table 4. This Table builds on a similar Table 10 reflecting the standards of review for other Constitutional doctrines, which appears id. at § 28.4.

("To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called ‘second order’ rational-basis review.").; Gerald Gunther, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 20-24 (1972) (discussing “strengthened ‘rationality’ scrutiny”).

86 See, e.g., District of Columbia v. Heller, 554 U.S. 570, 689-90 (Breyer, J., joined by Stevens, Souter & Ginsburg, dissenting) (“I would simply adopt such an interest-balancing inquiry explicitly. . . . [T]his sort of ‘proportionality’ approach is [not] unprecedented [as] the Court has applied it in various contexts, including election-law cases, speech cases, and due process cases. . . . [I]n these cases, the court exercises ‘independent judicial judgment’ in light of the whole record . . . .”)


## Table 4
Levels of Review of Government Action: The “Base Plus Six” Model of Review

<table>
<thead>
<tr>
<th>Level of Scrutiny</th>
<th>Gov’t Ends or Interest to be Advanced</th>
<th>Statutory Means to Ends Relationship to Benefits</th>
<th>Relationship to Burdens</th>
<th>Typical Areas Where Used</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Base&quot; Minimum Rational Review (Three Requirements are Separate Elements to Meet)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minimum Rational Review: Burden on challenger to prove unconstitutionality</td>
<td>Legitimate</td>
<td>Rational</td>
<td>Not Irrational</td>
<td>If No First Amendment Review,*</td>
</tr>
<tr>
<td></td>
<td>(substantial)</td>
<td>(substantial)</td>
<td>(substantial)</td>
<td>then likely only Carolene Products</td>
</tr>
<tr>
<td></td>
<td>deference to government</td>
<td>deference to government</td>
<td>deference to government</td>
<td>review under Due Process Clause,</td>
</tr>
<tr>
<td></td>
<td>[Does government have “rational basis” for action]</td>
<td></td>
<td></td>
<td>or Railway Express review under</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Equal Protection Clause Analysis</td>
</tr>
<tr>
<td>*Government funding own speech or enlisting private parties to convey government message, or non-viewpoint discrimination involving advocacy of illegal conduct, true threats, fighting words, obscenity, or childhood indecency.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### The "Plus Six" Standards of Increased Scrutiny

#### Heightened Rational Review (Reasonableness Balancing of Means and Ends, Not Separate Elements)

<table>
<thead>
<tr>
<th>Second-Order</th>
<th>Legitimate &quot;Not Unreasonable” Given Means</th>
<th>Nonpublic Forum: Subject-Matter</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reasonableness</td>
<td>(no substantial)</td>
<td>Government Grants or Subsidies</td>
</tr>
<tr>
<td>Review: Burden on challenger to prove unconstitutionality</td>
<td>deference to government) to government) to government)</td>
<td>Defamation and other Related Torts</td>
</tr>
<tr>
<td></td>
<td>[Balance government interests and availability of less burdensome alternatives v. burden on persons]</td>
<td>Less than Substantial Burdens on Freedom of Assembly/Association</td>
</tr>
</tbody>
</table>

#### Intermediate Review Standards (Three Requirements are Separate Elements to Meet)

<table>
<thead>
<tr>
<th>Intermediate Review</th>
<th>Substantial/ Important</th>
<th>Substantially Related</th>
<th>Not Substantially More Burdensome Than Necessary</th>
<th>Public Forum: Content-Neutral Regulations of Speech</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intermediate Review with Bite</td>
<td>Substantial/ Important &amp; Directly Related</td>
<td>Not Substantially More Burdensome Than Necessary</td>
<td>Commercial Speech: Central Hudson</td>
<td></td>
</tr>
</tbody>
</table>

#### Strict Scrutiny Standards (Three Requirements are Separate Elements to Meet)

<table>
<thead>
<tr>
<th>Loose Strict Scrutiny</th>
<th>Compelling</th>
<th>Substantially &amp; Directly Related</th>
<th>Not Substantially More Burdensome Than Necessary</th>
<th>Content-Based Regulations of Cable/Satellite TV and Radio: Denver Area Educ.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Strict Scrutiny Review</td>
<td>Compelling</td>
<td>Substantially &amp; Directly Related</td>
<td>Least Restrictive Effective Alternative</td>
<td>Public Forum: Content-Based Regulations of Speech</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>All Viewpoint Discrimination Campaign Finance: Citizens United</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Substantial Burdens on Freedom of Assembly/Association</td>
<td></td>
</tr>
</tbody>
</table>

As noted in this Coursebook at § 12.1, four different tests are used by different Justices to determine violations of the Establishment Clause. As discussed at § 14.3, under Employment Division v. Smith, there is either no further Free Exercise review or minimum rationality review for neutral laws of general applicability. Strict scrutiny is used for discrimination against religion; for hybrid cases involving Free Exercise and other Fundamental Rights, where those other rights would trigger strict scrutiny; or for cases involving unemployment compensation in Sherbert v. Verner.
CHAPTER 2: CONTENT-BASED VERSUS CONTENT-NEUTRAL REGULATIONS

§ 2.1 Introduction to Content-Based versus Content-Neutral Regulations

By its terms, the First Amendment proscribes only governmental regulations “abridging the freedom of speech,” not conduct. Governmental regulations of conduct, therefore, are outside of the ambit of the First Amendment. In determining whether the regulation is one of speech or conduct, the Court has noted that “symbolic speech” is protected by the First Amendment. “Symbolic speech” exists where conduct is not “pure speech,” such as talking, writing, or wearing informative clothing, but is nevertheless intended to be expressive and conveys a message reasonably likely to be understood. Case examples of symbolic conduct include burning a draft card or cross to convey a particular message.\(^1\) On the other hand, speech which is “integral to criminal conduct” has no First Amendment protection.\(^2\)

Sometimes, whether the regulation is one of speech or conduct may not be so clear. For example, the Court held in *Dallas v. Stanglin*\(^3\) that “recreational dancing” by patrons of a dance hall was not expressive activity, but mere conduct, and thus a city ordinance that restricted admission to certain dance halls to persons between 14 and 18 to protect teenagers did not raise First Amendment issues concerning the freedom of association rights of persons between 14 and 18 to associate with persons

---


\(^2\) See, e.g., United States v. Hobgood, 868 F.3d 744 (8th Cir. 2017) (speech used to support conviction of interstate stalking and extortion not entitled to free speech protection). Similarly, the Fourth Circuit held in *United States v. Hassen*, 742 F.3d 104 (4th Cir. 2014), that an agreement to provide material support to terrorism was not protected speech, but conduct used to show conspiracy to commit illegal acts. In *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), excerpted at § 5.3.1, the Supreme Court held that in any event by not criminalizing “pure political speech” the material support statute satisfied strict scrutiny applicable to content-based regulations of speech.

\(^3\) 490 U.S. 19, 24-25 (1989). See also Willis v. Town of Marshall, North Carolina, 426 F.3d 251, 257-64 (4th Cir. 2005) (“lewd recreational dancing” at a community center not entitled to First Amendment protection, but discriminatory enforcement may trigger Equal Protection complaint).
outside that age group. In contrast, in *Barnes v. Glen Theatre, Inc.*, the Court held that a statute barring public nudity applied to nude dancing by performers at an adult entertainment establishment was expressive activity because part of the purpose of the performance was “erotic expression.” From a formalist perspective, focused more on literal meaning than purpose, Justice Scalia said the First Amendment did not apply, since nude dancing literally was not symbolic speech, but conduct.

Lower federal courts have disagreed about whether laws banning state-licensed mental health providers from treating patients under 18 years old with “sexual orientation change efforts” are regulations of conduct or speech. Lower state courts have disagreed about whether anti-discrimination laws requiring bakers to make cakes, florists to prepare floral displays, or making wedding invitations for same-sex couples’ weddings involve regulations of conduct or expression.

As discussed in § 1.2.6 & Table 3, cases on the power of government to control speech typically discuss both the nature of the forum involved in the regulation (public versus nonpublic government forum), and what kind of regulation of speech is involved (content-based or content-neutral). For ease of presentation, all of the cases in Chapter 2, with the exception of § 2.2, involve regulations of speech in a public forum, such as on a public street or public park, or regulations of speech on private property where public forum standards also apply. The question of how the Court determines the nature of a government forum, public or nonpublic, is discussed in Chapter 3.

---

4 501 U.S. 560, 565-66 (1991); *id.* at 572 (Scalia, J., concurring in the judgment). *But see* Tagami v. City of Chicago, 875 F.3d 375 (7th Cir. 2017) (public nudity law which banned women, but not men, from walking around topless in public a regulation of conduct, not expression; in any case, constitutional under intermediate review of *United States v. O’Brien* or gender discrimination).

5 *See, e.g.*, Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (regulation of conduct) (*en banc* hearing denied); King v. Governor of New Jersey, 767 F.3d 216 (3rd Cir. 2014) (ban valid as content-based regulation of licensed professional speech; as discussed at § 9.4, the *King* court’s view such speech is entitled to only *Central Hudson* commercial speech intermediate review, not strict scrutiny, was rejected by the Supreme Court in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-76 (2018). *See also* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144 (2017) (New York law which permits retailers to give discounts for cash purchases, but prevents surcharges for credit card purchases, regulates how merchants may communicate their prices, and thus is a regulation of commercial speech, not mere conduct, as discussed at § 9.4).

6 *See, e.g.*, Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 436-40 (Ariz. Ct. App. 2018) (anti-discrimination law applied to wedding invitation and other wedding design business is a regulation of conduct, not speech), and cases cited therein; Department of Fair Employment & Housing v. Cathy’s Creations, Inc., 2018 WL 747835 (Cal. Super. Ct., Bakerfield Dep’t, Feb. 5, 2018) (baking a wedding cake is artistic expression, and regulation unconstitutional under strict scrutiny). The Supreme Court dodged this issue in *Craig v. Masterpiece Cakeshop, Inc.*, 138 S. Ct. 1719 (2018), by holding that application of the anti-discrimination law in this case was tainted by religious intolerance, and thus violated the Free Exercise Clause, rendering unnecessary consideration of the free speech issues possibly at issue in the case.
Chief Justice WARREN delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event. Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

The indictment upon which he was tried charged that he “willfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462(b).” Section 462(b) is part of the Universal Military Training and Service Act of 1948. Section 462(b)(3), one of six numbered subdivisions of § 462(b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person, “who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate . . . .” (Italics supplied.)

This Court has held that when “speech” and “nonspeech” elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The power of Congress to classify and conscript manpower for military service is “beyond question.” Lichter v. United States, supra, 334 U.S. at 756; Selective Draft Law Cases, supra. Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.
O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefitting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective Service number, and a registrant who has his number readily available so that he can communicate it to his local board when he supplies or requests information can make simpler the board's task in locating his file. Finally, a registrant's inquiry, particularly through a local board other than his own, concerning his eligibility status is frequently answerable simply on the basis of his classification certificate; whereas, if the certificate were not reasonably available and the registrant were uncertain of his classification, the task of answering his questions would be considerably complicated.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them.

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having
a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. People of State of California*, 283 U.S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their “opposition to organized government” by displaying “any flag, badge, banner, or device.” Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also *NLRB v. Fruit & Vegetable Packers Union*, 377 U.S. 58, 79 (1964) (concurring opinion).

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462(b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the “purpose” of Congress was “to suppress freedom of speech.” We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated: “The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.” *McCray v. United States*, 195 U.S. 27, 56 (1904). This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Justice Brandeis for the Court in *State of Arizona v. State of California*, 283 U.S. 423, 455 (1931).
Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

Justice MARSHALL took no part in the consideration or decision of these cases.

Justice HARLAN, concurring.

The crux of the Court's opinion, which I join, is of course its general statement that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.

Justice DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is 'beyond question.'" This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war. That question has not been briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling. I have discussed in Holmes v. United States, 390 U.S. 936, the nature of the legal issue and it will be seen from my dissenting opinion in that case that this Court has never ruled on the question. It is time that we made a ruling. This case should be put down for reargument and heard with Holmes v. United States and with Hart v. United States, 390 U.S. 956, in which the Court today denies certiorari.
The *O'Brien* principle, although framed in the context of a regulation of symbolic speech that had a problematic secondary effect, was extended in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*,\(^7\) excerpted at § 2.4.2, to time, place, or manner regulations. This was done based on the common-sense observation that a time, place, or manner regulation also involves a case where the government is not concerned about the content of the speech, but only the time, place, or manner of the speech’s delivery.

Consistent with the standards of review, as discussed at § 26.1.3 nn.83-99 of CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW (2007) (E-Treatise on the Constitution) (http://libguides.stcl.edu/kelsomaterials), under strict scrutiny the content-based reasons must be actual government purposes to be considered by a court. Under intermediate review, the content-neutral reasons must be actual or plausible government purposes. For restrictions on free speech in a nonpublic forum that trigger some form of rational review, any conceivable content-neutral reason for regulation can be used. Naturally, illegitimate pretexts for regulation cannot be used at strict scrutiny, intermediate review, or rational review, consistent with the analysis of illegitimate interests, discussed *id.* at § 26.1.1.1 nn.16-21, and illegitimate pretexts in *McCulloch v. Maryland*,\(^8\) discussed *id.* at § 18.1.2 nn.31-34.

It has been argued that the Court in “dual motive” cases (i.e., there is both a content-neutral and content-based justification for the regulation) should embrace a suggestion by Justice Stevens and determine what is the predominant motive of the regulation considering the “content, character, context, nature, and scope” of the regulation.\(^9\) However, the better approach is to recognize that the discussion in the Court’s “dual motive” cases regarding the content-neutral aspect of the regulation is focused on whether the content-neutral reason is an actual or plausible purpose of the government action, or merely a pretext to justify content-based discrimination.\(^10\) If it is a pretext, then only strict scrutiny will be applied to the content-based reason for regulating. If the content-neutral reason is an actual or plausible purpose, then intermediate review will be applied to that content-neutral reason for regulating, while strict scrutiny will be applied to the content-based reason. As with all constitutional cases, if the government has one reason to act that makes the government action constitutional — in these cases typically the content-neutral reason — the act is constitutional, even if the content-based reason cannot survive constitutional scrutiny.

---

\(^7\) 466 U.S. 789, 803-05 (1984).


A famous example a “dual motive” case is *Texas v. Johnson*. In this case, the majority held that a state flag desecration statute was invalid as applied to defendant, who had burned a flag as part of a political protest. The majority noted that the state’s interest in banning flag burning to prevent breaches of the peace was a content-neutral reason for the regulation. It thus triggered the *O’Brien* standard of intermediate review. Since no breach of the peace was imminent, there was no substantial interest involved in the case, and thus intermediate review was not met. The state’s second interest was an interest in preserving the flag as a symbol of nationhood and national unity. The majority said that this interest was related to the suppression of expression and, thus, was content-based. Therefore, strict scrutiny was applied to the consideration of that interest.

*Texas v. Johnson*

491 U.S. 397 (1989)

Justice BRENNAN delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the “Republican War Chest Tour.” As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage “die-ins” intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted: “America, the red, white, and blue, we spit on you.” [A] witness to the flag burning collected the flag’s remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989). After a trial, he was convicted, sentenced to one year in prison, and fined $2,000 . . . , but the Texas Court of Criminal Appeals reversed, 755 S.W.2d 92 (1988), holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.
Although we have recognized that where “speech” and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms,” [United States v. O'Brien, 391 U.S. 367, 376 (1968)], we have limited the applicability of O'Brien's relatively lenient standard to those cases in which “the governmental interest is unrelated to the suppression of free expression.” Id., at 377; see also Spence [v. Washington, 418 U.S. 405,] 414, n.8 [(1974)]. In stating, moreover, that O'Brien's test “in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions,” Clark [v. Community for Creative Non-Violence, 468 U.S. 288,] 298 [(1984)], we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under O'Brien's less demanding rule.

In order to decide whether O'Brien's test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether O'Brien's test applies. See Spence, supra, at 414, n.8. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34-36, it admits that “no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning.” Id., at 34. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to Johnson's conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning. Id., at 6–7.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal “function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” Terminiello v. Chicago, 337 U.S. 1, 4 (1949). See also Tinker v. Des Moines Independent Community School Dist. 393 U.S., at 508-509; Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988). It would be odd indeed to conclude both that “if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection,” FCC v. Pacifica Foundation, 438 U.S. 726, 745 (1978) (opinion of Stevens, J.), and that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.
The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the government's interest in preserving the flag's special symbolic value “is directly related to expression in the context of activity” such as affixing a peace symbol to a flag. 418 U.S., at 414, n.8. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related “to the suppression of free expression” within the meaning of *O'Brien*. We are thus outside of *O'Brien*'s test altogether.

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

As in *Spence*, “[w]e are confronted with a case of prosecution for the expression of an idea through activity,” and “[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution.” 418 U.S., at 411. Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. See, e.g., *Boos v. Barry*, [485 U.S. 312,] 318 [(1988)]; *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause “serious offense.” If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag “when it is in such condition that it is no longer a fitting emblem for display,” 36 U.S.C. § 176(k), and Texas has no quarrel with this means of disposal. Brief for Petitioner 45. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. Texas concedes as much: “Section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals.” Id., at 44.

Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. Our decision in *Boos v. Barry*, supra, tells us that this restriction on Johnson's expression is content based. In *Boos*, we considered the constitutionality of a law prohibiting “the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into ‘public odium’ or ‘public disrepute.’” [485 U.S.] at 315. Rejecting the argument that the law was content neutral because it was justified by “our international law obligation to shield diplomats from speech that offends their dignity,” id., at 320, we held that “[t]he emotive impact of speech on its audience is not a ‘secondary effect’” unrelated to the content of the expression itself. Id., at 321 (plurality opinion); see also id., at 334 (Brennan, J., concurring in part and concurring in judgment).
According to the principles announced in Boos, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to “the most exacting scrutiny.” Boos v. Barry, supra, 485 U.S., at 321.

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the “special place” reserved for the flag in our Nation. Brief for Petitioner 22, quoting Smith v. Goguen, 415 U.S., at 601 (Rehnquist, J., dissenting). The State's argument is not that it has an interest simply in maintaining the flag as a symbol of something, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings. Brief for Petitioner 20-24. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

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. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S., at 55-56; City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); FCC v. Pacifica Foundation, 438 U.S., at 745-746; Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972); O'Brien, 391 U.S., at 382.

We have not recognized an exception to this principle [for the flag]. In Street v. New York, 394 U.S. 576 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had “failed to show the respect for our national symbol which may properly be demanded of every citizen,” we concluded that “the constitutionally guaranteed ‘freedom to be intellectually . . . diverse or even contrary,’ and the ‘right to differ as to things that touch the heart of the existing order,’ encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous.” Id., at 593, quoting Barnette, 319 U.S., at 642.

In West Virginia State Board of Education v. Barnette, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Id., at 642. In Spence, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag. “Given the protected character of [Spence's] expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts,” we held, “the conviction must be invalidated.” 418 U.S., at 415. See also Goguen, supra, 415 U.S., at 588 (White, J., concurring in judgment) (to convict person who had sewn a flag onto the seat of his pants for “contemptuous”
treatment of the flag would be “[t]o convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature”).

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.

Justice KENNEDY, concurring.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

Chief Justice REHNQUIST, with whom Justice WHITE and Justice O'CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that “a page of history is worth a volume of logic.” New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Two flags are
prominently placed in our courtroom. Countless flags are placed by the graves of loved ones each year on what was first called Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. 10 U.S.C. §§ 1481, 1482. Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials “as a mark of respect to their memory.” 36 U.S.C. § 175(m). The flag identifies United States merchant ships, 22 U.S.C. § 454, and “[t]he laws of the Union protect our commerce wherever the flag of the country may float.” United States v. Guthrie, 58 U.S. (17 How.) 284, 309 (1855).

No other American symbol has been as universally honored as the flag. In 1931, Congress declared “The Star-Spangled Banner” to be our national anthem. 36 U.S.C. § 170. In 1949, Congress declared June 14th to be Flag Day. § 157. In 1987, John Philip Sousa's “The Stars and Stripes Forever” was designated as the national march. Pub. L. 101-186, 101 Stat. 1286. Congress has also established “The Pledge of Allegiance to the Flag” and the manner of its deliverance. 36 U.S.C. § 172. The flag has appeared as the principal symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol.

Both Congress and the States have enacted numerous laws regulating misuse of the American flag. Until 1967, Congress left the regulation of misuse of the flag up to the States. Now, however, 18 U.S.C. § 700(a) provides that “Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.”

Congress has also prescribed, inter alia, detailed rules for the design of the flag, 4 U.S.C. § 1, the time and occasion of flag's display, 36 U.S.C. § 174, the position and manner of its display, § 175, respect for the flag, § 176, and conduct during hoisting, lowering, and passing of the flag, § 177. With the exception of Alaska and Wyoming, all of the States now have statutes prohibiting the burning of the flag. [Most] are patterned after the Uniform Flag Act of 1917, which in § 3 provides: “No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield.” Proceedings of National Conference of Commissioners on Uniform State Laws 323-324 (1917). Most were passed [around] World War I. Rosenblatt, Flag Desecration Statutes: History and Analysis, 1972 Wash.U.L.Q. 193, 197.

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another “idea” or “point of view” competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

The Court decides that the . . . government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.
Justice STEVENS, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than “nationhood and national unity.” It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized “nationhood and national unity,” but they had vastly different meanings. The message conveyed by some flags – the swastika, for example – may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded.

Congress reacted to Texas v. Johnson by enacting a statute that provided criminal penalties for “Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground or tramples upon any flag of the United States.”11 This law was struck down on its face in United States v. Eichman,12 by the same 5-4 vote that was recorded in Texas v. Johnson. Writing again for the majority, Justice Brennan said that the new federal law, although wider in scope than the Texas law, “suppresses expression out of concern for its likely communicative impact.” State redrafting of flag desecration statutes, such as exceptions for flag in photographs or on articles of clothing, continue to be held invalid. See, e.g., State v. Johnson, 473 S.W.3d 860 (Tex. Ct. Crim. App. 2015).

§ 2.2 Content-Based Regulations Involving Viewpoint Discrimination

The Court distinguishes between two kinds of content-based regulations: (1) those that discriminate on grounds of the speaker’s viewpoint of a topic; and (2) those that discriminate on grounds of the subject-matter or topic being talked about, without regard to the speaker’s viewpoint.

As noted at § 1.2.6, Table 3, in a public forum, both kinds of content-based regulations trigger strict scrutiny. In other areas, however, the distinction is critical, since in government owned nonpublic fora viewpoint discrimination will trigger strict scrutiny, while subject-matter/topic regulations trigger only 2nd-order reasonableness review, as discussed at § 3.1. Similarly, in cases involving government grants or subsidies for speech, as in Rosenberger below, viewpoint discrimination triggers strict scrutiny, while subject-matter/topic regulation only triggers 2nd-order reasonableness review, as discussed at § 4.2. For speech not otherwise protected by the First Amendment, such as advocacy of illegal conduct, fighting words, obscenity, or indecency involving children, there is no further First Amendment review for subject-matter/topic regulations, while strict scrutiny is still applied to viewpoint discrimination, as discussed at § 6.1. For the government’s own speech, there is no free speech review, even for viewpoint discrimination, since the government may express its own views when speaking on any topic or subject-matter, as discussed at § 4.1 & § 4.4.

Given the difficulty meeting the strict scrutiny test, the Court occasionally will phrase the doctrine in more absolutist terms, particularly in cases involving viewpoint discrimination. However, even for viewpoint discrimination, the better view is that there is no per se rule of unconstitutionality, but that strict scrutiny should apply. While dicta in recent Supreme Court cases has taken the view that in a public forum viewpoint discrimination is absolutely prohibited, and that dicta may reflect majority doctrine on the Supreme Court today, that dicta does not accurately reflect the cases on which it relies. However, this anomaly makes little difference in practice, since the Court has never found strict scrutiny satisfied in a public forum, viewpoint discrimination case. As the Court


stated in a famous, related compelled speech case requiring school children to recite the Pledge of Allegiance in school, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added), excerpted at § 4.3.1, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *If there are any circumstances which permit an exception, they do not now occur to us.*”

Additional cases raising issues of viewpoint discrimination are discussed at § 3.1 (public versus nonpublic forum distinction); § 4.2 (government grants or subsidies to individuals); and § 6.1 (discussing categories of speech not otherwise entitled to First Amendment protection). If the Court were to adopt the doctrine that in those cases viewpoint discrimination did not trigger strict scrutiny, but was absolutely barred, that would be a more significant doctrinal conclusion.

**Rosenberger v. Rector and Visitors of the University of Virginia**  

Justice KENNEDY delivered the opinion of the Court.

The University of Virginia, an instrumentality of the Commonwealth for which it is named and thus bound by the First and Fourteenth Amendments, authorizes the payment of outside contractors for the printing costs of a variety of student publications. It withheld any authorization for payments on behalf of petitioners for the sole reason that their student paper [Ed.: Wide Awake Productions (WAP)] “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.” That the paper did promote or manifest views within the defined exclusion seems plain enough. The challenge is to the University's regulation and its denial of authorization, the case raising issues under the Speech and Establishment Clauses of the First Amendment.

The most recent and most apposite case is our decision in *Lamb's Chapel* [*v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)]. There, a school district had opened school facilities for use after school hours by community groups for a wide variety of social, civic, and recreational purposes. The district, however, had enacted a formal policy against opening facilities to groups for religious purposes. Invoking its policy, the district rejected a request from a group desiring to show a film series addressing various child-rearing questions from a “Christian perspective.” There was no indication in the record in *Lamb's Chapel* that the request to use the school facilities was “denied, for any reason other than the fact that the presentation would have been from a religious perspective.” [Id.] at 393-394. Our conclusion was unanimous: “[I]t discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and childrearing except those dealing with the subject matter from a religious standpoint.” Id., at 393.

The dissent's assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar and that antireligious speech is the only response to religious speech. Our understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.

Before its brief on the merits in this Court, the University had argued at all stages of the litigation that inclusion of WAP's contractors in SAF [Ed.: Student Activities Fund] funding authorization would violate the Establishment Clause. Indeed, that is the ground on which the University prevailed in the Court of Appeals. We granted certiorari on this question: “Whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious.” Pet. for Cert. i. The University now seems to have abandoned this position, contending that “[t]he fundamental objection to petitioners' argument is not that it implicates the Establishment Clause but that it would defeat the ability of public education at all levels to control the use of public funds.” Brief for Respondents 29; see id., at 27-29, and n.17. That the University itself no longer presses the Establishment Clause part of this opinion is discussed at § 13.2]

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law
implementing the First Amendment's Establishment and Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such. Because there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishment, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause. [Ed.: The Establishment Clause part of this opinion is discussed at § 13.2].

The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint. See Cornelius, supra, at 806 (“[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject”). As when deciding whether a speech restriction is content based or content neutral, “[t]he government's purpose is the controlling consideration.” Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); see also ibid. (content neutrality turns on, *inter alia*, whether a speech restriction is “justified without reference to the content of the regulated speech”) (internal quotation marks and citations omitted) (emphasis deleted). So, for example, a city that enforces its excessive noise ordinance by pulling the plug on a rock band using a forbidden amplification system is not guilty of viewpoint discrimination simply because the band wishes to use that equipment to espouse antiracist views. Accord, Rock Against Racism, supra. Nor does a municipality's decision to prohibit political advertising on bus placards amount to viewpoint discrimination when in the course of applying this policy it denies space to a person who wishes to speak in favor of a particular political candidate. Accord, Lehman v. Shaker Heights, 418 U.S. 298, 304 (1974) (plurality opinion).

Accordingly, the prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate. Other things being equal, viewpoint discrimination occurs when government allows one message while prohibiting the messages of those who can reasonably be expected to respond. See First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 785-786 (1978) (“Especially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended”) (footnote omitted); Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175-176 (1976) (“to permit one side of a debatable public question to have a monopoly in expressing its views . . . is the antithesis of constitutional guarantees”) (footnote omitted); United States v. Kokinda, 497 U.S. 720, 736 (1990) (viewpoint discrimination involves an “inten[t] to discourage one viewpoint and advance another”) (plurality opinion) (citations and internal quotation marks omitted). It is precisely this element of taking sides in a public debate that identifies viewpoint discrimination and makes it the most pernicious of all distinctions based on content. Thus, if government assists those espousing one point of view, neutrality requires it to assist those espousing opposing points of view, as well.

There is no viewpoint discrimination in the University's application of its Guidelines to deny funding to Wide Awake. Under those Guidelines, a “religious activit[y],” which is not eligible for funding, App. to Pet. for Cert. 62a, is “an activity which primarily promotes or manifests a particular belief[s] in or about a deity or an ultimate reality,” id., at 66a. It is clear that this is the basis on which Wide
Awake Productions was denied funding. Letter from Student Council to Ronald W. Rosenberger, App. 54 (“In reviewing the request by Wide Awake Productions, the Appropriations Committee determined your organization's request could not be funded as it is a religious activity”). The discussion of Wide Awake's content, supra, at 2534-2536, shows beyond any question that it “primarily promotes or manifests a particular belief[s] in or about a deity . . . ,” in the very specific sense that its manifest function is to call students to repentance, to commitment to Jesus Christ, and to particular moral action because of its Christian character.

If the Guidelines were written or applied so as to limit only such Christian advocacy and no other evangelical efforts that might compete with it, the discrimination would be based on viewpoint. But that is not what the regulation authorizes; it applies to Muslim and Jewish and Buddhist advocacy as well as to Christian. And since it limits funding to activities promoting or manifesting a particular belief not only “in” but “about” a deity or ultimate reality, it applies to agnostics and atheists as well as it does to deists and theists as the University maintained at oral argument, Tr. of Oral Arg. 18-19, and as the Court recognizes, see ante, at 2520). The Guidelines, and their application to Wide Awake, thus do not skew debate by funding one position but not its competitors. As understood by their application to Wide Awake, they simply deny funding for hortatory speech that “primarily promotes or manifests” any view on the merits of religion; they deny funding for the entire subject matter of religious apologetics.

The Court, of course, reads the Guidelines differently, but while I believe the Court is wrong in construing their breadth, the important point is that even on the Court's own construction the Guidelines impose no viewpoint discrimination. In attempting to demonstrate the potentially chilling effect such funding restrictions might have on learning in our Nation's universities, the Court describes the Guidelines as “a sweeping restriction on student thought and student inquiry,” disentitling a vast array of topics to funding. Ante, at 2520. As the Court reads the Guidelines to exclude “any writing that is explicable as resting upon a premise which presupposes the existence of a deity or ultimate reality,” as well as “those student journalistic efforts which primarily manifest or promote a belief that there is no deity and no ultimate reality,” the Court concludes that the major works of writers from Descartes to Sartre would be barred from the funding forum. Ibid. The Court goes so far as to suggest that the Guidelines, properly interpreted, tolerate nothing much more than essays on “making pasta or peanut butter cookies.” Ante, at 2520.

Now, the regulation is not so categorically broad as the Court protests. The Court reads the word “primarily” (“primarily promotes or manifests a particular belief[s] in or about a deity or an ultimate reality”) right out of the Guidelines, whereas it is obviously crucial in distinguishing between works characterized by the evangelism of Wide Awake and writing that merely happens to express views that a given religion might approve, or simply descriptive writing informing a reader about the position of a given religion. But, as I said, that is not the important point. Even if the Court were indeed correct about the funding restriction's categorical breadth, the stringency of the restriction would most certainly not work any impermissible viewpoint discrimination under any prior understanding of that species of content discrimination. If a university wished to fund no speech beyond the subjects of pasta and cookie preparation, it surely would not be discriminating on the basis of someone's viewpoint, at least absent some controversial claim that pasta and cookies did not
exist. The upshot would be an instructional universe without higher education, but not a universe where one viewpoint was enriched above its competitors.

The Guidelines are thus substantially different from the access restriction considered in *Lamb's Chapel*, the case upon which the Court heavily relies in finding a viewpoint distinction here. *Lamb's Chapel* addressed a school board's regulation prohibiting the after-hours use of school premises “by any group for religious purposes,” even though the forum otherwise was open for a variety of social, civic, and recreational purposes. 508 U.S., at 387 (citation and internal quotation marks omitted). “Religious” was understood to refer to the viewpoint of a believer, and the regulation did not purport to deny access to any speaker wishing to express a non-religious or expressly antireligious point of view on any subject, see ibid. (“The issue in this case is whether . . . it violates the Free Speech Clause of the First Amendment . . . to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues”); id., at 394, citing May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105, 1114 (CA7 1986).

With this understanding, it was unremarkable that in *Lamb's Chapel* we unanimously determined that the access restriction, as applied to a speaker wishing to discuss family values from a Christian perspective, impermissibly distinguished between speakers on the basis of viewpoint. See *Lamb's Chapel*, supra, at 393-394 (considering as-applied challenge only). Equally obvious is the distinction between that case and this one, where the regulation is being applied, not to deny funding for those who discuss issues in general from a religious viewpoint, but to those engaged in promoting or opposing religious conversion and religious observances as such. If this amounts to viewpoint discrimination, the Court has all but eviscerated the line between viewpoint and content.

To put the point another way, the Court's decision equating a categorical exclusion of both sides of the religious debate with viewpoint discrimination suggests the Court has concluded that primarily religious and antireligious speech, grouped together, always provides an opposing (and not merely a related) viewpoint to any speech about any secular topic. Thus, the Court's reasoning requires a university that funds private publications about any primarily nonreligious topic also to fund publications primarily espousing adherence to or rejection of religion. But a university's decision to fund a magazine about racism, and not to fund publications aimed at urging repentance before God does not skew the debate either about racism or the desirability of religious conversion. The Court's contrary holding amounts to a significant reformulation of our viewpoint discrimination precedents and will significantly expand access to limited-access forums. See *Greer v. Spock*, 424 U.S. 828 (1976) (upholding regulation prohibiting political speeches on military base); *Cornelius*, 473 U.S., at 812 (exclusion from fundraising drive of political activity or advocacy groups is facially viewpoint neutral despite inclusion of charitable, health, and welfare agencies); *Perry*, 460 U.S., at 49-50, and n 9 (ability of teachers' bargaining representative to use internal school mail system does not require that access be provided to “any other citizen's group or community organization with a message for school personnel”); *Lehman*, 418 U.S., at 304 (exclusion of political messages from forum permissible despite ability of nonpolitical speakers to use the forum).
In Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez, the Court considered whether a state law school policy that student organizations must agree to open their membership to all students in order to obtain school recognition and be eligible for financial or other assistance from the school was viewpoint neutral or viewpoint discrimination when applied to the Christian Legal Society Chapter which wanted to excluded individuals who engage in “unrepentant homosexual conduct.” Since under the stipulated facts in the case the anti-discrimination policy was applied equally to all students organizations, the Court held it was viewpoint neutral. Since school student organization regulations, like other aspects of the school curriculum, discussed at § 3.4, trigger a nonpublic forum analysis, the school’s regulation would be constitutional as long as it was “reasonable.” The Court held it was reasonable for a number of reasons, including ensuring that leadership, educational, and social opportunities are available to all students; the all-comers policy brings together individuals of different backgrounds and encourages toleration, cooperation, and learning among students; and ensures that no Hastings College of Law student is forced to fund a group that would reject the student as a member.

A four-Justice dissent noted that, despite the stipulation that Hastings’ non-discrimination policy as interpreted by Hastings since litigation commenced required student organizations to admit all-comers, when Hastings originally refused to register the Christian Legal Society it claimed that the CLS bylaws impermissibly discriminated on the basis of religion and sexual orientation. The dissent then noted, “As interpreted by Hastings and applied to CLS, both of these grounds constituted viewpoint discrimination.” In response, the majority noted factual stipulations are “formal concessions . . . that have the effect of withdrawing a fact from issue.”

Cases involving regulations that permit some groups to use public school facilities after school hours, while banning other groups, such as religious groups, from such use of public facilities, often trigger a question of whether the ban involved viewpoint discrimination. Such regulations are often viewed as involving viewpoint discrimination. A similar finding of viewpoint discrimination was made in the context of a public law school’s clinical education program which allegedly refused to represent a particular plaintiff because of plaintiff’s past criticism of the program, its director, and

---

16 130 S. Ct. 2971, 2987-95 (2010),

17 *Id.* at 3010 (Alito, J., joined by Roberts, C.J., and Scalia & Thomas, JJ., dissenting).

18 *Id.* at 2983.

19 *See, e.g.*, Wigg v. Sioux Falls Sch. Dist. 49-5, 382 F.3d 807, 812-16 (8th Cir. 2004) (school district policy prohibiting employees from participating in religious activities conducted on school grounds by private groups viewpoint-based discrimination against private religious speech); Bronx Household of Faith v. Board of Educ. of City of New York, 331 F.3d 342, 351-55 (2nd Cir. 2003) (school board’s refusal to rent school building for religious worship services that include teaching moral values, but allowing others to use facilities to teach moral values, viewpoint discrimination).
its suit challenging public display of the Ten Commandments.20 In contrast, a county policy barring use of community centers for home schooling or other private courses, while allowing informal community educational activities, was held to be viewpoint neutral, and based only on a subject-matter distinction between formal private education and informal educational activities.21

§ 2.3 Content-Based Regulations Involving Subject-Matter Discrimination

1. General Concerns with Subject-Matter Discrimination

For content-based regulations that involve subject-matter regulation, rather than viewpoint discrimination, the strict scrutiny inquiry typically appears more clearly on the face of the opinion.

United States v. Alvarez

Justice KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, Justice GINSBURG, and Justice SOTOMAYOR join.

Lying was his habit. Xavier Alvarez, the respondent here, lied when he said that he played hockey for the Detroit Red Wings and that he once married a starlet from Mexico. But when he lied in announcing he held the Congressional Medal of Honor, respondent ventured onto new ground; for that lie violates a federal criminal statute, the Stolen Valor Act of 2005. 18 U.S.C. § 704.

It is right and proper that Congress, over a century ago, established an award so the Nation can hold in its highest respect and esteem those who, in the course of carrying out the “supreme and noble duty of contributing to the defense of the rights and honor of the nation,” Selective Draft Law Cases, 245 U.S. 366, 390 (1918), have acted with extraordinary honor. And it should be uncontested that this is a legitimate Government objective, indeed a most valued national aspiration and purpose. This does not end the inquiry, however. Fundamental constitutional principles require that laws enacted to honor the brave must be consistent with the precepts of the Constitution for which they fought.

The Government contends the criminal prohibition is a proper means to further its purpose in creating and awarding the Medal. When content-based speech regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment. By this measure, the statutory provisions under which respondent was convicted must be held invalid, and his conviction must be set aside.

20 Wishnatsky v. Rovner, 433 F.3d 608, 609-13 (8th Cir. 2006).

The Act by its plain terms applies to a false statement made at any time, in any place, to any person. It can be assumed that it would not apply to, say, a theatrical performance. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990) (recognizing that some statements nominally purporting to contain false facts in reality “cannot reasonably be interpreted as stating actual facts about an individual” (internal quotation marks and brackets omitted)). Still, the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain. See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 539-540 (1987) (prohibiting a nonprofit corporation from exploiting the “commercial magnetism” of the word “Olympic” when organizing an athletic competition (internal quotation marks omitted)).

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. Orwell, Nineteen Eighty-Four (1949) (Centennial ed.2003). Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out. Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. See, e.g., Virginia Bd. of Pharmacy, 425 U.S., at 771 (noting that fraudulent speech generally falls outside the protections of the First Amendment). But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. In assessing content-based restrictions on protected speech, the Court has not adopted a free-wheeling approach, see [United States v.] Stevens, 130 S. Ct. [1577, 1585 (2010)] (“The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits”), but rather has applied the “most exacting scrutiny.” Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994). Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny.

The Government is correct when it states military medals “serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service,” and also “‘fost[e]r morale, mission accomplishment and esprit de corps' among service members.” Brief for
General George Washington observed that an award for valor would “cherish a virtuous ambition in . . . soldiers, as well as foster and encourage every species of military merit.” General Orders of George Washington Issued at Newburgh on the Hudson, 1782-1783 (Aug. 7, 1782), p. 30 (E. Boynton ed. 1883). Time has not diminished this idea. In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission.

But to recite the Government's compelling interests is not to end the matter. The First Amendment requires that the Government's chosen restriction on the speech at issue be “actually necessary” to achieve its interest. [Brown v.] Entertainment Merchants Assn., 131 S.Ct. [2729,] 2738 [(2011)]. There must be a direct causal link between the restriction imposed and the injury to be prevented. See ibid. The link between the Government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown. [Ed.: Thus, the regulation fails the second prong of strict scrutiny requiring such a direct relationship to exist.] Although appearing to concede that “an isolated misrepresentation by itself would not tarnish the meaning of military honors,” the Government asserts it is “common sense that false representations have the tendency to dilute the value and meaning of military awards,” Brief for United States 49, 54. It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true. Furthermore, the lie may offend the true holders of the Medal. From one perspective it insults their bravery and high principles when falsehood puts them in the unworthy company of a pretender.

Yet these interests do not satisfy the Government's heavy burden when it seeks to regulate protected speech. See United States v. Playboy Entertainment Group, Inc., 529 U.S. 803, 818 (2000). The Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez. Cf. Entertainment Merchants Assn., supra, 131 S.Ct., at 2738-2739 (analyzing and rejecting the findings of research psychologists demonstrating the causal link between violent video games and harmful effects on children). As one of the Government's amici notes “there is nothing that charlatans such as Xavier Alvarez can do to stain [the Medal winners'] honor.” Brief for Veterans of Foreign Wars of the United States et al. as Amici Curiae 1. This general proposition is sound, even if true holders of the Medal might experience anger and frustration.

The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. [Ed.: If counterspeech would be effective, the government would not have adopted the least burdensome effective alternative, as required under the third prong of strict scrutiny review.] The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting. Even before the FBI began investigating him for his false statements “Alvarez was perceived as a phony,” 617 F.3d, at 1211. Once the lie was made public, he was ridiculed online, see Brief for Respondent 3, his actions were reported in the press, see Ortega, Alvarez Again Denies Claim, Ontario, CA, Inland Valley Daily Bulletin (Sept.
27, 2007), and a fellow board member called for his resignation, see, e.g., Bigham, Water District Rep Requests Alvarez Resign in Wake of False Medal Claim, San Bernardino Cty., CA, The Sun (May 21, 2008). There is good reason to believe that a similar fate would befall other false claimants. See Brief for Reporters Committee for Freedom of the Press et al. as *Amici Curiae* 30-33 (listing numerous examples of public exposure of false claimants). Indeed, the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose. The acclaim that recipients of the Congressional Medal of Honor receive also casts doubt on the proposition that the public will be misled by the claims of charlatans or become cynical of those whose heroic deeds earned them the Medal by right. See, e.g., Well Done, *Washington Post*, Feb. 5, 1943, p. 8 (reporting on President Roosevelt's awarding the Congressional Medal of Honor to Maj. Gen. Alexander Vandegrift); Devroy, Medal of Honor Given to 2 Killed in Somalia, *Washington Post*, May 24, 1994, p. A6 (reporting on President Clinton's awarding the Congressional Medal of Honor to two special forces soldiers killed during operations in Somalia).

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth. See Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence”). The theory of our Constitution is “that the best test of truth is the power of the thought to get itself accepted in the competition of the market,” Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

In addition, when the Government seeks to regulate protected speech, the restriction must be the “least restrictive means among available, effective alternatives.” *Ashcroft*, 542 U.S., at 666. There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor winners. Were a database accessible through the Internet, it would be easy to verify and expose false claims. It appears some private individuals have already created databases similar to this, see Brief for Respondent 25, and at least one database . . . is online and fully searchable, see Congressional Medal of Honor Society, Full Archive, http://www.cmohs.org/recipient-archive.php. The Solicitor General responds that although Congress and the Department of Defense investigated the feasibility of establishing a database in 2008, the Government “concluded that such a database would be impracticable and insufficiently comprehensive.” Brief for United States 55. Without more explanation, it is difficult to assess the Government's claim, especially when at least one database of Congressional Medal of Honor winners already exists.
Justice BREYER, with whom Justice KAGAN joins, concurring in the judgment.

I agree with the plurality that the Stolen Valor Act of 2005 violates the First Amendment. But I do not rest my conclusion upon a strict categorical analysis. *Ante,* at 2543-2547. Rather, I base that conclusion upon the fact that the statute works First Amendment harm, while the Government can achieve its legitimate objectives in less restrictive ways.

In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.


As the dissent points out, “there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech.” *Post,* at 2564. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict
scrutiny. But this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas. And the government often has good reasons to prohibit such false speech. See infra, at 2553-2555 (listing examples of statutes and doctrines regulating false factual speech). But its regulation can nonetheless threaten speech-related harms. Those circumstances lead me to apply what the Court has termed “intermediate scrutiny” here.

Like both the plurality and the dissent, I believe the statute nonetheless has substantial justification. It seeks to protect the interests of those who have sacrificed their health and life for their country. The statute serves this interest by seeking to preserve intact the country's recognition of that sacrifice in the form of military honors. To permit those who have not earned those honors to claim otherwise dilutes the value of the awards. Indeed, the Nation cannot fully honor those who have sacrificed so much for their country's honor unless those who claim to have received its military awards tell the truth. Thus, the statute risks harming protected interests but only in order to achieve a substantial countervailing objective.

We must therefore ask whether it is possible substantially to achieve the Government's objective in less burdensome ways. In my view, the answer to this question is “yes.” Some potential First Amendment threats can be alleviated by interpreting the statute to require knowledge of falsity, etc. Supra, at 2552-2553. But other First Amendment risks, primarily risks flowing from breadth of coverage, remain. Supra, at 2553-2554, 2554-2555. As is indicated by the limitations on the scope of the many other kinds of statutes regulating false factual speech, supra, at 2553-2555, it should be possible significantly to diminish or eliminate these remaining risks by enacting a similar but more finely tailored statute. For example, not all military awards are alike. Congress might determine that some warrant greater protection than others. And a more finely tailored statute might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.

I recognize that in some contexts, particularly political contexts, such a narrowing will not always be easy to achieve. In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications. Some lower courts have upheld the constitutionality of roughly comparable but narrowly tailored statutes in political contexts. See, e.g., United We Stand America, Inc. v. United We Stand, America New York, Inc., 128 F.3d 86, 93 (C.A.2 1997) (upholding against First Amendment challenge application of Lanham Act to a political organization); Treasurer of the Committee to Elect Gerald D. Lostracco v. Fox, 150 Mich. App. 617, 389 N.W.2d 446 (1986) (upholding under First Amendment statute prohibiting campaign material falsely claiming that one is an incumbent). Without expressing any view on the validity of those cases, I would also note, like the plurality, that in this area more accurate information will
normally counteract the lie. And an accurate, publicly available register of military awards, easily obtainable by political opponents, may well adequately protect the integrity of an award against those who would falsely claim to have earned it. See ante, at 2550-2551. And so it is likely that a more narrowly tailored statute combined with such information-disseminating devices will effectively serve Congress' end.

Justice ALITO, with whom Justice SCALIA and Justice THOMAS join, dissenting.

Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award. The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country's system of military honors and inflicting real harm on actual medal recipients and their families.

Both the plurality and Justice Breyer argue that Congress could have preserved the integrity of military honors by means other than a criminal prohibition, but Congress had ample reason to believe that alternative approaches would not be adequate. The chief alternative that is recommended is the compilation and release of a comprehensive list or database of actual medal recipients. If the public could readily access such a resource, it is argued, imposters would be quickly and easily exposed, and the proliferation of lies about military honors would come to an end.

This remedy, unfortunately, will not work. The Department of Defense has explained that the most that it can do is to create a database of recipients of certain top military honors awarded since 2001. See Office of Undersecretary of Defense, Report to the Senate and House Armed Services Committees on a Searchable Military Valor Decorations Database 4-5 (2009).

Because a sufficiently comprehensive database is not practicable, lies about military awards cannot be remedied by what the plurality calls “counterspeech.” Ante, at 2549. Without the requisite database, many efforts to refute false claims may be thwarted, and some legitimate award recipients may be erroneously attacked. In addition, a steady stream of stories in the media about the exposure of imposters would tend to increase skepticism among members of the public about the entire awards system. This would only exacerbate the harm that the Stolen Valor Act is meant to prevent.

[M]any kinds of false factual statements have long been proscribed without “rais[ing] any Constitutional problem.” United States v. Stevens, 130 S. Ct. 1577, 1584 (2010) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942)). Laws prohibiting fraud, perjury, and defamation, for example, were in existence when the First Amendment was adopted, and their constitutionality is now beyond question. See, e.g., Donaldson v. Read Magazine, Inc., 333 U.S. 178, 190 (1948) (explaining that the government's power “to protect people against fraud” has “always been recognized in this country and is firmly established”); United States v. Dunnigan, 507 U.S. 87, 97 (1993) (observing that “the constitutionality of perjury statutes is unquestioned”); Beauharnais v. Illinois, 343 U.S. 250, 256 (1952) (noting that the “prevention and punishment” of libel “have never been thought to raise any Constitutional problem”).

Page 110
We have also described as falling outside the First Amendment's protective shield certain false factual statements that were neither illegal nor tortious at the time of the Amendment's adoption. The . . . freedom of speech has been held to permit recovery for the intentional infliction of emotional distress by means of a false statement, see [Hustler Magazine, Inc. v.] Falwell, [485 U.S. 46,] 56 [(1988)], even though that tort did not enter our law until the late 19th century, see W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 12, p. 60, and n. 47. (5th ed.1984) (hereinafter Prosser and Keeton). And in [Time, Inc. v.] Hill, [385 U.S. 374,] 390 [(1967)], the Court concluded that the free speech right allows recovery for the even more modern tort of false-light invasion of privacy, see Prosser and Keeton § 117, at 863. [Ed.: discussed herein at § 8.2]

In line with these holdings, it has long been assumed that the First Amendment is not offended by prominent criminal statutes with no close common-law analog. The most well known of these is probably 18 U.S.C. § 1001, which makes it a crime to “knowingly and willfully” make any “materially false, fictitious, or fraudulent statement or representation” in “any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” Unlike perjury, § 1001 is not limited to statements made under oath or before an official government tribunal. Nor does it require any showing of “pecuniary or property loss to the government.” United States v. Gilliland, 312 U.S. 86, 93 (1941). Instead, the statute is based on the need to protect “agencies from the perversion which might result from the deceptive practices described.” Ibid. (emphasis added).

Still other statutes make it a crime to falsely represent that one is speaking on behalf of, or with the approval of, the Federal Government. See, e.g., 18 U.S.C. § 912 (making it a crime to falsely impersonate a federal officer); § 709 (making it a crime to knowingly use, without authorization, the names of enumerated federal agencies, such as “Federal Bureau of Investigation,” in a manner reasonably calculated to convey the impression that a communication is approved or authorized by the agency). We have recognized that § 912, like § 1001, does not require a showing of pecuniary or property loss and that its purpose is to “maintain the general good repute and dignity” of Government service. United States v. Lepowitch, 318 U.S. 702, 704 (1943) (quoting United States v. Barnow, 239 U.S. 74, 80 (1915)). All told, there are more than 100 federal criminal statutes that punish false statements made in connection with areas of federal agency concern. See United States v. Wells, 519 U.S. 482, 505-507, and nn. 8-10 (1997) (Stevens, J., dissenting) (citing “at least 100 federal false statement statutes” in the United States Code).

These examples amply demonstrate that false statements of fact merit no First Amendment protection in their own right. It is true, as Justice Breyer notes, that many in our society either approve or condone certain discrete categories of false statements, including false statements made to prevent harm to innocent victims and so-called “white lies.” See ante, at 2543. But respondent's false claim to have received the Medal of Honor did not fall into any of these categories. His lie did not “prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence.” Ibid. Nor did his lie “stop a panic or otherwise preserve calm in the face of danger” or further philosophical or scientific debate. Ibid. Respondent's claim, like all those covered by the Stolen Valor Act, served no valid purpose.
Subsequent to *Alvarez*, the Fourth Circuit upheld in *United States v. Hamilton*[^22] a federal law that makes it a crime to wear military uniforms and medals without authorization with an intent to deceive. Even under strict scrutiny, the court concluded the statute was constitutional based on the compelling interests of preventing the potential debasement of military uniforms and awards, avoiding the implication that military honors are awarded on a frequent basis, and avoiding obstructions to the administration of military command. The court noted that the “counterspeech” remedied discussed in *Alvarez* would be much less effective “in the present context, which involves the false display of military honors, rather than false words. Although speech may effectively counter other speech a person hears, speech may not effectively counter that which a person sees.”

Justice Breyer’s use of the term “proportionality review” in his concurrence in *Alvarez* embodies a number of different standards of review between minimum rationality review and strict scrutiny: “2nd-order reasonableness review” of *Burdick*, excerpted at § 11.2 and *Bartnicki*, discussed at § 8.2.2 nn.15-18; “3rd-order reasonableness review” of *Pickering*, excerpted at § 8.3; “intermediate review” of *O’Brien*, excerpted at § 2.1; “intermediate review with bite” of *Central Hudson*, excerpted at § 9.2; and “loose strict scrutiny” possibly used for content-based regulations of cable and satellite television and radio, discussed at § 10.1. In many other countries around the world, the term “proportionality review” is used to refer to the one standard of review – “proportionality review” – their courts use to test constitutionality of government action. As discussed at § 28.4 of *Charles D. Kelso & R. Randall Kelso, American Constitutional Law: An E-Coursebook Volumes 1 & 2 (2018 Orig. Ed. 2014)* (http://libguides.stcl.edu/kelsomaterials), citing R. Randall Kelso, *United States Standards of Review Versus the International Standard of Proportionality: Convergence and Symmetry*, 39 Ohio Northern L. Rev. 455, 457-66, 494-97 (2013), this standard is somewhat more stringent than “third-order reasonableness review,” but less stringent in most respects than “intermediate review.” The fact that such a generic, uniform standard of “proportionality review” is used in many other countries in constitutional review of governmental action should not blind one to the fact that under United States Supreme Court precedents a number of different levels of review are used, as summarized above and at § 1.4.2 & Table 4.

### 2. Protecting the Press from Taxation That Threatens to Suppress Ideas

In the original natural law period, Chief Justice Marshall observed, “The Power to tax involves the power to destroy.”[^23] In the formalist era, Justice Holmes rebutted Marshall by saying, “The Power to tax is not the power to destroy while this Court sits.”[^24] Even so, during the Holmesian era, the Court tended to uphold taxes, unless the activity was entitled to special constitutional protection.[^25]

[^22]: 699 F.3d 356, 373 (4th Cir. 2012).


Of course, the press is entitled to protection as a matter of routine free speech protections. From an historical perspective, after licensing prior restraints were abandoned in England, taxes soon were passed whose objective was the control of “licentious, schismatical, and scandalous” publications.  

In Grosjean v. American Press Co., decided in 1936, on the borderline between the formalist and Holmesian eras, the Court struck down a tax on the gross receipts of newspapers having a circulation of more than 20,000 copies per week. The Court said that in light of its history and setting, the tax was “a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guarantee.”

First Amendment protection from taxation was broadened during the instrumentalist era. In 1983, in Minneapolis Star and Tribune Company v. Minnesota Commission of Revenue, Justice O’Connor said that government can subject newspapers to generally applicable economic regulations without creating constitutional problems, but a use tax on the cost of paper and ink products, with the first $100,000 being exempt, singled out the press for special treatment. Such singling out cannot stand unless under strict scrutiny it is necessary to achieve a compelling government interest. The state had not shown such an interest since it had not explained why it chose to use a substitute for the state’s general sales tax.

The protection traditionally given the press from being singled out in taxes has continued in the modern era. For example, in 1987, in Arkansas Writers’ Project v. Ragland, the Court held that the First Amendment was violated by a state sales tax scheme that taxed general interest magazines but exempted newspapers and religious, professional, trade, and sports journals. Justice Marshall noted that the incidence of the tax depended entirely on the content of the magazine, and yet the state did not show that this was justified by a compelling state interest necessary to achieve that end.

In 1991, a 7-2 Court held in Leathers v. Medlock that Arkansas could impose a sales tax on cable television, but exempt newspapers, magazines, and satellite broadcast services. For the Court, Justice O’Connor noted that the record did not show an impermissible motive to discriminate against the press; the law did not single out a small group of publishers, since there were approximately 100 cable systems operating in the state; and the law did not discriminate on the basis of content, but rather targeted more financially successful media. She added that there is no rule that intermedia or intramedia discrimination violates the First Amendment in the absence of any evidence of intent.


to suppress speech or of any effect on the expression of particular ideas. Justice Marshall, dissenting with Justice Blackmun, said that where the state discriminates between elements of the media, thus creating the risk of covert censorship, strict scrutiny should apply. The state’s only expressed interest, that of raising revenue, was not a compelling governmental interest. Justice Marshall added that it was not necessary for the Court to find evidence of an improper censorial motive. It was up to the state to justify its discrimination because the government has an obligation of evenhandedness.

§ 2.4 Content-Neutral Regulations and Intermediate Review

1. Content-Neutral Regulations Involving Elements of Content-Based Regulation

As discussed at § 1.2.6 & Table 3, content-neutral regulations not related to the suppression of free expression are given intermediate review, first articulated in United States v. O’Brien, excerpted at § 2.1. In Schacht v. United States, the Court first cited O’Brien in upholding a federal statute making it a crime to wear a military uniform without authority. The Court then invalidated a portion of the law that allowed an actor in a theatrical production to wear the uniform “if the portrayal does not tend to discredit that armed force.” Justice Black wrote that an actor, like anyone else in our country, enjoys a constitutional right to freedom of speech, including the right openly to criticize the government during a dramatic performance. Thus, the restrictive portion of the law, obviously related to the suppression of expression, was content-based, leading to a strict scrutiny analysis.

Another example of the intermediate review level of O’Brien possibly not applying because the government regulation was content-based, not content-neutral, occurred in Spence v. State of Washington. There the defendant was charged with violating a prohibition against exposing to public view a flag to which is attached any word or design. The defendant had hung his own flag from a window in his apartment, upside down, with a black peace symbol, which was removable, having been attached. The main interest advanced by the state was a desire to preserve the national flag as an unalloyed symbol of our country. This interest would be directly related to expression and, thus, O’Brien would not apply. Further, the Court noted that any interest the state might have was not significantly impaired where there was no risk that the act would mislead viewers into assuming that the government endorsed his viewpoint, the flag had not been permanently disfigured, and his message was direct and likely to be understood.

2. Content-Neutral Secondary Effects Cases

One kind of content-neutral regulation involves regulating speech because of the secondary effects of the speech, not the content of the speech itself. Such secondary effects can involve environmental harms caused by littering or public eyesores; economic harms of depressed property values; harms to the community from increased prostitution or drug activity; or other kinds of secondary effects.


Members of the City Council of Los Angeles v. Taxpayers for Vincent

Justice STEVENS delivered the opinion of the Court.

In March 1979, Roland Vincent was a candidate for election to the Los Angeles City Council. A group of his supporters known as Taxpayers for Vincent (Taxpayers) entered into a contract with a political sign service company known as Candidates' Outdoor Graphics Service (COGS) to fabricate and post signs with Vincent's name on them. COGS produced 15 by 44-inch cardboard signs and attached them to utility poles at various locations by draping them over crosswires which support the poles and stapling the cardboard together at the bottom. The signs' message was: “Roland Vincent-City Council.”

Acting under the authority of § 28.04 of the Municipal Code, employees of the city's Bureau of Street Maintenance routinely removed all posters attached to utility poles and similar objects covered by the ordinance, including the COGS signs. The weekly sign removal report covering the period March 1-March 7, 1979, indicated that among the 1,207 signs removed from public property during that week, 48 were identified as “Roland Vincent” signs. Most of the other signs identified in that report were apparently commercial in character.

It has been clear since this Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest. Schenck v. United States, 249 U.S. 47, 52 (1919). As Stromberg [v. California, 283 U.S. 359 (1931)] and Lovell [v. Griffin, 303 U.S. 444 (1938)] demonstrate, there are some purported interests — such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas — that are so plainly illegitimate that they would immediately invalidate the rule. The general principle that has emerged from this line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others. See Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65, 72 (1983); Police Department of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972).

That general rule has no application to this case. For there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance. There is no claim that the ordinance was designed to suppress certain ideas that the City finds distasteful or that it has been applied to appellees because of the views that they express. The text of the ordinance is neutral — indeed it is silent — concerning any speaker's point of view, and the District Court's findings indicate that it has been applied to appellees and others in an evenhanded manner.

In United States v. O'Brien, 391 U.S. 367 (1968), the Court set forth the appropriate framework for reviewing a viewpoint-neutral regulation of this kind: "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” Id., at 377.
It is well settled that the state may legitimately exercise its police powers to advance esthetic values. Thus, in *Berman v. Parker*, 348 U.S. 26, 32-33 (1954), in referring to the power of the legislature to remove blighted housing, this Court observed that such housing may be “an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn.” Ibid. We concluded: “The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.” Id., at 33 (citation omitted). See also Penn Central Transportation Co. v. New York City, 438 U.S. 104, 129 (1978); Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Euclid v. Ambler Co., 272 U.S. 365, 387-388 (1926).

In *Kovacs v. Cooper*, 336 U.S. 77 (1949), the Court rejected the notion that a city is powerless to protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance. In upholding an ordinance that prohibited loud and raucous sound trucks, the Court held that the State had a substantial interest in protecting its citizens from unwelcome noise. In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court upheld the city's prohibition of political advertising on its buses, stating that the city was entitled to protect unwilling viewers against intrusive advertising that may interfere with the city's goal of making its buses “rapid, convenient, pleasant, and inexpensive,” id., at 302-303 (plurality opinion). See also id., at 307 (Douglas, J., concurring in judgment). These cases indicate that the municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.

*Metromedia, Inc. v. San Diego*, [453 U.S. 490 (1981)], dealt with San Diego's prohibition of certain forms of outdoor billboards. There the Court considered the city's interest in avoiding visual clutter, and seven Justices explicitly concluded that this interest was sufficient to justify a prohibition of billboards, see id., at 507-508, 510 (opinion of White, J., joined by Stewart, Marshall, and Powell, JJ.); id., at 552 (Stevens, J., dissenting in part); id., at 559-561 (Burger, C.J., dissenting); id., at 570 (Rehnquist, J., dissenting). Justice White, writing for the plurality, expressly concluded that the city's esthetic interests were sufficiently substantial to provide an acceptable justification for a content-neutral prohibition against the use of billboards; San Diego's interest in its appearance was undoubtedly a substantial governmental goal. Id., at 507-508.

We reaffirm the conclusion of the majority in *Metromedia*. The problem addressed by this ordinance – the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit. “[T]he city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.” Young v. American Mini Theatres, Inc., 427 U.S., at 71 (plurality opinion).

We turn to the question whether the scope of the restriction on appellees' expressive activity is substantially broader than necessary to protect the City's interest in eliminating visual clutter. The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest. The District Court found that the signs prohibited by the ordinance do constitute visual clutter and blight. By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy. The plurality wrote in *Metromedia*: “It is not speculative to recognize that billboards by their very nature, wherever located and however
constructed, can be perceived as an ‘esthetic harm.’” 453 U.S., at 510. The same is true of posted signs.

It is true that the esthetic interest in preventing the kind of litter that may result from the distribution of leaflets on the public streets and sidewalks cannot support a prophylactic prohibition against the citizen's exercise of that method of expressing his views. In *Schneider v. State*, 308 U.S. 147 (1939), the Court held that ordinances that absolutely prohibited handbilling on the streets were invalid. The Court explained that cities could adequately protect the esthetic interest in avoiding litter without abridging protected expression merely by penalizing those who actually litter. See id., at 162. Taxpayers contend that their interest in supporting Vincent's political campaign, which affords them a constitutional right to distribute brochures and leaflets on the public streets of Los Angeles, provides equal support for their asserted right to post temporary signs on objects adjacent to the streets and sidewalks. They argue that the mere fact that their temporary signs “add somewhat” to the city's visual clutter is entitled to no more weight than the temporary unsightliness of discarded handbills and the additional street-cleaning burden that were insufficient to justify the ordinances reviewed in *Schneider*.

The rationale of *Schneider* is inapposite in the context of the instant case. There, individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene. In this case, appellees posted dozens of temporary signs throughout an area where they would remain unattended until removed. As the Court expressly noted in *Schneider*, the First Amendment does not “deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.” 308 U.S., at 160-161. In short, there is no constitutional impediment to “the punishment of those who actually throw papers on the streets.” Id., at 162. A distributor of leaflets has no right simply to scatter his pamphlets in the air – or to toss large quantities of paper from the window of a tall building or a low flying airplane. Characterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance. The right recognized in *Schneider* is to tender the written material to the passerby who may reject it or accept it, and who thereafter may keep it, dispose of it properly, or incur the risk of punishment if he lets it fall to the ground. One who is rightfully on a street open to the public “carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.” *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In *Schneider*, an antilitering statute could have addressed the substantive evil without prohibiting expressive activity, whereas application of the prophylactic rule actually employed gratuitously infringed upon the right of an individual to communicate directly with a willing listener. Here, the substantive evil – visual blight – is not merely a possible by-product of the activity, but is created by the medium of expression itself. In contrast to *Schneider*, therefore, the application of the ordinance in this case...
responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

The plurality opinion in *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981), concluded that the City of San Diego could, consistently with the First Amendment, restrict the commercial use of billboards in order to “preserve and improve the appearance of the City.” Id., at 493. Today, the Court sustains the constitutionality of Los Angeles' similarly motivated ban on the posting of political signs on public property. Because the Court's lenient approach towards the restriction of speech for reasons of aesthetics threatens seriously to undermine the protections of the First Amendment, I dissent.

The Court finds that the City's “interest [in eliminating visual clutter] is sufficiently substantial to justify the effect of the ordinance on appellees' expression” and that the effect of the ordinance on speech is “no greater than necessary to accomplish the City's purpose.” Ante, at 2129. These are the right questions to consider when analyzing the constitutionality of the challenged ordinance, see *Metromedia*, supra, at 525-527 (Brennan, J., concurring in judgment); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 656 (1981) (Brennan, J., concurring in part and dissenting in part), but the answers that the Court provides reflect a startling insensitivity to the principles embodied in the First Amendment. In my view, the City of Los Angeles has not shown that its interest in eliminating “visual clutter” justifies its restriction of appellees' ability to communicate with the local electorate.

In deciding this First Amendment question, the critical importance of the posting of signs as a means of communication must not be overlooked. Use of this medium of communication is particularly valuable in part because it entails a relatively small expense in reaching a wide audience, allows flexibility in accommodating various formats, typographies, and graphics, and conveys its message in a manner that is easily read and understood by its reader or viewer. There may be alternative channels of communication, but the prevalence of a large number of signs in Los Angeles is a strong indication that, for many speakers, those alternatives are far less satisfactory. Cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975).

Nevertheless, the City of Los Angeles asserts that ample alternative avenues of communication are available. The City notes that, although the posting of signs on public property is prohibited, the posting of signs on private property and the distribution of handbills are not. Brief for Appellants at 25-26. But there is no showing that either of these alternatives would serve appellees' needs nearly as well as would the posting of signs on public property. First, there is no proof that a sufficient number of private parties would allow the posting of signs on their property. Indeed, common sense suggests the contrary at least in some instances. A speaker with a message that is generally unpopular or simply unpopular among property owners is hardly likely to get his message across if forced to rely on this medium. It is difficult to believe, for example, that a group advocating an increase in the rate of a property tax would succeed in persuading private property owners to accept its signs.
As the Court acknowledges, ante, at 2129, when an ordinance significantly limits communicative activity, “the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation.” Schneider v. State, 308 U.S. 147, 161 (1939). The Court's first task is to determine whether the ordinance is aimed at suppressing the content of speech, and, if it is, whether a compelling state interest justifies the suppression. Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 540 (1980); Police Department of Chicago v. Mosley, 408 U.S. 92, 99 (1972). If the restriction is content-neutral, the court's task is to determine (1) whether the governmental objective advanced by the restriction is substantial, and (2) whether the restriction imposed on speech is no greater than is essential to further that objective. Unless both conditions are met the restriction must be invalidated. See ante, at 2128, 2130-2132.

My suggestion in Metromedia was that courts should exercise special care in addressing these questions when a purely aesthetic objective is asserted to justify a restriction of speech. Specifically, “before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment.” 453 U.S., at 531. I adhere to that view. Its correctness – premised largely on my concern that aesthetic interests are easy for a city to assert and difficult for a court to evaluate – is, for me, reaffirmed by this case.

The fundamental problem in this kind of case is that a purely aesthetic state interest offered to justify a restriction on speech – that is, a governmental objective justified solely in terms like “proscribing intrusive and unpleasant formats for expression,” ante, at 2130 creates difficulties for a reviewing court in fulfilling its obligation to ensure that government regulation does not trespass upon protections secured by the First Amendment. The source of those difficulties is the unavoidable subjectivity of aesthetic judgments – the fact that “beauty is in the eye of the beholder.” As a consequence of this subjectivity, laws defended on aesthetic grounds raise problems for judicial review that are not presented by laws defended on more objective grounds – such as national security, public health, or public safety. In practice, therefore, the inherent subjectivity of aesthetic judgments makes it all too easy for the government to fashion its justification for a law in a manner that impairs the ability of a reviewing court meaningfully to make the required inquiries.

3. Content-Neutral Time, Place, or Manner Cases

Time, place, or manner regulations involve regulating speech not because of its content, but because the time, place, or manner of the speech conflicts with content-neutral government concerns. Such concerns can involve considerations of time, like trying to prevent two groups from demonstrating at the same time in the same place; considerations of place, such as protecting residential privacy by regulating speech activities outside residential homes; or considerations of manner, like limiting noise pollution by restricting the decibel level of speech. The use of intermediate scrutiny for content-neutral time, place, or manner regulations of speech is illustrated in Clark v. Community for Creative Non-Violence.
Clark v. Community for Creative Non-Violence

Justice WHITE delivered the opinion of the Court.

The issue in this case is whether a National Park Service regulation prohibiting camping in certain parks violates the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in connection with a demonstration intended to call attention to the plight of the homeless. We hold that it does not and reverse the contrary judgment of the Court of Appeals.

Demonstrations for the airing of views or grievances are permitted in the Memorial-core parks, but for the most part only by Park Service permits. 36 CFR § 50.19 (1983). Temporary structures may be erected for demonstration purposes but may not be used for camping. 36 CFR § 50.19(e)(8) (1983).

In 1982, the Park Service issued a renewable permit to respondent Community for Creative Non-Violence (CCNV) to conduct a wintertime demonstration in Lafayette Park and the Mall for the purpose of demonstrating the plight of the homeless. The permit authorized the erection of two symbolic tent cities: 20 tents in Lafayette Park that would accommodate 50 people and 40 tents in the Mall with a capacity of up to 100. The Park Service, however, relying on the above regulations, specifically denied CCNV's request that demonstrators be permitted to sleep in the symbolic tents.

We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case, cf. United States v. O'Brien, 391 U.S. 367, 376 (1968), but this assumption only begins the inquiry. Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

It is also true that a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative. Spence v. Washington, 418 U.S. 405 (1974); Tinker v. Des Moines School District, 393 U.S. 503 (1969). Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. United States v. O'Brien, supra.

Petitioners submit, as they did in the Court of Appeals, that the regulation forbidding sleeping is defensible either as a time, place, or manner restriction or as a regulation of symbolic conduct. We agree with that assessment. The permit that was issued authorized the demonstration but required
compliance with 36 CFR § 50.19 (1913), which prohibits “camping” on park lands, that is, the use of park lands for living accommodations, such as sleeping, storing personal belongings, making fires, digging, or cooking. These provisions, including the ban on sleeping, are clearly limitations on the manner in which the demonstration could be carried out. That sleeping, like the symbolic tents themselves, may be expressive and part of the message delivered by the demonstration does not make the ban any less a limitation on the manner of demonstrating, for reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid. City Council of Los Angeles v. Taxpayers for Vincent, supra; Heffron v. International Society for Krishna Consciousness, Inc., supra; Kovacs v. Cooper, 336 U.S. 77 (1949).

Neither does the fact that sleeping, arguendo, may be expressive conduct, rather than oral or written expression, render the sleeping prohibition any less a time, place, or manner regulation. To the contrary, the Park Service neither attempts to ban sleeping generally nor to ban it everywhere in the parks. It has established areas for camping and forbids it elsewhere, including Lafayette Park and the Mall. Considered as such, we have very little trouble concluding that the Park Service may prohibit overnight sleeping in the parks involved here.

The requirement that the regulation be content-neutral is clearly satisfied. The courts below accepted that view, and it is not disputed here that the prohibition on camping, and on sleeping specifically, is content-neutral and is not being applied because of disagreement with the message presented. Neither was the regulation faulted, nor could it be, on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways. The regulation otherwise left the demonstration intact, with its symbolic city, signs, and the presence of those who were willing to take their turns in a day-and-night vigil. Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.

It is also apparent to us that the regulation narrowly focuses on the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence. To permit camping – using these areas as living accommodations – would be totally inimical to these purposes, as would be readily understood by those who have frequented the National Parks across the country and observed the unfortunate consequences of the activities of those who refuse to confine their camping to designated areas.

Chief Justice BURGER, concurring.

I concur fully in the Court's opinion.

The actions here claimed as speech entitled to the protections of the First Amendment simply are not speech; rather, they constitute conduct. As Justice Black, who was never tolerant of limits on speech, emphatically pointed out in his separate opinion in Cox v. Louisiana, 379 U.S. 536, 578 (1965): “The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly where people have a right to
be for such purposes. . . . Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment.” (Emphasis in original; citations omitted.)

Respondents' attempt at camping in the park is a form of “picketing”; it is conduct, not speech. Moreover, it is conduct that interferes with the rights of others to use Lafayette Park for the purposes for which it was created. Lafayette Park and others like it are for all the people, and their rights are not to be trespassed even by those who have some “statement” to make. Tents, fires, and sleepers, real or feigned, interfere with the rights of others to use our parks. Of course, the Constitution guarantees that people may make their “statements,” but Washington has countless places for the kind of “statement” these respondents sought to make.

It trivializes the First Amendment to seek to use it as a shield in the manner asserted here. And it tells us something about why many people must wait for their “day in court” when the time of the courts is pre-empted by frivolous proceedings that delay the causes of litigants who have legitimate, nonfrivolous claims. This case alone has engaged the time of 1 District Judge, an en banc court of 11 Court of Appeals Judges, and 9 Justices of this Court.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

Although sleep in the context of this case is symbolic speech protected by the First Amendment, it is nonetheless subject to reasonable time, place, and manner restrictions. I agree with the standard enunciated by the majority: “[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” Ante, at 3069 (citations omitted). I conclude, however, that the regulations at issue in this case, as applied to respondents, fail to satisfy this standard.

According to the majority, the significant Government interest advanced by denying respondents' request to engage in sleep-speech is the interest in “maintaining the parks in the heart of our capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence.” Ante, at 3070. That interest is indeed significant. However, neither the Government nor the majority adequately explains how prohibiting respondents' planned activity will substantially further that interest.

The flaw in these two contentions is that neither is supported by a factual showing that evinces a real, as opposed to a merely speculative, problem. The majority fails to offer any evidence indicating that the absence of an absolute ban on sleeping would present administrative problems to the Park Service that are substantially more difficult than those it ordinarily confronts. A mere apprehension of difficulties should not be enough to overcome the right to free expression. See United States v. Grace, 461 U.S. 171, 182 (1983). Moreover, if the Government's interest in avoiding administrative difficulties were truly “substantial,” one would expect the agency most involved in administering the parks at least to allude to such an interest. Here, however, the perceived difficulty of administering requests from other demonstrators seeking to convey messages through sleeping was
not among the reasons underlying the Park Service regulations. Nor was it mentioned by the Park Service in its rejection of respondents' particular request.

The Court's erroneous application of the standard for ascertaining a reasonable time, place, and manner restriction is also revealed by the majority's conclusion that a substantial governmental interest is served by the sleeping ban because it will discourage “around-the-clock demonstrations for days” and thus further the regulation's purpose “to limit wear and tear on park properties.” Ante, at 3072. The majority cites no evidence indicating that sleeping engaged in as symbolic speech will cause substantial wear and tear on park property. Furthermore, the Government's application of the sleeping ban in the circumstances of this case is strikingly underinclusive. The majority acknowledges that a proper time, place, and manner restriction must be “narrowly tailored.” Here, however, the tailoring requirement is virtually forsaken inasmuch as the Government offers no justification for applying its absolute ban on sleeping yet is willing to allow respondents to engage in activities – such as feigned sleeping – that is no less burdensome.

A number of noteworthy cases involving the Occupy Wall Street movement have been decided by lower federal courts. See Occupy Minneapolis v. County of Hennepin, 866 F. Supp. 2d 1062 (D. Minn. 2011) (Minneapolis did not violate the First Amendment when it cut off electricity to Occupy Minneapolis protestors assembled in public plazas or when it banned tents in the plaza; city was advancing content-neutral interest in controlling the aesthetic appearance of the plazas); Occupy Fort Myers v. City of Fort Myers, 882 F. Supp. 2d 1320 (M.D. Fla. 2011) (ban on erection of temporary shelters at park occupied by Occupy Fort Myers constitutional; broad permit system attempting to regulate protests and parades at the parks likely unconstitutional, justifying preliminary injunction against enforcement); Occupy Columbia v. Haley, 866 F. Supp. 2d 545 (D.S.C. 2011) (South Carolina attempt to ban protestors after 6 p.m. from occupying park likely unconstitutional, justifying preliminary injunction against enforcement).

An early case to apply the intermediate scrutiny “narrowly tailored” requirement to a time, place, or manner regulation was Grayned v. City of Rockford.33 There the Court declared that an anti-noise ordinance was not invalid on its face which provided that persons adjacent to a school with classes in session “shall not willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session.“ Justice Marshall delivered the Court’s opinion which recited that reasonable time, place, and manner regulations may prohibit expressive activity if, as in Tinker v. Des Moines Independent Community School District, discussed

33 408 U.S. 104, 107, 111-12 (1972), citing Cox v. Louisiana, 379 U.S. 559 (1965) (upholding a ban on picketing in or near a courthouse); Cameron v. Johnson, 390 U.S. 611 (1968) (upholding a ban on picketing that unreasonably interferes with ingress or egress to any county courthouse). See also Faustin v. City and County of Denver, Colo., 423 F.3d 1192 (10th Cir. 2005) (city policy banning signs and banners from highway overpasses narrowly tailored to serve interest in traffic safety).
at § 3.4, it materially disrupts class work or involves substantial disorder or invasion of the rights of others. Justice Marshall said the ordinance went no further than *Tinker* permits, since the ordinance was narrowly tailored to further a substantial interest in not having a substantial disruption of school sessions.

A case where the Court found no ample alternative channels of communication, as thus a failure of the third prong of the intermediate standard of review, occurred in *City of Ladue v. Gilleo*. There, the Court held unconstitutional on its face an ordinance which prohibited all signs within the city except those that fell into one of 10 exemptions, but which did not contain an exemption for signs on private property (other than "For Sale" or "Sold" signs). The challenger wanted to put a 24" by 36" sign on her lawn with the words, "Say No to War in the Persian Gulf, Call Congress Now." For the Court, Justice Stevens wrote that the interest in minimizing visual clutter was valid, but the ordinance did not leave open ample alternative channels for communication. The Court was not convinced that adequate substitutes existed for the important medium of speech being closed off. Justice Stevens gave four reasons why no adequate substitute exists: (1) displaying a sign from one's own residence often carries a message distinct from what can be conveyed by other means; (2) residential signs are unusually cheap and convenient forms of communication, especially for persons of modern means and limited mobility; (3) a special respect for individual liberty in the home has long been part of our culture and our law; and (4) the need to regulate temperate speech from the home is less pressing than the need to mediate among various competing uses for streets and other public facilities.

A similar case of an ordinance that was not narrowly tailored occurred in *Deegan v. Ithaca*. In this case, the Second Circuit held that a municipal ordinance prohibiting any noise audible from 25 feet away was not sufficiently narrowly drawn when applied to a street evangelist to quiet him in a public forum. The court noted that the regulation was substantially broader than necessary, particularly since it would ban the sound of a person stepping in high heel boots, the opening and closing of a door, or the ringing of a cell phone. In *Bowman v. White*, a case involving a public university’s 5-day cap per semester on non-university persons speaking on a designated public forum on campus, the Eighth Circuit held that the 5-day cap was substantially more burdensome than necessary to advance the university’s content-neutral interests in protecting the students’ educational experience, ensuring public safety, and encouraging diverse use of resources. The court noted that a more narrowly drawn policy might permit the plaintiff extra days when the space was not being used by others, but grant preference to individuals who have not already been granted 5 days of use.

---


35 *Id.* at 58.

36 444 F.3d 135, 142-44 (2nd Cir. 2006).

37 444 F.3d 967, 980-83 (8th Cir. 2006).
Another area where courts have considered limitations on picketing rights to protect privacy involves limiting the rights of picketers at funeral services. For a good article addressing this issue, which suggests that narrowly tailored regulations based on the content-neutral reason of protecting privacy of funeral mourners should survive the intermediate review applicable to content-neutral regulations in a public forum, see Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 Maryland L. Rev. 295 (2008). See also Phelps-Roper v. Koster, 713 F.3d 942 (8th Cir. 2013) (law prohibiting protests “within 300 feet of or about” a funeral from one hour before until one hour after funeral constitutional under intermediate review; broader provision banning protests “in front of or about” any funeral unconstitutional as failing to define sufficiently the extent of the spatial ban). An 8-1 Court held in Synder v. Phelps, 131 S. Ct. 1207, 1212 (2011), that where speech involved a matter of public concern (in this case Westboro Baptist Church members protesting against homosexuality at military funerals), the First Amendment shielded protestors from state tort law for intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy, with Justice Alito dissenting.

4. **Considerations Regarding Applying Intermediate Scrutiny in Content-Neutral Cases and How to Determine if the Regulation is Content-Neutral or Content-Based**

As noted at § 1.4.1 end of section, there are four kinds of questions regarding benefits and burdens that can be asked about any statute. Two relate to Equal Protection Clause issues (underinclusiveness and overinclusiveness) and two relate to Due Process Clause issues (service and oppressiveness/restrictiveness). Because First Amendment scrutiny does the jobs of both Equal Protection and Due Process kinds of concerns when applied to free speech issues, both questions of benefits (underinclusiveness and service) and both questions of burdens (overinclusiveness and restrictiveness) are necessary for a complete First Amendment analysis.

For example, as the Court noted in *City of Ladue v. Gilleo*, 38 “[T]he notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles.” As Justice Kennedy noted in *Ward v. Rock Against Racism*, 39 a content-neutral regulation of speech cannot burden substantially more speech than necessary to further the interest (the overinclusiveness inquiry), nor can it place a substantial burden on speech that fails to leave open ample alternative channels for communication (the restrictiveness inquiry) or that do not serve to advance its goals (the service inquiry). Thus, in *City of Los Angeles v. Alameda Books, Inc.*, 40 Justice Kennedy correctly observed that First Amendment analysis must consider both benefits and burdens on the speech. Justice Kennedy noted, “[T]he necessary rationale for applying intermediate scrutiny is the promise that zoning ordinances like this one may reduce the costs of secondary effects [the service inquiry] without substantially reducing speech [the restrictiveness inquiry].”

---


While this aspect of doctrine should be clear, occasionally it can cause some confusion. For example, in his dissent in *Alameda Books*, Justice Souter stated, “Although the goal of intermediate scrutiny is to filter out laws that unduly burden speech, this is achieved by examining the asserted government interest, not the burden on speech, which must simply be no greater than necessary to further that interest.” Justice Souter’s “asserted government interest” is the intermediate requirement of a substantial government interest, and Justice Souter’s “no greater than necessary” analysis is the *overinclusiveness* inquiry, which must be done. Justice Kennedy’s *restrictiveness* inquiry, however, must also be done to do a complete First Amendment intermediate review analysis of burdens. As in *Ward v. Rock Against Racism*, under intermediate review a regulation of speech cannot burden substantially more speech than necessary to further the interest (the *overinclusiveness* inquiry), but it also cannot place a substantial burden on speech that fails to leave open ample alternative channels for communication (the *restrictiveness* inquiry).

Justice Souter’s dissent in *Alameda Books* correctly noted that there are in fact two different versions of intermediate scrutiny used in the Court’s First Amendment cases. One version, which Justice Souter termed the “comparatively softer intermediate scrutiny,” is used for “restrictions going only to time, place, and manner or speech,” since in those cases “[n]o one has to disagree with any message to find something wrong with a loudspeaker at three in the morning.” In other cases, however, where there is a greater reason to “ensure that an asserted rationale does not cloak an illegitimate governmental motive,” as in cases involving the “[r]egulation of commercial speech,” the Court uses the higher intermediate review standard of *Central Hudson Gas & Elec. Corp. v. Public. Serv. Comm’n*, excerpted at § 9.2. As discussed at § 1.4.2 n.87 & 9.2, the “intermediate review with bite” standard of *Central Hudson* is more stringent than basic intermediate scrutiny on the second prong of the test – that is, it requires that the governmental statute satisfy the strict scrutiny requirement of both directly and substantially advancing the government’s interest, not mere indirect, substantial advancement. However, the *Central Hudson* test adopts the intermediate scrutiny test for the third prong of the analysis, by not requiring a least restrictive alternative analysis, but only that the statute not substantially burden more speech than necessary.

Having made these points, Justice Souter correctly observed in *Alameda Books* that regulations of speech that are content-neutral because the government’s focus is on secondary effects are logically different than regulations of speech that are content-neutral because they are merely reasonable time, place, or manner regulations. Historically, such secondary effects regulations, or, in Justice Souter’s words, “content-correlated” regulations, have been given the same “basic” or “softer” intermediate scrutiny as time, place, or manner regulations. Justice Souter argued in *Alameda Books* that such content-correlated regulations should be given higher scrutiny, on the order of *Central Hudson*,

---

41 *Id.* at 464 n.8 (Souter, J., joined by Stevens, J., Ginsburg, J., & Breyer, J., dissenting).


44 *Id.* at 458 n.3, citing *Central Hudson Gas*, 447 U.S. 557, 569 (1980).
because there is a greater reason to fear that pretextual content-based regulation is taking place, even though the Court’s reluctance to inquire into motives, as indicated in O’Brien, excerpted at § 2.1, may make that pretext difficult to prove. In Alameda Books, Justice Souter, joined by Justices Stevens and Ginsburg, indicated his belief that the O’Brien test does represent this more stringent intermediate scrutiny of Central Hudson. This assertion is inaccurate. Historically, as indicated in Justice Kennedy’s majority opinion in Ward v. Rock Against Racism, O’Brien has been viewed as a basic intermediate scrutiny case, similar to time, place, or manner regulations.

It is open to doubt whether it is worth adopting the additional level of rigor supported by Justice Souter’s analysis of “content-correlated” regulations. There is a similar issue about secondary effects cases that involve complete bans on speech, rather than partial time, place, or manner bans. In City of Erie v. Pap’s A.M., excerpted at § 7.2, Justices Stevens and Ginsburg noted that prior to Pap’s A.M. all the Court’s secondary effects cases had not involved complete bans on speech. Difficult line-drawing decisions might have to be made under Justice Souter’s approach if different standards were adopted for “secondary effects” and “time, place, or manner” regulations. What of a regulation based on secondary effects that involves a time, place, or manner ban, as most do? If only complete bans based on secondary effects trigger the higher Central Hudson test, then Souter’s proposed approach would have little effect. Further, it would call for line-drawing on whether a ban on complete nudity, like that in Pap’s A.M., excerpted at § 7.2, is a complete ban on totally nude dancing, as it was viewed by Justices Stevens and Ginsburg, or is merely a manner regulation of permitting erotic dancing but only with a G-string, as viewed by Justice O’Connor for the Court. The Court can avoid all these difficult category questions by just continuing the current approach that any content-neutral secondary effects case, and any content-neutral time, place, or manner regulation, triggers the same intermediate standard of review. Further, any truly complete ban on speech based on secondary effects would seem to have trouble under current doctrine meeting the intermediate prong three restrictiveness requirement that it not be too much of a “substantial burden” on speech, but instead leave open “ample alternative channels for communication.”

With regard to whether a regulation is content-neutral or content-based, the Court muddied the waters a bit in 2015 in Reed v. Town of Gilbert, Arizona. Reed involved an sign code regulation that provided different sizes and lengths of posting times for signs based upon whether the sign was an “Ideological Sign,” “Political Sign,” or “Temporary Directional Sign Relating to a Qualifying Event.” Under traditional doctrine, discussed at §2.1 nn.7-8, use of intermediate review would depend on the town proving they had “actual” or “plausible” content-neutral substantial government interests (e.g., visual clutter, aesthetics, etc.) to justify the regulation. Concurring in the judgment,

---

45 Id. at 455-58 & n.2.

46 Id. at 456 n.2 & 458 n.3 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).


Justice Kagan noted, joined by Justices Ginsburg and Breyer, that in this case the town provided “no reason at all” and “no coherent justification” for the distinctions they drew among signs, and thus the regulation “does not pass strict scrutiny, intermediate scrutiny, or even the laugh test.”\(^{49}\) The majority adopted a rigid rule that if a regulation is content-based “on its face,” strict scrutiny is automatically triggered.\(^{50}\) As Justice Kagan’s opinion noted, this is inconsistent with traditional doctrine, such as in *Renton v. Playtime Theatres, Inc.*, excerpted at § 7.2, where zoning regulations employing “on their face” content-based regulation of “adult motion picture theaters” trigger only intermediate review because the regulation is justified by “actual” or “plausible” secondary effects concern with increased crime around such theaters, particularly prostitution and drug trafficking, and the impact such theaters have on retail trade and maintaining property values.\(^{51}\) It seems unlikely the majority in *Reed* would adopt strict scrutiny in a *Renton*-like case, although that is the logic of the opinion. Hopefully, *Reed’s* approach will not be extended widely.\(^{52}\)

\(^{49}\) *Id.* at 2239 (Kagan, J., joined by Ginsburg & Breyer, JJ., concurring in the judgment).

\(^{50}\) *Id.* at 2228. The breath of *Reed* was mitigated by a concurrence listing ways sign ordinances could avoid strict scrutiny. *Id.* at 2233 (Alito, J., joined by Kennedy & Sotomayor, JJ., concurring) (regulating size for all signs, lighted versus unlighted signs, signs on public vs. private property or commercial vs. residential property, total number of signs, and signs advertising a one-time event). *Cf.* Muslim American Society Freedom Foundation v. District of Columbia, 846 F.3d 391 (D.C. Cir. 2017) (rule requiring event-related signs on city lampposts to be removed within 30 days after the event content neutral and constitutional under intermediate review). But see Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015) (banning “spoken” requests for donations, while allowing “signs,” was content-neutral based on greater coercive effect of spoken request, but after *Reed* is content-based; unconstitutional under strict scrutiny); Herson v. City of Richmond, 631 F. App’x 472 (9th Cir. 2016) (sign height and size restrictions meet strict scrutiny even if content-based).

\(^{51}\) *Id.* at 2238, citing *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986).

\(^{52}\) See, e.g., BBL, Inc. v. City of Angola, 809 F.3d 317, 326 n.1 (7th Cir. 2015) (applying *Renton*, not *Reed*, to regulation of “sexually explicit entertainment”). But see Free Speech Coalition, Inc. v. Attorney Gen. United States, 825 F.3d 149 (3rd Cir. 2016) (requiring adult film producers to keep identity & age of every performer to stop child pornography triggers strict scrutiny after *Reed*; invalid as not least restrictive effective alternative); March v. Mills, 2016 WL 2993168 (D. Me. 2016) (not reported in F. Supp. 3d) (law banning noise with intent to disrupt medical care, such as abortion, content-based under *Reed*; invalid); Champion v. Kentucky, 520 S.W.3d 331(Ky. 2017) (law prohibiting begging or solicitation from public streets or intersections content-based after *Reed*; invalid). *Cf.* Gresham v. Swanson, 866 F.3d 853 (8th Cir. 2017) (statute banning most robocalls unless prior consent obtained a content-neutral regulation triggering only intermediate review). In *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), the Supreme Court held that a ban on a registered sex offender accessing social network sites that permit minors as members, like Facebook or Twitter, was unconstitutional as substantially overbroad assuming intermediate review based on *O’Brien/Renton*. The Court thus dodged whether the law’s facial content-based criteria for determining which websites were regulated should trigger strict scrutiny under *Reed*. 

Page 128
CHAPTER 3: PUBLIC FORUM VERSUS NONPUBLIC FORUM ANALYSIS

§ 3.1 Classic Statement of the Public/Nonpublic Forum Distinction ................. 129

§ 3.2 Modern Development of the Public/Nonpublic Forum Distinction ............ 137

§ 3.3 Classic Cases of Nonpublic Fora versus Public Fora Analysis ............... 151

§ 3.4 Specialized Case of Government as Educator Running Public Schools ....... 164

§ 3.1 Classic Statement of the Public/Nonpublic Forum Distinction

As noted at § 1.2.6 & Table 3, the Court applies a different standard of scrutiny to government regulations of speech in nonpublic forums owned by the government. The leading case on what standard of review to apply in such nonpublic forums remains *Perry Education Association v. Perry Local Educators’ Association*. Decided in 1983, *Perry* held that a school could reserve access to an interschool mail system and teacher mailboxes to the union certified as the exclusive representative of the teachers. Summarizing and organizing precedents, Justice White noted that strict scrutiny applied to content-based regulations in a public forum, on public property which the state has opened for use by the public as a place for expressive activity, or for government attempts to regulate individual speech on an individual’s own “nonpublic” private property. However, with regard to nonpublic forum property owned by the government, the state can impose time, place, or manner restrictions, and also may reserve the forum for its intended purposes, as long as the regulation on speech is “reasonable” and not an effort to suppress speech because the public officials oppose the speaker’s view, *i.e.*, viewpoint discrimination, which would trigger strict scrutiny.

*Perry Education Association v. Perry Local Educators’ Association.*

460 U.S. 37 (1983)

Justice WHITE delivered the opinion of the Court.

Perry Education Association is the duly elected exclusive bargaining representative for the teachers of the Metropolitan School District of Perry Township, Ind. A collective-bargaining agreement with the Board of Education provided that Perry Education Association, but no other union, would have access to the interschool mail system and teacher mailboxes in the Perry Township schools. The issue in this case is whether the denial of similar access to the Perry Local Educators' Association, a rival teacher group, violates the First and Fourteenth Amendments.

The Metropolitan School District of Perry Township, Ind., operates a public school system of 13 separate schools. Each school building contains a set of mailboxes for the teachers. Interschool

---

1 460 U.S. 37, 45-54 (1983).
delivery by school employees permits messages to be delivered rapidly to teachers in the district. The primary function of this internal mail system is to transmit official messages among the teachers and between the teachers and the school administration. In addition, teachers use the system to send personal messages and individual school building principals have allowed delivery of messages from various private organizations.

Prior to 1977, both the Perry Education Association (PEA) and the Perry Local Educators' Association (PLEA) represented teachers in the school district and apparently had equal access to the interschool mail system. In 1977, PLEA challenged PEA's status as de facto bargaining representative for the Perry Township teachers by filing an election petition with the Indiana Education Employment Relations Board (Board). PEA won the election and was certified as the exclusive representative, as provided by Indiana law. Ind. Code Ann. § 20–7.5–1–2(1).

The Board permits a school district to provide access to communication facilities to the union selected for the discharge of the exclusive representative duties of representing the bargaining unit and its individual members without having to provide equal access to rival unions. Following the election, PEA and the school district negotiated a labor contract in which the school board gave PEA “access to teachers' mailboxes in which to insert material” and the right to use the interschool mail delivery system to the extent that the school district incurred no extra expense by such use. The labor agreement noted that these access rights were being accorded to PEA “acting as the representative of the teachers” and went on to stipulate that these access rights shall not be granted to any other “school employee organization” — a term of art defined by Indiana law to mean “any organization which has school employees as members and one of whose primary purposes is representing school employees in dealing with their employer.” The PEA contract with these provisions was renewed in 1980 and is presently in force.

The exclusive access policy applies only to use of the mailboxes and school mail system. PLEA is not prevented from using other school facilities to communicate with teachers. PLEA may post notices on school bulletin boards; may hold meetings on school property after school hours; and may, with approval of the building principals, make announcements on the public address system. Of course, PLEA also may communicate with teachers by word of mouth, telephone, or the United States mail. Moreover, under Indiana law, the preferential access of the bargaining agent may continue only while its status as exclusive representative is insulated from challenge. Ind. Code Ann. § 20-7.5-1-10(c)(4). While a representation contest is in progress, unions must be afforded equal access to such communication facilities.

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which “have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” Hague v. CIO, 307 U.S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Carey v. Brown, 447 U.S.
The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. United States Postal Service v. Council of Greenburgh, 453 U.S. 114, 132 (1981); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535-536 (1980).

A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Widmar v. Vincent, 454 U.S. 263 (1981) (university meeting facilities); City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167 (1976) (school board meeting); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (municipal theater). Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Widmar v. Vincent, supra, 454 U.S., at 269-270.

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” United States Postal Service v. Greenburgh Civic Ass'n, supra, 453 U.S., at 129. In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. Id. at 131, n.7. As we have stated on several occasions, “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” Id. at 129; Greer v. Spock, 424 U.S. 828, 836 (1976); Adderley v. Florida, 385 U.S. 39, 48.

The school mail facilities at issue here fall within this third category. The Court of Appeals recognized that Perry School District's interschool mail system is not a traditional public forum: “We do not hold that a school's internal mail system is a public forum in the sense that a school board may not close it to all but official business if it chooses.” 652 F.2d at 1301. On this point the parties agree. Nor do the parties dispute that, as the District Court observed, the “normal and intended function [of the school mail facilities] is to facilitate internal communication of school related matters to teachers.” Perry Local Educators' Ass'n v. Hohlt, IP 79-189-C (1980). The internal mail system, at least by policy, is not held open to the general public. It is instead PLEA's position that the school mail facilities have become a “limited public forum” from which it may not be excluded because of the periodic use of the system by private non-school connected groups, and PLEA's own unrestricted access to the system prior to PEA's certification as exclusive representative.

Neither of these arguments is persuasive. The use of the internal school mail by groups not affiliated with the schools is no doubt a relevant consideration. If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA could justifiably argue a public forum has been created. This, however, is not the case. As the case comes
before us, there is no indication in the record that the school mailboxes and interschool delivery system are open for use by the general public. Permission to use the system to communicate with teachers must be secured from the individual building principal. There is no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material. We can only conclude that the schools do allow some outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations to use the facilities. This type of selective access does not transform government property into a public forum. In *Greer v. Spock*, 424 U.S. [828], 838 n.10 [(1976)], the fact that other civilian speaker and entertainers had sometimes been invited to appear at Fort Dix did not convert the military base into a public forum. And in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (Opinion of Blackmun, J.), a plurality of the Court concluded that a city transit system's rental of space in its vehicles for commercial advertising did not require it to accept partisan political advertising.

Moreover, even if we assume that by granting access to the Cub Scouts, YMCAs, and parochial schools, the school district has created a “limited” public forum, the constitutional right of access would in any event extend only to other entities of similar character. While the school mail facilities thus might be a forum generally open for use by the Girl Scouts, the local boys' club and other organizations that engage in activities of interest and educational relevance to students, they would not as a consequence be open to an organization such as PLEA, which is concerned with the terms and conditions of teacher employment.

PLEA also points to its ability to use the school mailboxes and delivery system on an equal footing with PEA prior to the collective bargaining agreement signed in 1978. Its argument appears to be that the access policy in effect at that time converted the school mail facilities into a limited public forum generally open for use by employee organizations, and that once this occurred, exclusions of employee organizations thereafter must be judged by the constitutional standard applicable to public forums. The fallacy in the argument is that it is not the forum, but PLEA itself, which has changed. Prior to 1977, there was no exclusive representative for the Perry school district teachers. PEA and PLEA each represented its own members. Therefore the school district's policy of allowing both organizations to use the school mail facilities simply reflected the fact that both unions represented the teachers and had legitimate reasons for use of the system. PLEA's previous access was consistent with the school district's preservation of the facilities for school-related business, and did not constitute creation of a public forum in any broader sense.

Because the school mail system is not a public forum, the School District had no “constitutional obligation per se to let any organization use the school mail boxes.” Connecticut St. Federation of Teachers v. Bd. of Education Members, 538 F.2d 471, 481 (CA2 1976). In the Court of Appeals' view, however, the access policy adopted by the Perry schools favors a particular viewpoint, that of the PEA, on labor relations, and consequently must be strictly scrutinized regardless of whether a public forum is involved. There is, however, no indication that the school board intended to discourage one viewpoint and advance another. We believe it is more accurate to characterize the access policy as based on the *status* of the respective unions rather than their views. Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are
inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the district's legitimate interest in “preserv[ing] the property . . . for the use to which it is lawfully dedicated.” Postal Service, supra, 453 U.S., at 129-130. Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of all Perry Township teachers. Conversely, PLEA does not have any official responsibility in connection with the school district and need not be entitled to the same rights of access to school mailboxes. We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector. We have previously noted that the “designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones.” Abood v. Detroit Bd. of Ed., 431 U.S. 209, 221 (1977). Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools. The policy “serves to prevent the District's schools from becoming a battlefield for inter-union squabbles.”

Justices BRENNAN, with whom Justice MARSHALL, Justice POWELL, and Justice STEVENS join, dissenting.

The Court today holds that an incumbent teachers' union may negotiate a collective bargaining agreement with a school board that grants the incumbent access to teachers' mailboxes and to the interschool mail system and denies such access to a rival union. Because the exclusive access provision in the collective bargaining agreement amounts to viewpoint discrimination that infringes the respondents' First Amendment rights and fails to advance any substantial state interest, I dissent.

The Court addresses only briefly the respondents' claim that the exclusive access provision amounts to viewpoint discrimination. In rejecting this claim, the Court starts from the premise that the school mail system is not a public forum and that, as a result, the board has no obligation to grant access to the respondents. The Court then suggests that there is no indication that the board intended to discourage one viewpoint and to advance another. In the Court's view, the exclusive access policy is based on the status of the respective parties rather than on their views. The Court then states that “implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.” Ante, at 957. According to the Court, “these distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.” Ibid.

As noted, whether the school mail system is a public forum or not the board is prohibited from discriminating among viewpoints on particular subjects. Moreover, whatever the right of public authorities to impose content-based restrictions on access to government property that is a nonpublic forum, once access is granted to one speaker to discuss a certain subject access may not be denied
to another speaker based on his viewpoint. Regardless of the nature of the forum, the critical inquiry is whether the board has engaged in prohibited viewpoint discrimination.

The Court responds to the allegation of viewpoint discrimination by suggesting that there is no indication that the board intended to discriminate and that the exclusive access policy is based on the parties' status rather than on their views. In this case, for the reasons discussed below, see infra, at 965-966, the intent to discriminate can be inferred from the effect of the policy, which is to deny an effective channel of communication to the respondents, and from other facts in the case. In addition, the petitioner's status has nothing to do with whether viewpoint discrimination in fact has occurred. If anything, the petitioner's status is relevant to the question of whether the exclusive access policy can be justified, not to whether the board has discriminated among viewpoints. See infra, at 966.

Addressing the question of viewpoint discrimination directly, free of the Court's irrelevant public forum analysis, it is clear that the exclusive access policy discriminates on the basis of viewpoint. The Court of Appeals found that “the access policy adopted by the Perry schools, in form a speaker restriction, favors a particular viewpoint on labor relation in the Perry schools . . . : the teachers inevitably will receive from [the petitioner] self-laudatory descriptions of its activities on their behalf and will be denied the critical perspective offered by [the respondents].” Perry Local Educators' Association v. Hohlt, 652 F.2d 1286, 1296 (CA7 1981). This assessment of the effect of the policy is eminently reasonable. Moreover, certain other factors strongly suggest that the policy discriminates among viewpoints.

On a practical level, the only reason for the petitioner to seek an exclusive access policy is to deny its rivals access to an effective channel of communication. No other group is explicitly denied access to the mail system. In fact, as the Court points out, ante, at 956, many other groups have been granted access to the system. Apparently, access is denied to the respondents because of the likelihood of their expressing points of view different from the petitioner's on a range of subjects. The very argument the petitioner advances in support of the policy, the need to preserve labor peace, also indicates that the access policy is not viewpoint-neutral.

In short, the exclusive access policy discriminates against the respondents based on their viewpoint. The board has agreed to amplify the speech of the petitioner, while repressing the speech of the respondents based on the respondents' point of view. This sort of discrimination amounts to censorship and infringes the First Amendment rights of the respondents.

In assessing the validity of the exclusive access policy, the Court of Appeals subjected it to rigorous scrutiny. Perry Local Educators' Association v. Hohlt, supra, at 1296. The court pursued this course after a careful review of our cases and a determination that “no case has applied any but the most exacting scrutiny to a content or speaker restriction that substantially tended to favor the advocacy of one point of view on a given issue.” Id., at 1296. The Court of Appeals' analysis is persuasive. In light of the fact that viewpoint discrimination implicates core First Amendment values, the exclusive access policy can be sustained “only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.” Consolidated Edison Company v.

The petitioner also argues, and the Court agrees, that the exclusive access policy is justified by the state's interest in preserving labor peace. As the Court of Appeals found, there is no evidence on this record that granting access to the respondents would result in labor instability. Id., at 1301. In addition, there is no reason to assume that the respondents' messages would be any more likely to cause labor discord when received by members of the majority union than the petitioner's messages would when received by the respondents. Moreover, it is noteworthy that both the petitioner and the respondents had access to the mail system for some time prior to the representation election. There is no indication that this policy resulted in disruption of the school environment.

Although the state's interest in preserving labor peace in the schools in order to prevent disruption is unquestionably substantial, merely articulating the interest is not enough to sustain the exclusive access policy in this case. There must be some showing that the asserted interest is advanced by the policy. In the absence of such a showing, the exclusive access policy must fall.

The decision in Perry was based on earlier decisions in the post-1954 instrumentalist era which had implicitly recognized that governments own property that had not been dedicated to expressive activity. For example, in Adderley v. Florida, a case upholding a criminal trespass conviction of demonstrators on grounds of a jail, Justice Black wrote for the Court, “The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” Similarly, except for viewpoint discrimination, which always triggers strict scrutiny, as noted at § 2.2, a prison can regulate the speech of prisoners for reasons reasonably related to penological objectives under rational review, as noted in Thornburgh v. Abbott, excerpted at § 3.3.1. A similar result was reached in Greer v. Spock with regard to handbill distribution on a military base, and in Brown v. Glines concerning safeguards regarding military security and morale.

Where government owned property has been open to the public, standard First Amendment public forum doctrine applies. For example, in Southeastern Promotions, Ltd. v. Conrad, the promoters

---

of the musical “Hair,” requested to use the municipal auditorium in Chattanooga, Tennessee. The auditorium managers denied the request on the ground that the production would not be in the best interest of the community. The promoters sought an injunction, which was denied on the ground that the production was obscene and not entitled to First Amendment protection. Reversing that judgment, the Court held that the auditorium, having been designed for and dedicated to expressive activities, was a public forum. Since the theater could accommodate the production, the denial of a request constituted the imposition of a prior restraint. This could not be done unless the minimal procedural safeguards specified in *Freedman v. Maryland*, excerpted at § 5.1, were complied met.

Justice White, joined by Chief Justice Burger, and Justice Rehnquist filed dissents. Reflecting more of a Holmesian deference-to-government predisposition, the dissents concluded that where a theater is owned by the city, the court should apply nonpublic forum standards requiring only rational review. Here, it was not unreasonable for the city to limit attractions in its theater to those which would not offend any substantial number of potential theatergoers, where there were no allegations the city was engaged in viewpoint discrimination because of expressions of political or social belief.7

In general, in deciding whether a government-owned forum is a public forum or nonpublic forum, formalist Justices focus more on the government’s intent, and whether the government has expressly, or literally, opened the forum for public use. Holmesian Justices also tend to focus on governmental intent, being predisposed to defer to the government’s contention in litigation that the forum is a nonpublic forum unless the opposite conclusion is clear. In contrast, instrumentalist and natural law Justices focus more on whether the objective nature of the forum is compatible with free speech uses. Based on their predisposition to protect free speech rights, particularly of the poor and dissenters, instrumentalist Justices tend to resolve close questions more in the direction of finding that the forum is a public forum than do natural law Justices.

For example, in 1985, in *Cornelius v. NAACP Legal Defense and Educational Fund*,8 the Court upheld a federal rule limiting its annual workplace charitable fundraising drive (CFC) to organizations that provide or support direct health and welfare services to individuals or their families, thus excluding advocacy, lobbying, and litigating organizations. As to whether the CFC was a public or nonpublic forum, Justice O’Connor said that the Court should consider not only the government’s policy and historical practice, but also the objective nature of the property and its compatibility with expressive activity. In this case, Justice O’Connor said the historical background indicated that CFC was designed to minimize disruption from ad hoc solicitation by lessening the amount of expressive activity occurring on federal property.

7 *Id.* at 564-69 (White, J., joined by Burger, C.J., dissenting); *id.* at 570-74 (Rehnquist, J., dissenting).

Because it was a nonpublic forum, rational review applied. Justice O'Connor said that the reasonableness of government action is judged in light of the purpose served by the forum and all the surrounding circumstances. Applying this test, Justice O'Connor concluded that the purpose of CFC was to minimize disruption, assure fundraising success, and avoid the appearance of political favoritism. The limits on who might participate were reasonable because limiting participation to widely accepted groups likely will avoid controversy and contribute to ultimate success. Further, the President could reasonably conclude that a dollar directly spent is more beneficial than a dollar spent in litigation that might not be successful. Remanded to lower courts was the issue of whether the exclusion was motivated by a desire to suppress a particular point of view. The lower courts had not considered this issue, and the Court did not want to decide the matter in the first instance. If viewpoint discrimination were involved, strict scrutiny would apply even in a nonpublic forum.

Justice Blackmun dissented, with Justice Brennan. Justice Blackmun said that the compatibility part of Justice O'Connor's test was critical to him, so that if speech is found compatible with the normal uses of government property, he would find that the government had opened a limited public forum and would apply strict scrutiny to exclusion policies. Further, he thought the exclusion was viewpoint-based discrimination, triggering strict scrutiny even if it were a nonpublic forum. Applying that level of scrutiny, Justice Blackmun did not find that the interests identified by Justice O'Connor were necessary for a compelling interest. Increasing contributions may be compelling, but that does not justify the exclusion of groups who work to enforce the rights of minorities through litigation. A simple disclaimer would suffice to achieve the government's interest in avoiding the appearance of support. As to avoiding controversy, the government should have to show that the excluded speech would disrupt other activities. In fact, however, the evidence showed increased contributions during years the respondents were all allowed to participate. Justice Stevens also dissented, based on a view that, without regard to public or nonpublic forum analysis, the government's exclusion of the designated charities could not survive rational review.

§ 3.2 Modern Development of the Public/Nonpublic Forum Distinction

The instrumentalist Court never classified any public property like parks or streets as other than a traditional public forum. However, in 1988 it was argued by challengers in *Frisby v. Schultz* that a street should lose its status as a traditional public forum when it runs through a residential neighborhood. This argument was rejected by the Court in an opinion by Justice O'Connor, which noted that since 1939 in *Hague v. Committee for Industrial Organization*, discussed at § 1.1.3 nn.32-33, the Court had uniformly held that public streets and parks are public forums held in “trust” for the public. Applying intermediate scrutiny to a content-neutral regulation in a public forum, the Court upheld a content-neutral ban on picketing directed at a single residence in order to protect residential privacy. Describing residents as a captive audience, Justice O'Connor wrote, “The First

---

9  *Id.* at 813 (Blackmun, J., joined by Brennan, J., dissenting).

10  *Id.* at 833 (Stevens, J., dissenting).

Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’
audience cannot avoid the objectionable speech.” 12

An influential case on whether certain property is a public or nonpublic forum is *International Society for Krishna Consciousness v. Lee*. Close attention should be paid to all the opinions in this case, since given current membership on the Court, there may now be a 5-Justice majority for Justice Kennedy’s approach (Justices Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan), rather than Chief Justice Rehnquist’s majority opinion for the Court.

**International Society for Krishna Consciousness v. Lee**

*505 U.S. 672 (1992)*

Chief Justice REHNQUIST delivered the opinion of the Court.

In this case we consider whether an airport terminal operated by a public authority is a public forum and whether a regulation prohibiting solicitation in the interior of an airport terminal violates the First Amendment.

The relevant facts in this case are not in dispute. Petitioner International Society for Krishna Consciousness, Inc. (ISKCON), is a not-for-profit religious corporation whose members perform a ritual known as sankirtan. The ritual consists of “‘going into public places, disseminating religious literature and soliciting funds to support the religion.’” 925 F.2d 576, 577 (CA2 1991). The primary purpose of this ritual is raising funds for the movement. Ibid.

Respondent Walter Lee, now deceased, was the police superintendent of the Port Authority of New York and New Jersey and was charged with enforcing the regulation at issue. The Port Authority owns and operates three major airports in the greater New York City area: John F. Kennedy International Airport (Kennedy), La Guardia Airport (La Guardia), and Newark International Airport (Newark). The three airports collectively form one of the world's busiest metropolitan airport complexes. They serve approximately 8% of this country's domestic airline market and more than 50% of the trans-Atlantic market. By decade's end they are expected to serve at least 110 million passengers annually. Id., at 578.

The airports are funded by user fees and operated to make a regulated profit. Id., at 581. Most space at the three airports is leased to commercial airlines, which bear primary responsibility for the leasehold. The Port Authority retains control over unleased portions, including La Guardia's Central Terminal Building, portions of Kennedy's International Arrivals Building, and Newark's North

---

12 Justice Brennan, joined by Justice Marshall, dissented and said that the ordinance was not narrowly tailored because it might be applied to a lone, silent individual, walking back and forth with a sign. Justice Stevens, also dissented, viewing the ordinance as “substantially overbroad” and thus in violation of the overbreadth doctrine, discussed at § 5.3.2. *Id.* at 495-96 (Brennan, J., joined by Marshall, J., dissenting); *id.* at 496-99 (Stevens, J., dissenting).
Terminal Building (we refer to these areas collectively as the “terminals”). The terminals are generally accessible to the general public and contain various commercial establishments such as restaurants, snack stands, bars, newsstands, and stores of various types. Id., at 578. Virtually all who visit the terminals do so for purposes related to air travel. These visitors principally include passengers, those meeting or seeing off passengers, flight crews, and terminal employees. Ibid.

The Port Authority has adopted a regulation forbidding within the terminals the repetitive solicitation of money or distribution of literature. The regulation states:

“1. The following conduct is prohibited within the interior areas of buildings or structures at an air terminal if conducted by a person to or with passers-by in a continuous or repetitive manner:

(a) The sale or distribution of any merchandise, including but not limited to jewelry, food stuffs, candles, flowers, badges and clothing.
(b) The sale or distribution of flyers, brochures, pamphlets, books or any other printed or written material.
(c) The solicitation and receipt of funds.” Id., at 578-579.

The regulation governs only the terminals; the Port Authority permits solicitation and distribution on the sidewalks outside the terminal buildings. The regulation effectively prohibits ISKCON from performing sankirtan in the terminals. As a result, ISKCON brought suit seeking declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that the regulation worked to deprive its members of rights guaranteed under the First Amendment. The District Court analyzed the claim under the “traditional public forum” doctrine. It concluded that the terminals were akin to public streets, 721 F.Supp. 572, 577 (SDNY 1989) . . . . This conclusion in turn meant that the Port Authority's terminal regulation could be sustained only if it was narrowly tailored to support a compelling state interest. Id., at 579. In the absence of any argument that the blanket prohibition constituted such narrow tailoring, the District Court granted ISKCON summary judgment. Ibid.

The Court of Appeals affirmed in part and reversed in part. 925 F.2d 576 (1991). Relying on our recent decision in United States v. Kokinda, 497 U.S. 720 (1990), a divided panel concluded that the terminals are not public fora. As a result, the restrictions were required only to satisfy a standard of reasonableness. The Court of Appeals then concluded that, presented with the issue, this Court would find that the ban on solicitation was reasonable, but the ban on distribution was not. ISKCON and one of its members, also a petitioner here, sought certiorari respecting the Court of Appeals' decision that the terminals are not public fora and upholding the solicitation ban. Respondent cross-petitioned respecting the court's holding striking down the distribution ban. We granted both petitions, 502 U.S. 1022 (1992), to resolve whether airport terminals are public fora, a question on which the Circuits have split and on which we once before granted certiorari but ultimately failed to reach. Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987).

The suggestion that the government has a high burden in justifying speech restrictions relating to traditional public fora made its first appearance in Hague v. Committee for Industrial Organization, 307 U.S. 496, 515, 516 (1939). Justice Roberts, concluding that individuals have a right to use
“streets and parks for communication of views,” reasoned that such a right flowed from the fact that “streets and parks . . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” We confirmed this observation in *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), where we held that a residential street was a public forum.

Our recent cases provide additional guidance on the characteristics of a public forum. In *Cornelius v. NAACP Legal Defense and Educational Fund,* we noted that a traditional public forum is property that has as “a principal purpose . . . the free exchange of ideas.” 473 U.S., at 800. Moreover, consistent with the notion that the government – like other property owners – “has power to preserve the property under its control for the use to which it is lawfully dedicated,” Greer, 424 U.S., at 836, the government does not create a public forum by inaction. Nor is a public forum created “whenever members of the public are permitted freely to visit a place owned or operated by the Government.” Ibid. The decision to create a public forum must instead be made “by intentionally opening a nontraditional forum for public discourse.” Cornelius, supra, 473 U.S., at 802. Finally, we have recognized that the location of property also has bearing because separation from acknowledged public areas may serve to indicate that the separated property is a special enclave, subject to greater restriction. United States v. Grace, 461 U.S. 171, 179-180 (1983).

These precedents foreclose the conclusion that airport terminals are public fora. Reflecting the general growth of the air travel industry, airport terminals have only recently achieved their contemporary size and character. See H. Hubbard, M. McClintock, & F. Williams, *Airports: Their Location, Administration and Legal Basis* 8 (1930) (noting that the United States had only 807 airports in 1930). But given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having “immemorially . . . time out of mind” been held in the public trust and used for purposes of expressive activity. Hague, supra, 307 U.S., at 515. Moreover, even within the rather short history of air transport, it is only “[i]n recent years [that] it has become a common practice for various religious and non-profit organizations to use commercial airports as a forum for the distribution of literature, the solicitation of funds, the proselytizing of new members, and other similar activities.” 45 Fed. Reg. 35314 (1980). Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity. Nor can we say that these particular terminals, or airport terminals generally, have been intentionally opened by their operators to such activity; the frequent and continuing litigation evidencing the operators' objections belies any such claim. See n.2, supra. In short, there can be no argument that society's time-tested judgment, expressed through acquiescence in a continuing practice, has resolved the issue in petitioners' favor.

Petitioners attempt to circumvent the history and practice governing airport activity by pointing our attention to the variety of speech activity that they claim historically occurred at various “transportation nodes” such as rail stations, bus stations, wharves, and Ellis Island. Even if we were inclined to accept petitioner's historical account describing speech activity at these locations, an account respondent contests, we think that such evidence is of little import for two reasons. First, much of the evidence is irrelevant to public fora analysis, because sites such as bus and rail terminals traditionally have had private ownership. See United Transp. Union v. Long Island R. Co., 455 U.S.
The development of privately owned parks that ban speech activity would not change the public fora status of publicly held parks. But the reverse is also true. The practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport.

Second, the relevant unit for our inquiry is an airport, not “transportation nodes” generally. When new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a new inquiry whether the transportation necessities are compatible with various kinds of expressive activity. To make a category of “transportation nodes,” therefore, would unjustifiably elide what may prove to be critical differences of which we should rightfully take account. The “security magnet,” for example, is an airport commonplace that lacks a counterpart in bus terminals and train stations. And public access to air terminals is also not infrequently restricted—just last year the Federal Aviation Administration required airports for a 4-month period to limit access to areas normally publicly accessible. See 14 CFR 107.11(f) (1991) and U.S. Dept. of Transportation News Release, Office of Assistant Secretary for Public Affairs, Jan. 18, 1991. To blithely equate airports with other transportation centers, therefore, would be a mistake.

The restrictions here challenged, therefore, need only satisfy a requirement of reasonableness. We reiterate what we stated in Kokinda: The restriction “‘need only be reasonable; it need not be the most reasonable or the only reasonable limitation.’” 497 U.S., at 730 (plurality opinion) (quoting Cornelius, supra, 473 U.S., at 808). We have no doubt that under this standard the prohibition on solicitation passes muster.

We have on many prior occasions noted the disruptive effect that solicitation may have on business. “Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card.” Kokinda, supra, at 734; see Heffron, 452 U.S., at 663 (Blackmun, J., concurring in part and dissenting in part). Passengers who wish to avoid the solicitor may have to alter their paths, slowing both themselves and those around them. The result is that the normal flow of traffic is impeded. Id., at 653. This is especially so in an airport, where “[a]ir travelers, who are often weighted down by cumbersome baggage . . . may be hurrying to catch a plane or to arrange ground transportation.” 925 F.2d, at 582. Delays may be particularly costly in this setting, as a flight missed by only a few minutes can result in hours worth of subsequent inconvenience.

In addition, face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation. See, e.g., International Soc. for Krishna Consciousness, Inc. v. Barber, 506 F. Supp. 147, 159-163 (NDNY 1980), rev'd on other grounds, 650 F.2d 430 (CA2 1981). The unsavory solicitor can also commit fraud through concealment of his affiliation or through deliberate efforts to shortchange those who agree to purchase. 506 F. Supp. at 159-163. Compounding this problem
is the fact that, in an airport, the targets of such activity frequently are on tight schedules. This in turn makes such visitors unlikely to stop and formally complain to airport authorities. As a result, the airport faces considerable difficulty in achieving its legitimate interest in monitoring solicitation activity to assure that travelers are not interfered with unduly.

The Port Authority has concluded that its interest in monitoring the activities can best be accomplished by limiting solicitation and distribution to the sidewalk areas outside the terminals. Sloane Supp. Affidavit, ¶ 11, App. 514. This sidewalk area is frequented by an overwhelming percentage of airport users, see id., at ¶ 14, App. 515-516 (noting that no more than 3% of air travelers passing through the terminals are doing so on intraterminal flights, i.e., transferring planes). Thus the resulting access of those who would solicit the general public is quite complete. In turn we think it would be odd to conclude that the Port Authority's terminal regulation is unreasonable despite the Port Authority having otherwise assured access to an area universally traveled.

The inconveniences to passengers and the burdens on Port Authority officials flowing from solicitation activity may seem small, but viewed against the fact that “pedestrian congestion is one of the greatest problems facing the three terminals,” 925 F.2d, at 582, the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive. Moreover, “[t]he justification for the Rule should not be measured by the disorder that would result from granting an exemption solely to ISKCON.” Heffron, supra, 452 U.S., at 652. For if ISKCON is given access, so too must other groups. “Obviously, there would be a much larger threat to the State's interest in crowd control if all other religious, nonreligious, and noncommercial organizations could likewise move freely.” 452 U.S., at 653. As a result, we conclude that the solicitation ban is reasonable.

Justice O'CONNOR, concurring in No. 91-155 and concurring in the judgment in No. 91-339.

In the decision below, the Court of Appeals upheld a ban on solicitation of funds within the airport terminals operated by the Port Authority of New York and New Jersey, but struck down a ban on the repetitive distribution of printed or written material within the terminals. 925 F.2d 576 (CA2 1991). I would affirm both parts of that judgment.

I concur in the Court's opinion in No. 91-155, and agree that publicly owned airports are not public fora. Unlike public streets and parks, both of which our First Amendment jurisprudence has identified as “traditional public fora,” airports do not count among their purposes the “free exchange of ideas,” Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985); they have not “by long tradition or by government fiat . . . been devoted to assembly and debate,” Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983); nor have they “time out of mind, . . . been used for purposes of . . . communicating thoughts between citizens, and discussing public questions,” Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939). Although most airports do not ordinarily restrict public access, “[p]ublicly owned or operated property does not become a ‘public forum’ simply because members of the public are permitted to come and go at will.” United States v. Grace, 461 U.S. 171, 177 (1983); see also Greer v. Spock, 424 U.S. 828, 836 (1976). “[W]hen government property is not dedicated to open communication the government may – without further justification – restrict use to those who participate in the forum's official
business.” Perry, supra, 460 U.S. at 53. There is little doubt that airports are among those publicly owned facilities that could be closed to all except those who have legitimate business there. See Grace, supra, 461 U.S. at 178. Public access to airports is thus not “inherent in the open nature of the locations,” as it is for most streets and parks, but is rather a “matter of grace by government officials.” United States v. Kokinda, 497 U.S. 720, 743 (1990) (Brennan, J., dissenting). I also agree with the Court that the Port Authority has not expressly opened its airports to the types of expression at issue here, see 112 S.Ct., at 2706, and therefore has not created a “limited” or “designated” public forum relevant to this case.

For these reasons, the Port Authority's restrictions on solicitation and leafletting within the airport terminals do not qualify for the strict scrutiny that applies to restriction of speech in public fora. That airports are not public fora, however, does not mean that the government can restrict speech in whatever way it likes. For example, in Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569 (1987), we unanimously struck down a regulation that prohibited “all First Amendment activities” in the Los Angeles International Airport (LAX) without even reaching the question whether airports were public fora. Id., at 574-575. We found it “obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech.” Id., at 575. Moreover, we have consistently stated that restrictions on speech in nonpublic fora are valid only if they are “reasonable” and “not an effort to suppress expression merely because public officials oppose the speaker's view.” Perry, supra, 460 U.S., at 46; see also Kokinda, supra, 497 U.S. at 731; Cornelius, supra, 473 U.S. at 800; Lehman v. Shaker Heights, 418 U.S. 298, 303 (1974). The determination that airports are not public fora thus only begins our inquiry.

“The reasonableness of the Government's restriction [on speech in a nonpublic forum] must be assessed in light of the purpose of the forum and all the surrounding circumstances.” Cornelius, supra, 473 U.S. at 809. “[C]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.”” Kokinda, supra, 497 U.S. at 732, quoting Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650-651 (1981).

Applying that standard, I agree with the Court in No. 91-155 that the ban on solicitation is reasonable. Face-to-face solicitation is incompatible with the airport's functioning in a way that the other, permitted activities are not. We have previously observed that “[s]olicitation impedes the normal flow of traffic [because it] requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. . . . As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information.” Kokinda, 497 U.S., at 733-734 (plurality opinion) (citations omitted); id., at 739 (Kennedy, J., concurring in judgment) (accepting Postal Service's judgment that, given its past experience, “in-person solicitation deserves different treatment from alternative forms of solicitation and expression”); Heffron, supra, 452 U.S.
at 657 (Brennan, J., concurring in part and dissenting in part) (upholding partial restriction on solicitation at fairgrounds because of state interest “in protecting its fairgoers from fraudulent, deceptive, and misleading solicitation practices”); 452 U.S., at 665 (Blackmun, J., concurring in part and dissenting in part) (upholding partial restriction on solicitation because of the “crowd control problems” it creates). The record in this case confirms that the problems of congestion and fraud that we have identified with solicitation in other contexts have also proved true in the airports' experience. See App. 67-111 (affidavits). Because airport users are frequently facing time constraints, and are traveling with luggage or children, the ban on solicitation is a reasonable means of avoiding disruption of an airport’s operation.

In my view, however, the regulation banning leafletting – or, in the Port Authority's words, the “continuous or repetitive . . . distribution of . . . printed or written material” – cannot be upheld as reasonable on this record. I therefore concur in the judgment in No. 91–339, 505 U.S. 830, striking down that prohibition. While the difficulties posed by solicitation in a nonpublic forum are sufficiently obvious that its regulation may “rin[g] of common-sense,” Kokinda, 497 U.S., at 734 (internal quotation marks and citation omitted), the same is not necessarily true of leafletting. To the contrary, we have expressly noted that leafletting does not entail the same kinds of problems presented by face-to-face solicitation. Specifically, “[o]ne need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand. . . . 'The distribution of literature does not require that the recipient stop in order to receive the message the speaker wishes to convey; instead the recipient is free to read the message at a later time.'” Ibid. (plurality opinion), quoting Heffron, supra, 452 U.S., at 665 (Blackmun, J., concurring in part and dissenting in part). With the possible exception of avoiding litter, see Schneider v. State (Town of Irvington), 308 U.S. 147, 162 (1939), it is difficult to point to any problems intrinsic to the act of leafletting that would make it naturally incompatible with a large, multipurpose forum such as those at issue here.

Justice KENNEDY, with whom Justice BLACKMUN, Justice STEVENS, and Justice SOUTER join as to Part I, concurring in the judgments.

I agree with the Court that government property of a type which by history and tradition has been available for speech activity must continue to be recognized as a public forum. Ante, at 2706. In my view, however, constitutional protection is not confined to these properties alone. Under the proper circumstances I would accord public forum status to other forms of property, regardless of their ancient or contemporary origins and whether or not they fit within a narrow historic tradition. If the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property. In conducting the last inquiry, courts must consider the consistency of those uses with expressive activities in general, rather than the
specific sort of speech at issue in the case before it; otherwise the analysis would be one not of classification but rather of case-by-case balancing, and would provide little guidance to the State regarding its discretion to regulate speech. Courts must also consider the availability of reasonable time, place, and manner restrictions in undertaking this compatibility analysis. The possibility of some theoretical inconsistency between expressive activities and the property's uses should not bar a finding of a public forum, if those inconsistencies can be avoided through simple and permitted regulations.

Under this analysis, it is evident that the public spaces of the Port Authority's airports are public forums. First, the District Court made detailed findings regarding the physical similarities between the Port Authority's airports and public streets. 721 F. Supp. 572, 576-577 (SDNY 1989). These findings show that the public spaces in the airports are broad, public thoroughfares full of people and lined with stores and other commercial activities. An airport corridor is of course not a street, but that is not the proper inquiry. The question is one of physical similarities, sufficient to suggest that the airport corridor should be a public forum for the same reasons that streets and sidewalks have been treated as public forums by the people who use them.

Second, the airport areas involved here are open to the public without restriction. Ibid. Plaintiffs do not seek access to the secured areas of the airports, nor do I suggest that these areas would be public forums. And while most people who come to the Port Authority's airports do so for a reason related to air travel, either because they are passengers or because they are picking up or dropping off passengers, this does not distinguish an airport from streets or sidewalks, which most people use for travel. Further, the group visiting the airports encompasses a vast portion of the public: In 1986 the Authority's three airports served over 78 million passengers. It is the very breadth and extent of the public's use of airports that makes it imperative to protect speech rights there. Of course, airport operators retain authority to restrict public access when necessary, for instance to respond to special security concerns. But if the Port Authority allows the uses and open access to airports that is shown on this record, it cannot argue that some vestigial power to change its practices bars the conclusion that its airports are public forums, any more than the power to bulldoze a park bars a finding that a public forum exists so long as the open use does.

Third, and perhaps most important, it is apparent from the record, and from the recent history of airports, that when adequate time, place, and manner regulations are in place, expressive activity is quite compatible with the uses of major airports. The Port Authority's primary argument to the contrary is that the problem of congestion in its airports' corridors makes expressive activity inconsistent with the airports' primary purpose, which is to facilitate air travel. The First Amendment is often inconvenient. But that is beside the point. Inconvenience does not absolve the government of its obligation to tolerate speech. The Authority makes no showing that any real impediments to the smooth functioning of the airports cannot be cured with reasonable time, place, and manner regulations. In fact, the history of the Authority's own airports, as well as other major airports in this country, leaves little doubt that such a solution is quite feasible. The Authority has for many years permitted expressive activities by petitioners and others, without any apparent interference with its ability to meet its transportation purposes. App. 462, 469-470; see also ante, at 2714 (opinion of O'Connor, J.). The Federal Aviation Administration, in its operation of the airports of the Nation's
capital, has issued rules which allow regulated expressive activity within specified areas, without any suggestion that the speech would be incompatible with the airports' business. 14 CFR §§ 159.93, 159.94 (1992). And, in fact, expressive activity has been a commonplace feature of our Nation's major airports for many years, in part because of the wide consensus among the Courts of Appeals, prior to the decision in these cases, that the public spaces of airports are public forums. See, e.g., Chicago Area Military Project v. Chicago, 508 F.2d 921 (CA7), cert. denied, 421 U.S. 992 (1975); Fernandes v. Limmer, 663 F.2d 619 (CA5 1981), cert. dism'd, 458 U.S. 1124 (1982); United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 228 U.S.App.D.C. 191, 708 F.2d 760 (1983); Jews for Jesus, Inc. v. Board of Airport Comm'rs, 785 F.2d 791 (CA9 1986), aff'd on other grounds, 482 U.S. 569 (1987); Jamison v. St. Louis, 828 F.2d 1280 (CA8 1987), cert. denied, 485 U.S. 987 (1988). . . . The Port Authority makes a half-hearted argument that the special security concerns associated with airports suggest they are not public forums; but this position is belied by the unlimited public access the Authority allows to its airports. This access demonstrates that the Port Authority does not consider the general public to pose a serious security threat, and there is no evidence in the record that persons engaged in expressive activities are any different.

II

It is my view, however, that the Port Authority's ban on the “solicitation and receipt of funds” within its airport terminals should be upheld under the standards applicable to speech regulations in public forums. The regulation may be upheld as either a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct. The two standards have considerable overlap in a case like this one.

It is well settled that “even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” Ward, supra, at 791 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). We have held further that the government in appropriate circumstances may regulate conduct, even if the conduct has an expressive component. United States v. O'Brien, 391 U.S. 367 (1968). And in several recent cases we have recognized that the standards for assessing time, place, and manner restrictions are little, if any, different from the standards applicable to regulations of conduct with an expressive component. Clark, supra, 468 U.S., at 298, and n 8; Ward, supra, 491 U.S., at 798; Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (plurality opinion); see generally Kalven, 1965 S. Ct. Rev., at 23, 27 (arguing that all speech contains elements of conduct which may be regulated). The confluence of the two tests is well demonstrated by a case like this, where the government regulation at issue can be described with equal accuracy as a regulation of the manner of expression, or as a regulation of conduct with an expressive component.

So viewed, I believe the Port Authority's rule survives our test for speech restrictions in the public forum. In-person solicitation of funds, when combined with immediate receipt of that money, creates a risk of fraud and duress that is well recognized, and that is different in kind from other forms of expression or conduct. Travelers who are unfamiliar with the airport, perhaps even unfamiliar with
this country, its customs, and its language, are an easy prey for the money solicitor. I agree in full
with the Court's discussion of these dangers in No. 91-155. Ante, at 2708-2709; ante, at 2713
(opinion of O'Connor, J.). I would add that our precedents, as well as the actions of coordinate
branches of Government, support this conclusion. We have in the past recognized that in-person
solicitation has been associated with coercive or fraudulent conduct. Cantwell v. Connecticut, 310
U.S. 296, 306 (1940); Riley, supra, 487 U.S., at 800; Heffron v. International Soc. for Krishna
Consciousness, Inc., 452 U.S. 640, 657 (1981) (Brennan, J., concurring in part and dissenting in
part); Schaumburg, supra, 444 U.S., at 636-638. In addition, the Federal Government has adopted
regulations which acknowledge and respond to the serious problems associated with solicitation.
The National Park Service has enacted a flat ban on the direct solicitation of money in the parks of
the Nation's capital within its control. 36 CFR § 7.96(h) (1991); see also United States v. Kokinda,
497 U.S., at 739 (Kennedy, J., concurring in judgment). Also, the Federal Aviation Administration,
in its administration of the airports of Washington, D.C., even while permitting the solicitation of
funds has adopted special rules to prevent coercive, harassing, or repetitious behavior. 14 CFR §
159.94(e)-(h) (1992). And in the commercial sphere, the Federal Trade Commission has long held
that “it constitutes an unfair and deceptive act or practice” to make a door-to-door sale without
allowing the buyer a 3-day “cooling-off period” during which time he or she may cancel the sale.
16 CFR § 429.1 (1992). All of these measures are based on a recognition that requests for immediate
payment of money create a strong potential for fraud or undue pressure, in part because of the lack
of time for reflection. As the Court recounts, questionable practices associated with solicitation can
include the targeting of vulnerable and easily coerced persons, misrepresentation of the solicitor's
cause, and outright theft. Ante, at 2708-2709; see also International Soc. for Krishna Consciousness,
Inc. v. Barber, 506 F. Supp. 147, 159-163 (NDNY 1980), rev'd on other grounds, 650 F.2d 430 (CA2

I have little difficulty in deciding that the Port Authority has left open ample alternative channels
for the communication of the message which is an aspect of solicitation. As already discussed, the
Authority's rule does not prohibit all solicitation of funds: It restricts only the manner of the
solicitation, or the conduct associated with solicitation, to prohibit immediate receipt of the solicited
money. Requests for money continue to be permitted, and in the course of requesting money
solicitors may explain their cause, or the purposes of their organization, without violating the
regulation. It is only if the solicitor accepts immediate payment that a violation occurs. Thus the
solicitor can continue to disseminate his message, for example, by distributing preaddressed
envelopes in which potential contributors may mail their donations.

Much of what I have said about the solicitation of funds may seem to apply to the sale of literature,
but the differences between the two activities are of sufficient significance to require they be
distinguished for constitutional purposes. The Port Authority's flat ban on the distribution or sale of
printed material must, in my view, fall in its entirety. The application of our time, place, and manner
test to the ban on sales leads to a result quite different from the solicitation ban. For one, the
government interest in regulating the sales of literature is not as powerful as in the case of
solicitation. The danger of a fraud arising from such sales is much more limited than from pure
solicitation, because in the case of a sale the nature of the exchange tends to be clearer to both
parties. Also, the Port Authority's sale regulation is not as narrowly drawn as the solicitation rule,
since it does not specify the receipt of money as a critical element of a violation. And perhaps most important, the flat ban on sales of literature leaves open fewer alternative channels of communication than the Port Authority's more limited prohibition on the solicitation and receipt of funds. Given the practicalities and ad hoc nature of much expressive activity in the public forum, sales of literature must be completed in one transaction to be workable. Attempting to collect money at another time or place is a far less plausible option in the context of a sale than when soliciting donations, because the literature sought to be sold will under normal circumstances be distributed within the forum. These distinctions have been recognized by the National Park Service, which permits the sale or distribution of literature, while prohibiting solicitation. 36 CFR § 7.96(j)(2) (1991). Thus the Port Authority's regulation allows no practical means for advocates and organizations to sell literature within the public forums which are its airports.

For these reasons I agree that the Court of Appeals should be affirmed in full in finding the Port Authority's ban on the distribution or sale of literature unconstitutional, but upholding the prohibition on solicitation and immediate receipt of funds.

Justice SOUTER, with whom Justice BLACKMUN and Justice STEVENS join, concurring in the judgment in No. 91-339 and dissenting in No. 91-155.

I join in Part I of Justice Kennedy's opinion and the judgment of affirmance in No. 91-339. I agree with Justice Kennedy's view of the rule that should determine what is a public forum and with his conclusion that the public areas of the airports at issue here qualify as such.

From the Court's conclusion in No. 91-155, however, sustaining the total ban on solicitation of money for immediate payment, I respectfully dissent. “We have held the solicitation of money by charities to be fully protected as the dissemination of ideas. See [Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781, 787-789 (1988);] Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 959-961 (1984). It is axiomatic that, although fraudulent misrepresentation of facts can be regulated, the dissemination of ideas cannot be regulated to prevent it from being unfair or unreasonable.” Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781, 803 (1988) (Scalia, J., concurring in part and concurring in judgment) (some citations omitted).

Even if I assume, arguendo, that the ban on the petitioners' activity at issue here is both content neutral and merely a restriction on the manner of communication, the regulation must be struck down for its failure to satisfy the requirements of narrow tailoring to further a significant state interest, see, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984), and availability of “ample alternative channels for communication,” Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

Even if respondent comes closest to justifying the restriction as one furthering the government's interest in preventing coercion and fraud. The claim to be preventing coercion is weak to start with. While a solicitor can be insistent, a pedestrian on the street or airport concourse can simply walk away or walk on. In any event, we have held in a far more coercive context than this one, that of a black boycott of white stores in Claiborne County, Mississippi, that “[s]peech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.” NAACP v.
Claiborne Hardware Co., 458 U.S. 886, 910 (1982). See also Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (“The claim that . . . expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper”). Since there is here no evidence of any type of coercive conduct, over and above the merely importunate character of the open and public solicitation, that might justify a ban, the regulation cannot be sustained to avoid coercion.

As for fraud, our cases do not provide government with plenary authority to ban solicitation just because it could be fraudulent. “Broad prophylactic rules in the area of free expression are suspect,” NAACP v. Button, 371 U.S. 415, 438 (1963), and more than a laudable intent to prevent fraud is required to sustain the present ban. See, e.g., Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 636-638 (1980) (“The Village, consistently with the First Amendment, may not label such groups 'fraudulent' and bar them from canvassing on the streets and house to house”). The evidence of fraudulent conduct here is virtually nonexistent. It consists of one affidavit describing eight complaints, none of them substantiated, “involving some form of fraud, deception, or larceny” over an entire 11-year period between 1975 and 1986, during which the regulation at issue here was, by agreement, not enforced. See Brief for Respondent 44; Brief for Petitioners 46. Petitioners claim, and respondent does not dispute, that by the Port Authority's own calculation, there has not been a single claim of fraud or misrepresentation since 1981. Ibid. As against these facts, respondent's brief is ominous in adding that “[t]he Port Authority is also aware that members of [International Society for Krishna Consciousness] have engaged in misconduct elsewhere.” Brief for Respondent 44. This is precisely the type of vague and unsubstantiated allegation that could never support a restriction on speech. Finally, the fact that other governmental bodies have also enacted restrictions on solicitation in other places, see, e.g., 36 CFR § 7.96(h) (1991), is not evidence of fraudulent conduct.

Even assuming a governmental interest adequate to justify some regulation, the present ban would fall when subjected to the requirement of narrow tailoring. See Schaumburg, supra, 444 U.S., at 637 (“The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms”). “Precision of regulation must be the touchstone. . . .” Button, supra, 371 U.S., at 438. Thus, in *Schaumburg* we said: “The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute. . . .” 444 U.S. at 637-638 (citations and footnotes omitted).

Similarly, in *Riley* we required the State to cure its perceived fraud problem by more narrowly tailored means than compelling disclosure by professional fundraisers of the amount of collected funds that were actually turned over to charity during the previous year: “In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception, more benign and narrowly tailored options are available. For example, as a
general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file. This procedure would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation. Alternatively, the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements.” 487 U.S., at 800.

Finally, I do not think the Port Authority's solicitation ban leaves open the “ample” channels of communication required of a valid content-neutral time, place, and manner restriction. A distribution of preaddressed envelopes is unlikely to be much of an alternative. The practical reality of the regulation, which this Court can never ignore, is that it shuts off a uniquely powerful avenue of communication for organizations like the International Society for Krishna Consciousness, and may, in effect, completely prohibit unpopular and poorly funded groups from receiving funds in response to protected solicitation. Cf. Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 93 (1977) (“Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like”).

Since Lee, lower courts have tended to reflect more the combination of considering both “history and tradition” and the “objective, physical characteristics of the property” of Justice Kennedy’s concurrence in Lee, while disagreeing in individual cases about application of the doctrine.13 In a recent case about an airport, however, the lower court properly felt obliged to follow the core holding of the majority in Lee that an airport terminal is a nonpublic forum. McDonnell v. City & County of Denver, 878 F.3d 1247, 1250-52 (10th Cir. 2018).

The same standards apply to privately-owned property if sufficiently entwined with the state that they trigger First Amendment analysis under the state action doctrine. This could apply to private airports built with state funds; privately-run prisons performing the public function of incarceration; charter schools with sufficient connections to the state; or otherwise.14

---

13 See, e.g., Ball v. City of Lincoln, 870 F.3d 722, 731-36 (8th Cir. 2017) (sports arena’s plaza’s physical size, shape and unique characteristics support concluding this plaza is a nonpublic forum); United Church of Christ v. Gateway Econ. Dev.Corp., 383 F.3d 449, 451-53 (6th Cir. 2004) (private sidewalk around sports arena encircling a privately owned sports arena complex, which appears like any public sidewalk and is used as a public thoroughfare, is a public forum). See also Powell v. Noble, 36 F. Supp. 3d 818, 830-36 (S.D. Iowa 2014) (state fairgrounds where 100,000 people per day attend during state fair a nonpublic forum given physical concern with traffic flow/congestion); Angeline v. Mahoning County Agricultural Society, 933 F. Supp. 627, 633-34 (N.D. Ohio 1998) (municipal fairgrounds a public forum in context of regulation not concerned with traffic flow/congestion, but prohibiting all fortune-telling, palmistry, phrenology, or horoscope readings at fairs).

14 See, e.g., Pruneyard Shopping Center v. Robins, 447 U.S. 74, 80-88 (1980) (privately-owned shopping center, held to be state actor by California Supreme Court, treated as public entity for First Amendment free speech analysis, not treated as a private party).
§ 3.3 Classic Cases of Nonpublic Forum Analysis

1. Prisons

In *Adderley v. Florida*, a case upholding a criminal trespass conviction of demonstrators on grounds of a jail, Justice Black wrote for the Court, “The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” Similarly, with the exception of viewpoint discrimination, which always triggers strict scrutiny, as noted at § 2.2, a prison can regulate the speech of prisoners for reasons “reasonably related to legitimate penological interests,” as in *Thornburgh v. Abbott*.

Of course, if the concern is with outgoing correspondence, and thus First Amendment rights of non-prisoners are involved, the Court will apply public forum standards, typically intermediate review, based on a content-neutral concern with security and public safety, as was applied in *Procunier v. Martinez*, 416 U.S. 396 (1974), cited in the *Thornburgh* case below.

*Thornburgh v. Abbott*

490 U.S. 401 (1989)

Justice BLACKMUN delivered the opinion of the Court.

Regulations promulgated by the Federal Bureau of Prisons broadly permit federal prisoners to receive publications from the “outside,” but authorize prison officials to reject incoming publications found to be detrimental to institutional security. For 15 years, respondents, a class of inmates and certain publishers, have claimed that these regulations violate their First Amendment rights under the standard of review enunciated in *Procunier v. Martinez*, 416 U.S. 396 (1974). They mount a facial challenge to the regulations as well as a challenge to the regulations as applied to 46 specific publications excluded by the Bureau.

After a 10-day bench trial, the District Court refrained from adopting the *Martinez* standard. Instead, it favored an approach more deferential to the judgment of prison authorities and upheld the regulations without addressing the propriety of the 46 specific exclusions. App. to Pet. for Cert. 26a, 43a-47a. The Court of Appeals, on the other hand, utilized the *Martinez* standard, found the regulations wanting, and remanded the case to the District Court for an individualized determination of the constitutionality of the 46 exclusions. Abbott v. Meese, 263 U.S. App. D.C. 186, 824 F.2d 1166 (1987).

Petitioners, officials of the Department of Justice and the Bureau of Prisons, sought certiorari. We granted the writ in order to determine the appropriate standard of review. Meese v. Abbott, 485 U.S. 1020 (1988).

---

We now hold that the District Court correctly anticipated that the proper inquiry in this case is whether the regulations are “reasonably related to legitimate penological interests,” Turner v. Safley, 482 U.S. 78, 89 (1987), and we conclude that under this standard the regulations are facially valid. We therefore disagree with the Court of Appeals on the issue of facial validity, but we agree with that court's remand of the case to the District Court for a determination of the validity of the regulations as applied to each of the 46 publications.

We are concerned primarily with the regulations set forth at 28 CFR §§ 540.70 and 540.71 (1988), first promulgated in 1979. These generally permit an inmate to subscribe to, or to receive, a publication without prior approval, but authorize the warden to reject a publication in certain circumstances. The warden may reject it “only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.” § 540.71(b). The warden, however, may not reject a publication “solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant.” Ibid. The regulations contain a nonexhaustive list of criteria which may support rejection of a publication. The warden is prohibited from establishing an excluded list of publications: each issue of a subscription publication is to be reviewed separately. § 540.71. The regulatory criteria for rejecting publications have been supplemented by Program Statement No. 5266.5, which provides further guidance on the subject of sexually explicit material.

The regulations provide procedural safeguards for both the recipient and the sender. The warden may designate staff to screen and, where appropriate, to approve incoming publications, but only the warden may reject a publication. § 540.70(b). The warden must advise the inmate promptly in writing of the reasons for the rejection, § 540.71(d), and must provide the publisher or sender with a copy of the rejection letter, § 540.71(e). The notice must refer to “the specific article(s) or material(s) considered objectionable.” § 540.71(d). The publisher or sender may obtain an independent review of the warden's rejection decision by a timely writing to the Regional Director of the Bureau. § 540.71(e). An inmate may appeal through the Bureau's Administrative Remedy Procedure. See §§ 542.10 to 542.16. The warden is instructed to permit the inmate to review the rejected material for the purpose of filing an appeal “unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.” § 540.71(d).

There is little doubt that the kind of censorship just described would raise grave First Amendment concerns outside the prison context. It is equally certain that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,” Turner v. Safley, 482 U.S., at 84, nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the “inside,” id., at 94-99; Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974). We have recognized, however, that these rights must be exercised with due regard for the “inordinately difficult undertaking” that is modern prison administration. Turner v. Safley, 482 U.S., at 85.

In particular, we have been sensitive to the delicate balance that prison administrators must strike between the order and security of the internal prison environment and the legitimate demands of
those on the “outside” who seek to enter that environment, in person or through the written word. Many categories of noninmates seek access to prisons. Access is essential to lawyers and legal assistants representing prisoner clients, see Procunier v. Martinez, 416 U.S. 396 (1974), to journalists seeking information about prison conditions, see Pell v. Procunier, supra, and to families and friends of prisoners who seek to sustain relationships with them, see Procunier v. Martinez, supra. All these claims to prison access undoubtedly are legitimate; yet prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison. Acknowledging the expertise of these officials and that the judiciary is “ill equipped” to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world. Id., at 404-405.

In this case, there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners. The question here, as it has been in our previous First Amendment cases in this area, is what standard of review this Court should apply to prison regulations limiting that access.

Martinez was our first significant decision regarding First Amendment rights in the prison context. There, the Court struck down California regulations concerning personal correspondence between inmates and noninmates, regulations that provided for censorship of letters that “unduly complain,” “magnify grievances,” or “expres[s] inflammatory political, racial, religious or other views or beliefs.” Id., at 399. We reviewed these regulations under the following standard:

“First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials . . . must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.” Id., at 413-414.

The Court's subsequent decisions regarding First Amendment rights in the prison context, however, laid down a different standard of review from that articulated in Martinez. As recently explained in Turner, these later decisions, which we characterized as involving “prisoners' rights,” adopted a standard of review that focuses on the reasonableness of prison regulations: the relevant inquiry is whether the actions of prison officials were “reasonably related to legitimate penological interests.” 482 U.S., at 89. The Court ruled that “such a standard is necessary if ‘prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.’” Ibid., quoting Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S., at 128.

Furthermore, we acknowledge today that the logic of our analyses in Martinez and Turner requires that Martinez be limited to regulations concerning outgoing correspondence. As we have observed,
outgoing correspondence was the central focus of our opinion in *Martinez*. The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials. Any attempt to justify a similar categorical distinction between incoming correspondence from prisoners (to which we applied a reasonableness standard in *Turner*) and incoming correspondence from nonprisoners would likely prove futile, and we do not invite it. To the extent that *Martinez* itself suggests such a distinction, we today overrule that case; the Court accomplished much of this step when it decided *Turner*.

In so doing, we recognize that it might have been possible to apply a reasonableness standard to all incoming materials without overruling *Martinez*: we instead could have made clear that *Martinez* does not uniformly require the application of a “least restrictive alternative” analysis. We choose not to go that route, however, for we prefer the express flexibility of the *Turner* reasonableness standard. We adopt the *Turner* standard in this case with confidence that, as petitioners here have asserted, “a reasonableness standard is not toothless.” Pet. for Cert. 17, n. 10.

The Court in *Turner* identified several factors that are relevant to, and that serve to channel, the reasonableness inquiry. [Ed.: *Turner* involved a substantial burden on a prisoner’s right to marry]

The first *Turner* factor is multifold: we must determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective. We agree with the District Court that this requirement has been met.

The legitimacy of the Government's purpose in promulgating these regulations is beyond question. The regulations are expressly aimed at protecting prison security, a purpose this Court has said is “central to all other corrections goals.” Pell v. Procunier, 417 U.S., at 823.

As to neutrality, “[w]e have found it important to inquire whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion, without regard to the content of the expression.” *Turner*, 482 U.S., at 90. The ban on *all* correspondence between certain classes of inmates at issue in *Turner* clearly met this “neutrality” criterion, as did the restrictions at issue in *Pell* and *Wolfish*. The issue, however, in this case is closer.

On their face, the regulations distinguish between rejection of a publication “solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant” (prohibited) and rejection because the publication is detrimental to security (permitted). 28 CFR § 540.71(b) (1988). Both determinations turn, to some extent, on content. But the Court's reference to “neutrality” in *Turner* was intended to go no further than its requirement in *Martinez* that “the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression.” 416 U.S., at 413. Where . . . administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are “neutral” in the [sense we] used that term in *Turner*.

We also conclude that the broad discretion accorded prison wardens by the regulations here at issue is rationally related to security interests. We reach this conclusion for two reasons. The first has to
do with the kind of security risk presented by incoming publications. This has been explored above in Part III. The District Court properly found that publications can present a security threat, and that a more closely tailored standard “could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder.” App. to Pet. for Cert. 32a. Where the regulations at issue concern the entry of materials into the prison, we agree with the District Court that a regulation which gives prison authorities broad discretion is appropriate.

Second, we are comforted by the individualized nature of the determinations required by the regulation. Under the regulations, no publication may be excluded unless the warden himself makes the determination that it is “detrimental to the security, good order, or discipline of the institution or . . . might facilitate criminal activity.” 28 CFR §§ 540.70(b), 540.71(b) (1988). This is the controlling standard. A publication which fits within one of the “criteria” for exclusion may be rejected, but only if it is determined to meet that standard under the conditions prevailing at the institution at the time.

A second factor the Court in Turner held to be “relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates.” 482 U.S., at 90. As has already been made clear in Turner and O’Lone, “the right” in question must be viewed sensibly and expansively. The Court in Turner did not require that prisoners be afforded other means of communicating with inmates at other institutions, 482 U.S., at 92, nor did it in O’Lone require that there be alternative means of attending the Jumu'ah religious ceremony, 482 U.S., at 351. Rather, it held in Turner that it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available, and in O’Lone if prisoners were permitted to participate in other Muslim religious ceremonies. As the regulations at issue in the present case permit a broad range of publications to be sent, received, and read, this factor is clearly satisfied.

The third factor to be addressed under the Turner analysis is the impact that accommodation of the asserted constitutional right will have on others (guards and inmates) in the prison. 482 U.S., at 90. Here, the class of publications to be excluded is limited to those found potentially detrimental to order and security; the likelihood that such material will circulate within the prison raises the prospect of precisely the kind of “ripple effect” with which the Court in Turner was concerned. Where, as here, the right in question “can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike,” id., at 92, the courts should defer to the “informed discretion of corrections officials,” id., at 90.

Finally, Turner held “[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns. . . . But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.” 482 U.S., at 90-91. We agree with the District Court that these regulations, on their face, are not an “exaggerated response” to the problem at hand: no obvious, easy alternative has been established.
In sum, we hold that Turner's reasonableness standard is to be applied to the regulations at issue in this case, and that those regulations are facially valid under that standard. We agree with the remand for an examination of the validity of the regulations as applied to any of the 46 publications introduced at trial as to which there remains a live controversy. See 263 U.S. App. D.C., at 196, 824 F.2d, at 1176.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, concurring in part and dissenting in part.

This Court first addressed the First Amendment in the prison context in Procunier v. Martinez, 416 U.S. 396 (1974). Prior lower court treatments had varied: some courts had maintained “a hands-off posture,” while others had required “demonstration of a ‘compelling state interest’ to justify censorship of prisoner mail.” Id., at 406. With characteristic wisdom Justice Powell, in his opinion for the Court, rejected both extremes. The difficulties of prison administration, he perceived, make the strict scrutiny that the First Amendment demands in other contexts inappropriate. See, e.g., First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Elrod v. Burns, 427 U.S. 347, 362 (1976) (opinion of Brennan, J.). Focusing not on the rights of prisoners, but on the “inextricably meshed” rights of nonprisoners “who have a particularized interest in communicating with them,” he wrote that an “undemanding standard of review” could not be squared with the fact “that the First Amendment liberties of free citizens are implicated in censorship of prisoner mail.” Martinez, supra, 416 U.S., at 408, 409. Thus he chose an “intermediate” means of evaluating speech restrictions, 416 U.S., at 408, 409. Thus he chose an “intermediate” means of evaluating speech restrictions, 416 U.S., at 407, allowing censorship if it “further[ed] an important or substantial governmental interest unrelated to the suppression of expression,” and “the limitation of First Amendment freedoms [was] no greater than [was] necessary or essential,” id., at 413. “Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements,” Justice Powell stressed. Ibid. Censorship might be permitted, however, to ensure “the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.”Id., at 412 (footnote omitted). Prison administrators did not have “to show with certainty that adverse consequences would flow from the failure to censor a particular letter,” but “any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests identified above.” Id., at 414.

In the 15 years since Martinez was decided, lower courts routinely have applied its standard to review limitations not only on correspondence between inmates and private citizens, but also on communications-such as the newsletters, magazines, and books at issue-between inmates and publishers. Carefully examining free speech rights and countervailing governmental interests, these courts approved some restrictions and invalidated others. This Court thus correctly recognizes that Martinez’s standard of review does not deprive prison officials of the discretion necessary to perform their difficult tasks. Ante, at 1879. Inexplicably, it then partially overrules Martinez by limiting its scope to outgoing mail; letters and publications sent to prisoners now are subject only to review for “reasonableness.” Ante, at 1881-1882.
This peculiar bifurcation of the constitutional standard governing communications between inmates and outsiders is unjustified. The decision in *Martinez* was based on a distinction between prisoners' constitutional rights and the protection the First Amendment affords those who are not prisoners—not between nonprisoners who are senders and those who are receivers. As Justice Powell explained:

“Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication. . . . The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him.” 416 U.S., at 408-409 (citations omitted).

. . . . The feeble protection provided by a “reasonableness” standard applied within the framework of these regulations is apparent in this record. Like the Labyrinth issue, many of the 46 rejected publications criticized prison conditions or otherwise presented viewpoints that prison administrators likely would not welcome. Testimony by one mail clerk and the rote explanations for decisions suggest that rejections were based on personal prejudices or categorical assumptions rather than individual assessments of risk. Cf. *Martinez*, 416 U.S., at 415. These circumstances belie the Court's interpretation of these regulations as “content-neutral” and its assertion that rejection decisions are made individually. See *ante*, at 1882. Some of the rejected publications may represent the sole medium for conveying and receiving a particular unconventional message; thus it is irrelevant that the regulations permit many other publications to be delivered to prisoners. See *ante*, at 1883-1884. No evidence supports the Court's assumption that, unlike personal letters, these publications will circulate within the prison and cause ripples of disruption. See *ante*, at 1881, 1883. Nor is there any evidence that an incoming publication ever caused a disciplinary or security problem; indeed, some of the rejected publications were delivered to inmates in other prisons without incident. See App. 60, 99, 116-117. In sum, the record convinces me that under either the *Martinez* standard or the more deferential “reasonableness” standard these regulations are an impermissibly exaggerated response to security concerns. Cf. *Turner*, 482 U.S., at 89-90.

A majority of the Supreme Court extended the 2nd-order reasonableness review used in *Thornburgh v. Abbott* and *Turner v. Safley* to a case involving burdening a prisoner’s access to newspapers, magazines, and photographs while in the prison's long-term segregation unit in *Beard v. Banks*.16

---

Such 2nd-order reasonableness review involved standard means/end reasoning balancing: (1) the government’s interest in effective prison management (Turner factor one); (2) the manner in which the regulation achieved its benefits for prison guards and other inmates, including considering less burdensome alternatives (Turner factors three and four), and (3) the burdens imposed on the prisoner, including alternative means of exercising First Amendment rights (Turner factor two), with the ultimate burden on the prisoner to establish that the government’s regulation was unreasonable.

2. Military Bases

Military bases are classic example of government-owned property not open to the public. Thus, for speech on military bases, a reasonableness standard applies. For example, in Greer v. Spock, the Court upheld as reasonably related to the legitimate interest of maintaining “a politically neutral military establishment” regulations banning on military bases speeches and demonstrations of a political nature and prohibiting distribution of literature without approval of post headquarters. In Brown v. Glines, the Court similarly upheld Air Force regulations relating to the circulation of petitions on air force bases. In United States v. Apel, the Court held that a portion of a military base that contained a protest area and easement for a public road was still a military nonpublic forum.

United States v. Apel
134 S. Ct. 1144 (2014)

Chief Justice ROBERTS delivered the opinion of the Court.

Federal law makes it a crime to reenter a “military . . . installation” after having been ordered not to do so “by any officer or person in command.” 18 U.S.C. § 1382. The question presented is whether a portion of an Air Force base that contains a designated protest area and an easement for a public road qualifies as part of a “military installation.”

Vandenberg Air Force Base is located in central California, near the coast, approximately 170 miles northwest of Los Angeles. The Base sits on land owned by the United States and administered by
the Department of the Air Force. It is the site of sensitive missile and space launch facilities. The commander of Vandenberg has designated it a “closed base,” meaning that civilians may not enter without express permission. Memorandum for the General Public Re: Closed Base, from David J. Buck, Commander (Oct. 23, 2008), App. 51; see also 32 CFR § 809a.2(b) (2013) (“Each [Air Force] commander is authorized to grant or deny access to their installations, and to exclude or remove persons whose presence is unauthorized”).

Although the Base is closed, the Air Force has granted to the County of Santa Barbara “an easement for a right-of-way for a road or street” over two areas within Vandenberg. Department of the Air Force, Easement for Road or Street No. DA-04-353-ENG-8284 (Aug. 20, 1962), App. 35. Pursuant to that easement, two state roads traverse the Base. Highway 1 (the Pacific Coast Highway) runs through the eastern part of the Base and provides a route between the towns of Santa Maria and Lompoc. Highway 246 runs through the southern part of the Base and allows access to a beach and a train station on Vandenberg’s western edge. The State of California maintains and polices these highways as it does other state roads, except that its jurisdiction is merely “concurrent” with that of the Federal Government. Letter from Governor Edmund G. Brown, Jr., to Joseph C. Zengerle, Assistant Secretary of the Air Force (July 21, 1981), App. 40. The easement instrument states that use of the roads “shall be subject to such rules and regulations as [the Base commander] may prescribe from time to time in order to properly protect the interests of the United States.” Easement, App. 36. The United States also “reserves to itself rights-of-way for all purposes” that would not create “unnecessary interference with . . . highway purposes.” Id., at 37.

Section 1382 provides in full: “Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof – Shall be fined under this title or imprisoned not more than six months, or both.”

Apel does not dispute that he was “found within” the lawful boundaries of Vandenberg, “within the jurisdiction of the United States,” after having been “ordered not to reenter” by the Base commander. § 1382. And certainly Vandenberg would naturally be described as a “military installation”: it is an Air Force base, which a military commander has closed to the public (with limited exceptions), located on land owned by the United States and under the jurisdiction of the Air Force, where military personnel conduct sensitive missile operations.

Section 1382 is most naturally read to apply to places with a defined boundary under the command of a military officer. Apel argues, however, that Vandenberg's commander has no authority on the highways running through the Base or, apparently, in the designated protest area. His arguments more or less reduce to two contentions: that the highways and protest area lie “outside the entrance to [a] closed military installation[ ],” Brief for Respondent 22, and that they are “uncontrolled” spaces where “no military operations are performed,” id., at 23. Neither contention is sound.
First, to say that the highway and protest area are “outside” the Vandenberg installation is not a legal argument; it simply assumes the conclusion. Perhaps recognizing as much, Apel tacks: He suggests that because Vandenberg’s operational facilities are surrounded by a fence and guarded by a security checkpoint, the Government has determined that it does not control the rest of the Base. The problem with this argument is that the United States has placed the *entire* Vandenberg property under the administration of the Air Force, which has defined that property as an Air Force base and designated the Base commander to exercise jurisdiction. Federal law makes the commander responsible “for the protection or security of” “property subject to the jurisdiction, administration, or in the custody of the Department of Defense.” 50 U.S.C. §§ 797(a)(2), (4); see also 32 CFR § 809a.2(a) (“Air Force installation commanders are responsible for protecting personnel and property under their jurisdiction”). And pursuant to that authority, the Base commander has issued an order closing the entire base to the public. Buck Memorandum Re: Closed Base, App. 51; see also 32 CFR § 809a.3 (“any directive issued by the commander of a military installation or facility, which includes the parameters for authorized entry to or exit from a military installation, is legally enforceable against all persons”). The fact that the Air Force chooses to secure a portion of the Base more closely – be it with a fence, a checkpoint, or a painted green line – does not alter the boundaries of the Base or diminish the jurisdiction of the military commander.

As for Apel’s claim that the protest area specifically is uncontrolled, the record is conclusively to the contrary. The Base commander “at all times has retained authority and control over who may access the installation,” including the protest area. Buck Memorandum Re: Protest Activity, App. 58. He has enacted rules to restrict the manner of protests in the designated area. Protest Advisory, App. 53. In particular, he requires two weeks’ notice to schedule a protest and prohibits the distribution of pamphlets or leaflets. Id., at 52-53. The Base commander has also publicly stated that persons who are barred from Vandenberg – for whatever reason – may not come onto the Base to protest. Id., at 54. And the District Court found, after hearing testimony, that “the Government exercises substantial control over the designated protest area, including, for example, patrolling the area.” App. to Pet. for Cert. 14a-15a. Apel has never disputed these facts.

Instead Apel tells us that, by granting an easement, the military has “relinquished its right to exclude civilians from Highway 1,” Brief for Respondent 36, and that the easement does not “permit[ ]” use by the military, id., at 43. But the easement itself specifically reserves to Vandenberg’s commander the authority to restrict access to the entire Base, including Highway 1, when necessary “to properly protect the interests of the United States,” and likewise “reserves to [the United States] rights-of-way for all purposes.” Easement, App. 36.

Apel likewise offers no support for his contention that military functions do not occur on the easement highways. The Government has referred us to instances when the commander of Vandenberg has closed the highways to the public for security purposes or when conducting a military launch. Reply Brief 12, and n.5; Tr. of Oral Arg. 8-9. In any event, there is no indication that Congress intended § 1382 to require base commanders to make continuous, uninterrupted use of a place within their jurisdiction, lest they lose authority to exclude individuals who have vandalized military property and been determined to pose a threat to the order and security of the base.
In sum, we decline Apel's invitation to require civilian judges to examine U.S. military sites around the world, parcel by parcel, to determine which have roads, which have fences, and which have a sufficiently important, persistent military purpose. The use-it-or-lose-it rule that Apel proposes would frustrate the administration of military facilities and raise difficult questions for judges, who are not expert in military operations. And it would discourage commanders from opening portions of their bases for the convenience of the public. We think a much better reading of § 1382 is that it reaches all property within the defined boundaries of a military place that is under the command of a military officer.

Much of the rest of Apel's brief is devoted to arguing that § 1382 would be unconstitutional as applied to him on this Base. But the Court of Appeals never reached Apel's constitutional arguments, and we decline to do so in the first instance. Apel also attempts to repackage his First Amendment objections as a statutory interpretation argument based on constitutional avoidance. See Brief for Respondent 54 (“the statute should be interpreted . . . not to apply to peaceful protests on a public road outside of a closed military base over which an easement has been granted and that has been declared a protest zone”). But we do not “interpret” statutes by gerrymandering them with a list of exceptions that happen to describe a party's case. “The canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means.” Clark v. Martinez, 543 U.S. 371, 381 (2005). Whether § 1382 is unconstitutional as applied is a question we need not address.

Where a place with a defined boundary is under the administration of a military department, the limits of the “military installation” for purposes of § 1382 are coterminous with the commanding officer's area of responsibility. Those limits do not change when the commander invites the public to use a portion of the base for a road, a school, a bus stop, or a protest area, especially when the commander reserves authority to protect military property by, among other things, excluding vandals and trespassers.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, concurring.

I agree with the Court's reading of 18 U.S.C. § 1382: The military's choice “to secure a portion of the Base more closely – be it with a fence, a checkpoint, or a painted green line – does not alter the boundaries of the Base or diminish the jurisdiction of the military commander.” Ante, at 1152. But a key inquiry remains, for the fence, checkpoint, and painted line, while they do not alter the Base boundaries, may alter the First Amendment calculus.

When the Government permits the public onto part of its property, in either a traditional or designated public forum, its “ability to permissibly restrict expressive conduct is very limited.” United States v. Grace, 461 U.S. 171, 177 (1983). . . . [T]he Government may enforce “reasonable time, place, and manner regulations,” but those regulations must be “content-neutral [and] narrowly tailored to serve a significant government interest.” Ibid. (internal quotation marks omitted).

The stated interest of the Air Force in keeping Apel out of the area designated for peaceful protest lies in ensuring base security. Brief for United States 22-26. See also Reply Brief 21-22. That interest, however, must be assessed in light of the general public's (including Apel's) permission to
traverse, at any hour of the day or night, the highway located a few feet from the designated protest area. See Appendix to opinion of the Court, ante (displaying maps of the area). The Air Force also permits open access to the middle school, bus stop, and visitors' center, all situated in close proximity to the protest area. See ante, at 1147.

As the Air Force has exhibited no “special interest[t] in who walks [or] talks” in these places, Flower v. United States, 407 U.S. 197, 198 (1972) (per curiam), it is questionable whether Apel's ouster from the protest area can withstand constitutional review. The Court has properly reserved that issue for consideration on remand. . . . In accord with that reservation, I join the Court's opinion.

Justice ALITO, concurring.

The Ninth Circuit did not rule on the constitutionality of 18 U.S.C. § 1382, and I see no reason to express any view on that question at this time. See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009). “This Court . . . is one of final review, ‘not of first view.’” Ibid. (quoting Cutter v. Wilkinson, 544 U.S. 709, 719, n.7 (2005)). Our failure to address this question should not be interpreted to signify either agreement or disagreement with the arguments outlined in Justice Ginsburg's concurrence.

3. Government Buildings

In 1990, a question of the status of a sidewalk outside a public building came before the Court in United States v. Kokinda.19 The Court upheld a postal regulation which forbade soliciting charitable contributions on postal premises, as applied to solicitors for the National Democratic Policy Committee who had set up a table for in-person solicitation on a sidewalk outside the postoffice. Justice O'Connor's plurality opinion, joined by Holmesians Chief Justice Rehnquist and Justices White, and formalist Justice Scalia, reasoned that because the sidewalk leading to and from the post office was constructed for the purpose of entering and leaving the post office, not for general use of the public, the sidewalk was a nonpublic forum. The regulation barring solicitation on postal premises was constitutional as viewpoint neutral and reasonable in view of the fact that solicitation was inherently disruptive of the Postal Service's business. Justice Kennedy concurred only in the judgment, noting that “the public’s use of postal property for communicative purposes means the surrounding sidewalks” may be a public forum. However, he said it was unnecessary here to decide whether the sidewalk was a public or a nonpublic forum because the postal regulations met the traditional intermediate review standards for a content-neutral time, place, and manner regulation of protected expression in a public forum.20


20 Id. at 737-38 (Kennedy, J., concurring in the judgment).
Justice Brennan dissented, with Justices Marshall, Blackmun, and Stevens. Justice Brennan said that
a sidewalk adjacent to a public building to which citizens are freely admitted is a natural location
for speech to occur and, thus, is a traditional public forum or a limited public forum. Brennan added
that even if strict scrutiny were not required, the regulation was not reasonable under rational review
because the government did not subject to the same categorical prohibition many other types of
speech presenting the same risk of disruption as solicitation, such as soapbox oratory, pamphleteering, distributing literature for free, or even flag burning.21

Sidewalks around courthouses tend to be viewed as public forums, with limitations on
demonstration, picketing, and other First Amendment activities analyzed under intermediate review,
applicable to regulations advancing the content-neutral reasons of protecting the “judicial system
from the pressures which picketing near a courthouse might create” to ensure “a fair trial [and]
exclude influence or domination by either a hostile or friendly mob.” See, e.g., Cox v. State of
Louisiana, 379 U.S. 559, 562 (1965). In contrast, actual courtrooms in courthouses are viewed as
government-owned nonpublic fora, dedicated to the business of conducting trials. Thus, reasonable
regulations to maintain the order and dignity of courtroom proceedings are routinely upheld.22

4. Other Kinds of Government-Owned Nonpublic Fora

In American Freedom Defense Initiative v. Suburban Mobility Authority for Regional
Transportation (SMART), 698 F.3d 885 (6th Cir. 2012), the Sixth Circuit held that a state
transportation agency’s refusal to display an anti-jihad advertisement on city buses was a reasonable
and viewpoint-neutral based on its general policy against political advertisements. The ban was thus
upheld, since the bus system was a nonpublic forum, relying on Lehman v. City of Shaker Heights,
cases which had held that the exterior of city buses were designated public forums, as in New York
Magazine v. Metropolitan Transit Authority, 136 F.3d 123, 129-30 (2nd Cir. 1998), because in such
cases the city accepted commercial and political ads. See also Christ’s Bride Ministries, Inc. v.
Southeastern Pennsylvania Trans. Auth., 148 F.3d 242, 247-55 (3rd Cir. 1998) (a mass transit
agency’s acceptance of all sorts of ads to raise revenue made subway and railroad stations public
fora). Considerations of public v. nonpublic forums regarding subway mass transit systems also
appears in cases discussed at § 6.4.2. See also Minnesota Voters Alliance v. Mansky, 138 S. Ct.
1876 (2018) (polling place is a nonpublic forum; under a 2nd-order reasonableness analysis a ban on
wearing “political” material inside a polling place not “capable of reasoned application” given
breadth of the statute applying not only to apparel “relating to a candidate, measure, or political
party appearing on the ballot” but to any “political” material, which is not specifically defined).

21 Id. at 740-60 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).

22 See, e.g., Huminski v. Corsones, 396 F.3d 53, 90-91 (2nd Cir. 2005) (courtrooms are
nonpublic fora); Mezibov v. Allen, 411 F.3d 712, 718 (6th Cir. 2005) (same); Berner v. Delahanty,
corridor treated as public forum to which standard public forum free speech standards applied).
§ 3.4 Specialized Case of Government As Educator Running Public Schools

Although the initial set of cases involving the government as educator did not use precise strict scrutiny, intermediate review, or rational review terminology, the cases were decided consistent with standard First Amendment doctrine. Thus, where the regulation involves an aspect of school life viewed as occurring in a nonpublic forum, such as government control over school classrooms or school auditoriums, a version of rational review has been applied. Where the regulation involves an aspect of school life on playgrounds or in a school lunchroom, which are viewed more as places designated for free speech, and thus public fora, content-neutral regulations have been subjected to intermediate scrutiny, and content-based regulations have triggered strict scrutiny.

The foundational case in the modern era regarding the constitutional rights of students in school is *Tinker v. Des Moines Independent Community School District*, 23 decided in 1969. In that case, several students had been disciplined for wearing black armbands in violation of a school policy against wearing such bands. The Court said that wearing black bands in protest of the Vietnam war was a symbolic act, *i.e.*, “symbolic speech,” akin to “pure speech,” and thus was protected by the First Amendment. The Court then concluded that the school could not sanction the behavior unless it “materially disrupts class work or involves substantial disorder or invasion of the rights of others,” *i.e.*, whether school authorities could reasonably forecast “material and substantial interference with schoolwork or discipline.” The Court said that to justify prohibition of a particular expression having no relation to school work, school officials must show more than a desire to avoid “the discomfort and unpleasantness that always accompany an unpopular viewpoint.” Applying its material disruption test, the Court noted that only a few of 18,000 students in the school wore armbands, and there was no indication that work of any class was substantially disrupted. Outside classes only a few students made hostile remarks to children who wore the armbands, and there was no evidence of any threats or acts of violence on school premises.

Although *Tinker* did not use precise intermediate scrutiny language, its requirement that the threat of disruption be “substantial” or “material” to justify school regulation follows the requirement of intermediate scrutiny that the government have an “important or substantial” government interest to regulate and the government action be “substantially related” to advancing that interest. That standard of review is appropriate in *Tinker* because *Tinker* involved an attempt to regulate wearing armbands even on the playground or the lunchroom, typically viewed as public fora, based on a content-neutral, secondary effects concern with disruption of the school’s educational mission.

Justice Black, dissenting, said the record showed that the armbands did divert students’ minds from their regular lessons and diverted them to thoughts about the highly emotional subject of the Vietnam war. Also, he seemed to view *Tinker* as applying its approach even to aspects of regulation in the classroom, and thus was concerned that the Court might apply the heightened *Tinker* standard, and not a rational review “reasonableness” standard, to those kinds of regulations. In Justice Black’s view, this case could subject all public schools to “the whims and caprices of their loudest-mouthed,

---

but maybe not their brightest, students." As noted in the cases discussed below, Justice Black’s fears on this score have not materialized, and rational review is applied to school regulations of matters in the curriculum and, typically, to matters of school dress codes or school uniforms to be worn in school classrooms.

Justice Harlan, also dissenting, would have cast on the challengers the burden of showing that a particular school measure was motivated by other than legitimate school concerns, e.g., a desire to prohibit the expression of a particular point of view, while allowing a dominant view to be expressed, i.e., viewpoint discrimination. While this view is consistent with the Holmesian predisposition to defer to government, it is inconsistent with the general rule that for cases at intermediate scrutiny the government bears the burden of defending its action, rather than the challenger bearing the burden of establishing that the action is unconstitutional.

Four years later, in 1973, the views of the majority in Tinker were reinforced in a case involving the distribution of a newspaper at a state university. In Papish v. Board of Curators of the University of Missouri, a university student had been disciplined for distributing on the campus a newspaper containing indecent language. In a per curiam opinion, the Court set aside the discipline as a violation of the First Amendment, saying that “the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” The majority cited cases where criminal prosecutions had not been allowed to punish indecency. Chief among them was Cohen v. California, where it was held that the state could not convict for disturbing the peace where the defendant, in a courthouse corridor, wore a jacket on which an indecent word was inscribed.

Applying more of a rational review standard, Justice Rehnquist, joined by Chief Justice Burger, dissented. Justice Rehnquist said that educational sanctions should be distinguished from criminal prosecutions, basically viewing the entire campus as a nonpublic forum for which only rational review should apply. Rehnquist explained, “A state university is an establishment for the purpose of educating the State’s young people, supported by tax revenues of the State’s citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contains the language described in the Court’s opinion is quite unacceptable to me and I would suspect would have been equally unacceptable to the Framers.”

24 Id. at 515-25 (Black, J., dissenting).
25 Id. at 526 (Harlan, J., dissenting).
28 410 U.S. at 677 (Rehnquist, J., joined by Burger, C.J., dissenting).
A majority of post-instrumentalist cases have involved regulations relating to activities more clearly within the core of what the Court views as nonpublic fora curricular matters or school-sponsored events. For example, in 1986, in *Bethel School District No. 403 v. Fraser*, the Court held that the First Amendment does not prohibit a school district from disciplining a high school student for a “lewd” speech at a high school assembly. As part of supporting a candidate for a student government office, the speaker used phrases like, “he is firm in his pants, firm in his shirt, and firm in his beliefs,” and he “doesn’t attack things in spurts – he drives hard, pushing and pushing until finally – he succeeds.” Chief Justice Burger wrote that the freedom of students to advocate unpopular and controversial views must be balanced against society’s interest in teaching students the boundaries of socially appropriate behavior. It was thus “perfectly appropriate” for the school to prohibit the use of vulgar terms in public discourse, particularly in an assembly where students as young as 14 were in attendance.

None of the four instrumentalist Justices on the Court in 1986 joined in the *Fraser* majority opinion. Justice Marshall dissented on the ground that the Court should have applied the *Tinker* standard of review, and the school had failed to demonstrate that the student’s remarks were disruptive. Justice Stevens doubted that the student could have known from the school’s rule that his speech was punishable, and thus to punish him absent such notice violated his due process rights. Justice Brennan concurred only in the judgment, saying that the speech may well have been protected were it delivered elsewhere than the assembly hall, but that the speech could be viewed as disruptive under the *Tinker* standard of review given the school’s educational mission on how to conduct civil and effective public discourse. Justice Blackmun concurred only in the result without explanation.

A general test for determining what behavior is encompassed by the curriculum was stated in *Hazelwood School District v. Kuhlmeier*, excerpted at § 1.4.2. Summing up, Justice White said that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”

These cases make clear that indecency by students in the school environment can be sanctioned in order to advance curricular goals, such as teaching students the boundaries of socially appropriate behavior, and a student newspaper supervised by faculty members can be censored by the school to insure that the audience is not exposed to material inappropriate for their level of maturity, the

---


30 *Id.* at 690 (Marshall, J., dissenting); *id.* at 691 (Stevens, J., dissenting); *id.* at 687-88 (Brennan, J., concurring in the judgment); *id.* at 678 (Blackmun, J., concurring in the result).


32 *Id.* at 270-73.

test being whether the actions of educators are reasonably related to legitimate pedagogical concerns.\textsuperscript{34} Reflecting a view widely shared among the lower federal courts, the Ninth Circuit Court of Appeals held in \textit{Chandler v. McMinnville School District} \textsuperscript{35} that the goal of teaching students the boundaries of appropriate behavior applies throughout the school grounds to any “vulgar, lewd, obscene, or plainly offensive speech,” and thus \textit{Fraser} applies to any such speech anywhere in the school.

Consistent with the analysis of \textit{Fraser} and \textit{Hazelwood}, in \textit{Morse v. Frederick}, the Supreme Court indicated a “reasonableness” analysis would be applied to student speech made in the context of the nonpublic forum of a “school-sanctioned and school-supervised” event – here, students being led out of the classroom to watch the Olympic Torch Relay pass by their school – even though the speech could not be said to bear the “imprimatur” of the school, as in \textit{Hazelwood}, or was “vulgar,” as in \textit{Fraser}. In all three cases – \textit{Morse}, \textit{Hazelwood}, and \textit{Fraser} – the speech occurred in a nonpublic forum – the school curriculum. Under reasonableness review, the school had a legitimate interest in \textit{Morse} in regulating speech “promoting illegal drug use [where] that interpretation is plainly a reasonable one.” A concurrence by Justices Kennedy and Alito, whose votes were critical to make up the \textit{Morse} majority, indicated that where the speech is not so connected to the school curriculum, and is student generated, even if in conflict with the “educational mission” of the school, the \textit{Tinker} test would still apply.

\textbf{Morse v. Frederick}

\textit{127 S. Ct. 2618 (2007)}

Chief Justice ROBERTS delivered the opinion of the Court.

At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. One student – among those who had brought the banner to the event – refused to do so. The principal confiscated the banner and later suspended the student. The Ninth Circuit held that the principal's actions violated the First Amendment, and that the student could sue the principal for damages.

Our cases make clear that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” \textit{Tinker} v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969). At the same time, we have held that “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,” \textit{Bethel School Dist. No. 403 v. Fraser}, 478 U.S. 675, 682 (1986), and that the rights of students “must be ‘applied in light of the special characteristics of the school environment,’” \textit{Hazelwood School Dist.}


\textsuperscript{35} 978 F.2d 524, 528-29 (9\textsuperscript{th} Cir. 1992).
v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Tinker, supra, at 506). Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. App. 22–23. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: “BONG HiTS 4 JESUS.” App. to Pet. for Cert. 70a. The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy. Juneau School Board Policy No. 5520 states: “The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . .” Id., at 53a. In addition, Juneau School Board Policy No. 5850 subjects “[p]upils who participate in approved social events and class trips” to the same student conduct rules that apply during the regular school program. Id., at 58a.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (eight days). In a memorandum setting forth his reasons, the superintendent determined that Frederick had displayed his banner “in the midst of his fellow students, during school hours, at a school-sanctioned activity.” Id., at 63a. He further explained that Frederick “was not disciplined because the principal of the school ‘disagreed’ with his message, but because his speech appeared to advocate the use of illegal drugs.” Id., at 61a.

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed “that the words were just nonsense meant to attract television cameras.” 439 F.3d, at 1117-1118. But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.
The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

In *Tinker*, this Court made clear that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.” 393 U.S., at 506. *Tinker* involved a group of high school students who decided to wear black armbands to protest the Vietnam War. School officials learned of the plan and then adopted a policy prohibiting students from wearing armbands. When several students nonetheless wore armbands to school, they were suspended. *Id.*, at 504. The students sued, claiming that their First Amendment rights had been violated, and this Court agreed.

*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will “materially and substantially disrupt the work and discipline of the school.” *Id.*, at 513. The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their “disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them.” *Id.*, at 514. Political speech, of course, is “at the core of what the First Amendment is designed to protect.” Virginia v. Black, 538 U.S. 343, 365 (2003) (plurality opinion). The only interest the Court discerned underlying the school's actions was the “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint,” or “an urgent wish to avoid the controversy which might result from the expression.” *Tinker*, 393 U.S., at 509, 510. That interest was not enough to justify banning “a silent, passive expression of opinion, unaccompanied by any disorder or disturbance.” *Id.*, at 508.

This Court's next student speech case was *Fraser*, 478 U.S. 675 [1986]. Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called “an elaborate, graphic, and explicit sexual metaphor.” *Id.*, at 678. Analyzing the case under *Tinker*, the District Court and Court of Appeals found no disruption, and therefore no basis for disciplining Fraser. *Id.*, at 679-680. This Court reversed, holding that the “School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.” *Id.*, at 685.

The mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech, citing the “marked distinction between the political ‘message’ of the armbands in *Tinker* and the sexual content of [Fraser's] speech.” *Id.*, at 680. But the Court also reasoned that school boards have the authority to determine “what manner of speech in the classroom or in school assembly is inappropriate.” *Id.*, at 683. Cf. *id.*, at 689 (Brennan, J., concurring in judgment) (“In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate [Fraser's] speech because they disagreed with the views he sought to express”).

We need not resolve this debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser*’s holding demonstrates that “the constitutional rights of
students in public school are not automatically coextensive with the rights of adults in other settings.” Id., at 682. Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. See Cohen v. California, 403 U.S. 15 (1971); Fraser, supra, at 682-683. In school, however, Fraser's First Amendment rights were circumscribed “in light of the special characteristics of the school environment.” Tinker, supra, at 506. Second, Fraser established that the mode of analysis set forth in Tinker is not absolute. Whatever approach Fraser employed, it certainly did not conduct the “substantial disruption” analysis prescribed by Tinker, supra, at 514. See Kuhlmeier, 484 U.S., at 271, n.4 (disagreeing with the proposition that there is “no difference between the First Amendment analysis applied in Tinker and that applied in Fraser,” and noting that the holding in Fraser was not based on any showing of substantial disruption).

Our most recent student speech case, Kuhlmeier, concerned “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” 484 U.S., at 271. Staff members of a high school newspaper sued their school when it chose not to publish two of their articles. The Court of Appeals analyzed the case under Tinker, ruling in favor of the students because it found no evidence of material disruption to classwork or school discipline. Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1375 (C.A.8 1986). This Court reversed, holding that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” Kuhlmeier, 484 U.S., at 273.

Kuhlmeier does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur. The case is nevertheless instructive because it confirms both principles cited above. Kuhlmeier acknowledged that schools may regulate some speech “even though the government could not censor similar speech outside the school.” Id., at 266. And, like Fraser, it confirms that the rule of Tinker is not the only basis for restricting student speech.

The “special characteristics of the school environment,” Tinker, 393 U.S., at 506 and the governmental interest in stopping student drug abuse – reflected in the policies of Congress and myriad school boards, including JDHS – allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. Tinker warned that schools may not prohibit student speech because of “undifferentiated fear or apprehension of disturbance” or “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” Id., at 508, 509. The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, App. 92-95; App. to Pet. for Cert. 53a, extends well beyond an abstract desire to avoid controversy.

Justice THOMAS, concurring.

The Court today decides that a public school may prohibit speech advocating illegal drug use. I agree and therefore join its opinion in full. I write separately to state my view that the standard set forth in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), is without basis in the Constitution.
In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools. Although colonial schools were exclusively private, public education proliferated in the early 1800's. By the time the States ratified the Fourteenth Amendment, public schools had become relatively common. W. Reese, America's Public Schools: From the Common School to “No Child Left Behind” 11-12 (2005) (hereinafter Reese). If students in public schools were originally understood as having free-speech rights, one would have expected 19th-century public schools to have respected those rights and courts to have enforced them. They did not.

Applying in loco parentis, the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order. Sheehan v. Sturges, 53 Conn. 481, 483-484, 2 A. 841, 842 (1885). Thus, in the early years of public schooling, schools and teachers had considerable discretion in disciplinary matters . . . .

The doctrine of in loco parentis limited the ability of schools to set rules and control their classrooms in almost no way. It merely limited the imposition of excessive physical punishment. In this area, the case law was split. One line of cases specified that punishment was wholly discretionary as long as the teacher did not act with legal malice or cause permanent injury. E.g., Boyd v. State, 88 Ala. 169, 170-172, 7 So. 268, 269 (1890) (allowing liability where the “punishment inflicted is immoderate, or excessive, and . . . it was induced by legal malice, or wickedness of motive”). Another line allowed courts to intervene where the corporal punishment was “clearly excessive.” E.g., Lander, supra, at 124. Under both lines of cases, courts struck down only punishments that were excessively harsh; they almost never questioned the substantive restrictions on student conduct set by teachers and schools. E.g., Sheehan, supra, at 483-484, 2 A., at 842; Gardner v. State, 4 Ind. 632, 635 (1853); Anderson v. State, 40 Tenn. 455, 456 (1859); Hardy v. James, 5 Ky. Op. 36 (1872).

Justice ALITO, with whom Justice KENNEDY joins, concurring.

I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as “the wisdom of the war on drugs or of legalizing marijuana for medicinal use.” See post, at 2649 (Stevens, J., dissenting).

The opinion of the Court correctly reaffirms the recognition in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969), of the fundamental principle that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” The Court is also correct in noting that Tinker, which permits the regulation of student speech that threatens a concrete and “substantial disruption,” id., at 514, does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings.
But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court. In addition to Tinker, the decision in the present case allows the restriction of speech advocating illegal drug use; Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a high school program; and Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988), allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ. I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.

The opinion of the Court does not endorse the broad argument advanced by petitioners and the United States that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." See Brief for Petitioners 21; Brief for United States as Amicus Curiae 6. This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed . . . officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

During the Tinker era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war. The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

The public schools are invaluable and beneficent institutions, but they are, after all, organs of the State. When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority – including their authority to determine what their children may say and hear – to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State. Most parents, realistically, have no choice but to send their children to a public school and little ability to influence what occurs in the school. It is therefore wrong to treat public school officials, for purposes relevant to the First Amendment, as if they were private, nongovernmental actors standing in loco parentis.

JUSTICE BREYER, concurring in the judgment in part and dissenting in part.

This Court need not and should not decide this difficult First Amendment issue on the merits. Rather, I believe that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more.
The defense of “qualified immunity” requires courts to enter judgment in favor of a government employee unless the employee's conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The defense is designed to protect “all but the plainly incompetent or those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335, 341 (1986).

Qualified immunity applies here and entitles Principal Morse to judgment on Frederick's monetary damages claim because she did not clearly violate the law during her confrontation with the student. At the time of that confrontation, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 513 (1969), indicated that school officials could not prohibit students from wearing an armband in protest of the Vietnam War, where the conduct at issue did not “materially and substantially disrupt the work and discipline of the school”; Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), indicated that school officials could restrict a student's freedom to give a school assembly speech containing an elaborate sexual metaphor; and Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988), indicated that school officials could restrict student contributions to a school-sponsored newspaper, even without threat of imminent disruption. None of these cases clearly governs the case at hand.

Justice STEVENS, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

A significant fact barely mentioned by the Court sheds a revelatory light on the motives of both the students and the principal of Juneau-Douglas High School (JDHS). On January 24, 2002, the Olympic Torch Relay gave those Alaska residents a rare chance to appear on national television. As Joseph Frederick repeatedly explained, he did not address the curious message – “BONG HITS 4 JESUS” – to his fellow students. He just wanted to get the camera crews' attention. Moreover, concern about a nationwide evaluation of the conduct of the JDHS student body would have justified the principal's decision to remove an attention-grabbing 14-foot banner, even if it had merely proclaimed “Glaciers Melt!”

I agree with the Court that the principal should not be held liable for pulling down Frederick's banner. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). I would hold, however, that the school's interest in protecting its students from exposure to speech “reasonably regarded as promoting illegal drug use,” ante, at 2622, cannot justify disciplining Frederick for his attempt to make an ambiguous statement to a television audience simply because it contained an oblique reference to drugs.

In my judgment, the First Amendment protects student speech if the message itself neither violates a permissible rule nor expressly advocates conduct that is illegal and harmful to students. This nonsense banner does neither, and the Court does serious violence to the First Amendment in upholding – indeed, lauding – a school's decision to punish Frederick for expressing a view with which it disagreed.

I will nevertheless assume for the sake of argument that the school's concededly powerful interest in protecting its students adequately supports its restriction on “any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .” App. to Pet. for Cert. 53a.
Given that the relationship between schools and students “is custodial and tutelary, permitting a
degree of supervision and control that could not be exercised over free adults,” Vernonia School Dist.
47J v. Acton, 515 U.S. 646, 655 (1995), it might well be appropriate to tolerate some targeted
viewpoint discrimination in this unique setting. And while conventional speech may be restricted
only when likely to “incit[e] . . . imminent lawless action,” Brandenburg, 395 U.S., at 449, it is
possible that our rigid imminence requirement ought to be relaxed at schools. See Bethel School
Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (“[T]he constitutional rights of students in public
school are not automatically coextensive with the rights of adults in other settings”).

But it is one thing to restrict speech that advocates drug use. It is another thing entirely to prohibit
an obscure message with a drug theme that a third party subjectively – and not very reasonably –
thinks is tantamount to express advocacy. Cf. Masses Pub. Co. v. Patten, 244 F. 535, 540, 541
(S.D.N.Y.1917) (Hand, J.) (distinguishing sharply between “agitation, legitimate as such,” and “the
direct advocacy” of unlawful conduct).

The Vietnam War is remembered today as an unpopular war. During its early stages, however, “the
dominant opinion” that Justice Harlan mentioned in his Tinker dissent regarded opposition to the
war as unpatriotic, if not treason. 393 U.S., at 526. That dominant opinion strongly supported the
prosecution of several of those who demonstrated in Grant Park during the 1968 Democratic
Convention in Chicago, see United States v. Dellinger, 472 F.2d 340 (C.A.7 1972), and the
In 1965, when the Des Moines students wore their armbands, the school district's fear that they
might “start an argument or cause a disturbance” was well founded. Tinker, 393 U.S., at 508. Given
that context, there is special force to the Court's insistence that “our Constitution says we must take
that risk; and our history says that it is this sort of hazardous freedom – this kind of openness – that
is the basis of our national strength and of the independence and vigor of Americans who grow up
and live in this relatively permissive, often disputatious, society.” Id., at 508-509 (citation omitted).
As we now know, the then-dominant opinion about the Vietnam War was not etched in stone.

Reaching back still further, the current dominant opinion supporting the war on drugs in general,
and our antimarijuana laws in particular, is reminiscent of the opinion that supported the nationwide
ban on alcohol consumption when I was a student. While alcoholic beverages are now regarded as
ordinary articles of commerce, their use was then condemned with the same moral fervor that now
supports the war on drugs. The ensuing change in public opinion occurred much more slowly than
the relatively rapid shift in Americans' views on the Vietnam War, and progressed on a state-by-state
basis over a period of many years. But just as prohibition in the 1920's and early 1930's was secretly
questioned by thousands of otherwise law-abiding patrons of bootleggers and speakeasies, today the
actions of literally millions of otherwise law-abiding users of marijuana, and of the majority of
voters in each of the several States that tolerate medicinal uses of the product, lead me to wonder
whether the fear of disapproval by those in the majority is silencing opponents of the war on drugs.
Surely our national experience with alcohol should make us wary of dampening speech suggesting
– however inarticulately – that it would be better to tax and regulate marijuana than to persevere in
a futile effort to ban its use entirely.
Even in high school, a rule that permits only one point of view to be expressed is less likely to produce correct answers than the open discussion of countervailing views. Whitney, 274 U.S., at 377 (Brandeis, J., concurring); Abrams, 250 U.S., at 630 (Holmes, J., dissenting); Tinker, 393 U.S., at 512. In the national debate about a serious issue, it is the expression of the minority's viewpoint that most demands the protection of the First Amendment.

With respect to non-vulgar speech, courts have struggled with the question of when speech is sufficiently connected with on-campus activities that it can be regulated under Hazelwood versus when the speech is sufficiently unconnected to the school that Tinker applies. The easy cases involve off-campus student speech later brought on-campus by persons other than the speaker. These cases have dealt with such things as "underground" student newspapers distributed off-campus, student-run websites created on off-campus computers, and various writings brought on-campus by students other than their original author. In these cases, Tinker usually applies.36

In harder cases of on-campus speech by students, a number of courts have suggested, consistent with the Ninth Circuit’s opinion in Chandler v. McMinnville School District,37 that Hazelwood only applies to speech or speech-related activities that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." While this was true of the student newspaper in Hazelwood, the better reasoning is that the Court’s opinion in Hazelwood focused on any activity “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.”38 It is this context of school classroom or school extra-curricular events to which the nonpublic forum analysis of Hazelwood should apply.

Faced with a possible limitation on Hazelwood as in Chandler, some lower courts have suggested that for on-campus speech Tinker should be limited to “political” speech of the students, and that other forms of student speech should never be entitled to the Tinker intermediate standard of review, even if the speech is not being regulated under Hazelwood as school sponsored or school generated, or otherwise part of the school’s curriculum.39 While such an approach may reflect the Miekeljohn view that the First Amendment is principally about political speech, discussed at § 1.2.2 n.26, it is inconsistent with modern doctrine where “literary, artistic, political, or scientific” speech are all entitled to the same level of First Amendment scrutiny, even in the school context.40 The better approach would be to remain faithful to Hazelwood, where “reasonableness review” applies to


37 978 F.2d 524, 5229 (9th Cir. 1992), citing Hazelwood, 484 U.S. at 271.

38 Hazelwood, 484 U.S. at 271.


40 See, e.g., LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988-89 (9th Cir. 2001).
speech not merely school sponsored or school generated, and thus bearing the imprimatur of the school, but also to speech connected to the school’s curriculum or school sponsorship in some fashion. For such cases of school-sponsored or school-generated speech, under standard nonpublic forum analysis, noted at § 1.2.6 & Table 3, content-neutral or content-based subject-matter regulations would trigger “reasonableness review,”\footnote{See, e.g., Bannon v. School Dist. of Palm Beach County, 387 F.3d 1208, 1212-17 (11th Cir. 2004), cert. denied, 126 S. Ct. 330 (2005) (prohibition of student’s religious messages on hallway murals opened to non-profane, non-offensive student artwork as part of supervised beautification project is content-based, subject matter restriction of school-sponsored expression that is reasonably related to legitimate pedagogical purpose of avoiding disruption of the learning environment); Keefe v. Adams, 840 F.3d 523, 531 (8th Cir. 2016) (“college administrators and educators in a professional school [here, a nursing school] have discretion to require compliance with recognized standards of the profession, both on and off campus, ‘so long as their actions are reasonably related to legitimate pedagogical concerns [here, sexually offensive and threatening Facebook posts about other class members].’”); Pompeo v. Board of Regents of New Mexico, 852 F.3d 973, 984-86 (10th Cir. 2017) (professor cannot be sued for pressuring student to revise anti-gay language in class assignment, as educators can limit school-sponsored speech having inflammatory or offensive views if “reasonably related to a legitimate pedagogical concern” and not a “sham pretext for an impermissible ulterior motive”; qualified immunity applies as any greater right the student had was not clearly established).} while regulations involving viewpoint discrimination would trigger strict scrutiny.\footnote{See, e.g., Peck v. Baldwinsville Central Sch. Dist., 426 F.3d 617, 629-33 (2nd Cir. 2005), cert. denied, 126 S. Ct. 1880 (2006) (evidence that kindergarten teacher and public school principal censored religious image from student poster prepared in response to assignment on protecting the environment because the poster offered religious viewpoint precludes summary judgment, as issue exists whether the action constituted viewpoint discrimination triggering strict scrutiny review).} This would permit \textit{Tinker}’s intermediate standard of review to apply for literary, artistic, political, or scientific speech that is clearly student generated and not supervised by faculty members at the school, as long as the school has a content-neutral reason for the regulation, such as safety or avoiding disruption of the educational environment.\footnote{See, e.g., Walker-Serrano v. Leonard, 325 F.3d 412 (3rd Cir. 2003) (public elementary school officials who interrupted third grader’s effort on icy playground, and in silent reading class period, to gather fellow student’s signatures on petition objecting to field trip to circus because of perceived cruelty to animals, satisfied \textit{Tinker} based on safety and disruption concerns).} For content-based regulations of such student speech, strict scrutiny would apply.

Although the Supreme Court has not ruled on the issue, many lower courts have upheld various school dress codes or uniform policies at the elementary and secondary school level on grounds that exercising control over student appearance in the classroom is reasonably related to the school’s curriculum.\footnote{See generally Andrew D.M. Miller, \textit{Balancing School Authority and Student Expression}, 54 Baylor L. Rev. 623, 664-75 (2002).} This would appear to be a sound approach. In contrast, in \textit{Canady v. Bossier Parish...
School Board, the Fifth Circuit upheld a school dress code by viewing the code as a content-neutral time, place, or manner restriction, but concluded that this form of intermediate scrutiny, which the court associated with the draft-card burning case of O’Brien, excerpted at § 2.1, is less vigorous than the Tinker form of intermediate scrutiny. In contrast, in Guiles v. Marineau, a Second Circuit panel applied the regular Tinker analysis to the case of a seventh-grader’s T-shirt that depicted President Bush as a drug and alcohol abuser. The Second Circuit found that the student had a constitutional right to wear the T-shirt absent a showing of disruption or confrontation in the school.

As suggested at § 2.4, the better analysis would be to recognize that the same intermediate review test applies in content-neutral time, place, or manner regulations, the O’Brien test for content-neutral secondary effects cases, and Tinker. Without regard to this aspect of intermediate scrutiny, school uniform cases should be analyzed under the Hazelwood/Fraser line of reasonable review cases, as involving regulation of student appearance as part of the nonpublic forum aspect of school control over the school’s educational program, at least for elementary and secondary school cases. Cases involving students over 18 in the college or university setting raise different considerations, particularly for dress on campus grounds outside the classroom.

An additional issue regarding the First Amendment and schools is the recent practice at some colleges and universities to designate official “free speech zones” dedicated to the advocacy of ideas, but then to limit the handing out of leaflets, or making speeches, on other parts of the university campus. The university typically justifies such zones on content-neutral grounds, such as limiting littering that might result from unrestricted leafletting, and administrative control to help prevent organizations with different viewpoints possibly clashing anywhere on campus. Since applicable to the entire campus, such regulations typically are viewed as content-neutral regulations in a public forum, triggering intermediate review, and requiring that the regulations ensure that meaningful communication with intended audiences can take place, as part of ensuring under the last prong of O’Brien that ample alternative channels of communication exist.

Another issue regarding the First Amendment and schools is a growing number of school districts that have expanded their curriculum to include “service learning” initiatives. Also known as “mandatory community service programs,” such “service learning” initiatives require that students devote a specified number of hours during high school at a community service organization. These programs are alleged to develop teamwork, communication, and problem-solving skills by placing the student in a "real-world" setting; instill a sense of civic obligation; advance an understanding of the student's links to his or her community; and generate lasting pro-social behavioral inclinations. Either as an aspect of reasonableness review under Hazelwood as part of the school’s curriculum, or even if viewed as regulating “off-campus” activities for the content-neutral reasons alleged to support such programs, such “service learning” initiatives would appear to be constitutional under

---

45 240 F.3d 437, 442-44 (5th Cir. 2001).
46 461 F.3d 320, 330-31 (2nd Cir. 2006).
the First Amendment, although arguments have been made which reach the opposite conclusion.48

For regulation of student behavior off-campus, but which can have impacts on-campus, courts tend to use the Tinker test under one or two theories: (1) a sufficient “nexus” exists so the student’s off-campus speech is “tied closely enough to the school” or (2) it is “reasonably foreseeable” that off-campus speech would reach the school. See C.R. v. Eugene School District 4J, 835 F.3d 1142, 1149 (9th Cir. 2016) (under either approach the school can discipline student for close-to-the-school, but off-campus sexually harassing speech), citing Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011) (“nexus” test); S.J.W. v. Lee’s Summit R-7 School District, 696 F.3d 771 (8th Cir. 2012) (“reasonably foreseeable” test). A number of lower courts have applied this doctrine to the issue of schools disciplining students for inappropriate material posted outside of school on the Internet. In some cases, the postings involved statements made against the school administration. In other cases, the postings involved so-called “bullying” of other students. In most cases the school prevailed, satisfying the intermediate Tinker standard of advancing substantial content-neutral concerns with teaching students appropriate communication, preventing vulgar speech, or dealing with “bullying” of other students. See Doninger v. Niehoff, 642 F.3d 334 (2nd Cir. 2011) (school could properly discipline student who, after a concert at the high school was cancelled, posted on her blog a statement that the concert was cancelled “due to douchebags in the central office” and “if you want to write something to call her to piss her off more”); J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915 (3rd Cir. 2011) (school could properly discipline student for creating fake internet profile of principal alleging he was a sex addict and pedophile); Layshock ex rel. Layshock v. Hermitage School Dist., 650 F.3d 205 (3rd Cir. 2011) (school could properly discipline student for creating fake internet profile of principal alleging drug and alcohol use and shoplifting); Kowalski v. Berkeley County Schools, 652 F.3d 565 (4th Cir. 2011) (school could properly discipline student for creating a false internet page called “S.A.S.H.”; student claimed the acronym was for “Students Against Sluts Herpes,” but the school concluded, based on posts on the site by students in response, that it really stood for “Students Against Shay’s Herpes,” which referred to another student at the school, and was an example of internet “bullying”). See also Morrow v. Balaski, 719 F.3d 160 (3rd Cir. 2013) (absent creating or enhancing the danger, school officials have no constitutional duty under Deshaney v. Winnebago Cnty. Dep’t of Social Servs., 489 U.S. 189, 197 (1989), to protect bullied students from the bully, and could tell the two bullied students they could not ensure their safety and they should find another school). A number of states, or local school districts, do have statutes or regulations requiring schools to respond to bullying activities in various ways, including preemptive anti-bullying programs directed to students.

School districts have also continued to win a number of other student regulation cases under *Tinker*. See, e.g., Dariano v. Morgan Hill Unified Sch. Dist., 745 F.3d 354 (9th Cir. 2014) (California high school may require students not to wear shirts showing the American Flag during school-sanctioned Cinco de Mayo celebration); Hardwick ex rel. Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013) (South Carolina school district may prohibit students from wearing shirts displaying the Confederate Flag when wearing them would “materially and substantially disrupt the work and discipline of the school”); Taylor v. Roswell Indep. Sch. Dist., 713 F.3d 25 (10th Cir. 2013) (New Mexico school district’s decision to halt a group of religious students from distributing thousands of rubber fetus dolls at high schools constitutional under *Tinker*, and not a violation of student’s Free Exercise rights under the rational basis review of *Employment Division v. Smith*, 494 U.S. 872, 878-81 (1990)).

*But see* Easton Area Sch. Dist. v. B.H., 725 F.3d 293 (3rd Cir. 2013) (categorical ban on middle school students wearing bracelets saying “I [heart] boobies” as part of breast awareness campaign unconstitutional as not lewd under *Fraser* or disruptive under *Tinker*); K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist., 710 F.3d 99 (3rd Cir. 2013) (Pennsylvania school district cannot ban a fifth grader from handing out invitations to a church Christmas party because the distribution would not “materially and substantially disrupt” activities at the school; the school routinely allowed students to hand out invitations during non-instructional time). See also Frudden v. Pilling, 742 F.3d 1199 (9th Cir. 2014) (school policy mandating “Tomorrow’s Leaders” be displayed on shirt, and granting exemption for uniforms of nationally recognized youth organization such as Boy Scouts or Girl Scouts on regular meeting days, content-based regulations triggering strict scrutiny); Gerlich v. Leath, 2017 WL 2543363 (8th Cir. 2017) (Iowa State University’s restrictions on student group selling t-shirts with marijuana logo on back viewpoint discrimination; invalid under strict scrutiny).

In *Board of Education v. Pico*, the Court considered: (1) the extent to which the First Amendment limits a school board's power at elementary or secondary schools to remove books from a library used for supplemental reading; and (2) whether the evidence raised a genuine issue of material fact regarding whether the board exceeded those limits in the case. On the first issue, a four-Justice instrumentalist plurality, led by Justice Brennan, and joined by Justices Marshall, Blackmun, and Stevens, said that in their view *Pico* did not involve aspects of control over the curriculum, as the books concerned were not required reading, nor did the case involve government funding, since the issue was not the acquisition of books. Rather, the case only involved the removal of books already in the library and available for general student use. Viewed in this way, the Brennan opinion considered the case from the perspective of public forum First Amendment law, and indicated that the books could have been removed for the content-neutral reason that they were "pervasively vulgar" or lacked "educational suitability." On the other hand, the school board could not claim unfettered discretion to make content-based decisions to remove the books because "our Constitution does not permit the official suppression of ideas." Justice Brennan said the district court erred in entering summary judgment for the board because the evidence, construed most favorably to the students, did not foreclose the possibility that the board's decision rested on disagreement with

---

constitutionally protected ideas in the books.\textsuperscript{50} Justice White concurred in the judgment because determining the reasons underlying the removal was fact-bound, and he was not inclined to disagree with the Court of Appeals’ view that there was a material issue on why the books were removed.\textsuperscript{51}

In addition to these points, Justice Brennan indicated that for him, and for Justices Marshall and Stevens, there is a constitutional right to receive ideas. This right exists as a logical corollary to the explicit rights of free speech and press, and is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.\textsuperscript{52} Although he joined the rest of Justice Brennan’s plurality opinion, Justice Blackmun disagreed that there is a right to receive ideas, and a majority of the Court has never agreed with Justice Brennan on this view.\textsuperscript{53} In contrast, for Justice Blackmun, this case was based on Justice Brennan’s analysis that state officials may not act to deny access to an idea simply because they disapprove of the idea for partisan reasons.\textsuperscript{54}

Chief Justice Burger dissented with Justices Powell, Rehnquist, and O'Connor. These Justices viewed the case through the lens of rational review, viewing the case a routine matter of government control over the nonpublic forum aspects of the school curriculum. Vulgarity need not be "pervasive" since a board might reasonably decide that random vulgarity is inappropriate for teenage students. In their view, the “vulgarity” of the books was sufficiently well-established that the district court’s summary judgment on that matter was appropriate, and no trial was needed.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{50} \textit{Id.} at 861-63, 869-75 (plurality opinion of Brennan, J., joined by Marshall, Blackmun & Stevens, JJ.).
\item \textsuperscript{51} \textit{Id.} at 883-84 (White, J., concurring in the judgment).
\item \textsuperscript{52} \textit{Id.} at 863-69 (plurality opinion of Brennan, J., joined by Marshall & Stevens, JJ.). On such a right, see generally Marc Johnathan Blitz, \textit{Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information}, 74 UMKC L. Rev. 799 (2006).
\item \textsuperscript{53} \textit{Id.} at 878-79 (Blackmun, J., concurring in part and concurring in the judgment). For this reason, although sometimes phrased in First Amendment terms, any right of the public or press to certain government-held information is dependent on statutory grounds only, like the Freedom of Information Act, and is not, properly speaking, a constitutional issue. See generally Karen L. Turner, \textit{Comment, Convergence of the First Amendment and the Withholding of Information for the Security of the Nation: A Historical Perspective and the Effect of September 11th on Constitutional Freedoms}, 33 McGeorge L. Rev. 593 (2002).
\item \textsuperscript{55} \textit{Id.} at 889-93 (Burger, C.J., joined by Rehnquist, Powell & O’Connor, JJ., dissenting).
\end{itemize}
The federal and state governments subsidize a wide variety of activities. For the federal government, this fits comfortably within the General Welfare Clause as supplemented by the Necessary and Proper Clause. As the Court held in Helvering v. Davis,1 “When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.” When the government has subsidized a particular activity, the Court has typically not reviewed its effects from a heightened level of scrutiny.

For example, the Court has held that government funding of childbirth expenses, but not the cost of abortions, does not violate either the due process or equal protection rights of pregnant women who may want to have an abortion. In Harris v. McRae,2 the Court said the law was not predicated on a constitutionally suspect class and left pregnant women no worse off than they were before. Further, the distinction in the federal law bore a rational relationship to a legitimate interest in protecting the potential life of a fetus. Liberal instrumentalist Justices Brennan, Marshall, Blackmun, and Stevens dissented on the grounds that this selective funding served to coerce indigent pregnant women to bear children they would otherwise elect not to have.

The situation is somewhat different if the government subsidizes some speech, but not other speech. There is always the possibility that it is engaged in viewpoint discrimination, which triggers strict scrutiny in non-funding cases, as discussed at § 2.2. Although the Court’s initial decisions in the modern era, such as Rust v. Sullivan, excepted below at § 4.1, upheld government funding on the questionable ground that the funding did not involve viewpoint discrimination, subsequent decisions have clarified that the government can engage in viewpoint discrimination when spending its own money. On the other hand, as discussed at § 4.2, when making grants, subsidies, or other aid to individuals or groups to develop their own message, rather than be conduits for the government’s

1 301 U.S. 619, 645 (1937).

2 448 U.S. 297, 311-18 (1980); id. at 329 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting); id. at 349 (Stevens, J., dissenting).
message, the Court has held that viewpoint discrimination triggers strict scrutiny, as in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, excerpted at § 2.2, and in *Legal Services v. Velasquez*, excerpted at § 4.2. Subject-matter/topic discrimination, or content-neutral regulations involving such government funding of individuals or groups trigger a “reasonableness” analysis, as in *National Endowment for the Arts v. Finley*, excerpted at § 4.2.

In general, in deciding whether particular speech is government speech or the speech of a private individual, the courts have examined: (1) the central "purpose" of the program in which the speech in question occurs; (2) the degree of "editorial control" exercised by the government or private entities over the content of the speech; (3) the identity of the "literal speaker"; and (4) whether the government or the private entity bears the "ultimate responsibility" for the content of the speech, in analyzing circumstances where both government and a private entity are claimed to be speaking.3

The starting point is *Rust v. Sullivan*,4 decided in 1991. *Rust* involved a facial challenge to federal regulations that barred persons working for federally funded health programs from discussing abortion as a lawful option. Chief Justice Rehnquist wrote for a 6-3 Court, “The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” In so doing, the government had not unlawfully discriminated on the basis of viewpoint; “it has merely chosen to fund one activity to the exclusion of another.” The challenged regulation was held not to violate First Amendment rights of free speech or Fifth Amendment rights of privacy regarding abortion choice, because it left a pregnant woman with the same choices as if the government had chosen not to operate any public hospitals.

Justice Blackmun, dissenting with Justices Marshall and Stevens, said that the regulation constituted a content-based regulation of speech that was also clearly viewpoint-based. Further, the challenged regulation had the practical effect of obliterating the freedom to choose, particularly for the poor, “as surely as if it had banned abortions outright.” Thus, for the dissent, strict scrutiny should have been triggered in the case, and the regulation should have been declared unconstitutional.5

---

3 See, e.g., Wells v. City and County of Denver, 257 F.3d 1132, 1140-41 (10th Cir. 2001), *cert. denied*, 534 U.S. 997 (2001) (a sign listing private sponsors of a public holiday display constituted government speech); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093-96 (8th Cir. 2000), *cert. denied*, 531 U.S. 814 (2000) (announcements of sponsors' names and brief messages from sponsors on public radio station constituted government speech, and thus the Klan had no viewpoint discrimination complaint when they were denied sponsorship rights); Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001) (postings to school bulletin boards were government speech, not private speech).


5 500 U.S. at 217 (Blackmun, J., joined by Marshall & Stevens, JJ., dissenting).
Chief Justice REHNQUIST delivered the opinion of the Court.

These cases concern a facial challenge to Department of Health and Human Services (HHS) regulations which limit the ability of Title X fund recipients to engage in abortion-related activities. The United States Court of Appeals for the Second Circuit upheld the regulations, finding them to be a permissible construction of the statute as well as consistent with the First and Fifth Amendments to the Constitution. We granted certiorari to resolve a split among the Courts of Appeals. We affirm.

We need not dwell on the plain language of the statute because we agree with every court to have addressed the issue that the language is ambiguous. The language of § 1008 – that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning” – does not speak directly to the issues of counseling, referral, advocacy, or program integrity. If a statute is “silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.” Chevron, 467 U.S., at 842-843.

The Secretary's construction of Title X may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. Ibid., In determining whether a construction is permissible, “[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” Id., at 843, n.11. Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it. Id., at 844.

The broad language of Title X plainly allows the Secretary's construction of the statute. By its own terms, § 1008 prohibits the use of Title X funds “in programs where abortion is a method of family planning.” Title X does not define the term “method of family planning,” nor does it enumerate what types of medical and counseling services are entitled to Title X funding. Based on the broad directives provided by Congress in Title X in general and § 1008 in particular, we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible.

Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit “all discussion about abortion as a lawful option – including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy – while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term.” Brief for Petitioners in No. 89-1391, p. 11. They assert that the regulations violate the “free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients” by impermissibly imposing “viewpoint-discriminatory conditions on government subsidies” and thus “penaliz[e] speech funded with non-Title X monies.”
Id., at 13, 14, 24. Because “Title X continues to fund speech ancillary to pregnancy testing in a manner that is not evenhanded with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint.” Id., at 18. Relying on Regan v. Taxation with Representation of Wash., 461 U.S. 540 (1983), and Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 234 (1987), petitioners also assert that while the Government may place certain conditions on the receipt of federal subsidies, it may not “discriminate invidiously in its subsidies in such a way as to ‘aim at the suppression of dangerous ideas.’” Regan, supra, 461 U.S., at 548 (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)).

There is no question but that the statutory prohibition contained in § 1008 is constitutional. In Maher v. Roe, 432 U.S. 464 (1977), we upheld a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions. The Court rejected the claim that this unequal subsidization worked a violation of the Constitution. We held that the government may “make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.” Id., 432 U.S., at 474. Here the Government is exercising the authority it possesses under Maher and Harris v. McRae, 448 U.S. 297 (1980), to subsidize family planning services which will lead to conception and childbirth, and declining to “promote or encourage abortion.” The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. “[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.” Regan, supra, 461 U.S., at 549. “A refusal to fund protected activity, without more, cannot be equated with the imposition of a ‘penalty’ on that activity.” McRae, supra, 448 U.S., at 317, n.19. “There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.” Maher, supra, 432 U.S., at 475.

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners' assertions ultimately boil down to the position that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. Regan v. Taxation with Representation of Wash., supra; Maher v. Roe, supra; Harris v. McRae, supra. Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.

We believe that petitioners' reliance upon our decision in Arkansas Writers' Project, supra, is misplaced. That case involved a state sales tax which discriminated between magazines on the basis of their content. Relying on this fact, and on the fact that the tax “targets a small group within the
press,” contrary to our decision in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Court held the tax invalid. But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.

Petitioners rely heavily on their claim that the regulations would not, in the circumstance of a medical emergency, permit a Title X project to refer a woman whose pregnancy places her life in imminent peril to a provider of abortions or abortion-related services. These cases, of course, involve only a facial challenge to the regulations, and we do not have before us any application by the Secretary to a specific fact situation. On their face, we do not read the regulations to bar abortion referral or counseling in such circumstances. Abortion counseling as a “method of family planning” is prohibited, and it does not seem that a medically necessitated abortion in such circumstances would be the equivalent of its use as a “method of family planning.” Neither § 1008 nor the specific restrictions of the regulations would apply. Moreover, the regulations themselves contemplate that a Title X project would be permitted to engage in otherwise-prohibited abortion-related, activity in such circumstances. Section 59.8(a)(2) provides a specific exemption for emergency care and requires Title X recipients “to refer the client immediately to an appropriate provider of emergency medical services.” 42 CFR § 59.8(a)(2) (1989). Section 59.5(b)(1) also requires Title X projects to provide “necessary referral to other medical facilities when medically indicated.”

Petitioners also contend that the restrictions on the subsidization of abortion-related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. Relying on *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), petitioners argue that “even though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.” *Perry*, supra, 408 U.S., at 597.

Petitioners' reliance on these cases is unavailing, however, because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X grantee and a Title X project. The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes. Brief for Petitioners in No. 89-1391, pp. 3, n.5, 13. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. 42 U.S.C. § 300(a). The regulations govern the scope of the Title X project's activities, and leave the grantee unfettered in its other activities. The Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds. 42 CFR § 59.9 (1989).
In contrast, our “unconstitutional conditions” cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. In FCC v. League of Women Voters of Cal., we invalidated a federal law providing that noncommercial television and radio stations that receive federal grants may not “engage in editorializing.” Under that law, a recipient of federal funds was “barred absolutely from all editorializing” because it “is not able to segregate its activities according to the source of its funding” and thus “has no way of limiting the use of its federal funds to all noneditorializing activities.” The effect of the law was that “a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing” and “barred from using even wholly private funds to finance its editorial activity.” 468 U.S., at 400. We expressly recognized, however, that were Congress to permit the recipient stations to “establish ‘affiliate’ organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid.” Ibid. Such a scheme would permit the station “to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities.” Ibid.

Justice BLACKMUN, with whom Justice MARSHALL joins, with whom Justice STEVENS joins as to Parts II and III, and with whom Justice O'CONNOR joins as to Part I, dissenting.

I

Casting aside established principles of statutory construction and administrative jurisprudence, the majority in these cases today unnecessarily passes upon important questions of constitutional law. In so doing, the Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the Government for economic support. Under essentially the same rationale, the majority upholds direct regulation of dialogue between a pregnant woman and her physician when that regulation has both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy. I conclude that the Secretary's regulation of referral, advocacy, and counseling activities exceeds his statutory authority, and, also, that the regulations violate the First and Fifth Amendments of our Constitution. Accordingly, I dissent and would reverse the divided-vote judgment of the Court of Appeals.

The majority does not dispute that “[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality.” Machinists v. Street, 367 U.S. 740, 749 (1961). Nor does the majority deny that this principle is fully applicable to cases such as the instant ones, in which a plausible but constitutionally suspect statutory interpretation is embodied in an administrative regulation. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988). Rather, in its zeal to address the constitutional issues, the majority sidesteps this established canon of construction with the feeble excuse that the challenged regulations “do not raise the sort of ‘grave and doubtful constitutional questions,’ . . . that would lead us to assume Congress did not intend to authorize their issuance.” Ante, at 1771, quoting United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909).
This facile response to the intractable problem the Court addresses today is disingenuous at best. Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions. The canon is applicable to these cases not because “it was likely that [the regulations] . . . would be challenged on constitutional grounds,” *ante*, at 1771, but because the question squarely presented by the regulations – the extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit – implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily. See, e.g., Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 6 (1988) (describing this problem as “the basic structural issue that for over a hundred years has bedeviled courts and commentators alike”); Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415-1416 (1989) (observing that this Court's unconstitutional conditions cases “seem a minefield to be traversed gingerly”).

A divided panel of the Tenth Circuit found the regulations to “fall[] squarely within the prohibition in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 [(1986)], and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983)], against state intrusion into the advice a woman requests from or is given by her doctor.” *Id.*, at 1501. The First Circuit, en banc with one judge dissenting, found the regulations to violate both the privacy rights of Title X patients and the First Amendment rights of Title X grantees. See also 889 F.2d 401, 415 (CA2 1989) (Kearse, J., dissenting in part). That a bare majority of this Court today reaches a different result does not change the fact that the constitutional questions raised by the regulations are both grave and doubtful.

Nor is this a situation in which the statutory language itself requires us to address a constitutional question. Section 1008 of the Public Health Service Act, 84 Stat. 1508, 42 U.S.C. § 300a-6, provides simply: “None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning.” The majority concedes that this language “does not speak directly to the issues of counseling, referral, advocacy, or program integrity,” *ante*, at 1767, and that “the legislative history is ambiguous” in this respect. *Ante*, at 1768. Consequently, the language of § 1008 easily sustains a constitutionally trouble-free interpretation.

II

Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech. Speiser v. Randall, 357 U.S. 513, 518-519 (1958) (“To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. . . . The denial is ‘frankly aimed at the suppression of dangerous ideas,’” quoting American Communications Assn. v. Douds, 339 U.S. 382, 402 (1950)). See also FCC v. League of Women Voters of Cal., 468 U.S. 364, 407 (1984) (Rehnquist, J., dissenting). Cf. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting). This rule is a sound one, for, as the Court often has noted: “A regulation of speech that
is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a “law . . . abridging the freedom of speech, or of the press.”’’ League of Women Voters, 468 U.S., at 383-384, quoting Consolidated Edison Co. of N.Y. v. Public Service Comm'n of N.Y., 447 U.S. 530, 546 (1980) (Stevens, J., concurring in judgment). “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

Nothing in the Court's opinion in Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983), can be said to challenge this long-settled understanding. In Regan, the Court upheld a content-neutral provision of the Internal Revenue Code, 26 U.S.C. § 501(c)(3), that disallowed a particular tax-exempt status to organizations that “attempt[ed] to influence legislation,” while affording such status to veterans' organizations irrespective of their lobbying activities. Finding the case controlled by Cammarano v. United States, 358 U.S. 498 (1959), the Court explained: “The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to “aim at the suppression of dangerous ideas.” . . . We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect.” 461 U.S., at 548, quoting Cammarano, 358 U.S., at 513, in turn quoting Speiser, 357 U.S., at 519. The separate concurrence in Regan joined the Court's opinion precisely “[b]ecause 26 U.S.C. § 501's discrimination between veterans' organizations and charitable organizations is not based on the content of their speech.” 461 U.S., at 551.

It cannot seriously be disputed that the counseling and referral provisions at issue in the present cases constitute content-based regulation of speech. Title X grantees may provide counseling and referral regarding any of a wide range of family planning and other topics, save abortion. Cf. Consolidated Edison Co., 447 U.S., at 537 (“The 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”); Boos v. Barry, 485 U.S. 312, 319 (1988) (opinion of O'Connor, J.) (same).

The regulations are also clearly viewpoint based. While suppressing speech favorable to abortion with one hand, the Secretary compels antiabortion speech with the other. [T]he Department of Health and Human Services' own description of the regulations makes plain that “Title X projects are required to facilitate access to prenatal care and social services, including adoption services, that might be needed by the pregnant client to promote her well-being and that of her child, while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process.” 53 Fed. Reg. 2927 (1988) (emphasis added).

Moreover, the regulations command that a project refer for prenatal care each woman diagnosed as pregnant, irrespective of the woman's expressed desire to continue or terminate her pregnancy. 42 CFR § 59.8(a)(2) (1990). If a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning. § 59.8(b)(4). Both requirements are antithetical to the First Amendment. See Wooley v. Maynard, 430 U.S. 705, 714 (1977).
The regulations pertaining to “advocacy” are even more explicitly viewpoint based. These provide: “A Title X project may not encourage, promote or advocate abortion as a method of family planning.” § 59.10 (emphasis added). They explain: “This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes.” § 59.10(a) (emphasis added). The regulations do not, however, proscribe or even regulate anti-abortion advocacy.

Remarkably, the majority concludes that “the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.” Ante, at 1772. But the majority's claim that the regulations merely limit a Title X project's speech to preventive or preconceptional services, ibid., rings hollow in light of the broad range of nonpreventive services that the regulations authorize Title X projects to provide. By refusing to fund those family-planning projects that advocate abortion because they advocate abortion, the Government plainly has targeted a particular viewpoint. The majority's reliance on the fact that the regulations pertain solely to funding decisions simply begs the question. Clearly, there are some bases upon which government may not rest its decision to fund or not to fund. For example, the Members of the majority surely would agree that government may not base its decision to support an activity upon considerations of race. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 220 (1886). As demonstrated above, our cases make clear that ideological viewpoint is a similarly repugnant ground upon which to base funding decisions.

The majority's reliance upon Regan in this connection is also misplaced. That case stands for the proposition that government has no obligation to subsidize a private party's efforts to petition the legislature regarding its views. Thus, if the challenged regulations were confined to non-ideological limitations upon the use of Title X funds for lobbying activities, there would exist no violation of the First Amendment. The advocacy regulations at issue here, however, are not limited to lobbying but extend to all speech having the effect of encouraging, promoting, or advocating abortion as a method of family planning. 42 CFR § 59.10(a) (1990). Thus, in addition to their impermissible focus upon the viewpoint of regulated speech, the provisions intrude upon a wide range of communicative conduct, including the very words spoken to a woman by her physician. . . .

The majority’s attempt to categorize the regulation in Rust v. Sullivan as not involving viewpoint discrimination has not withstood the test of time. However, the holding of Rust v. Sullivan remains good law. In part of Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 833 (1995), not excerpted at § 2.2, the Court noted: [W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message. In the same vein, in Rust v. Sullivan . . . [w]e recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” Thus, in this context, viewpoint discrimination is permissible.
A similar result was reached in 2009 in *Pleasant Grove City, Utah v. Summum*. In *Summum*, a religious organization filed a § 1983 action against various local officials, asserting that they had violated the Free Speech Clause by rejecting a proposed Seven Aphorisms monument for a local park that already contained a donated Ten Commandments monument. The Court held, unanimously, that permanent monuments displayed on public property typically represent government speech and, although the Free Speech Clause restricts government regulation of private speech, it does not regulate government speech. Justice Alito stated that the government need not maintain viewpoint neutrality in the selection of donated monuments, for if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. The opinion added that there are some restraints on government speech, such as the Establishment Clause, and the involvement of government officials in advocacy may be limited by law, regulations, or practice.

Justice Stevens, concurring with Justice Ginsburg, added that government speakers are bound by the Equal Protection Clause and so do not have free license to communicate offensive or partisan messages. Justice Breyer, concurring, said the First Amendment might well be violated if the city were to discriminate in the selection of permanent monuments on grounds unrelated to the display’s theme, say, solely on political grounds. Justice Souter, concurring in the judgment, said that the test should be “whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land,” and noted such a “reasonable observer” test is “of a piece with the one for spotting forbidden governmental endorsement of religion in Establishment Clause cases.” Justice Scalia, concurring with Justice Thomas, said that under *Van Orden v. Perry*, 545 U.S. 677 (2005), excerpted at § 13.1.2, the park displays would not likely violate the Establishment Clause because in *Van Orden* the Court rejected an Establishment Clause challenge of a virtually identical Ten Commandments monument donated by a private group. See also *Eagle Point Education Ass’n/SOBC/OEA v. Jackson County School Dist. No. 9*, 880 F.3d 1097 (9th Cir. 2018) (school district policy banning picketing or picketers from entering school facilities triggers regular free speech analysis, as a reasonable observer would not view the striking public school teachers as engaged in government speech; even if nonpublic forum analysis applied, the absolute ban, even banning striking teachers from entering school to visit their children, was unreasonable).

### § 4.2 Government Grants, Subsidies, or Other Aid to Speakers

In contrast to *Rust v. Sullivan*, viewpoint discrimination does trigger strict scrutiny “when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” *Rosenberger*, 515 U.S. 819, 834 (1995). The Court extended this principle in *Legal Services v. Velasquez*, 531 U.S. 533, 542 (2000), to a program “designed to facilitate private speech, not to promote a governmental message.”

---

6 129 S. Ct. 1125, 1121-32 (2009); id. at 1139 (Stevens, J., joined by Ginsburg, J., concurring); id. at 1140 (Breyer, J., concurring); id. at 1142 (Souter, J., concurring in the judgment); id. at 1139-40 (Scalia, J., joined by Thomas, J., concurring).
Legal Services v. Velasquez  
531 U.S. 533 (2001)

Justice KENNEDY delivered the opinion of the Court.

In 1974, Congress enacted the Legal Services Corporation Act, 88 Stat. 378, 42 U.S.C. § 2996 et seq. The Act establishes the Legal Services Corporation (LSC) as a District of Columbia nonprofit corporation. LSC's mission is to distribute funds appropriated by Congress to eligible local grantee organizations “for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.” § 2996b(a).

LSC grantees consist of hundreds of local organizations governed, in the typical case, by local boards of directors. In many instances the grantees are funded by a combination of LSC funds and other public or private sources. The grantee organizations hire and supervise lawyers to provide free legal assistance to indigent clients. Each year LSC appropriates funds to grantees or recipients that hire and supervise lawyers for various professional activities, including representation of indigent clients seeking welfare benefits.

This suit requires us to decide whether one of the conditions imposed by Congress on the use of LSC funds violates the First Amendment rights of LSC grantees and their clients. For purposes of our decision, the restriction, to be quoted in further detail, prohibits legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law. As interpreted by the LSC and by the Government, the restriction prevents an attorney from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute by its terms or in its application is violative of the United States Constitution.

We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, see Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229, 235 (2000), or instances, like Rust, in which the government “used private speakers to transmit specific information pertaining to its own program.” Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995). As we said in Rosenberger, “[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.” Ibid. The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, “[w]hen the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.” Southworth, supra, at 235.

Neither the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however. As we have pointed out, “[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.” Rosenberger, supra, at 834.
Although the LSC program differs from the program at issue in *Rosenberger* in that its purpose is not to “encourage a diversity of views,” the salient point is that, like the program in *Rosenberger*, the LSC program was designed to facilitate private speech, not to promote a governmental message. Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients. In the specific context of § 504(a)(16) suits for benefits, an LSC-funded attorney speaks on the behalf of the client in a claim against the government for welfare benefits. The lawyer is not the government's speaker. The attorney defending the decision to deny benefits will deliver the government's message in the litigation. The LSC lawyer, however, speaks on the behalf of his or her private, indigent client. Cf. Polk County v. Dodson, 454 U.S. 312, 321-322 (1981) (holding that a public defender does not act “under color of state law” because he “works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client” and because there is an “assumption that counsel will be free of state control”).

The Government has designed this program to use the legal profession and the established Judiciary of the States and the Federal Government to accomplish its end of assisting welfare claimants in determination or receipt of their benefits. The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.

By providing subsidies to LSC, the Government seeks to facilitate suits for benefits by using the state and federal courts and the independent bar on which those courts depend for the proper performance of their duties and responsibilities. Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited. Just as government in those cases could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems, see *Arkansas Ed. Television Comm'n*, supra, and *Rosenberger*, supra, it may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice O'CONNOR, and Justice THOMAS join, dissenting.

Section 504(a)(16) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (Appropriations Act) defines the scope of a federal spending program. It does not directly regulate speech, and it neither establishes a public forum nor discriminates on the basis of viewpoint.

In *Rust v. Sullivan*, supra, the Court applied these principles to a statutory scheme that is in all relevant respects indistinguishable from § 504(a)(16). The statute in *Rust* authorized grants for the provision of family planning services, but provided that “[n]one of the funds . . . shall be used in programs where abortion is a method of family planning.” Id., at 178. Valid regulations implementing the statute required funding recipients to refer pregnant clients “for appropriate prenatal . . . services by furnishing a list of available providers that promote the welfare of mother and unborn child,” but forbade them to refer a pregnant woman specifically to an abortion provider,
even upon request. Id., at 180. We rejected a First Amendment free-speech challenge to the funding scheme, explaining that “[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem another way.” Id., at 193. This was not, we said, the type of “discriminat[ion] on the basis of viewpoint” that triggers strict scrutiny, ibid., because the “‘decision not to subsidize the exercise of a fundamental right does not infringe the right,’” ibid. (quoting Regan v. Taxation With Representation of Wash., supra, at 549).

Viewpoint discrimination was also the focal point in National Endowment for the Arts v. Finley. This case upheld a provision in the National Foundation on the Arts and Humanities Act of 1965 that requires the National Endowment for the Arts to ensure that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.” The Court said the regulation did not involve viewpoint discrimination. Justices Scalia and Thomas concurred, saying there is a distinction between abridging speech, where viewpoint discrimination is troublesome, and funding speech, which leaves free those who wish to create indecent art. Their view is that funding speech is not literally a regulation of speech, and thus viewpoint discrimination should not trigger strict scrutiny review. Justice Souter, dissenting, contended that the statute makes clear that Congress’ purpose was viewpoint based, i.e., to prevent the funding of art that conveys an offensive message in Congress’ judgment, as implemented by the NEA.

National Endowment for the Arts v. Finley
524 U.S. 569 (1998)

Justice O'CONNOR delivered the opinion of the Court, in which the CHIEF JUSTICE, and JUSTICE STEVENS, JUSTICE KENNEDY, and JUSTICE BREYER, joined, and in all but Part II-B of which JUSTICE GINSBURG joined.

The National Foundation on the Arts and the Humanities Act of 1965, as amended in 1990, 104 Stat. 1963, requires the Chairperson of the National Endowment for the Arts (NEA) to ensure that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.” 20 U.S.C. § 954(d)(1). In this case, we review the Court of Appeals' determination that § 954(d)(1), on its face, impermissibly discriminates on the basis of viewpoint and is void for vagueness under the First and Fifth Amendments. We conclude that § 954(d)(1) is facially valid, as it neither inherently interferes with First Amendment rights nor violates constitutional vagueness principles.

7 524 U.S. 569, 580-87 (1998); id. at 599 (Scalia, J., joined by Thomas, J., concurring in the judgment).

8 Id. at 600-01 (Souter, J., dissenting).
The four individual respondents in this case, Karen Finley, John Fleck, Holly Hughes, and Tim Miller, are performance artists who applied for NEA grants before § 954(d)(1) was enacted. An advisory panel recommended approval of respondents' projects, both initially and after receiving Frohnmayer's request to reconsider three of the applications. A majority of the Council subsequently recommended disapproval, and in June 1990, the NEA informed respondents that they had been denied funding.

II

A

Respondents raise a facial constitutional challenge to § 954(d)(1), and consequently they confront “a heavy burden” in advancing their claim. Rust, supra, at 183. Facial invalidation “is, manifestly, strong medicine” that “has been employed by the Court sparingly and only as a last resort.” Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); see also FW/PBS, Inc. v. Dallas, 493 U.S. 215, 223 (1990) (noting that “facial challenges to legislation are generally disfavored”). To prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech. See Broadrick, supra, at 615.

Respondents argue that the provision is a paradigmatic example of viewpoint discrimination because it rejects any artistic speech that either fails to respect mainstream values or offends standards of decency. The premise of respondents' claim is that § 954(d)(1) constrains the agency's ability to fund certain categories of artistic expression. The NEA, however, reads the provision as merely hortatory, and contends that it stops well short of an absolute restriction. Section 954(d)(1) adds “considerations” to the grant-making process; it does not preclude awards to projects that might be deemed “indecent” or “disrespectful,” nor place conditions on grants, or even specify that those factors must be given any particular weight in reviewing an application. Indeed, the agency asserts that it has adequately implemented § 954(d)(1) merely by ensuring the representation of various backgrounds and points of view on the advisory panels that analyze grant applications. See Declaration of Randolph McAusland, Deputy Chairman for Programs at the NEA, reprinted in App. 79 (stating that the NEA implements the provision “by ensuring that the peer review panels represent a variety of geographical areas, aesthetic views, professions, areas of expertise, races and ethnic groups, and gender, and include a lay person”). We do not decide whether the NEA's view – that the formulation of diverse advisory panels is sufficient to comply with Congress' command – is in fact a reasonable reading of the statute. It is clear, however, that the text of § 954(d)(1) imposes no categorical requirement. The advisory language stands in sharp contrast to congressional efforts to prohibit the funding of certain classes of speech. When Congress has in fact intended to affirmatively constrain the NEA's grant-making authority, it has done so in no uncertain terms. See § 954(d)(2) (“[O]bscenity is without artistic merit, is not protected speech, and shall not be funded”).

Furthermore, like the plain language of § 954(d), the political context surrounding the adoption of the “decency and respect” clause is inconsistent with respondents' assertion that the provision compels the NEA to deny funding on the basis of viewpoint discriminatory criteria. The legislation was a bipartisan proposal introduced as a counterweight to amendments aimed at eliminating the NEA's funding or substantially constraining its grant-making authority. See, e.g., 136 Cong. Rec.
The Independent Commission had cautioned Congress against the adoption of distinct viewpoint-based standards for funding, and the Commission's report suggests that “additional criteria for selection, if any, should be incorporated as part of the selection process (perhaps as part of a definition of ‘artistic excellence’), rather than isolated and treated as exogenous considerations.” Report to Congress 89. In keeping with that recommendation, the criteria in § 954(d)(1) inform the assessment of artistic merit, but Congress declined to disallow any particular viewpoints. As the sponsors of § 954(d)(1) noted in urging rejection of the Rohrabacher Amendment: “[I]f we start down that road of prohibiting categories of expression, categories which are indeed constitutionally protected speech, where do we end? Where one Member's aversions end, others with different sensibilities and with different values begin.” 136 Cong. Rec. 28624 (statement of Rep. Coleman); see also id., at 28663 (statement of Rep. Williams) (arguing that the Rohrabacher Amendment would prevent the funding of Jasper Johns' flag series, The Merchant of Venice, Chorus Line, Birth of a Nation, and the Grapes of Wrath). In contrast, before the vote on § 954(d)(1), one of its sponsors stated: “If we have done one important thing in this amendment, it is this. We have maintained the integrity of freedom of expression in the United States.” Id., at 28674.

That § 954(d)(1) admonishes the NEA merely to take “decency and respect” into consideration and that the legislation was aimed at reforming procedures rather than precluding speech undercut respondents' argument that the provision inevitably will be utilized as a tool for invidious viewpoint discrimination. In cases where we have struck down legislation as facially unconstitutional, the dangers were both more evident and more substantial. In *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), for example, we invalidated on its face a municipal ordinance that defined as a criminal offense the placement of a symbol on public or private property “‘which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.’” See id., at 380. That provision set forth a clear penalty, proscribed views on particular “disfavored subjects,” id., at 391, and suppressed “distinctive idea[s], conveyed by a distinctive message,” id., at 393.

In contrast, the “decency and respect” criteria do not silence speakers by expressly “threaten[ing] censorship of ideas.” See ibid. Thus, we do not perceive a realistic danger that § 954(d)(1) will compromise First Amendment values. As respondents' own arguments demonstrate, the considerations that the provision introduces, by their nature, do not engender the kind of directed viewpoint discrimination that would prompt this Court to invalidate a statute on its face. Respondents assert, for example, that “[o]ne would be hard-pressed to find two people in the United States who could agree on what the ‘diverse beliefs and values of the American public’ are, much less on whether a particular work of art ‘respects' them”; and they claim that “‘[d]ecency’ is likely to mean something very different to a septegenarian in Tuscaloosa and a teenager in Las Vegas.” Brief for Respondents 41. The NEA likewise views the considerations enumerated in § 954(d)(1) as susceptible to multiple interpretations. See Department of the Interior and Related Agencies Appropriations for 1992, Hearing before the Subcommittee on Interior and Related Agencies of the House Committee on Appropriations, 102d Cong., 1st Sess., 234 (1991) (testimony of John Frohnmayer) (“[N]o one individual is wise enough to be able to consider general standards of decency and the diverse values and beliefs of the American people all by him or herself. These are group decisions”). Accordingly, the provision does not introduce considerations that, in practice,
would effectively preclude or punish the expression of particular views. Indeed, one could hardly anticipate how “decency” or “respect” would bear on grant applications in categories such as funding for symphony orchestras.

The NEA's enabling statute contemplates a number of indisputably constitutional applications for both the “decency” prong of § 954(d)(1) and its reference to “respect for the diverse beliefs and values of the American public.” Educational programs are central to the NEA's mission. See § 951(9) (“Americans should receive in school, background and preparation in the arts and humanities”); § 954(c)(5) (listing “projects and productions that will encourage public knowledge, education, understanding, and appreciation of the arts” among the NEA's funding priorities); National Endowment for the Arts, FY 1999 Application Guidelines 18-19 (describing “Education & Access” category); Brief for Twenty-six Arts, Broadcast, Library, Museum and Publishing Amici Curiae 5, n. 2 (citing NEA Strategic Plan FY 1997-FY 2002, which identifies children's festivals and museums, art education, at-risk youth projects, and artists in schools as examples of the NEA's activities). And it is well established that “decency” is a permissible factor where “educational suitability” motivates its consideration. Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982); see also Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (“Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse”).

Permissible applications of the mandate to consider “respect for the diverse beliefs and values of the American public” are also apparent. In setting forth the purposes of the NEA, Congress explained that “[i]t is vital to a democracy to honor and preserve its multicultural artistic heritage.” § 951(10). The agency expressly takes diversity into account, giving special consideration to “projects and productions . . . that reach, or reflect the culture of, a minority, inner city, rural, or tribal community,” § 954(c)(4), as well as projects that generally emphasize “cultural diversity,” § 954(c)(1). Respondents do not contend that the criteria in § 954(d)(1) are impermissibly applied when they may be justified, as the statute contemplates, with respect to a project's intended audience.

We recognize, of course, that reference to these permissible applications would not alone be sufficient to sustain the statute against respondents' First Amendment challenge. But neither are we persuaded that, in other applications, the language of § 954(d)(1) itself will give rise to the suppression of protected expression. Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding. The NEA has limited resources, and it must deny the majority of the grant applications that it receives, including many that propose “artistically excellent” projects. The agency may decide to fund particular projects for a wide variety of reasons, “such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community, or even simply that the work could increase public knowledge of an art form.” Brief for Petitioners 32. As the dissent below noted, it would be “impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression.” 100 F.3d, at 685 (opinion of Kleinfeld, J.). The “very assumption” of the NEA is that grants will be awarded according to the “artistic worth of

Respondents’ reliance on our decision in Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995), is therefore misplaced. In Rosenberger, a public university declined to authorize disbursements from its Student Activities Fund to finance the printing of a Christian student newspaper. We held that by subsidizing the Student Activities Fund, the University had created a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints. Id., at 837. Although the scarcity of NEA funding does not distinguish this case from Rosenberger, see id., at 835, the competitive process according to which the grants are allocated does. In the context of arts funding, in contrast to many other subsidies, the Government does not indiscriminately “encourage a diversity of views from private speakers,” id., at 834. The NEA's mandate is to make esthetic judgments, and the inherently content-based “excellence” threshold for NEA support sets it apart from the subsidy at issue in Rosenberger – which was available to all student organizations that were “related to the educational purpose of the University,” id., at 824 – and from comparably objective decisions on allocating public benefits, such as access to a school auditorium or a municipal theater, see Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 386 (1993); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975), or the second class mailing privileges available to “all newspapers and other periodical publications,” see Hannegan v. Esquire, Inc., 327 U.S. 146, 148, n.1 (1946).

Respondents do not allege discrimination in any particular funding decision. (In fact, after filing suit to challenge § 954(d)(1), two of the individual respondents received NEA grants. See 4 Record, Doc. No. 57, Exh. 35 (Sept. 30, 1991, letters from the NEA informing respondents Hughes and Miller that they had been awarded Solo Performance Theater Artist Fellowships.) Thus, we have no occasion here to address an as-applied challenge in a situation where the denial of a grant may be shown to be the product of invidious viewpoint discrimination. If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not “ai[rm] at the suppression of dangerous ideas,” Regan v. Taxation With Representation of Wash., 461 U.S. 540, 550 (1983) (internal quotation marks omitted), and if a subsidy were “manipulated” to have a “coercive effect,” then relief could be appropriate. See Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting); see also Leathers v. Medlock, 499 U.S. 439, 447 (1991) (“[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints”). In addition, as the NEA itself concedes, a more pressing constitutional question would arise if Government funding resulted in the imposition of a disproportionate burden calculated to drive “certain ideas or viewpoints from the marketplace.” Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991); see Brief for Petitioners 38, n.12. Unless § 954(d)(1) is applied in a manner that raises concern about the suppression of disfavored viewpoints, however, we uphold the constitutionality of the provision. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 396 (1969) (“[W]e will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, but will deal with those problems if and when they arise” (internal citation omitted)).
Finally, although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. See Regan, supra, at 549. In the 1990 amendments that incorporated § 954(d)(1), Congress modified the declaration of purpose in the NEA’s enabling Act to provide that arts funding should “contribute to public support and confidence in the use of taxpayer funds,” and that “[p]ublic funds . . . must ultimately serve public purposes the Congress defines.” § 951(5). And as we held in Rust, Congress may “selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.” 500 U.S., at 193 . . . ; see also Maher v. Roe, 432 U.S. 464, 475 (1977) (“There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy”).

III

The lower courts also erred in invalidating § 954(d)(1) as unconstitutionally vague. Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards. See NAACP v. Button, 371 U.S. 415, 432-433 (1963). The terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any “forbidden area” in the context of grants of this nature. Cf. Board of Airport Comm’rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987) (facially invalidating a flat ban on any “First Amendment” activities in an airport); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (“prohibitory and stigmatizing effect” of a “quasi-criminal” ordinance relevant to the vagueness analysis); Grayned v. City of Rockford, 408 U.S., at 108 (requiring clear lines between “lawful and unlawful” conduct). We recognize, as a practical matter, that artists may conform their speech to what they believe to be the decisionmaking criteria in order to acquire funding. See Statement of Charlotte Murphy, Executive Director of NAAO, reprinted in App. 21-22. But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.

In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all Government programs awarding scholarships and grants on the basis of subjective criteria such as “excellence.” See, e.g., 2 U.S.C. § 802 (establishing the Congressional Award Program to “promote initiative, achievement, and excellence among youths in the areas of public service, personal development, and physical and expedition fitness”); 20 U.S.C. § 956(c)(1) (providing funding to the National Endowment for the Humanities to promote “progress and scholarship in the humanities”); § 1134h(a) (authorizing the Secretary of Education to award fellowships to “students of superior ability selected on the basis of demonstrated achievement and exceptional promise”); 22 U.S.C. § 2452(a) (authorizing the award of Fulbright grants to “strengthen international cooperative relations”); 42 U.S.C. § 7382c
(authorizing the Secretary of Energy to recognize teachers for “excellence in mathematics or science education”). To accept respondents' vagueness argument would be to call into question the constitutionality of these valuable Government programs and countless others like them.

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

“The operation was a success, but the patient died.” What such a procedure is to medicine, the Court's opinion in this case is to law. It sustains the constitutionality of 20 U.S.C. § 954(d)(1) by gutting it. The most avid congressional opponents of the provision could not have asked for more. I write separately because, unlike the Court, I think that § 954(d)(1) must be evaluated as written, rather than as distorted by the agency it was meant to control. By its terms, it establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.

The statute requires the decency and respect factors to be considered in evaluating all applications – not, for example, just those applications relating to educational programs, ante, at 2177, or intended for a particular audience, ibid. Just as it would violate the statute to apply the artistic excellence and merit requirements to only select categories of applications, it would violate the statute to apply the decency and respect factors less than universally. A reviewer may, of course, give varying weight to the factors depending on the context, and in some categories of cases (such as the Court's example of funding for symphony orchestras, ante, at 2177) the factors may rarely if ever affect the outcome; but § 954(d)(1) requires the factors to be considered in every case.

This unquestionably constitutes viewpoint discrimination. That conclusion is not altered by the fact that the statute does not “compe[]” the denial of funding, ante, at 2176, any more than a provision imposing a five-point handicap on all black applicants for civil service jobs is saved from being race discrimination by the fact that it does not compel the rejection of black applicants. If viewpoint discrimination in this context is unconstitutional (a point I shall address anon), the law is invalid unless there are some situations in which the decency and respect factors do not constitute viewpoint discrimination. And there is none. The applicant who displays “decency,” that is, “[c]onformity to prevailing standards of propriety or modesty,” American Heritage Dictionary, at 483 (def. 2), and the applicant who displays “respect,” that is, “deferential regard,” for the diverse beliefs and values of the American people, id., at 1536 (def. 1), will always have an edge over an applicant who displays the opposite. And finally, the conclusion of viewpoint discrimination is not affected by the fact that what constitutes “‘decency’” or “the diverse values and beliefs of the American people” is difficult to pin down, ante, at 2176 – any more than a civil service preference in favor of those who display “Republican-Party values” would be rendered nondiscriminatory by the fact that there is plenty of room for argument as to what Republican-Party values might be.

The Court devotes so much of its opinion to explaining why this statute means something other than what it says that it neglects to cite the constitutional text governing our analysis. The First Amendment reads: “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const., Amdt. 1 (emphasis added). To abridge is “to contract, to diminish; to deprive of.” T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796). With the enactment of § 954(d)(1),
Congress did not *abridge* the speech of those who disdain the beliefs and values of the American public, nor did it *abridge* indecent speech. Those who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute. *Avant-garde artistes* such as respondents remain entirely free to *épater les bourgeois*; they are merely deprived of the additional satisfaction of having the bourgeois taxed to pay for it. It is preposterous to equate the denial of taxpayer subsidy with measures “‘aimed at the *suppression* of dangerous ideas.’” Regan *v.* Taxation with Representation of Wash., 461 U.S. 540, 550 (1983) (emphasis added) (quoting Cammarano *v.* United States, 358 U.S. 498, 513 (1959), in turn quoting Speiser *v.* Randall, 357 U.S. 513, 519 (1958)). “The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily ‘infringe’ a fundamental right is that – unlike direct restriction or prohibition – such a denial does not, as a general rule, have any significant coercive effect.” Arkansas Writers' Project, Inc. *v.* Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting).

Section 954(d)(1) is no more discriminatory, and no less constitutional, than virtually every other piece of funding legislation enacted by Congress. “The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program . . . .” Rust *v.* Sullivan, 500 U.S. 173, 193 (1991). As we noted in *Rust*, when Congress chose to establish the National Endowment for Democracy it was not constitutionally required to fund programs encouraging competing philosophies of government – an example of funding discrimination that cuts much closer than this one to the core of political speech which is the primary concern of the First Amendment. See id., at 194. It takes a particularly high degree of chutzpah for the NEA to contradict this proposition, since the agency itself discriminates – and is required by law to discriminate – in favor of artistic (as opposed to scientific, or political, or theological) expression. Not all the common folk, or even all great minds, for that matter, think that is a good idea. In 1800, when John Marshall told John Adams that a recent immigration of Frenchmen would include talented artists, “Adams denounced all Frenchmen, but most especially ‘schoolmasters, painters, poets, & C.’ He warned Marshall that the fine arts were like germs that infected healthy constitutions.” J. Ellis, After the Revolution: Profiles of Early American Culture 36 (1979). Surely the NEA itself is nothing less than an institutionalized discrimination against that point of view. Nonetheless, it is constitutional, as is the congressional determination to favor decency and respect for beliefs and values over the opposite because such favoritism does not “abridge” anyone's freedom of speech.

Justice SOUTER, dissenting.

The question here is whether the italicized segment of this statute is unconstitutional on its face: “[A]rtistic excellence and artistic merit are the criteria by which applications [for grants from the National Endowment for the Arts (NEA) ] are judged, *taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.*” 20 U.S.C. § 954(d) (emphasis added). It is.
The decency and respect proviso mandates viewpoint-based decisions in the disbursement of Government subsidies, and the Government has wholly failed to explain why the statute should be afforded an exemption from the fundamental rule of the First Amendment that viewpoint discrimination in the exercise of public authority over expressive activity is unconstitutional. The Court's conclusions that the proviso is not viewpoint based, that it is not a regulation, and that the NEA may permissibly engage in viewpoint-based discrimination, are all patently mistaken. Nor may the question raised be answered in the Government's favor on the assumption that some constitutional applications of the statute are enough to satisfy the demand of facial constitutionality, leaving claims of the proviso's obvious invalidity to be dealt with later in response to challenges of specific applications of the discriminatory standards. This assumption is irreconcilable with our longstanding and sensible doctrine of facial overbreadth, applicable to claims brought under the First Amendment's speech clause. I respectfully dissent.

“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.” Texas v. Johnson, 491 U.S. 397, 414 (1989). “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas,” Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972), which is to say that “[t]he principle of viewpoint neutrality . . . underlies the First Amendment,” Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 505 (1984). Because this principle applies not only to affirmative suppression of speech, but also to disqualification for government favors, Congress is generally not permitted to pivot discrimination against otherwise protected speech on the offensiveness or unacceptability of the views it expresses. See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (public university's student activities funds may not be disbursed on viewpoint-based terms); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) (after-hours access to public school property may not be withheld on the basis of viewpoint); Leathers v. Medlock, 499 U.S. 439, 447 (1991) (“[D]ifferential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints”); Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) (government-mandated access to public utility's billing envelopes must not be viewpoint based).

When called upon to vindicate this ideal, we characteristically begin by asking “whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration.” Ward v. Rock Against Racism, supra, at 791 (citation omitted). The answer in this case is damning. One need do nothing more than read the text of the statute to conclude that Congress's purpose in imposing the decency and respect criteria was to prevent the funding of art that conveys an offensive message; the decency and respect proviso on its face is quintessentially viewpoint based, and quotations from the Congressional Record merely confirm the obvious legislative purpose. In the words of a cosponsor of the bill that enacted the proviso, “[w]orks which deeply offend the sensibilities of significant portions of the public ought not to be supported with public funds.” 136 Cong. Rec. 28624 (1990). Another supporter of the bill observed that “the Endowment's support for artists like Robert Mapplethorpe and Andre[s] Serrano has offended and angered many citizens,” behooving “Congress . . . to listen to these complaints about the NEA and make sure that exhibits like [these] are not funded again.”
Id., at 28642. Indeed, if there were any question at all about what Congress had in mind, a definitive answer comes in the succinctly accurate remark of the proviso's author, that the bill “add[s] to the criteria of artistic excellence and artistic merit, a shell, a screen, a viewpoint that must be constantly taken into account.” Id., at 28631.

In *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F. Supp. 184 (E.D.N.Y. 1999), the court held that New York City’s withholding appropriated funds for a museum that displayed “The Holy Virgin Mary” by Chris Ofili, which was made in part by using elephant dung and deemed offensive to Catholics, was unconstitutional viewpoint discrimination, distinguishing *Feeley*. In *Buxton v. Kurtinitis*, 862 F.3d 423 (4th Cir. 2017), the court held that plaintiff had no Free Speech claim of retaliation that he was denied admission to a public college (Radiation Therapy Program at Community College of Baltimore County) because of religious speech in a competitive interview for admission, even though religion was not supposed to be “brought up in the clinic.” Perhaps a better approach would have applied *Finley* reasonableness review and upheld denial on that ground.

In *Alliance for Open Society International Inc. v. United States Agency for International Development*, 651 F.3d 218 (2nd Cir. 2011), en banc review denied, 678 F.3d 127 (2nd Cir. 2012), *cert. granted*, 133 S. Ct. 928 (2012), a 2-1 panel of the Second Circuit ruled that a federal statute’s requirement that any group receiving federal funds in the international fight against AIDS have a policy “explicitly opposing prostitution” compels speech, and thus is unconstitutional; the majority distinguished the case from *Rust v. Sullivan* on the grounds that in *Rust* the strings on the funding merely required the recipient not to speak about abortion, whereas here the strings on funding required the recipient to take a position inconsistent with the speaker’s actual views. In *Agency for International Development v. Alliance for Open Society International, Inc.*, 133 S. Ct. 2321 (2013), the Supreme Court affirmed the Second Circuit on the independent ground that since the speech restriction regarding prostitution was not related to the government program, which was about fighting HIV/AIDS, the *Rust* doctrine, which involved strings placed on funding in the context of a government program, did not apply. Thus, under standard First Amendment doctrine, the restriction constituted unconstitutional viewpoint discrimination.

133 S. Ct. 2321 (2013)

Chief Justice ROBERTS delivered the opinion of the Court.

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (Leadership Act), 117 Stat. 711, as amended, 22 U.S.C. § 7601 et seq., outlined a comprehensive strategy to combat the spread of HIV/AIDS around the world. As part of that strategy, Congress authorized the appropriation of billions of dollars to fund efforts by nongovernmental organizations to assist in the fight. The Act imposes two related conditions on that funding: First, no funds made available by the Act “may be used to promote or advocate the legalization or practice of prostitution or sex trafficking.” § 7631(e). And second, no funds may be used by an organization “that does not
have a policy explicitly opposing prostitution and sex trafficking.” § 7631(f). This case concerns the second of these conditions, referred to as the Policy Requirement. . . .

The Spending Clause of the Federal Constitution grants Congress the power “[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” Art. I, § 8, cl. 1. The Clause provides Congress broad discretion to tax and spend for the “general Welfare,” including by funding particular state or private programs or activities. That power includes the authority to impose limits on the use of such funds to ensure they are used in the manner Congress intends. Rust v. Sullivan, 500 U.S. 173, 195, n.4 (1991) (“Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use.”).

As a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds. This remains true when the objection is that a condition may affect the recipient's exercise of its First Amendment rights. See, e.g., United States v. American Library Assn., Inc., 539 U.S. 194, 212 (2003) (plurality opinion) (rejecting a claim by public libraries that conditioning funds for Internet access on the libraries' installing filtering software violated their First Amendment rights, explaining that “[t]o the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance”); Regan v. Taxation With Representation of Wash., 461 U.S. 540, 546 (1983) (dismissing “the notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State” (internal quotation marks omitted)).

At the same time, however, we have held that the Government “‘may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.’” [Rumsfeld v.] Forum for Academic and Institutional Rights, [547 U.S. 47,] 59 [(2006)] (quoting American Library Assn., supra, at 210). . . .

The dissent thinks that can only be true when the condition is not relevant to the objectives of the program (although it has its doubts about that), or when the condition is actually coercive, in the sense of an offer that cannot be refused. See post, at 2325-2326 (opinion of Scalia, J.). Our precedents, however, are not so limited. In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program – those that specify the activities Congress wants to subsidize – and conditions that seek to leverage funding to regulate speech outside the contours of the program itself. The line is hardly clear, in part because the definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that “Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.” Legal Services Corporation v. Velazquez, 531 U.S. 533, 547 (2001).

A comparison of two cases helps illustrate the distinction: In Regan v. Taxation With Representation of Washington, the Court upheld a requirement that nonprofit organizations seeking tax-exempt status under 26 U.S.C. § 501(c)(3) not engage in substantial efforts to influence legislation. The tax-exempt status, we explained, “ha[d] much the same effect as a cash grant to the organization.” 461 U.S., at 544. And by limiting § 501(c)(3) status to organizations that did not attempt to influence
In rejecting the nonprofit’s First Amendment claim, the Court highlighted the fact that the condition did not prohibit that organization from lobbying Congress altogether. By returning to a “dual structure” it had used in the past – separately incorporating as a § 501(c)(3) organization and § 501(c)(4) organization – the nonprofit could continue to claim § 501(c)(3) status for its nonlobbying activities, while attempting to influence legislation in its § 501(c)(4) capacity with separate funds. Ibid. Maintaining such a structure, the Court noted, was not “unduly burdensome.” Id., at 545, n.6. The condition thus did not deny the organization a government benefit “on account of its intention to lobby.” Id., at 545.

In *FCC v. League of Women Voters of California*, by contrast, the Court struck down a condition on federal financial assistance to noncommercial broadcast television and radio stations that prohibited all editorializing, including with private funds.468 U.S. 364, 399-401 (1984). Even a station receiving only one percent of its overall budget from the Federal Government, the Court explained, was “barred absolutely from all editorializing.” Id., at 400. Unlike the situation in *Regan*, the law provided no way for a station to limit its use of federal funds to noneditorializing activities, while using private funds “to make known its views on matters of public importance.” 468 U.S., at 400. The prohibition thus went beyond ensuring that federal funds not be used to subsidize “public broadcasting station editorials,” and instead leveraged the federal funding to regulate the stations' speech outside the scope of the program. Id., at 399 (internal quotation marks omitted).

Our decision in *Rust v. Sullivan* elaborated on the approach reflected in *Regan* and *League of Women Voters*. In *Rust*, we considered Title X of the Public Health Service Act, a Spending Clause program that issued grants to nonprofit health-care organizations “to assist in the establishment and operation of voluntary family planning projects [to] offer a broad range of acceptable and effective family planning methods and services.” 500 U.S., at 178 (internal quotation marks omitted). The organizations received funds from a variety of sources other than the Federal Government for a variety of purposes. The Act, however, prohibited the Title X federal funds from being “used in programs where abortion is a method of family planning.” Ibid. (internal quotation marks omitted).

We explained that Congress can, without offending the Constitution, selectively fund certain programs to address an issue of public concern, without funding alternative ways of addressing the same problem. In Title X, Congress had defined the federal program to encourage only particular family planning methods. The challenged regulations were simply “designed to ensure that the limits of the federal program are observed,” and “that public funds [are] spent for the purposes for which they were authorized.” Rust, 500 U.S., at 193, 196.

In making this determination, the Court stressed that “Title X expressly distinguishes between a Title X grantee and a Title X project.” Id., at 196. The regulations governed only the scope of the grantee’s Title X projects, leaving it “unfettered in its other activities.” Ibid. “The Title X grantee can continue to . . . engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.” Ibid. Because the regulations did not “prohibit[ ] the recipient from engaging in the protected conduct outside the scope of the federally funded program,” they did not run afoul of the First Amendment. Id., at 197.
As noted, the distinction drawn in these cases – between conditions that define the federal program and those that reach outside it – is not always self-evident. As Justice Cardozo put it in a related context, “Definition more precise must abide the wisdom of the future.” Steward Machine Co. v. Davis, 301 U.S. 548, 591 (1937). Here, however, we are confident that the Policy Requirement falls on the unconstitutional side of the line.

To begin, it is important to recall that the Leadership Act has two conditions relevant here. The first – unchallenged in this litigation – prohibits Leadership Act funds from being used “to promote or advocate the legalization or practice of prostitution or sex trafficking.” 22 U.S.C. § 7631(e). The Government concedes that § 7631(e) by itself ensures that federal funds will not be used for the prohibited purposes. Brief for Petitioners 26–27.

The Policy Requirement therefore must be doing something more – and it is. The dissent views the Requirement as simply a selection criterion by which the Government identifies organizations “who believe in its ideas to carry them to fruition.” Post, at 2332. As an initial matter, whatever purpose the Policy Requirement serves in selecting funding recipients, its effects go beyond selection. The Policy Requirement is an ongoing condition on recipients’ speech and activities, a ground for terminating a grant after selection is complete. See AAPD 12-04, at 12. In any event, as the Government acknowledges, it is not simply seeking organizations that oppose prostitution. Reply Brief 5. Rather, it explains, “Congress has expressed its purpose ‘to eradicate’ prostitution and sex trafficking, 22 U.S.C. § 7601(23), and it wants recipients to adopt a similar stance.” Brief for Petitioners 32 (emphasis added). . . .

The Government suggests that the Policy Requirement is necessary because, without it, the grant of federal funds could free a recipient's private funds “to be used to promote prostitution or sex trafficking.” Brief for Petitioners 27 (citing Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2725-2726 (2010)). That argument assumes that federal funding will simply supplant private funding, rather than pay for new programs or expand existing ones. The Government offers no support for that assumption as a general matter, or any reason to believe it is true here. And if the Government's argument were correct, League of Women Voters would have come out differently, and much of the reasoning of Regan and Rust would have been beside the point.

The Government cites but one case to support that argument, Holder v. Humanitarian Law Project. [Ed:excerpted § 5.3.1] That case concerned the quite different context of a ban on providing material support to terrorist organizations, where the record indicated that support for those organizations' nonviolent operations was funneled to support their violent activities. 130 S. Ct., at 2725-2726.

The Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. As to that, we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Barnette, 319 U.S., at 642.
JUSTICE KAGAN took no part in the consideration or decision of this case.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

The Leadership Act provides that “any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking” may not receive funds appropriated under the Act. 22 U.S.C. § 7631(f). This Policy Requirement is nothing more than a means of selecting suitable agents to implement the Government's ... strategy to eradicate HIV/AIDS. That is perfectly permissible.

The First Amendment does not mandate a viewpoint-neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal, weapon development over disarmament, and so forth. Moreover, the government may enlist the assistance of those who believe in its ideas to carry them to fruition; and it need not enlist for that purpose those who oppose or do not support the ideas. That seems to me a matter of the most common common sense. . . .

The argument is that this commonsense principle will enable the government to discriminate against, and injure, points of view to which it is opposed. Of course the Constitution does not prohibit government spending that discriminates against, and injures, points of view to which the government is opposed; every government program which takes a position on a controversial issue does that. Anti-smoking programs injure cigar aficionados, programs encouraging sexual abstinence injure free-love advocates, etc. The constitutional prohibition at issue here is not a prohibition against discriminating against or injuring opposing points of view, but the First Amendment's prohibition against the coercing of speech. I am frankly dubious that a condition for eligibility to participate in a minor federal program such as this one runs afoul of that prohibition even when the condition is irrelevant to the goals of the program. Not every disadvantage is a coercion.

But that is not the issue before us here. Here the views that the Government demands an applicant forswear — or that the Government insists an applicant favor — are relevant to the program in question. The program is valid only if the Government is entitled to disfavor the opposing view (here, advocacy of or toleration of prostitution). And if the program can disfavor it, so can the selection of those who are to administer the program. There is no risk that this principle will enable the Government to discriminate arbitrarily against positions it disfavors. It would not, for example, permit the Government to exclude from bidding on defense contracts anyone who refuses to abjure prostitution. But here a central part of the Government's HIV/AIDS strategy is the suppression of prostitution, by which HIV is transmitted. It is entirely reasonable to admit to participation in the program only those who believe in that goal.

. . . . Elimination of prostitution is an objective of the HIV/AIDS program, and any promotion of prostitution — whether made inside or outside the program — does harm the program.

___________________________________

Page 206
In *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (Gorsuch, J., not participating), the Court held a provision of federal law prohibiting registration of trademarks that may “disparage . . . or bring . . . into contemp[t] or disrepute” any “persons, living or dead” was unconstitutional as applied to an Asian-American band “The Slants.” Four Justices distinguished *NEA v. Finley*, excepted at § 4.2, on the ground this case involved trademark protection, not grants or subsidies, *id.* at 1760-61, and then held the provision failed *Central Hudson Gas*’ intermediate review regulation of commercial speech. *Id.* at 1763-65 (Alito, J., joined by Roberts, C.J., and Thomas & Breyer, JJ.) (“preventing speech expressing ideas that offend . . . strikes at the heart of the First Amendment” and is viewpoint discrimination, not a “substantial interest”; provision not “narrowly drawn” to drive out trademarks supporting invidious discrimination conduct). Four Justices held that because the regulation was an example of viewpoint discrimination it triggered strict scrutiny even if a regulation of commercial speech. *Id.* at 1765-68 (Kennedy, J., joined by Ginsburg, Sotomayor & Kagan, JJ.) (“speech burden based on audience reactions is simply government hostility . . . long prohibited [to justify] a First Amendment burden”). Why the “dispargement” regulation in *Tam* was viewed as viewpoint discrimination, while the “decency” regulation in *Finley* was not, was unconsidered. See also *Boos v. Barry*, 485 U.S. 312, 319-20 (1988) (regulation banning signs around foreign embassies which tend to bring foreign government into “public disrepute” not viewpoint discrimination, but subject-matter regulation, since enforcement depends not on federal government’s view, but policies of foreign government). *Cf.* In re *Brunetti*, 877 F.3d 1330 (Fed. Cir. 2017) (federal trademark ban on “immoral” or “scandalous” matter unconstitutional based on *Tam*; mark in this case was “FUCT”).

§ 4.3 Government Directed Speech: Coerced Speech

1. Classic Cases of Coerced Speech

The foundation for modern cases on coerced expression was laid in the 1943 case of *West Virginia State Board of Education v. Barnette*. There a 6-3 Court held it unconstitutional to require teachers and pupils, as a regular part of a public school program, to participate in a salute to the flag of the United States, overruling *Minersville School District v. Gobitis*, decided 8-1, just three years earlier.

*West Virginia State Board of Education v. Barnette*

319 U.S. 624 (1943)

Justice JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District v. Gobitis*, 310 U.S. 586 [(1940)], the West Virginia . . . Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become “a regular part of the program of activities in the public schools,” that all teachers and pupils “shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly.”
It was said [in *Gobitis*] that the flag-salute controversy confronted the Court with “the problem which Lincoln cast in memorable dilemma: ‘Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?’ and that the answer must be in favor of strength.” *Gobitis*, supra, 310 U.S. at 596.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning.

The *Gobitis* opinion reasoned that this is a field “where courts possess no marked and certainly no controlling competence,” that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to “fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena,” since all the “effective means of inducing political changes are left free.” Id., 310 U.S. at 597, 598, 600.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

[At] the very heart of the *Gobitis* opinion, [the Court] reasoned that “National unity is the basis of national security,” that the authorities have “the right to select appropriate means for its attainment,” and hence reaches the conclusion that such compulsory measures toward “national unity” are constitutional. 310 U.S. at 595. Upon the verity of this assumption depends our answer in this case.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.


Justice FRANKFURTER, dissenting.

One who belongs to the most vilified and persecuted minority in history [Ed.: Justice Frankfurter was Jewish] is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive
our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard.

When Justice Holmes, speaking for this Court, wrote that “it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts,” Missouri, Kansas & Texas R. Co. v. May, 194 U.S. 267, 270 [(1904)], he went to the very essence of our constitutional system and the democratic conception of our society.

The framers of the federal Constitution might have chosen to assign an active share in the process of legislation to this Court. They had before them the well-known example of New York's Council of Revision, which had been functioning since 1777. After stating that “laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed,” the state constitution made the judges of New York part of the legislative process by providing that “all bills which have passed the senate and assembly shall, before they become laws,” be presented to a Council of which the judges constituted a majority, “for their revisal and consideration.” Art. III, New York Constitution of 1777. Judges exercised this legislative function in New York for nearly fifty years. See Art. I, § 12, New York Constitution of 1821. But the framers of the Constitution denied such legislative powers to the federal judiciary.

It has been speculated that abuse of authoritarian governmental power represented by the Nazi government in Germany; two new appointments to the Court by President Roosevelt (Justice Jackson and Rutledge); recognition they voted in error in Gobitis (Justices Black and Douglas), and rhetoric by the Roosevelt Administration on civil liberties matters, all may have combined for the change in Court attitudes between Gobitis in 1940 and Barnette in 1943.9

In 1977, in Wooley v. Maynard,10 the Court was confronted with a First Amendment challenge to a New Hampshire law that required all passenger vehicle license plates to carry the motto, "Live

---


10 430 U.S. 705, 714-17 (1977). Justice Rehnquist dissented in Wooley, joined, somewhat surprisingly, by Justice Blackmun. Justice Rehnquist said that the plaintiff was not required to say anything, and could display disagreement with the motto as long as the plate was not obscured. By analogy, the fact than an atheist carries and uses United States currency does not convey any affirmation of belief in "In God We Trust." Id. at 710-20 (Rehnquist, J., joined by Blackmun, J., dissenting). Justice White also dissented on the grounds that while declaratory relief against the statute may have been appropriate, the “stronger medicine” of injunctive relief was not appropriate. Id. at 717-19 (White, J., joined in part by Blackmun & Rehnquist, JJ., dissenting in part).
Free or Die." This slogan was at odds with plaintiff's religion and politics since he believed that life is more precious than freedom. Chief Justice Burger applied strict scrutiny to this content-based requirement, and concluded the state did not have a compelling interest in this mode of facilitating passenger vehicle identification, or in promoting the appreciation of history, individuals, and state pride. The Chief Justice said the record showed that New Hampshire passenger license plates have a special configuration of letters and numbers which makes them readily distinguishable without reference to the motto. Regarding the second interest, where a state seeks to disseminate an ideology, such interest cannot outweigh the individual's First Amendment right to avoid becoming the courier of the state’s message. See also Cressman v. Thompson, 719 F.3d 1139 (10th Cir. 2013) (motorist alleging that Oklahoma statutes prohibiting him from covering image on standard license plate of Native American shooting arrow toward the sky states a colorable First Amendment claim).

While the Sixth Circuit held in ACLU of Tennessee v. Bredesen, 441 F.3d 370 (6th Cir. 2006), that Tennessee’s “Choose Life” license plate are government speech exempt from standard free speech analysis, other circuit courts of appeals ruled differently. In Arizona Life Coalition, Inc. v. Stanton, 515 F.3d 956 (9th Cir. 2008), the Ninth Circuit held that Arizona’s rejection of “Choose Life” plates constituted impermissible viewpoint discrimination in a nonpublic forum, since Arizona permitted specialized license plates as long as they were not offensive or promote discrimination, a product brand, or a specific religion or antireligious belief. Consistent with Planned Parenthood of South Carolina, Inc. v. Rose, 361 F.3d 786 (4th Cir. 2004), a district court in the Fourth Circuit ruled in ACLU of North Carolina v. Conti, 912 F. Supp. 2d 363 (E.D.N.C. 2012), that if a state permits a pro-life license plate, the failure to create a pro-choice alternative constitutes viewpoint discrimination. In Choose Life Illinois, Inc. v. White, 547 F.3d 853 (7th Cir. 2008), the Seventh Circuit held that while nonpublic forum analysis did apply, the state’s rejection of a “Choose Life” specialty plate was subject-matter regulation, not viewpoint discrimination, since Illinois excluded the “entire subject of abortion” from its license plate program, rejecting both “Choose Life” and “Pro-Choice.”

In Walker v. Texas Div. Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245-46 (2015), a 5-4 Court adopted the Bredesen view that specialty license plates are government speech, and so government regulations – here denying a plate featuring the Confederate battle flag – was not subject to free speech review. This approach permits viewpoint discrimination in license plate regulation. See, e.g., ACLU of North Carolina v. Tennyson, 815 F.3d 183 (4th Cir. 2016) (North Carolina can allow motorists to promote anti-abortion agenda on license plates, while denying pro-choice views); Vawter v. Abernathy, 45 N.E.3d 1200 (Ind. 2016) (Indiana law granting Bureau of Motor Vehicles broad discretion to accept or reject personalized license plates cannot be challenged for vagueness given plates are government speech). A better approach would have been to find the state had a compelling government interest not to promote the Confederate battle flag (as a symbol of rebellion or racism), or to hold the ban reflected a subject-matter regulation related to decency, as in Finley, excerpted at § 4.2, and uphold it under reasonableness review. The dissent in Walker observed that individual-chosen specialty license plates are not “government speech,” but then applied viewpoint discrimination, strict scrutiny to hold the ban unconstitutional. 135 S. Ct. at 2254-55 (Alito, J., joined by Roberts, C.J., and Scalia & Kennedy, JJ., dissenting). Cf. Mitchell v. Maryland Motor Vehicle Admin., 148 A.3d 319 (Md. 2016) (vanity license plates, where individual tailors numbers and letters to form a personalized message, still subject to nonpublic forum analysis after Walker).
In *Torcaso v. Watkins*, the Court considered a case involving a Maryland statute that required an individual to profess a belief in God to become a notary public. A unanimous Supreme Court held, “We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’ Neither [a State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” By the same token, the oath most persons take at trial to “tell the truth, the whole truth, and nothing but the truth, so help me God” would create a First Amendment problem if the government required the individual to add the phrase “so help me God.” Instead, governments permit individuals to promise to tell the truth at trial by “oath” or secular “affirmation.” Similarly, as Justice O’Connor noted, concurring in *Elk Grove Unified School District v. Newdow*, “the oaths of judicial office, citizenship, and military and civil service all end with the [optional] phrase ‘[S]o help me God.’ See 28 U.S.C. § 453; 5 U.S.C. § 3331; 10 U.S.C. § 502; 8 CFR § 337.1.” The phrase mentioning God must be optional.

2. **Coerced Membership in a Group Cases**

Another way that persons may be compelled to participate actively in speech with which they may disagree is to be forced to contribute money that will pay for the speech. In *Abood v. Detroit Board of Education*, the Court held that government employees, who were non-union employees included in an "agency shop" contract, had a constitutional right that the union not spend part of their required service fee toward the advancement of ideological causes not germane to the union’s duties as their collective-bargaining representative. It was sufficient, said the Court, that the union could collect the fees unless the individual union member affirmatively “opted-out.” Additionally, the union could require all members to pay general union dues devoted to collective bargaining and other core union activities, such as representing members in grievance hearings. In reaching this conclusion, the Court reaffirmed its prior holdings in two cases: *Railway Employees’ Department v. Hanson* and in *International Association of Machinists v. Street*. In those cases, the Court had held that employees may be required to pay dues under a union shop contract because such interference with their rights of free speech is justified by the legislative assessment of the compelling contribution by the union shop to the system of labor relations established by Congress, as long as the union does not use this power, over an employee's objection, to use his exacted funds to support political causes which the employee opposes.

---


Until 2018, the Court generally followed these instrumentalist-era precedents, but typically avoided extending those cases to new situations. In contrast, instrumentalist Justices have been more willing to adopt added exceptions to standard First Amendment analysis for regulations that support what they perceive as valid business or educational objectives. For example, *Abood* was followed in *Keller v. State Bar of California*.\(^{16}\) There, in 1990, the Court held that although an attorney could be required to join and financially support a state bar association, the attorney’s rights were violated if, without his consent, the State Bar funded activities not germane to regulating the legal process and improving the quality of legal services. However, in 1997, in *Glickman v. Wileman Bros*,\(^{17}\) discussed at § 4.4 nn.22-24, *Abood* was distinguished and farmers were required to pay assessments used by the state for generic advertising of California produce. The majority was composed of Justices Stevens, Ginsburg, and Breyer, joined by Justices O’Connor and Kennedy.

In *Locke v. Karass*,\(^{18}\) Justice Breyer wrote on behalf of unanimous Court that if two tests are met a local union can charge nonmembers a part of the affiliation fee that it pays to its national union or organization, including an appropriate share of litigation expenses that do not directly involve the local union, which the Court called “national litigation expenses.” The two tests are first that the subject matter of the national litigation must bear an appropriate relation to collective bargaining and, second, the arrangement must be reciprocal in the sense that the litigation may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization. A concurring opinion by Justice Alito, joined by the Chief Justice and Justice Scalia, pointed out that the parties in this litigation had assumed that the benefits of the expenses involved here were reciprocal and, therefore, the Court had not decided whether the union had the burden of proving the arrangement was reciprocal.

In *Knox v. Service Employees International Union, Local 1000*,\(^{19}\) a 7-2 Court held that when dealing with a “special assessment” of dues, not general annual dues, the First Amendment required the members to have to “opt-in” to pay the dues, rather than the dues being collected unless the member affirmatively chose to “opt-out.” *Cf.* Fleck v. Wetch, 868 F.3d 652 (8th Cir. 2017) (State Bar mandatory annual dues where attorney writes check either to fund all activities or roughly 2.5% less to fund only activities germane to regulating the legal profession, not political advocacy, does not implicate “opt-out” concern of *Knox*, as attorney affirmative writes check in either instance).

---


18 129 S. Ct. 798, 801-02 (2009); id. at 808 (Alito, J., joined by Roberts, C.J., and Scalia, J., concurring).

19 132 S.Ct. 2277, 2295-96 (2012); id. at 2296 (Sotomayor, J., joined by Ginsburg J., concurring in the judgment); id. at 2299-2300 (Breyer, J., joined by Kagan, J., dissenting) (“opt-out” provision constitutional as not an undue burden on members seeking to avoid compelled speech).
In *Harris v. Quinn*, a 5-4 Court held that personal assistants providing in-home health care paid by the state, but otherwise not considered state employees, cannot be required to pay *Abood/Karass*-style fees imposed as part of public-sector union rules applicable to state employees. A 4-Justice dissent held these workers are public employees because of the close relationship between the workers and the state, including the state set all “workforce-wide terms of employment,” including payment for the services rendered, and the state “structures the individual relationship between the customer and his assistant [and] develops a service plan laying out the assistant’s specific job responsibilities, hours, and working conditions.”

In *Friedrichs v. California Teachers Ass’n*, the Court was poised to overrule the 9th Circuit’s decision and extend the “opt-in” requirement of *Knox*, applicable to special assessments, to regular union dues, thus overruling the “opt-out” aspect of *Abood*. With Justice Scalia’s death on February 13, 2016, the Court affirmed on a 4-4 tie vote. With Justice Gorsuch joining the Court, the Court did overrule *Abood* in *Janus v. American Federation of State, County, and Municipal Employees, Council 31*.

*Janus v. American Federation of State, County, and Municipal Employees, Council 31*  
138 S. Ct. 2448 (2018)

Justice ALITO delivered the opinion of the Court.

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

We upheld a similar law in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 2009 (1977), and we recognize the importance of following precedent unless there are strong reasons for not doing so. But there are very strong reasons in this case. Fundamental free speech rights are at stake. *Abood* was poorly reasoned. It has led to practice problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

---


Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. See Ill. Comp. Stat., ch. 5, §315/6(a) (West 2016). If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees. §§315/3(s)(1), 315/6(c), 315/9. Employees in the unit are not obligated to join the union selected by their co-workers, but whether they join or not, that union is deemed to be their sole permitted representative. See §§315/6(a), (c).

Employees who decline to join the union are not assessed full union dues but must instead pay what is generally called an “agency fee,” which amounts to a percentage of the union dues. Under Abood, nonmembers may be charged for the portion of union dues attributable to activities that are “germane to [the union’s] duties as collective-bargaining representative,” but nonmembers may not be required to fund the union’s political and ideological projects. 431 U. S., at 235; see id., at 235–236. In labor-law parlance, the outlays in the first category are known as “chargeable” expenditures, while those in the latter are labeled “nonchargeable.”

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified “levels of scrutiny” to be applied in different contexts.

In Knox [v. Service Employees International Union, Local 1000], we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. 567 U. S., at 309–310, 321–322. Even though commercial speech has been thought to enjoy a lesser degree of protection, see, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y., 447 U.S. 557, 562–563 (1980), prior precedent in that area, specifically United Foods [Ed.: discussed in this Coursebook at § 4.4], had applied what we characterized as “exacting” scrutiny, Knox, 567 U. S., at 310, a less demanding test than the “strict” scrutiny that might be thought to apply outside the commercial sphere. Under “exacting” scrutiny, we noted, a compelled subsidy must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” Ibid. (internal quotation marks and alterations omitted). In Harris, the second of these cases, we again found that an agency-fee requirement failed “exacting scrutiny.” 573 U. S., at ___ (slip op., at 33). But we questioned whether that test provides sufficient protection for free speech rights, since “it is apparent that the speech compelled” in agency-fee cases “is not commercial speech.” Id., at ___ (slip op., at 30).

It unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in Knox and Harris.

In Abood, the main defense of the agency-fee arrangement was that it served the State’s interest in “labor peace,” 431 U. S., at 224. By “labor peace,” the Abood Court meant avoidance of the conflict and disruption that it envisioned would occur if the employees in a unit were represented by more than one union. In such a situation, the Court predicted, “inter-union rivalries” would foster “dissension within the work force,” and the employer could face “conflicting demands from different unions.” Id., at 220–221. Confusion would ensue if the employer entered into and attempted to
“enforce two or more agreements specifying different terms and conditions of employment.” *Id.*, at 220. And a settlement with one union would be “subject to attack from [a] rival labor organizatio[n].” *Id.*, at 221. We assume that “labor peace,” in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*’s fears were unfounded. . . .

The federal employment experience is illustrative. Under federal law, a union chosen by majority vote is designated as the exclusive representative of all the employees, but federal law does not permit agency fees. See 5 U. S. C. §§7102, 7111(a), 7114(a). Nevertheless, nearly a million federal employees—about 27% of the federal work force—are union members. The situation in the Postal Service is similar. Although permitted to choose an exclusive representative, Postal Service employees are not required to pay an agency fee, 39 U. S. C. §§1203(a), 1209(c), and about 400,000 are union members. Likewise, millions of public employees in the 28 States that have laws generally prohibiting agency fees are represented by unions that serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was handed down, it is now undeniable that “labor peace” can readily be achieved “through means significantly less restrictive of associational freedoms” than the assessment of agency fees. *Harris, supra*, at ___ (slip op., at 30) (internal quotation marks omitted).

In addition to the promotion of “labor peace,” *Abood* cited “the risk of ‘free riders’” as justification for agency fees, 431 U. S., at 224. Respondents and some of their amici endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs.

Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage.

Whichever description fits the majority of public employees who would not subsidize a union if given the option, avoiding free riders is not a compelling interest. As we have noted, “free-rider arguments . . . are generally insufficient to overcome First Amendment objections.” *Knox*, 567 U. S., at 311. To hold otherwise across the board would have startling consequences. Many private groups speak out with the objective of obtaining government action that will have the effect of benefitting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering*, 391 U. S. 563 [Ed.: discussed in this Coursebook at § 8.3], which held that a school district violated the First Amendment by firing a teacher for writing a letter critical of the school administration. Under *Pickering* and later cases in the same line, employee speech is largely unprotected if it is part of what the employee is paid to do, see *Garcetti v. Ceballos*, 547 U. S. 410, 421–422 (2006), or if it involved a matter of only private concern, see *Connick, supra*, at 146–149. On the other hand, when a public employee speaks as a citizen on a matter of public concern, the
employee’s speech is protected unless “‘the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees’ outweighs ‘the interests of the [employee], as a citizen, in commenting upon matters of public concern.’” *Harris*, 573 U. S., at ___ (slip op., at 35) (quoting *Pickering*, supra, at 568). *Pickering* was the centerpiece of the defense of *Abood* in *Harris*, see 573 U. S., at ____–____ (slip op., at 17–21) (KAGAN, J., dissenting), and we found the argument unpersuasive, see *id.*, at ____–____ (slip op., at 34–37). The intervening years have not improved its appeal.

Even if that were attempted, the shoe would be a painful fit for at least three reasons. First, the *Pickering* framework was developed for use in a very different context—in cases that involve “one employee’s speech and its impact on that employee’s public responsibilities.” *United States v. Treasury Employees*, 513 U. S. 454, 467 (1995). This case, by contrast, involves a blanket requirement that all employees subsidize speech with which they may not agree. While we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees, we have acknowledged that the standard *Pickering* analysis requires modification in that situation. See 513 U. S., at 466–468, and n. 11. A speech-restrictive law with “widespread impact,” we have said, “gives rise to far more serious concerns than could any single supervisory decision.” *Id.*, at 468.

Second, the *Pickering* framework fits much less well where the government compels speech or speech subsidies in support of third parties. *Pickering* is based on the insight that the speech of a public-sector employee may interfere with the effective operation of a government office. When a public employer does not simply restrict potentially disruptive speech but commands that its employees mouth a message on its own behalf, the calculus is very different.

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

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

A similar problem arises with respect to speech that is germane to collective bargaining. The parties dispute how much of this speech is of public concern, but respondents concede that much of it falls squarely into that category. See Tr. of Oral Arg. 47, 65. Under *Abood*, nonmembers may be required to pay for all this speech, but *Pickering* would permit that practice only if the employer’s interests outweighed those of the employees. Thus, recasting *Abood* as an application of *Pickering* would substantially alter the *Abood* scheme.

Even if we were to apply some form of *Pickering*, Illinois’ agency-fee arrangement would not survive.
In *Harris*, the dissent’s central argument in defense of *Abood* was that union speech in collective bargaining, including speech about wages and benefits, is basically a matter of only private interest. See 573 U. S., at ___–___ (slip op., at 19–20) (KAGAN, J., dissenting). We squarely rejected that argument, see *id.*, at ___–___ (slip op., at 35–36), and the facts of the present case substantiate what we said at that time: “[I]t is impossible to argue that the level of . . . state spending for employee benefits . . . is not a matter of great public concern,” *id.* at ___ (slip op., at 36).

The only remaining question under *Pickering* is whether the State’s proffered interests justify the heavy burden that agency fees inflict on nonmembers’ First Amendment interests. We have already addressed the state interests asserted in *Abood*—promoting “labor peace” and avoiding free riders, see *supra*, at 11–18—and we will not repeat that analysis. In *Harris* and this case, defenders of *Abood* have asserted a different state interest—in the words of the *Harris* dissent, the State’s “interest in bargaining with an adequately funded exclusive bargaining agent.” 573 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 7); see also *post*, at 6–7 (KAGAN, J., dissenting). This was not “the interest *Abood* recognized and protected,” *Harris, supra*, at ___ (slip op., at 7) (KAGAN, J., dissenting), and, in any event, it is insufficient.

Although the dissent would accept without any serious independent evaluation the State’s assertion that the absence of agency fees would cripple public-sector unions and thus impair the efficiency of government operations, see *post*, at 8–9, 11, ample experience, as we have noted, *supra*, at 12, shows that this is questionable.

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether *stare decisis* nonetheless counsels against overruling *Abood*. It does not.

Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of *Abood*’s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that *stare decisis* does not require us to retain *Abood*.

In some cases, reliance provides a strong reason for adhering to established law, see, e.g., *Hilton v. South Carolina Public Railways Comm’n*, 502 U. S. 197, 202–203 (1991), and this is the factor that is stressed most strongly by respondents, their *amici*, and the dissent. They contend that collective-bargaining agreements now in effect were negotiated with agency fees in mind and that unions may have given up other benefits in exchange for provisions granting them such fees. Tr. of Oral Arg. 67–68; see Brief for State Respondents 54; Brief for Union Respondent 50; *post*, at 22–26 (KAGAN, J., dissenting). In this case, however, reliance does not carry decisive weight.

For one thing, it would be unconscionable to permit free speech rights to be abridged in perpetuity in order to preserve contract provisions that will expire on their own in a few years’ time. “The fact that [public-sector unions] may view [agency fees] as an entitlement does not establish the sort of

For another, *Abood* does not provide “a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced.” *South Dakota v. Wayfair, Inc.*, ante, at 20; see *supra*, at 38–41. This is especially so because public-sector unions have been on notice for years regarding this Court’s misgivings about *Abood*. In *Knox*, decided in 2012, we described *Abood* as a First Amendment “anomaly.” 567 U. S., at 311. Two years later in *Harris*, we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood*’s many weaknesses. In 2015, we granted a petition for certiorari asking us to review a decision that sustained an agency-fee arrangement under *Abood*. *Friedrichs v. California Teachers Assn.*, 576 U. S. ___. After exhaustive briefing and argument on the question whether *Abood* should be overruled, we affirmed the decision below by an equally divided vote. 578 U. S. ___ (2016) (*per curiam*). During this period of time, any public-sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain.

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

For over 40 years, *Abood v. Detroit Bd. of Ed.*, 431 U. S. 209 (1977), struck a stable balance between public employees’ First Amendment rights and government entities’ interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union’s political or ideological activities.

That holding fit comfortably with this Court’s general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court’s decisions have long made plain that government entities have substantial latitude to regulate their employees’ speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees’ expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Far from an “anomaly,” *ante*, at 7, the *Abood* regime was a paradigmatic example of how the government can regulatespeech in its capacity as an employer.

Not any longer. Today, the Court succeeds in its 6-year campaign to reverse *Abood*. See *Friedrichs v. California Teachers Assn.*, 578 U. S. ___ (2016) (*per curiam*); *Harris v. Quinn*, 573 U. S. ___ (2014); *Knox v. Service Employees*, 567 U. S. 298 (2012). Its decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.
Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of *stare decisis*. There are no special justifications for reversing *Abood*. It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

Unlike the majority, I see nothing “questionable” about *Abood*’s analysis. *Ante*, at 7 (quoting *Harris*, 573 U. S., at ___ (slip op., at 17)). The decision’s account of why some government entities have a strong interest in agency fees (now often called fair-share fees) is fundamentally sound. And the balance *Abood* struck between public employers’ interests and public employees’ expression is right at home in First Amendment doctrine.

*Abood*’s reasoning about governmental interests has three connected parts. First, exclusive representation arrangements benefit some government entities because they can facilitate stable labor relations. In particular, such arrangements eliminate the potential for inter-union conflict and streamline the process of negotiating terms of employment. See 431 U. S., at 220–221. Second, the government may be unable to avail itself of those benefits unless the single union has a secure source of funding. . . . See *id.*, at 221. And third, agency fees are often needed to ensure such stable funding. That is because without those fees, employees have every incentive to free ride on the union dues paid by others. See *id.*, at 222.

The majority’s initial response to this reasoning is simply to dismiss it. “[F]ree rider arguments,” the majority pronounces, “are generally insufficient to overcome First Amendment objections.” *Ante*, at 13 (quoting *Knox*, 567 U. S., at 311). “To hold otherwise,” it continues, “would have startling consequences” because “[m]any private groups speak out” in ways that will “benefit[ ] nonmembers.” *Ante*, at 13. But that disregards the defining characteristic of *this* free-rider argument—that unions, unlike those many other private groups, must serve members and non-members alike. Groups advocating for “senior citizens or veterans” (to use the majority’s examples) have no legal duty to provide benefits to all those individuals: They can spur people to pay dues by conferring all kinds of special advantages on their dues-paying members. Unions are—by law—in a different position, as this Court has long recognized. See, *e.g.*, *Machinists v. Street*, 367 U. S. 740, 762 (1961). Justice Scalia, responding to the same argument as the majority’s, may have put the point best. In a way that is true of no other private group, the “law requires the union to carry” non-members—“indeed, requires the union to go out of its way to benefit [them], even at the expense of its other interests.” *Lehnert v. Ferris Faculty Assn.*, 500 U. S. 507, 556 (1991) (opinion concurring in part and dissenting in part). That special feature was what justified *Abood*: “Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them.” 500 U. S., at 556.

The majority claims it is not making a special and unjustified exception. It offers two main reasons for declining to apply here our usual deferential approach, as exemplified in *Pickering*, to the
regulation of public employee speech. First, the majority says, this case involves a “blanket” policy rather than an individualized employment decision, so *Pickering* is a “painful fit.” *Ante*, at 23. Second, the majority asserts, the regulation here involves compelling rather than restricting speech, so the pain gets sharper still. See *ante*, at 24–25. And finally, the majority claims that even under the solicitous *Pickering* standard, the government should lose, because the speech here involves a matter of public concern and the government’s managerial interests do not justify its regulation. See *ante*, at 27–31. The majority goes wrong at every turn. First, this Court has applied the same basic approach whether a public employee challenges a general policy or an individualized decision. Even the majority must concede that “we have sometimes looked to *Pickering* in considering general rules that affect broad categories of employees.” *Ante*, at 23. In fact, the majority cannot come up with any case in which we have not done so. All it can muster is one case in which while applying the *Pickering* test to a broad rule—barring any federal employee from accepting any payment for any speech or article on any topic—the Court noted that the policy’s breadth would count against the government at the test’s second step. See *United States v. Treasury Employees*, 513 U. S. 454 (1995). Which is completely predictable. The inquiry at that stage, after all, is whether the government has an employment-related interest in going however far it has gone—and in *Treasury Employees*, the government had indeed gone far.

Second, the majority’s distinction between compelling and restricting speech also lacks force. The majority posits that compelling speech always works a greater injury, and so always requires a greater justification. See *ante*, at 8. But the only case the majority cites for that reading of our precedent is possibly (thankfully) the most exceptional in our First Amendment annals: It involved the state forcing children to swear an oath contrary to their religious beliefs. See *ibid.* (quoting *West Virginia Bd. of Ed. v. Barnette*, 319 U. S. 624 (1943)). Regulations challenged as compelling expression do not usually look anything like that—and for that reason, the standard First Amendment rule is that the “difference between compelled speech and compelled silence” is “without constitutional significance.” *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 796 (1988); see *Wooley v. Maynard*, 430 U. S. 705, 714 (1977) (referring to “[t]he right to speak and the right to refrain from speaking” as “complementary components” of the First Amendment).

Third and finally, the majority errs in thinking that under the usual deferential approach, the government should lose this case. The majority mainly argues here that, at *Pickering*’s first step, “union speech in collective bargaining” is a “matter of great public concern” because it “affect[s] how public money is spent” and addresses “other important matters” like teacher merit pay or tenure. *Ante*, at 27, 29 (internal quotation marks omitted).

But to start, the majority misunderstands the threshold inquiry set out in *Pickering* and later cases. The question is not, as the majority seems to think, whether the public is, or should be, interested in a government employee’s speech. Instead, the question is whether that speech is about and directed to the workplace—as contrasted with the broader public square.

Consistent with that focus, speech about the terms and conditions of employment—the essential stuff of collective bargaining—has never survived *Pickering*’s first step. This Court has rejected all attempts by employees to make a “federal constitutional issue” out of basic “employment matters,
including working conditions, pay, discipline, promotions, leave, vacations, and terminations.” *Guarnieri*, 564 U. S., at 391; see *Board of Comm’rs, Wabaunsee Cty. v. Umbehr*, 518 U. S. 668, 675 (1996) (stating that public employees’ “speech on merely private employment matters is unprotected”).

For that reason, even the Justices who originally objected to *Abood* conceded that the use of agency fees for bargaining on “economic issues” like “salaries and pension benefits” would not raise significant First Amendment questions. 431 U. S., at 263, n. 16 (Powell, J., concurring in judgment).

And in any event, one *stare decisis* factor—reliance—dominates all others here and demands keeping *Abood*. *Stare decisis*, this Court has held, “has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision.” *Hilton v. South Carolina Public Railways Comm’n*, 502 U. S. 197, 202 (1991). That is because overruling a decision would then “require an extensive legislative response” or “dislodge settled rights and expectations.” *Ibid.* Both will happen here: The Court today wreaks havoc on entrenched legislative and contractual arrangements.

Over 20 States have by now enacted statutes authorizing fair-share provisions. To be precise, 22 States, the District of Columbia, and Puerto Rico—plus another two States for police and firefighter unions. Many of those States have multiple statutory provisions, with variations for different categories of public employees. See, *e.g.*, Brief for State of California as Amicus Curiae 24–25. Every one of them will now need to come up with new ways—elaborated in new statutes—to structure relations between government employers and their workers. The majority responds, in a footnote no less, that this is of no proper concern to the Court. See *ante*, at 47, n. 27. But in fact, we have weighed heavily against “abandon[ing] our settled jurisprudence” that “[s]tate legislatures have relied upon” it and would have to “reexamine [and amend] their statutes” if it were overruled. *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U. S. 768, 785 (1992); *Hilton*, 502 U. S., at 203.

Still more, thousands of current contracts covering millions of workers provide for agency fees. Usually, this Court recognizes that “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights.” *Payne*, 501 U. S., at 828. Not today. The majority undoes bargains reached all over the country. It prevents the parties from fulfilling other commitments they have made based on those agreements.

Americans have debated the pros and cons for any decades—in large part, by deciding whether to use fair-share arrangements. Yesterday, 22 States were on one side, 28 on the other (ignoring a couple of inbetweeners). Today, that healthy—that democratic—debate ends. The majority has adjudged who should prevail. Indeed, the majority is bursting with pride over what it has accomplished: Now those 22 States, it crows, “can follow the model of the federal government and 28 other States.” *Ante*, at 47, n. 27.

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

__________

A related case in this series is Board of Regents of University of Wisconsin System v. Southworth.22 There, the Court upheld a mandatory student activity fee which was used in part to support student organizations engaging in political or ideological speech, so long as there was viewpoint neutrality. Justice Kennedy said for the Court, “When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.” Justice Kennedy said that the standard of viewpoint neutrality was being used, rather than the standard of being germane to the organization’s purposes, which was used in Abood, because the germane standard would be unmanageable in a university setting, “particularly where the State undertakes to stimulate the whole universe of speech and ideas.” The Court remanded a referendum aspect of the university’s program, explaining it was not clear how allowing a vote of the student body to control funding of particular grants could protect viewpoint neutrality. Justice Souter concurring in the judgment, along with Justices Stevens and Breyer, cautioned against imposing a cast-iron viewpoint neutrality requirement on the university because protecting a university’s discretion to shape its educational mission is an important consideration regarding objections to student fees.

§ 4.4 Government Directed Speech: Advertising Cases

In Glickman v. Wileman Bros. & Elliott, Inc.,23 the Court upheld California legislation which required growers of certain crops to pay assessments which were used by the state for generic advertising of California nectarines, plums, and peaches. The Court said this was an economic regulation and did not abridge anyone's right to speak. For the Court, Justice Stevens pointed out that the marketing orders did not restrain anyone from communicating any message, or compel any person to engage in any actual or symbolic speech, or require the producers to endorse or to finance any political or ideological views. For the most part, they complained of having less money for their own advertising. But that is equally true of assessments to cover employee benefits, inspection fees, or any other activity authorized by a marketing order. The Court noted:

__________

22 529 U.S. 217, 232-33 (2000); id. at 236 (Souter, J., joined by Stevens & Breyer, JJ., concurring in the judgment).

The use of assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they "would prefer to remain silent," or require them to be publicly identified or associated with another's message. Respondents are not required themselves to speak, but are merely required to make contributions for advertising. With trivial exceptions on which the court did not rely, none of the generic advertising conveys any message with which respondents disagree. Furthermore, the advertising is attributed not to them, but to the California Tree Fruit Agreement or "California Summer Fruits."  

A dissent by Justice Souter, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, concluded that compelling speech officially is just as suspect as suppressing it, and should typically be given the same level of scrutiny.  

The Glickman case was narrowly interpreted and distinguished in United States v. United Foods, Inc.  

In this case, the Court struck down a federal program that mandated assessments on handlers of fresh mushrooms to fund, for the most part, generic advertising to promote mushroom sales. The majority opinion by Justice Kennedy and the dissenting opinion by Justice Breyer both agreed that the case was similar to Glickman in that: (1) the program did not impose restraints on the freedom of any producer to communicate any message to any audience; (2) no person was compelled to engage in any actual or symbolic speech; and (3) producers were not compelled to endorse or finance any political or ideological views. However, for Justice Kennedy and Justice Stevens, who switched sides from their votes in Glickman, that case was distinguishable on the ground that the tree fruits involved in that case were marketed pursuant to detailed marketing orders that had displaced many aspects of independent business activity. The mandated participation in an advertising program was part of a valid scheme of economic regulation. Here, in contrast, almost all of the funds collected were for one purpose: generic advertising. Because it had not been raised below, the Court did not consider an alternative argument by the government that its advertising was government speech that could be upheld under Rust v. Sullivan, excerpted at § 4.1.  

According to Justice Breyer, dissenting with Justices Ginsburg and O'Connor, this case was similar enough to Glickman that it should be upheld as an economic regulation. Based not merely on  

24 Id. at 470-76, citing Lehnert v. Ferris Faculty Ass’n, 500 U.S. 507, 527-29 (1991).  

25 Id. at 477-78 (Souter, J., joined by Rehnquist, C.J., and Scalia & Thomas, J.J., dissenting). Since this involved commercial speech, Justice Souter and Chief Justice Rehnquist called for the intermediate scrutiny used in Central Hudson, excerpted at§ 37.2. Id. at 491-92 (Souter, J., joined by Rehnquist, C.J., dissenting). Justice Scalia and Thomas would apply strict scrutiny to all content-based regulations of commercial speech. Id. at 504-05 (Thomas, J., joined by Scalia, J., dissenting).  

faithfulness to precedent, which supported Justice O'Connor joining the dissent. Justice Breyer and Ginsburg also indicated strong support for the Glickman approach. They noted:

Nearly every human action that the law affects, and virtually all governmental activity, involves speech. For First Amendment purposes this Court has distinguished among contexts in which speech activity might arise, applying special speech-protective rules and presumptions in some of those areas, but not in others. Were the Court not to do so – were it to apply the strictest level of scrutiny in every area of speech touched by law – it would, at a minimum, create through its First Amendment analysis a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect. That, I believe, is why it is important to understand that the regulatory program before us is a "species of economic regulation," which does not "warrant special First Amendment scrutiny."

Reliance on the speech being government speech was the basis of the decision in 2005 in Johanns v. Livestock Marketing Association.

**Johanns v. Livestock Marketing Association**

544 U.S. 550 (2005)

Justice SCALIA delivered the opinion of the Court.

For the third time in eight years, we consider whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment. In these cases, unlike the previous two, the dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny.

The Beef Promotion and Research Act of 1985 (Beef Act or Act), 99 Stat. 1597, announces a federal policy of promoting the marketing and consumption of “beef and beef products,” using funds raised by an assessment on cattle sales and importation. 7 U.S.C. § 2901(b). The statute directs the Secretary of Agriculture to implement this policy by issuing a Beef Promotion and Research Order (Beef Order or Order), § 2903, and specifies four key terms it must contain: The Secretary is to appoint a Cattlemen's Beef Promotion and Research Board (Beef Board or Board), whose members are to be a geographically representative group of beef producers and importers, nominated by trade associations. § 2904(1). The Beef Board is to convene an Operating Committee, composed of 10 Beef Board members and 10 representatives named by a federation of state beef councils. § 2904(4)(A). The Secretary is to impose a $1–per–head assessment (or “checkoff”) on all sales or importation of cattle and a comparable assessment on imported beef products. § 2904(8). And the

---

27 Id. at 419 (Breyer, J., joined by Ginsburg, J., and joined as to Parts I & III by O'Connor, J., dissenting).

28 Id. at 424-25 (Breyer, J., joined by Ginsburg, J., dissenting).
assessment is to be used to fund beef-related projects, including promotional campaigns, designed by the Operating Committee and approved by the Secretary. §§ 2904(4)(B), (C).

The Secretary promulgated the Beef Order with the specified terms. The assessment is collected primarily by state beef councils, which then forward the proceeds to the Beef Board. 7 CFR § 1260.172(a)(5) (2004). The Operating Committee proposes projects to be funded by the checkoff, including promotion and research. § 1260.167(a). The Secretary or his designee (see §§ 2.22(a)(1)(viii)(X), 2.79(a)(8)(xxxii)) approves each project and, in the case of promotional materials, the content of each communication. §§ 1260.168(e), 1260.169; App. 114, 143.

The Beef Order was promulgated in 1986 on a temporary basis, subject to a referendum among beef producers on whether to make it permanent. 7 U.S.C. §§ 2903, 2906(a). In May 1988, a large majority voted to continue it. Since that time, more than $1 billion has been collected through the checkoff, 132 F. Supp. 2d 817, 820 (D.S.D.2001), and a large fraction of that sum has been spent on promotional projects authorized by the Beef Act – many using the familiar trademarked slogan “Beef. It's What's for Dinner.” App. 50. In fiscal year 2000, for example, the Beef Board collected over $48 million in assessments and spent over $29 million on domestic promotion. The Board also funds overseas marketing efforts; market and food-science research, such as evaluations of the nutritional value of beef; and informational campaigns for both consumers and beef producers. See 7 U.S.C. §§ 2902(6), (9), (15), 2904(4)(B).

Many promotional messages funded by the checkoff (though not all, see App. 52-53) bear the attribution “Funded by America's Beef Producers.” E.g., id., at 50-51. Most print and television messages also bear a Beef Board logo, usually a check-mark with the word “BEEF.” [I]d., at 50-52.

Respondents are two associations whose members collect and pay the checkoff, and several individuals who raise and sell cattle subject to the checkoff. Id., at 17-19. They sued the Secretary, the Department of Agriculture, and the Board in Federal District Court on a number of constitutional and statutory grounds not before us – in particular, that the Board impermissibly used checkoff funds to send communications supportive of the beef program to beef producers. 132 F. Supp.2d, at 823. Petitioners in No. 03-1165, a state beef producers' association and two individual producers, intervened as defendants to argue in support of the program. The District Court granted a limited preliminary injunction, which forbade the continued use of checkoff funds to laud the beef program or to lobby for governmental action relating to the checkoff. Id., at 832.

While the litigation was pending, we held in United States v. United Foods, Inc., 533 U.S. 405 (2001), that a mandatory checkoff for generic mushroom advertising violated the First Amendment. Noting that the mushroom program closely resembles the beef program, respondents amended their complaint to assert a First Amendment challenge to the use of the beef checkoff for promotional activity. 207 F. Supp. 2d 992, 996 (D.S.D.2002); App. 30-32. Respondents noted that the advertising promotes beef as a generic commodity, which, they contended, impedes their efforts to promote the superiority of, inter alia, American beef, grain-fed beef, or certified Angus or Hereford beef.
We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true “compelled-speech” cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and “compelled-subsidy” cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech.

“The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies.” Southworth, 529 U.S., at 229. We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns. See ibid.; Keller, supra, at 12-13; Rosenberger, supra, at 833; see also Wooley, supra, at 721 (Rehnquist, J., dissenting).

The Secretary of Agriculture does not write ad copy himself. Rather, the Beef Board's promotional campaigns are designed by the Beef Board's Operating Committee, only half of whose members are Beef Board members appointed by the Secretary. (All members of the Operating Committee are subject to removal by the Secretary. 7 CFR § 1260.213 (2004).) Respondents contend that speech whose content is effectively controlled by a nongovernmental entity – the Operating Committee – cannot be considered “government speech.” We need not address this contention, because we reject its premise: The message of the promotional campaigns is effectively controlled by the Federal Government itself.

The message set out in the beef promotions is from beginning to end the message established by the Federal Government. Congress has directed the implementation of a “coordinated program” of promotion, “including paid advertising, to advance the image and desirability of beef and beef products.” 7 U.S.C. §§ 2901(b), 2902(13). Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain, see, e.g., § 2904(4)(B)(i) (campaigns “shall . . . take into account” different types of beef products), and what they shall not, see, e.g., 7 CFR § 1260.169(d) (2004) (campaigns shall not, without prior approval, refer “to a brand or trade name of any beef product”). Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well).

Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. App. 114, 118-121, 274-275. Nor is the Secretary's role limited to final approval or rejection: Officials of the Department also attend and participate in the open meetings at which proposals are developed. Id., at 111-112.
Respondents also contend that the beef program does not qualify as “government speech” because it is funded by a targeted assessment on beef producers, rather than by general revenues. This funding mechanism, they argue, has two relevant effects: It gives control over the beef program not to politically accountable legislators, but to a narrow interest group that will pay no heed to respondents' dissenting views, and it creates the perception that the advertisements speak for beef producers such as respondents.

We reject the first point. The compelled-subsidy analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. Cf. United States v. Lee, 455 U.S. 252, 260 (1982) (“There is no principled way . . . to distinguish between general taxes and those imposed under the Social Security Act” in evaluating the burden on the right to free exercise of religion). The First Amendment does not confer a right to pay one's taxes into the general fund, because the injury of compelled funding (as opposed to the injury of compelled speech) does not stem from the Government's mode of accounting. Cf. Bowen v. Roy, 476 U.S. 693, 700 (1986) (“The Free Exercise Clause . . . does not afford an individual a right to dictate the conduct of the Government's internal procedures”); id., at 716-717 (Stevens, J., concurring in part and concurring in result).

As to the second point, respondents' argument proceeds as follows: They contend that crediting the advertising to “America's Beef Producers” impermissibly uses not only their money but also their seeming endorsement to promote a message with which they do not agree. Communications cannot be “government speech,” they argue, if they are attributed to someone other than the government; and the person to whom they are attributed, when he is, by compulsory funding, made the unwilling instrument of communication, may raise a First Amendment objection.

We need not determine the validity of this argument – which relates to compelled speech rather than compelled subsidy – with regard to respondents' facial challenge. Since neither the Beef Act nor the Beef Order requires attribution, neither can be the cause of any possible First Amendment harm.

On some set of facts, this second theory might (again, we express no view on the point) form the basis for an as-applied challenge – if it were established, that is, that individual beef advertisements were attributed to respondents. The record, however, includes only a stipulated sampling of these promotional materials, see App. 47, and none of the exemplars provides any support for this attribution theory except for the tagline identifying the funding. Respondents apparently presented no other evidence of attribution at trial, and the District Court made no factual findings on the point. Indeed, in the only trial testimony on the subject that any party has identified, an employee of one of the respondent associations said he did not think the beef promotions would be attributed to his group. Whether the individual respondents who are beef producers would be associated with speech labeled as coming from “America's Beef Producers” is a question on which the trial record is altogether silent. We have only the funding tagline itself, a trademarked term that, standing alone,
is not sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad. We therefore conclude that on the record before us an as-applied First Amendment challenge to the individual advertisements affords no basis on which to sustain the Eighth Circuit's judgment, even in part.

Justice THOMAS, concurring.

I join the Court's opinion. I continue to believe that “[a]ny regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny.” United States v. United Foods, Inc., 533 U.S. 405, 419 (2001) (Thomas, J., concurring); see also Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457, 504-506 (1997) (Thomas, J., dissenting). At the same time, I recognize that this principle must be qualified where the regulation compels the funding of speech that is the government's own. It cannot be that all taxpayers have a First Amendment objection to taxpayer-funded government speech, even if the funded speech is not “germane” to some broader regulatory program. See ante, at 2060-2062. Like the Court, I see no analytical distinction between “pure” government speech funded from general tax revenues and speech funded from targeted exactions, ante, at 2063-2065; the practice of using targeted taxes to fund government operations, such as excise taxes, dates from the founding, see The Federalist No. 12, p. 75 (J. Cooke ed.1961).

Justice BREYER, concurring.

The beef checkoff program in these cases is virtually identical to the mushroom checkoff program in United States v. United Foods, Inc., 533 U.S. 405 (2001), which the Court struck down on First Amendment grounds. The “government speech” theory the Court adopts today was not before us in United Foods, and we declined to consider it when it was raised at the eleventh hour. See id., at 416-417. I dissented in United Foods, based on my view that the challenged assessments involved a form of economic regulation, not speech. See id., at 428. And I explained that, were I to classify the program as involving “commercial speech,” I would still vote to uphold it. See id., at 429.

I remain of the view that the assessments in these cases are best described as a form of economic regulation. However, I recognize that a majority of the Court does not share that view. Now that we have had an opportunity to consider the “government speech” theory, I accept it as a solution to the problem presented by these cases. With the caveat that I continue to believe that my dissent in United Foods offers a preferable approach, I join the Court's opinion.

Justice GINSBURG, concurring in the judgment.

and available in Clerk of Court's case file) (noting that “[t]rans fatty acids . . . are present in foods that come from ruminant animals (e.g., cattle and sheep)” and recommending that Americans “[l]imit intake of fats and oils high in saturated and/or trans fatty acids”); post, at 2072, n.7 (Souter, J., dissenting). I remain persuaded, however, that the assessments in these cases, as in United States v. United Foods, Inc., 533 U.S. 405 (2001), and Glickman v. Wileman Brothers & Elliott, Inc., 521 U.S. 457 (1997), qualify as permissible economic regulation.

JUSTICE KENNEDY, dissenting.

I join Justice Souter's dissenting opinion, which demonstrates with persuasive analysis why the speech at issue here cannot meaningfully be considered government speech at all. I would reserve for another day the difficult First Amendment questions that would arise if the government were to target a discrete group of citizens to pay even for speech that the government does “embrace as publicly as it speaks,” post, at 2073.

Justice SOUTER, with whom Justice STEVENS and Justice KENNEDY join, dissenting.

The Beef Promotion and Research Act of 1985, known as the Beef Act, taxes cattle sold in or imported into the United States at one dollar a head. 7 U.S.C. § 2904(8). Much of the revenue is spent urging people to eat beef, as in advertisements with the slogan, “Beef. It's What's for Dinner.” App. 50. Respondent taxpayers, “South Dakota and Montana ranchers and organizations representing their interests,” Brief for Respondents 1, object to the tax because they disagree with the advertisements' content, which they see as a generic message that “beef is good.” This message, the ranchers say, ignores the fact that not all beef is the same; the ads fail to distinguish, for example, the American ranchers' grain-fed beef from the grass-fed beef predominant in the imports, which the Americans consider inferior.

The ranchers' complaint is on all fours with the objection of the mushroom growers in United States v. United Foods, Inc., 533 U.S. 405 (2001), where a similar statutory exaction was struck down as a compelled subsidy of speech prohibited by the First Amendment absent a comprehensive regulatory scheme to which the speech was incidental. The defense of the Government's actions in these cases, however, differs from the position of the United States in United Foods. There we left open the possibility that a compelled subsidy would be justifiable not only as one element of an otherwise valid regulatory scheme, but also as speech of the Government itself, which the Government may pay for with revenue (usually from taxes) exacted from those who dissent from the message as well as from those who agree with it or do not care about it. [T]he Government argues here that the beef advertising is its own speech, exempting it from the First Amendment bar against extracting special subsidies from those unwilling to underwrite an objectionable message.

The Court accepts the defense unwisely. The error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own. Otherwise there is no check whatever on government's power to compel special speech subsidies, and the rule of United Foods is a dead letter.
I take the view that if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message, not just the statement of one self-interested group the government is currently willing to invest with power. Sometimes, as in these very cases, government can make an effective disclosure only by explicitly labeling the speech as its own. Because the Beef Act fails to require the Government to show its hand, I would affirm the judgment of the Court of Appeals holding the Act unconstitutional, and I respectfully dissent from the Court's decision to condone this compelled subsidy.

In 1779 Jefferson wrote that “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical.” A Bill for Establishing Religious Freedom, in 5 The Founders' Constitution, No. 37, p. 77 (P. Kurland & R. Lerner eds.1987), codified in 1786 at Va. Code Ann. § 57-1 (Lexis 2003). Although he was not thinking about compelled advertising of farm produce, we echoed Jefferson's view four years ago in United Foods, where we said that “First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . .” 533 U.S., at 411.

In sum, the First Amendment cannot be implemented by sanctioning government deception by omission (or by misleading statement) of the sort the Court today condones, and expression that is not ostensibly governmental, which government is not required to embrace as publicly as it speaks, cannot constitute government speech sufficient to justify enforcement of a targeted subsidy to broadcast it. The Court of Appeals thus correctly held that United Foods renders the Beef Act's mandatory-assessment provisions unconstitutional.

Following Johanns, the Supreme Court returned a number of cases to lower courts to reconsider their decisions in light of Johanns. Lower courts followed the Johanns precedent in those reconsidered cases.29

CHAPTER 5: PROCEDURAL ASPECTS OF FREE SPEECH DOCTRINE

§ 5.1 Prior Restraints on Speech: Permits or Licensing Systems

A prior restraint is a legal sanction that has the effect of suppressing future speech before there is a judicial finding, after appropriate proceedings, that such speech is not constitutionally protected from restraint. The Court has often emphasized that any prior restraint has a “‘heavy’ presumption against its constitutional validity.”1 This is particularly true because of the collateral bar rule. While a person accused of violating a law can defend on the grounds that the law is unconstitutional, in the case of a prior restraint “a court order must be obeyed until it is set aside” and “persons subject to the order who disobey it may not defend against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional.”2

In 1931, in Near v. Minnesota,3 the Court was confronted with a state statute that permitted courts to enjoin as a nuisance any “malicious, scandalous and defamatory newspaper, magazine, or other periodical.” For the Court, Chief Justice Hughes noted that under the statute an injunction could issue that would make further publication punishable as contempt unless the publisher could prove in an initial hearing that the material was true and published with good motives for justifiable ends. Hughes concluded that an injunction imposed on these grounds would be unconstitutional, as injunctions can be imposed only in exceptional cases, such as the threatened publication of military secrets, or incitements to violence or government overthrow. Such was not the case in Near.

Freedman v. Maryland
380 U.S. 51(1965)

Justice BRENNAN delivered the opinion of the Court.

Appellant sought to challenge the constitutionality of the Maryland motion picture censorship statute, Md. Ann. Code, 1957, Art. 66A, and exhibited the film “Revenge at Daybreak” at his

3 283 U.S. 697, 701-02 (1931).
Baltimore theatre without first submitting the picture to the State Board of Censors as required by § 2 thereof. The State concedes that the picture does not violate the statutory standards and would have received a license if properly submitted, but the appellant was convicted of a § 2 violation despite his contention that the statute in its entirety unconstitutionally impaired freedom of expression. The Court of Appeals of Maryland affirmed, 197 A.2d 232, and we noted probable jurisdiction, 377 U.S. 987. We reverse.

In *Times Film Corp. v. City of Chicago*, 365 U.S. 43 [(1961)], we considered and upheld a requirement of submission of motion pictures in advance of exhibition. The Court of Appeals held, on the authority of that decision, that “the Maryland censorship law must be held to be not void on its face as violative of the freedoms protected against State action by the First and Fourteenth Amendments.” 197 A.2d, at 235. This reliance on *Times Film* was misplaced. The only question tendered for decision in that case was “whether a prior restraint was necessarily unconstitutional under all circumstances.” Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, n.10 (emphasis in original). The exhibitor's argument that the requirement of submission without more amounted to a constitutionally prohibited prior restraint was interpreted by the Court in *Times Film* as a contention that the “constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. . . . even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government . . . .” 365 U.S., at 46, 47. The Court held that on this “narrow” question, id., at 46, the argument stated the principle against prior restraints too broadly; citing a number of our decisions, the Court quoted the statement from *Near v. State of Minnesota*, 283 U.S. 697, 716 [(1931)], that “[t]he protection even as to previous restraint is not absolutely unlimited.” In rejecting the proffered proposition in *Times Film* the Court emphasized, however, that “[i]t is that question alone which we decide,” 365 U.S., at 46, and it would therefore be inaccurate to say that *Times Film* upheld the specific features of the Chicago censorship ordinance.

Unlike the petitioner in *Times Film*, appellant does not argue that § 2 is unconstitutional simply because it may prevent even the first showing of a film whose exhibiting may legitimately be the subject of an obscenity prosecution. He presents a question quite distinct from that passed on in *Times Film*; accepting the rule in *Times Film*, he argues that § 2 constitutes an invalid prior restraint because, in the context of the remainder of the statute, it presents a danger of unduly suppressing protected expression. He focuses particularly on the procedure for an initial decision by the censorship board, which, without any judicial participation, effectively bars exhibition of any disapproved film, unless and until the exhibitor undertakes a time-consuming appeal to the Maryland courts and succeeds in having the Board's decision reversed. Under the statute, the exhibitor is required to submit the film to the Board for examination, but no time limit is imposed for completion of Board action, § 17. If the film is disapproved, or any elimination ordered, § 19 provides that

“The person submitting such film or view for examination will receive immediate notice of such elimination or disapproval, and if appealed from, such film or view will be promptly reexamined, in the presence of such person, by two or more members of the Board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the Board to the Baltimore City Court of Baltimore City. There
shall be a further right of appeal from the decision of the Baltimore City Court to the Court of Appeals of Maryland, subject generally to the time and manner provided for taking appeal to the Court of Appeals.”

Thus there is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review. Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and final vindication of the film on appellate review, six months. United Artists Corp. v. Maryland State Board of Censors, 210 Md. 586, 124 A.2d 292.

Although the Court has said that motion pictures are not “necessarily subject to the precise rules governing any other particular method of expression,” Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 [(1952)], it is as true here as of other forms of expression that “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” Bantam Books, Inc. v. Sullivan, supra, 372 U.S. at 70. “... [U]nder the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity ... without regard to the possible consequences for constitutionally protected speech.” Marcus v. Search Warrant, 367 U.S. 717, 731 [(1961)]. The administration of a censorship system for motion pictures presents peculiar dangers to constitutionally protected speech. Unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor. Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression must rest on the censor. As we said in Speiser v. Randall, 357 U.S. 513, 526 [(1958)], “Where the transcendent value of speech is involved, due process certainly requires ... that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.” Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See Bantam Books, Inc. v. Sullivan, supra; A Quantity of Books v. State of Kansas, 378 U.S. 205; Marcus v. Search Warrant, supra; Manual Enterprises, Inc. v. Day, 370 U.S. 478, 518-519. To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with
sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. See Bantam Books, Inc. v. Sullivan, supra. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country; for we are told that only four States and a handful of municipalities have active censorship laws.

It is readily apparent that the Maryland procedural scheme does not satisfy these criteria. First, once the censor disapproves the film, the exhibitor must assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression. Second, once the Board has acted against a film, exhibition is prohibited pending judicial review, however protracted. Under the statute, appellant could have been convicted if he had shown the film after unsuccessfully seeking a license, even though no court had ever ruled on the obscenity of the film. Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination. We hold, therefore, that appellant's conviction must be reversed. . . .

How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking: In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 ([1957]), we upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. The statute provides for a hearing one day after joinder of issue; the judge must hand down his decision within two days after termination of the hearing. The New York procedure operates without prior submission to a censor, but the chilling effect of a censorship order, even one which requires judicial action for its enforcement, suggests all the more reason for expeditious determination of the question whether a particular film is constitutionally protected.

The requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression. Similarly, we think that the nature of the motion picture industry may suggest different time limits for a judicial determination. It is common knowledge that films are scheduled well before actual exhibition, and the requirement of advance submission in § 2 recognizes this. One possible scheme would be to allow the exhibitor or distributor to submit his film early enough to ensure an orderly final disposition of the case before the scheduled exhibition date – far enough in advance so that the exhibitor could safely advertise the opening on a normal basis. Failing such a scheme or sufficiently early submission under such a scheme, the statute would have to require adjudication considerably more prompt than has been the case under the Maryland statute. Otherwise, litigation might be unduly expensive and protracted,
or the victorious exhibitor might find the most propitious opportunity for exhibition past. We do not mean to lay down rigid time limits or procedures, but to suggest considerations in drafting legislation to accord with local exhibition practices, and in doing so to avoid the potentially chilling effect of the Maryland statute on protected expression.

Justice DOUGLAS, whom Justice BLACK joins, concurring.

On several occasions I have indicated my view that movies are entitled to the same degree and kind of protection under the First Amendment as other forms of expression. Superior Films v. Department of Education, 346 U.S. 587, 588; Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 697; Times Film Corp. v. City of Chicago, 365 U.S. 43, 78. For the reasons there stated, I do not believe any form of censorship – no matter how speedy or prolonged it may be – is permissible. If censors are banned from the publishing business, from the pulpit, from the public platform – as they are – they should be banned from the theatre. I would not admit the censor even for the limited role accorded him in Kingsley Books, Inc. v. Brown, 354 U.S. 436. I adhere to my dissent in that case.

A case that raised directly the issue of publication of military secrets was New York Times Co. v. United States (The Pentagon Papers Case). This case involved the desire of The New York Times, Washington Post, and other newspapers to publish leaked government documents relating to the ongoing Vietnam war. On an expedited basis, a fragmented Court decided the case 6-3. At one extreme, Justices Douglas and Black took an absolutist view that prior restraints are never permissible under the First Amendment. At the other extreme, Chief Justice Burger, and Justices Harlan and Blackmun, concluded that, given the record presented on the expedited review, the prior restraint was justified. In the middle of the Court, Justices Brennan, White, Stewart, and Marshall held that the prior restraint could not be justified under prior Court precedents. Although the language in each of the four opinions was slightly different, each indicated the difficulty in justifying a prior restraint tracking a strict scrutiny approach. Justice Brennan wrote that to justify a prior restraint the government must prove that publication would “inevitably, directly, and immediately” cause the happening of an event such as a nuclear holocaust. Justice Stewart concluded that the government must show that disclosure of the information would result in “direct, immediate, and irreparable damage to our Nation or its people.” While acknowledging that disclose might result in substantial damage to the public interest, Justice White concluded that the government had not met its “very heavy burden.” Justice Marshall based his decision on the fact that Congress had not

4 403 U.S. 713, 718-20 (1971) (Black, J., joined by Douglas, J., concurring); id. at 726-27 (Brennan, J., concurring); id. at 730 (Stewart, J., joined by White, J., concurring); id. at 731 (White, J., joined by Stewart, J., concurring) id. at 745-46 (Marshall, J., concurring); id. at 753-59 (Harlan, J., joined by Burger, C.J., and Blackmun, J., dissenting)
authorized a prior restraint in this case, and that “[w]hen Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues – to overrule Congress.” An injunction also failed for an article in *The Progressive* magazine about how to build an atom bomb.  

In contrast, a prior restraint was upheld in *Snepp v. United States*. In *Snepp*, a former agent of the Central Intelligence Agency (CIA) breached his employment contract when he failed to submit for pre-publication review a book about the CIA. The Court concluded Snepp should have submitted the proposed book to the CIA, and then if Snepp and the CIA disagreed on any disclosures, the CIA would have the burden to seek an injunction against publication. Because Snepp failed to follow this procedure, the Court put all the profits from his book into a constructive trust for the benefit of the government. Justice Stevens, joined by Justices Brennan and Marshall, dissented, stating that the Court’s “drastic new remedy [of a constructive trust] has been fashioned to enforce a species of prior restraint on a citizen’s right to criticize his government.”

In *Burk v. Augusta-Richmond County, Georgia*, the Eleventh Circuit invalidated an ordinance, adopted in advance of expected protests by women’s groups at the Masters Golf Tournament, which required a permit for political demonstrations and submission of indemnification suitable to city attorney. The court concluded that the ordinance discriminated on the basis of content, and gave the city attorney unbridled discretion to deny indemnification pacts.

For the strict scrutiny, *Freedman v. Maryland* analysis to apply, a prior restraint must be involved. In *Alexander v. United States*, the Court rejected an argument that a forfeiture of a bookstore under the RICO statute was a prior restraint. Chief Justice Rehnquist noted that the forfeiture did not forbid any future expressive activities or require prior approval for actions. It merely punished the defendant by depriving him of assets derived from prior racketeering activities. Justice Kennedy dissented, with Justices Blackmun and Stevens, saying that the forfeiture was a prior restraint because it served not only an interest in purging a criminal taint, but also an interest in deterring the activities of his speech-related business.

---


6 444 U.S. 507, 510-16 (1980); *id.* at 526 (Stevens, J., joined by Brennan & Marshall, JJ., dissenting). *See also* Haig v. Agee, 453 U.S. 280 (1981) (former CIA agent Agee’s passport validly revoked when he disclosed names of CIA officers in violation of his CIA employment agreement). The government would have a similar argument of violation of any employment agreement to prosecute Edward Snowdon, but would not have that argument against Julian Assange of Wikileaks.

7 365 F.3d 1247 (11th Cir. 2004). *See also* Epona, LLC v. County of Ventura, 876 F.3d 1214 (9th Cir. 2017) (permit requirement for outdoor weddings left too much discretion when based on factors like “obnoxious or harmful to neighboring properties” and “detrimental to public interest.”).

8 509 U.S. 544, 549-54 (1993); *id.* at 565-76 (Kennedy, J., joined by Stevens & Blackmun, JJ., dissenting).
As the Court indicated in *Freedman v. Maryland*, for even a temporary prior restraint to be valid the restraint must: (1) put the burden on the government to go to court and bear the burden of proving the speech unprotected; (2) merely preserve the status quo for the shortest fixed period compatible with sound judicial resolution; and (3) provide for a prompt, final judicial disposition of the case. Further, due to the concern expressed by the Court about the repressive character of a prior restraint, strict scrutiny will apply to any injunction having a prior restraint impact on speech.

As an example, in *Tory v. Cochran*, the trial court had enjoined the defendant, who had engaged in a pattern of defamatory statements about famous trial attorney Johnnie Cochran, to stop picketing or uttering oral statements about Cochran or his law firm in any public forum. While the case was on appeal, Mr. Cochran died. After concluding the case was not moot, because the injunction remained in force even after Cochran’s death, the Court held that since picketing Cochran and his law office could no longer achieve its objective of forcing Cochran to pay “a tribute” to stop the activity, the injunction was now an overly broad prior restraint upon speech.

Of course, as part of management of a trial, a trial court judge may impose a “gag order” on parties not to reveal certain information about the on-going proceedings if such an order can satisfy strict scrutiny by being necessary to advance the compelling government interest of ensuring a fair trial. However, that order rarely could be justified if applied to non-parties to the case. For example, in *Multimedia Holdings v. Circuit Court of Florida*, a lower court initially had issued an order seeming to tell both the parties to the case and news media outlets that they would be guilty of a misdemeanor and criminal contempt of court if they published the contents of transcripts of grand jury proceedings. However, the court then entered a second order indicating that the court was only enjoining the parties from publication, and that the first order merely pointed out to news media outlets they might be prosecuted by the district attorney’s office if they revealed secret grand jury proceedings. Thus, although “informal procedures undertaken by officials and designed to chill expression can constitute a prior restraint,” citing *Bantam Books, Inc. v. Sullivan*, and “[w]arnings from a court have added weight,” in this case “any threat once implicit in the court’s first order is much diminished,” and thus no stay of the order pending petition for certiorari was warranted.

If the government has a content-neutral reason for regulating, only an intermediate standard of review would apply, as the Court noted in *Thomas v. Chicago Park District*.

---


10 See Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations, 413 U.S. 376, 390 (1973); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 183-84 (1968).


Thomas v. Chicago Park District

Justice SCALIA delivered the opinion of the Court.

Respondent, the Chicago Park District (Park District), is responsible for operating public parks and other public property in Chicago. See Ill. Comp. Stat., ch. 70, § 1505/7.01 (2001). Pursuant to its authority to “establish by ordinance all needful rules and regulations for the government and protection of parks . . . and other property under its jurisdiction,” § 1505/7.02, the Park District adopted an ordinance that requires a person to obtain a permit in order to “conduct a public assembly, parade, picnic, or other event involving more than fifty individuals,” or engage in an activity such as “creat[ing] or emit[ting] any Amplified Sound.” Chicago Park Dist.Code, ch. VII, §§ C.3.a(1), C.3.a(6). The ordinance provides that “[a]pplications for permits shall be processed in order of receipt,” § C.5.a, and the Park District must decide whether to grant or deny an application within 14 days unless, by written notice to the applicant, it extends the period an additional 14 days, § C.5.c. Applications can be denied on any of 13 specified grounds. § C.5.e. If the Park District denies an application, it must clearly set forth in writing the grounds for denial and, where feasible, must propose measures to cure defects in the application. §§ C.5.d, C.5.e. When the basis for denial is prior receipt of a competing application for the same time and place, the Park District must suggest alternative times or places. § C.5.e. An unsuccessful applicant has seven days to file a written appeal to the General Superintendent of the Park District, who must act on the appeal within seven days. § C.6.a. If the General Superintendent affirms a permit denial, the applicant may seek judicial review in state court by common-law certiorari. See Norton v. Nicholson, 543 N.E.2d 1053, 1059 (Ill. 1989).

Petitioners have applied to the Park District on several occasions for permits to hold rallies advocating the legalization of marijuana. The Park District has granted some permits and denied others. Not satisfied, petitioners filed an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Northern District of Illinois, alleging, inter alia, that the Park District's ordinance is unconstitutional on its face. The District Court granted summary judgment in favor of the Park District, and the United States Court of Appeals for the Seventh Circuit affirmed. 227 F.3d 921 (2000). We granted certiorari. 532 U. S. 1051 (2001).

The First Amendment's guarantee of “the freedom of speech, or of the press” prohibits a wide assortment of government restraints upon expression, but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the “evils” of the printing press in 16th- and 17-century England. The Printing Act of 1662 had “prescribed what could be printed, who could print, and who could sell.” Mayton, Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245, 248 (1982). It punished the publication of any book or pamphlet without a license and required that all works be submitted for approval to a government official, who wielded broad authority to suppress works that he found to be “‘heretical, seditious, schismatical, or offensive.’” F. Siebert, Freedom of the Press in England, 1476-1776, p. 240 (1952). The English licensing system expired at the end of the 17th century, but the memory of its abuses
was still vivid enough in colonial times that Blackstone warned against the “restrictive power” of such a “licenser”—an administrative official who enjoyed unconfined authority to pass judgment on the content of speech. 4 W. Blackstone, Commentaries on the Laws of England 152 (1769).

In *Freedman v. Maryland*, 380 U.S. 51 (1965), we confronted a state law that enacted a strikingly similar system of prior restraint for motion pictures. It required that every motion picture film be submitted to a Board of Censors before the film was shown anywhere in the State. The board enjoyed authority to reject films that it considered “‘obscene’” or that “‘tend[ed], in the judgment of the Board, to debase or corrupt morals or incite to crimes,’” characteristics defined by the statute in broad terms. Id., at 52, n.2. The statute punished the exhibition of a film not submitted to the board for advance approval, even where the film would have received a license had it been properly submitted. It was no defense that the content of the film was protected by the First Amendment.

. . . . In response to these grave “dangers of a censorship system,” *Freedman*, supra, at 58, we held that a film licensing process must contain certain procedural safeguards in order to avoid constituting an invalid prior restraint: “(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.” FW/PBS, Inc. v. Dallas, 493 U.S. 215, 227 (1990) (principal opinion of O'Connor, J., joined by Stevens and Kennedy, JJ.) (citing *Freedman*, supra, at 58-60).

Petitioners contend that the Park District, like the Board of Censors in *Freedman*, must initiate litigation every time it denies a permit and that the ordinance must specify a deadline for judicial review of a challenge to a permit denial. We reject those contentions. *Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation of the use of a public forum. The Park District's ordinance does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say. Indeed, the ordinance (unlike the classic censorship scheme) is not even directed to communicative activity as such, but rather to all activity conducted in a public park. The picnicker and soccer player, no less than the political activist or parade marshal, must apply for a permit if the 50-person limit is to be exceeded. And the object of the permit system (as plainly indicated by the permissible grounds for permit denial) is not to exclude communication of a particular content, but to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damage caused by the event. As the Court of Appeals well put it: “[T]o allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech.” 227 F.3d, at 924.

We have never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*. “A licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the like.” Niemotko v.
Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result). “[T]he [permit] required is not the kind of prepublication license deemed a denial of liberty since the time of John Milton but a ministerial, police routine for adjusting the rights of citizens so that the opportunity for effective freedom of speech may be preserved.” Poulos v. New Hampshire, 345 U.S. 395, 403 (1953). Regulations of the use of a public forum that ensure the safety and convenience of the people are not “inconsistent with civil liberties but . . . [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.” Cox v. New Hampshire, 312 U.S. 569, 574 (1941). Such a traditional exercise of authority does not raise the censorship concerns that prompted us to impose the extraordinary procedural safeguards on the film licensing process in *Freedman*.

Of course even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression. Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content. See *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992). We have thus required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review. See *Niemotko*, supra, at 271. Petitioners contend that the Park District's ordinance fails this test.

We think not. As we have described, the Park District may deny a permit only for one or more of the reasons set forth in the ordinance. See n.1, supra. It may deny, for example, when the application is incomplete or contains a material falsehood or misrepresentation; when the applicant has damaged Park District property on prior occasions and has not paid for the damage; when a permit has been granted to an earlier applicant for the same time and place; when the intended use would present an unreasonable danger to the health or safety of park users or Park District employees; or when the applicant has violated the terms of a prior permit. See Chicago Park Dist. Code, ch. VII, § C.5.e. Moreover, the Park District must process applications within 28 days, § C.5.c, and must clearly explain its reasons for any denial, § C.5.e. These grounds are reasonably specific and objective, and do not leave the decision “to the whim of the administrator.” *Forsyth County*, 505 U.S., at 133. They provide “‘narrowly drawn, reasonable and definite standards’” to guide the licensor's determination, ibid. (quoting *Niemotko*, supra, at 271). And they are enforceable on review-first by appeal to the General Superintendent of the Park District, see Chicago Park Dist. Code, ch. VII, § C.6.a, and then by writ of common-law certiorari in the Illinois courts, see *Norton v. Nicholson*, 543 N.E.2d 1053 (Ill. 1989), which provides essentially the same type of review as that provided by the Illinois administrative procedure act, see *Nowicki v. Evanston Fair Housing Review Bd.*, 338 N.E.2d 186, 188 (Ill. 1975).

Petitioners contend that the criteria set forth in the ordinance are insufficiently precise because they are described as grounds on which the Park District “may” deny a permit, rather than grounds on which it *must* do so. This, they contend, allows the Park District to waive the permit requirements for some favored speakers, while insisting upon them for others. That is certainly not the intent of the ordinance, which the Park District has reasonably interpreted to permit overlooking only those inadequacies that, under the circumstances, do no harm to the policies furthered by the application requirements. See Tr. of Oral Arg. 31-32. Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional, but we think that this
abuse must be dealt with if and when a pattern of unlawful favoritism appears, rather than by insisting upon a degree of rigidity that is found in few legal arrangements. On petitioners' theory, every obscenity law, or every law placing limits upon political expenditures, contains a constitutional flaw, since it merely permits, but does not require, prosecution. The prophylaxis achieved by insisting upon a rigid, no-waiver application of the ordinance requirements would be far outweighed, we think, by the accompanying senseless prohibition of speech (and of other activity in the park) by organizations that fail to meet the technical requirements of the ordinance but for one reason or another pose no risk of the evils that those requirements are designed to avoid. On balance, we think the permissive nature of the ordinance furthers, rather than constricts, free speech.

Because the Park District's ordinance is not subject to Freedman's procedural requirements, we do not reach one of the questions on which we granted certiorari, and on which the Courts of Appeals are divided: whether the requirement of prompt judicial review means a prompt judicial determination or the prompt commencement of judicial proceedings. Compare Nightclubs, Inc. v. Paducah, 202 F.3d 884, 892-893 (C.A.6 2000); Baby Tam & Co. v. Las Vegas, 154 F.3d 1097, 1101 (C.A.9 1998); 11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988, 998-1001 (C.A.4 1995) (en banc), with Boss Capital, Inc. v. Casselberry, 187 F.3d 1251, 1255-1257 (C.A.11 1999); TK's Video, Inc. v. Denton County, 24 F.3d 705, 709 (C.A.5 1995); Graff v. Chicago, 9 F.3d 1309, 1324-1325 (C.A.7 1993) (en banc); Jews for Jesus, Inc. v. Massachusetts Bay Transp. Authority, 984 F.2d 1319, 1327 (C.A.1 1993).

In 2004, the Supreme Court concluded in City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.,¹³ that for content-based prior restraints, which must meet Maryland v. Friedman, a “prompt judicial decision” is required. However, for content-neutral regulatory systems, to which Thomas v. Chicago Park District applies, application of the state’s “ordinary ‘judicial review’ rules” was adequate, absent “special problems of undue delay in individual cases as the ordinance is applied.” For a case applying Thomas, see Moore v. Brown, 868 F.3d 398 (5th Cir. 2017) (rule requiring permit approval for structures larger than 4 feet square in a public park satisfies intermediate review when applied to minister using 4 feet wide and 6.5 feet high sketch board based on concerns with safety and coordination of uses of park, including preserving line-of-sight views for all park patrons).

§ 5.2 Government Fees and Injunctions on Speech

1. Government Fees for Permits to Speak

Where the government has a content-neutral justification for imposing a fee prior to permitting speech, such as ensuring two groups are not trying to speak at the same time in the same place, or ensuring that the costs are covered of cleaning up any littering that might occur during an event, the court applies an intermediate standard of review. As typically phrased, such laws are only allowed

if the government has: (1) an important, content-neutral reason for the regulation (the prong one requirement of intermediate review requiring an important or substantial interest); (2) there are clear criteria leaving no overly broad discretion to the licensing authority (the prong two requirement of ensuring the regulation is substantially related to advancing the content-neutral interest and is not a cover for content-based discrimination); and (3) procedural safeguards, such as requiring prompt determinations as to license requests and judicial review of license standards (the prong three requirement of the regulation not being substantially more burdensome than necessary).\textsuperscript{14}

In \textit{Cox v. New Hampshire},\textsuperscript{15} the Court confronted a state statute that required payment of a license fee up to $300 to local governments for the right to parade in the public streets. The fee could be adjusted based on the size of the parade, as the fee "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession." The Court stated, "The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.” Because collecting a modest fee to reimburse for public expense in policing events is an important government interest that is not a substantial burden on free speech, and the permit system substantially limited the discretion of the licensing board in determining the amount of the fee, and required the permit to be granted as long as the area was not already committed to the used by another group, the Court indicated that the fee system was constitutional.

\textbf{Forsyth County, Georgia v. Nationalist Movement}

\textit{505 U.S. 123 (1992)}

Justice BLACKMUN delivered the opinion of the Court.

In this case, with its emotional overtones, we must decide whether the free speech guarantees of the First and Fourteenth Amendments are violated by an assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order.

Petitioner Forsyth County is a primarily rural Georgia county approximately 30 miles northeast of Atlanta. It has had a troubled racial history. In 1912, in one month, its entire African-American population, over 1,000 citizens, was driven systematically from the county in the wake of the rape and murder of a white woman and the lynching of her accused assailant. Seventy-five years later, in 1987, the county population remained 99% white.

\textsuperscript{14} \textit{See, e.g., Erwin Chemerinsky, Constitutional Law: Principles and Policies 993-94 (4th ed. 2011).}

\textsuperscript{15} 312 U.S. 569, 576-78 (1941).
Spurred by this history, Hosea Williams, an Atlanta city councilman and civil rights personality, proposed a Forsyth County “March Against Fear and Intimidation” for January 17, 1987. Approximately 90 civil rights demonstrators attempted to parade in Cumming, the county seat. The marchers were met by members of the Forsyth County Defense League (an independent affiliate of respondent, The Nationalist Movement), of the Ku Klux Klan, and other Cumming residents. In all, some 400 counterdemonstrators lined the parade route, shouting racial slurs. Eventually, the counterdemonstrators, dramatically outnumbering police officers, forced the parade to a premature halt by throwing rocks and beer bottles.

Williams planned a return march the following weekend. It developed into the largest civil rights demonstration in the South since the 1960’s. On January 24, approximately 20,000 marchers joined civil rights leaders, United States Senators, Presidential candidates, and an Assistant United States Attorney General in a parade and rally. The 1,000 counterdemonstrators on the parade route were contained by more than 3,000 state and local police and National Guardsmen. Although there was sporadic rockthrowing and 60 counterdemonstrators were arrested, the parade was not interrupted. The demonstration cost over $670,000 in police protection, of which Forsyth County apparently paid a small portion. See App. to Pet. for Cert. 75-94.

“As a direct result” of these two demonstrations, the Forsyth County Board of Commissioners enacted Ordinance 34 on January 27, 1987. See Brief for Petitioner 6. The ordinance recites that it is “to provide for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes.” See App. to Pet. for Cert. 98. The board of commissioners justified the ordinance by explaining that “the cost of necessary and reasonable protection of persons participating in or observing said parades, assemblies, demonstrations, road closings and other related activities exceeds the usual and normal cost of law enforcement for which those participating should be held accountable and responsible.” Id., at 100. The ordinance required the permit applicant to defray these costs by paying a fee, the amount . . . to be fixed “from time to time” by the Board. Id., at 105. Ordinance 34 was amended on June 8, 1987, to provide that every permit applicant “‘shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place.’” Id., at 119. In addition, the county administrator was empowered to “‘adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.’” Ibid.

In January 1989, respondent The Nationalist Movement proposed to demonstrate in opposition to the federal holiday commemorating the birthday of Martin Luther King, Jr. In Forsyth County, the Movement sought to “conduct a rally and speeches for one and a half to two hours” on the courthouse steps on a Saturday afternoon. Nationalist Movement v. City of Cumming, 913 F.2d 885, 887 (CA11 1990). The county imposed a $100 fee. The fee did not include any calculation for expenses incurred by law enforcement authorities, but was based on 10 hours of the county administrator's time in issuing the permit. The county administrator testified that the cost of his time was deliberately undervalued and that he did not charge for the clerical support involved in processing the application. Tr. 135-139.
The Movement did not pay the fee and did not hold the rally. Instead, it instituted this action on January 19, 1989, in the United States District Court for the Northern District of Georgia, requesting a temporary restraining order and permanent injunction prohibiting Forsyth County from interfering with the Movement's plans.

The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in “the archetype of a traditional public forum,” Frisby v. Schultz, 487 U.S. 474, 480 (1988), is a prior restraint on speech, see Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969); Niemotko v. Maryland, 340 U.S. 268, 271 (1951). Although there is a “heavy presumption” against the validity of a prior restraint, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963), the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally, see Cox v. New Hampshire, 312 U.S. 569, 574-576 (1941). Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. See Freedman v. Maryland, supra. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. See United States v. Grace, 461 U.S. 171, 177 (1983).

Respondent contends that the county ordinance is facially invalid because it does not prescribe adequate standards for the administrator to apply when he sets a permit fee. A government regulation that allows arbitrary application is “inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.” Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981). To curtail that risk, “a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license” must contain “narrow, objective, and definite standards to guide the licensing authority.” Shuttlesworth, 394 U.S., at 150-151; see also Niemotko, 340 U.S., at 271. The reasoning is simple: If the permit scheme “involves appraisal of facts, the exercise of judgment, and the formation of an opinion,” Cantwell v. Connecticut, 310 U.S. 296, 305 (1940), by the licensing authority, “the danger of censorship and of abridgment of our precious First Amendment freedoms is too great” to be permitted, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975).

In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it. See Ward v. Rock Against Racism, 491 U.S. 781, 795-796 (1989); Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 770, n.11 (1988); Gooding v. Wilson, 405 U.S. 518, 524-528 (1972). In the present litigation, the county has made clear how it interprets and implements the ordinance. The ordinance can apply to any activity on public property – from parades, to street corner speeches, to bike races – and the fee assessed may reflect the county's police and administrative costs. Whether or not, in any given instance, the fee would include any or all of the county's administrative and security expenses is decided by the county administrator.
In this case, according to testimony at the District Court hearing, the administrator based the fee on his own judgment of what would be reasonable. Although the county paid for clerical support and staff as an “expense incident to the administration” of the permit, the administrator testified that he chose in this instance not to include that expense in the fee. The administrator also attested that he had deliberately kept the fee low by undervaluing the cost of the time he spent processing the application. Even if he had spent more time on the project, he claimed, he would not have charged more. He further testified that, in this instance, he chose not to include any charge for expected security expense. Tr. 135-139.

The administrator also explained that the county had imposed a fee pursuant to a permit on two prior occasions. The year before, the administrator had assessed a fee of $100 for a permit for the Movement. The administrator testified that he charged the same fee the following year (the year in question here), although he did not state that the Movement was seeking the same use of county property or that it required the same amount of administrative time to process. Id., at 138. The administrator also once charged bike-race organizers $25 to hold a race on county roads, but he did not explain why processing a bike-race permit demanded less administrative time than processing a parade permit or why he had chosen to assess $25 in that instance. Id., at 143–144. At oral argument in this Court, counsel for Forsyth County stated that the administrator had levied a $5 fee on the Girl Scouts for an activity on county property. Tr. of Oral Arg. 26. Finally, the administrator testified that in other cases the county required neither a permit nor a fee for activities in other county facilities or on county land. Tr. 146.

Based on the county’s implementation and construction of the ordinance, it simply cannot be said that there are any “narrowly drawn, reasonable and definite standards,” Niemotko, 340 U.S., at 271, guiding the hand of the Forsyth County administrator. The decision how much to charge for police protection or administrative time – or even whether to charge at all – is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county’s established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

The Forsyth County ordinance contains more than the possibility of censorship through uncontrolled discretion. As construed by the county, the ordinance often requires that the fee be based on the content of the speech.

The county envisions that the administrator, in appropriate instances, will assess a fee to cover “the cost of necessary and reasonable protection of persons participating in or observing said . . . activit[y].” See App. to Pet. for Cert. 100. In order to assess accurately the cost of security for parade participants, the administrator “‘must necessarily examine the content of the message that is conveyed,’” Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987), quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984), estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will
depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.

Although petitioner agrees that the cost of policing relates to content, see Tr. of Oral Arg. 15 and 24, it contends that the ordinance is content neutral because it is aimed only at a secondary effect – the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification “‘ha[s] nothing to do with content.’” Ward, 491 U.S., at 792, quoting Boos v. Barry, 485 U.S. 312, 320 (1988) (opinion of O'Connor, J.).

The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation. See id., at 321 (opinion of O'Connor, J.); id., at 334 (opinion of Brennan, J.); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988); Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943); cf. Schneider v. State (Town of Irvington), 308 U.S. 147, 162 (1939) (fact that city is financially burdened when listeners throw leaflets on the street does not justify restriction on distribution of leaflets). Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob. See Gooding v. Wilson, 405 U.S. 518 (1972).

This Court has held time and again: “Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.” Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984); Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 502 U.S. 105, 116 (1991); Arkansas Writers' Project, 481 U.S., at 230. The county offers only one justification for this ordinance: raising revenue for police services. While this undoubtedly is an important government responsibility, it does not justify a content-based permit fee. See id., at 229-231.

Petitioner insists that its ordinance cannot be unconstitutionally content based because it contains much of the same language as did the state statute upheld in Cox v. New Hampshire, 312 U.S. 569 (1941). Although the Supreme Court of New Hampshire had interpreted the statute at issue in Cox to authorize the municipality to charge a permit fee for the “maintenance of public order,” no fee was actually assessed. See id., at 577. Nothing in this Court's opinion suggests that the statute, as interpreted by the New Hampshire Supreme Court, called for charging a premium in the case of a controversial political message delivered before a hostile audience. In light of the Court's subsequent First Amendment jurisprudence, we do not read Cox to permit such a premium.

Petitioner, as well as the Court of Appeals and the District Court, all rely on the maximum allowable fee as the touchstone of constitutionality. Petitioner contends that the $1,000 cap on the fee ensures that the ordinance will not result in content-based discrimination. The ordinance was found unconstitutional by the Court of Appeals because the $1,000 cap was not sufficiently low to be “nominal.” Neither the $1,000 cap on the fee charged, nor even some lower nominal cap, could save the ordinance because in this context, the level of the fee is irrelevant. A tax based on the content of speech does not become more constitutional because it is a small tax.
The lower courts derived their requirement that the permit fee be “nominal” from a sentence in the opinion in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). In *Murdock*, the Court invalidated a flat license fee levied on distributors of religious literature. In distinguishing the case from *Cox*, where the Court upheld a permit fee, the Court stated: “And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors.” 319 U.S., at 116. This sentence does not mean that an invalid fee can be saved if it is nominal, or that only nominal charges are constitutionally permissible. It reflects merely one distinction between the facts in *Murdock* and those in *Cox*.

The tax at issue in *Murdock* was invalid because it was unrelated to any legitimate state interest, not because it was of a particular size. Similarly, the provision of the Forsyth County ordinance relating to fees is invalid because it unconstitutionally ties the amount of the fee to the content of the speech and lacks adequate procedural safeguards; no limit on such a fee can remedy these constitutional violations.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice SCALIA, and Justice THOMAS join, dissenting.

We granted certiorari in this case to consider the following question: “Whether the provisions of the First Amendment to the United States Constitution limit the amount of a license fee assessed pursuant to the provisions of a county parade ordinance to a nominal sum or whether the amount of the license fee may take into account the actual expense incident to the administration of the ordinance and the maintenance of public order in the matter licensed, up to the sum of $1,000.00 per day of the activity.” Pet. for Cert. i.

The Court's discussion of this question is limited to an ambiguous and noncommittal paragraph toward the very end of the opinion. The rest of the opinion takes up and decides other perceived unconstitutional defects in the Forsyth County ordinance. None of these claims were passed upon by the Court of Appeals; that court decided only that the First Amendment forbade the charging of more than a nominal fee for a permit to parade on public streets. Since that was the question decided by the Court of Appeals below, the question which divides the Courts of Appeals, and the question presented in the petition for certiorari, one would have thought that the Court would at least authoritatively decide, if not limit itself to, that question.

The answer to this question seems to me quite simple, because it was authoritatively decided by this Court more than half a century ago in *Cox v. New Hampshire*, 312 U.S. 569 (1941). There we confronted a state statute which required payment of a license fee of up to $300 to local governments for the right to parade in the public streets. The Supreme Court of New Hampshire had construed the provision as requiring that the amount of the fee be adjusted based on the size of the parade, as the fee “for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession.” Id., at 577 (internal quotation marks omitted). Under the state court's construction, the fee provision was “not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public
order in the matter licensed.” Ibid. (internal quotation marks omitted). This Court, in a unanimous opinion by Chief Justice Hughes, upheld the statute, saying: “There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought. There is no evidence that the statute has been administered otherwise than in the fair and nondiscriminatory manner which the state court has construed it to require.” Ibid.

Two years later, in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), this Court confronted a municipal ordinance that required payment of a flat license fee for the privilege of canvassing door-to-door to sell one's wares. Pursuant to that ordinance, the city had levied the flat fee on a group of Jehovah's Witnesses who sought to distribute religious literature door-to-door for a small price. Id., at 106-107. The Court held that the flat license tax, as applied against the hand distribution of religious tracts, was unconstitutional on the ground that it was “a flat tax imposed on the exercise of a privilege granted by the Bill of Rights.” Id., at 113. In making this ruling, the Court distinguished *Cox* by stating that “the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors.” 319 U.S., at 116. This language, which suggested that the fee involved in *Cox* was only nominal, led the Court of Appeals for the Eleventh Circuit in the present case to conclude that a city is prohibited from charging any more than a nominal fee for a parade permit. 913 F.2d 885, 890-891, and n.6 (1990). But the clear holding of *Cox* is to the contrary. In that case, the Court expressly recognized that the New Hampshire state statute allowed a city to levy much more than a nominal parade fee, as it stated that the fee provision “had a permissible range from $300 to a nominal amount.” *Cox* v. New Hampshire, supra, 312 U.S., at 576. The use of the word “nominal” in *Murdock* was thus unfortunate, as it represented a mistaken characterization of the fee statute in *Cox*. But a mistaken allusion in a later case to the facts of an earlier case does not by itself undermine the holding of the earlier case. The situations in *Cox* and *Murdock* were clearly different; the first involved a sliding fee to account for administrative and security costs incurred as a result of a parade on public property, while the second involved a flat tax on protected religious expression. I believe that the decision in *Cox* squarely controls the disposition of the question presented in this case, and I therefore would explicitly hold that the Constitution does not limit a parade license fee to a nominal amount.

In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Statton*, 16 the Court used the intermediate approach of *Thomas* to strike down an ordinance requiring individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand. Although the Court acknowledged that the prevention of fraud, the protection of residents' privacy, and crime prevention were important interests, the statute was not narrowly tailored, either because

---

it was not substantially related to advancing the interests, as for fraud or crime prevention, or was substantially more burdensome than necessary, as for protection of residential privacy. The Court noted:

Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. . . . With respect to [residential privacy], it seems clear that § 107 of the ordinance, which provides for the posting of "No Solicitation" signs and which is not challenged in this case, coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener. With respect to [prevention of crime], it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance. They might, for example, ask for directions or permission to use the telephone, or pose as surveyors or census takers. Or they might register under a false name with impunity because the ordinance contains no provision for verifying an applicant's identity or organizational credentials.17

Reflecting the fact that at intermediate scrutiny the government bears the burden to justify its statute, and cannot justify it "on any conceivable basis," but must use "actual or plausible" governmental interests, discussed at § 2.1 n.8, Justice Breyer noted that here the interest in crime prevention was not alleged to be an "actual" interest and was also "intuitively implausible."18

2. Government Injunctions on Speech

A refinement in the standard of review for content-neutral injunctions on speech, rather than content-neutral regulations of speech, was announced by the Supreme Court in *Madsen v. Women's Health Center*. Chief Justice Rehnquist stated that the differences between an injunction and a generally applicable ordinance required somewhat more stringent application of First Amendment principles regarding content-neutral injunctions than for usual time, place, or manner regulations.

*Madsen v. Women’s Health Center, Inc.*

512 U.S. 753 (1994)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioners challenge the constitutionality of an injunction entered by a Florida state court which prohibits antiabortion protesters from demonstrating in certain places and in various ways outside of a health clinic that performs abortions.

17 Id. at 168-69.

18 Id. at 170 (Breyer, J., joined by Souter & Ginsburg, JJ., concurring).
If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in *Ward v. Rock Against Racism*, supra, 491 U.S., at 791, and similar cases. Given that the forum around the clinic is a traditional public forum, see Frisby v. Schultz, 487 U.S., at 480, we would determine whether the time, place, and manner regulations were “narrowly tailored to serve a significant governmental interest.” *Ward*, supra, 491 U.S., at 791. See also *Perry Ed. Assn.*, supra, 460 U.S., at 45.

There are obvious differences, however, between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. See United States v. W.T. Grant Co., 345 U.S. 629, 632-633 (1953). Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. “[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.” *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113 (1949). Injunctions, of course, have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred. *United States v. Paradise*, 480 U.S. 149 (1987).

We believe that these differences require a somewhat more stringent application of general First Amendment principles in this context. In past cases evaluating injunctions restricting speech, see, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 836 (1941), we have relied upon such general principles while also seeking to ensure that the injunction was no broader than necessary to achieve its desired goals. See *Carroll v. President and Comm'r's of Princess Anne*, 393 U.S. 175 (1968); *Claiborne Hardware*, supra, 458 U.S., at 912, n.47. Our close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, “that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). See also *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 418-420 (1977). Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest. See, e.g., *Claiborne Hardware*, supra, 458 U.S., at 916 (when sanctionable “conduct occurs in the context of constitutionally protected activity . . . ‘precision of regulation’ is demanded”) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Both Justice Stevens and Justice Scalia disagree with the standard we announce, for policy reasons. See *post*, at 2531 (Stevens, J.); *post*, at 2538-2539 (Scalia, J.). Justice Stevens believes that “injunctive relief should be judged by a more lenient standard than legislation,” because injunctions are imposed on individuals or groups who have engaged in illegal activity. *Post*, at 2531. Justice Scalia, by contrast, believes that content-neutral injunctions are “at least as deserving of strict scrutiny as a statutory, content-based restriction.” *Post*, at 2538. Justice Scalia bases his belief on the danger that injunctions, even though they might not “attack content as content,” may be used to
suppress particular ideas; that individual judges should not be trusted to impose injunctions in this context; and that an injunction is procedurally more difficult to challenge than a statute. Post, at 2538–2539. We believe that consideration of all of the differences and similarities between statutes and injunctions supports, as a matter of policy, the standard we apply here.

[Applying this heightened test to the facts, the Chief Justice reached the following conclusions, which shed light on the current meaning of burdening “no more speech than necessary”:

1. A 36-foot buffer zone around clinic entrances burdens no more speech than necessary to accomplish the government interests: protecting unfettered ingress and egress.
2. A 36-foot buffer zone to the private property north and west, which staff and patients do not have to cross, burdens more speech than necessary.
3. The noise restrictions were permissible to ensure the health and well-being of patients.
4. A blanket ban on all "images observable" by persons in the clinic burdens more speech than necessary since the clinic can simply pull its curtains.
5. It burdens more speech than necessary to ban all approaches to persons seeking services of the clinic, unless such person indicates a desire to communicate, because in public debate our citizens must tolerate insulting and even outrageous speech in order to provide adequate breathing space to First Amendment freedoms.
6. A ban on picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff is not sufficiently supported in the record as necessary since it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the same result.]

Justice STEVENS, concurring in part and dissenting in part.

I agree with the Court that a different standard governs First Amendment challenges to generally applicable legislation than the standard that measures such challenges to judicial remedies for proven wrongdoing. Unlike the Court, however, I believe that injunctive relief should be judged by a more lenient standard than legislation. As the Court notes, legislation is imposed on an entire community, ibid., regardless of individual culpability. By contrast, injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty – the normal consequence of illegal activity.

Given this distinction, a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment, but an injunction directed at a limited group of persons who have engaged in unlawful conduct in a similar zone might well be constitutional.

The standard governing injunctions has two obvious dimensions. On the one hand, the injunction should be no more burdensome than necessary to provide complete relief, Califano v. Yamasaki, 442 U.S. 682, 702 (1979). In a First Amendment context, as in any other, the propriety of the remedy depends almost entirely on the character of the violation and the likelihood of its recurrence. For this reason, standards fashioned to determine the constitutionality of statutes should not be used to evaluate injunctions.
On the other hand, even when an injunction impinges on constitutional rights, more than “a simple proscription against the precise conduct previously pursued” may be required; the remedy must include appropriate restraints on “future activities both to avoid a recurrence of the violation and to eliminate its consequences.” National Soc. of Professional Engineers v. United States, 435 U.S. 679, 697-698 (1978). Moreover, “[t]he judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large.” Teachers v. Hudson, 475 U.S. 292, 309-310, n.22 (1986). As such, repeated violations may justify sanctions that might be invalid if applied to a first offender or if enacted by the legislature. See United States v. Paradise, 480 U.S. 149 (1987).

In this case, the trial judge heard three days of testimony and found that petitioners not only had engaged in tortious conduct, but also had repeatedly violated an earlier injunction. The injunction is thus twice removed from a legislative proscription applicable to the general public and should be judged by a standard that gives appropriate deference to the judge's unique familiarity with the facts.

Justice SCALIA, with whom Justice KENNEDY and Justice THOMAS join, concurring in the judgment in part and dissenting in part.

The judgment in today's case has an appearance of moderation and Solomonic wisdom, upholding as it does some portions of the injunction while disallowing others. That appearance is deceptive. The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal.

Under this Court's jurisprudence, there is no question that this public sidewalk area is a “public forum,” where citizens generally have a First Amendment right to speak. United States v. Grace, 461 U.S. 171, 177 (1983). The parties to this case invited the Court to employ one or the other of the two well-established standards applied to restrictions upon this First Amendment right. Petitioners claimed the benefit of so-called “strict scrutiny,” the standard applied to content-based restrictions: The restriction must be “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.” Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). Respondents, on the other hand, contended for what has come to be known as “intermediate scrutiny” (midway between the “strict scrutiny” demanded for content-based regulation of speech and the “rational basis” standard that is applied – under the Equal Protection Clause – to government regulation of nonspeech activities). See, e.g., Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 642 (1994). That standard, applicable to so-called “time, place, and manner regulations” of speech, provides that the regulations are permissible so long as they “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” Perry, supra, 460 U.S., at 45. The Court adopts neither of these, but creates, brand new for this abortion-related case, an additional standard that is (supposedly) “somewhat more stringent,” ante, at 2524, than intermediate scrutiny, yet not as “rigorous,” ante, at 2525, as strict scrutiny. The Court does not give this new standard a name, but perhaps we could call it intermediate-intermediate scrutiny. The difference between it and intermediate scrutiny (which the Court acknowledges is inappropriate for injunctive restrictions on speech) is frankly too subtle for me to describe, so I must simply recite it: Whereas intermediate scrutiny requires that the
restriction be “narrowly tailored to serve a significant government interest,” the new standard requires that the restriction “burden no more speech than necessary to serve a significant government interest.” Ibid.

The real question in this case is not whether intermediate scrutiny, which the Court assumes to be some kind of default standard, should be supplemented because of the distinctive characteristics of injunctions; but rather whether those distinctive characteristics are not, for reasons of both policy and precedent, fully as good a reason as “content basis” for demanding strict scrutiny. That possibility is simply not considered. Instead, the Court begins Part III with the following optical illusion: “If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the [intermediate scrutiny] standard,”– and then proceeds to discuss whether petitioners can sustain the burden of departing from that presumed disposition.

But this is not a statute, and it is an injunctive order. The Court might just as logically (or illogically) have begun Part III: “If this were a content-based injunction, rather than a non-content-based injunction, its constitutionality would be assessed under the strict scrutiny standard” – and have then proceeded to discuss whether respondents can sustain the burden of departing from that presumed disposition. The question should be approached, it seems to me, without any such artificial loading of the dice. And the central element of the answer is that a restriction upon speech imposed by injunction (whether nominally content based or nominally content neutral) is at least as deserving of strict scrutiny as a statutory, content-based restriction.

That is so for several reasons: The danger of content-based statutory restrictions upon speech is that they may be designed and used precisely to suppress the ideas in question rather than to achieve any other proper governmental aim. But that same danger exists with injunctions. Although a speech-restricting injunction may not attack content as content (in the present case, as I shall discuss, even that is not true), it lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he knows he is enjoining) the expression of pro-union views. Such targeting of one or the other side of an ideological dispute cannot readily be achieved in speech-restricting general legislation except by making content the basis of the restriction; it is achieved in speech-restricting injunctions almost invariably. The proceedings before us here illustrate well enough what I mean. The injunction was sought against a single-issue advocacy group by persons and organizations with a business or social interest in suppressing that group's point of view.

The second reason speech-restricting injunctions are at least as deserving of strict scrutiny is obvious enough: They are the product of individual judges rather than of legislatures – and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman. And the third reason is that the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards. Normally, when injunctions are enforced through contempt proceedings, only the defense of factual innocence is available. The collateral bar rule of Walker v. Birmingham, 388 U.S. 307 (1967), eliminates the defense that the injunction itself was unconstitutional. Accord, Dade
County Classroom Teachers' Assn. v. Rubin, 238 So.2d 284, 288 (Fla.1970). Thus, persons subject to a speech-restricting injunction who have not the money or not the time to lodge an immediate appeal face a Hobson's choice: They must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings. This is good reason to require the strictest standard for issuance of such orders.

The Court seeks to minimize the similarity between speech-restricting injunctions and content-based statutory proscriptions by observing that the fact that “petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order,” but rather “suggests only that those in the group whose conduct violated the court's order happen to share the same opinion regarding abortions,” ante, at 2524. But the Court errs in thinking that the vice of content-based statutes is that they necessarily have the invidious purpose of suppressing particular ideas. “[O]ur cases have consistently held that ‘[i]licit legislative intent is not the sine qua non of a violation of the First Amendment.’” Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 592 (1983)). The vice of content-based legislation – what renders it deserving of the high standard of strict scrutiny – is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes. And, because of the unavoidable “targeting” discussed above, precisely the same is true of the speech-restricting injunction.

Assuming a “significant state interest” of the sort cognizable for injunction purposes (i.e., one protected by a law that has been or is threatened to be violated) in both (1) keeping pedestrians off the paved portion of Dixie Way, and (2) enabling cars to cross the public sidewalk at the clinic's driveways without having to slow down or come to even a “momentary” stop, there are surely a number of ways to protect those interests short of banishing the entire protest demonstration from the 36-foot zone. For starters, the Court could have (for the first time) ordered the demonstrators to stay out of the street (the original injunction did not remotely require that). It could have limited the number of demonstrators permitted on the clinic side of Dixie Way. And it could have forbidden the pickets to walk on the driveways. The Court's only response to these options is that “[t]he state court was convinced that [they would not work] in view of the failure of the first injunction to protect access.” Ante, at 2527. But must we accept that conclusion as valid – when the original injunction contained no command (and at the very least no clear command) that had been disobeyed, and contained nothing even related to staying out of the street? If the “burden no more speech than necessary” requirement can be avoided by merely opining that (for some reason) no lesser restriction than this one will be obeyed, it is not much of a requirement at all.

One aspect of the majority’s decision in this case is unquestionably unfortunate. The Court adopted in Madsen v. Woman's Health Center, Inc. an analysis under prong three of heightened scrutiny

19 512 U.S. at 765 (Rehnquist, J., opinion for the Court).
that was described as being somewhere between the intermediate “not substantially more burdensome” test and the strict scrutiny “least restrictive alternative” test. From the opinion, it is not clear exactly how much more stringent this test is than traditional intermediate scrutiny, nor are other precedents of any help, since the standard is not used in any other case.

In fact, this additional version of the narrowly drawn analysis is unnecessary. It is understandable the Court might wish to adopt in Madsen a standard of review higher than traditional intermediate scrutiny, which applies to a content-neutral regulation of speech, because Madsen involves review of a court injunction rather than a generally applicable ordinance. The majority opinion in Madsen discussed the differences between ordinances and injunctions, and concluded that “these differences require a somewhat more stringent application of general First Amendment principles in this context.” The “base plus six” model, discussed at § 1.4.2 & Table 4, gives the Court three well-formed options from which to choose – intermediate with bite, loose strict scrutiny, or strict scrutiny.

The dissent in Madsen opted for strict scrutiny. The majority could have achieved basically the same result it reached in the case by adopting the intermediate review with bite standard of Central Hudson, excerpted at § 9.2. As the majority’s analysis reveals, where the injunction at issue in Madsen was constitutional, it was because it was “directly related” to the perceived harms and was a close enough fit to satisfy the intermediate “not substantially more burdensome than necessary” test. The Court found that a 36-foot buffer zone in front of an abortion clinic was directly related to protecting unfettered ingress and egress from the clinic, and a close enough fit given the deference due to the state court’s familiarity with the factual background, and the Court concluded that the regulation of noise levels was directly related to the need for noise control around hospitals and medical facilities. Where the injunction was unconstitutional, it was because it was not directly related to perceived harms, or not a close enough fit, and thus substantially overbroad. The Court concluded that inclusion of 36-foot buffer zone at the back and side of the clinic was not directly related to ingress and egress from clinic, nor was the prohibition on all uninvited approaches to persons seeking to enter the clinic directly related to preventing clinic patients from being stalked or shadowed, and that banning all images observable from the clinic was not narrowly drawn given the substantially less burdensome option for the clinic to pull its curtains, and the 300-foot ban on picketing around the clinic was “much larger” than necessary and substantially overbroad.

20 Id. at 764-66 (Rehnquist, J., opinion for the Court).
21 Id. at 765.
22 Id. at 792-94 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and dissenting in part) (“speech-restricting injunction[s]” should always be given strict scrutiny).
23 Id. at 768-70, 772-73 (Rehnquist, J., opinion for the Court).
24 Id. at 771, 773-75.
§ 5.3 Vagueness and Overbreadth Doctrine

1. Vagueness Doctrine

A law is unconstitutionally vague under the Due Process Clauses of the Fifth and 14th Amendments if the law does not define with “sufficient definiteness” what conduct is permitted and what conduct is prohibited and “in a manner that does not encourage arbitrary and discriminatory enforcement.”

While any law can be unconstitutionally vague, the Court has expressed the greatest concern regarding vagueness in the context of criminal statutes and in the context of the First Amendment. Regarding vagueness in the First Amendment context, Professor Erwin Chemerinsky has noted, “[C]ourts are particularly troubled about vague laws restricting speech out of concern that they will chill constitutionally protected speech.” In NAACP v. Button, the Court stated that “standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. . . . [The freedom of speech is] delicate and vulnerable,[and] the threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”

Based on concerns such as these, the Court has declared unconstitutionally vague a statute preventing any “subversive person” from being employed by the state and requiring persons to swear they are not members of a “subversive organization”; a statute that prohibited treating the flag of the United States “contemptuously”; and a statute making it unlawful to “interrupt” police officers in the performance of their duties. The Court noted that this latter law was not clearly limited to “disorderly conduct or fighting words” and the law effectively grants police “the discretion to make arrests selectively on the basis of the content of the speech.” While a lower


26 See, e.g., Johnson v. United States, 135 S. Ct. 2551 (2015) (term “violent felony” in the Armed Career Criminal Act, defined as “conduct that presents a serious potential risk of physical injury to another” is unconstitutionally vague; under the Act three prior convictions for a violent felony triggered a mandatory 15-year minimum sentence) (Justices Kennedy, Thomas, and Alito dissented from this conclusion). Cf. Sessions v. Dimaya, 138 S. Ct. 1204 (2018) (term “crime of violence” in the Immigration and Nationality Act, defined as “substantial risk that physical force against the person or property of another may be used” is unconstitutionally vague; under the Act a person convicted is virtually guaranteed to be deported) (Roberts, C.J., joined by Kennedy, Thomas & Alito, JJ., dissenting).

27 CHEMERINSKY, supra note 14 , at 971.


federal court ruled in *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1148-52 (C.D. Cal. 2005), that the provisions of the USA Patriot Act that include within the definition of “knowingly provides material support or resources” to a terrorist group the activities of providing “training,” “expert advice or assistance,” or “service” were unconstitutionally vague, the Supreme Court upheld these provisions in *Holder v. Humanitarian Law Project*, excerpted next.

**Holder v. Humanitarian Law Project**

130 S. Ct. 2705 (2010)

Chief Justice ROBERTS delivered the opinion of the Court.

Congress has prohibited the provision of “material support or resources” to certain foreign organizations that engage in terrorist activity. 18 U.S.C. § 2339B(a)(1). That prohibition is based on a finding that the specified organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose). The plaintiffs in this litigation seek to provide support to two such organizations. Plaintiffs claim that they seek to facilitate only the lawful, nonviolent purposes of those groups, and that applying the material-support law to prevent them from doing so violates the Constitution. In particular, they claim that the statute is too vague, in violation of the Fifth Amendment, and that it infringes their rights to freedom of speech and association, in violation of the First Amendment. We conclude that the material-support statute is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue. We do not, however, address the resolution of more difficult cases that may arise under the statute in the future.

This litigation concerns 18 U.S.C. § 2339B, which makes it a federal crime to “knowingly provid[e] material support or resources to a foreign terrorist organization.” Congress has amended the definition of “material support or resources” periodically, but at present it is defined as follows: “[T]he term ‘material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.” § 2339A(b)(1); see also § 2339B(g)(4).

The authority to designate an entity a “foreign terrorist organization” rests with the Secretary of State. 8 U.S.C. §§ 1189(a)(1), (d)(4). She may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in
“terrorist activity” or “terrorism,” and thereby “threatens the security of United States nationals or the national security of the United States.” §§ 1189(a)(1), (d)(4). “[N]ational security’ means the national defense, foreign relations, or economic interests of the United States.” § 1189(d)(2). An entity designated a foreign terrorist organization may seek review of that designation before the D.C. Circuit within 30 days of that designation. § 1189(c)(1).

In 1997, the Secretary of State designated 30 groups as foreign terrorist organizations. See 62 Fed.Reg. 52650. Two of those groups are the Kurdistan Workers’ Party (also known as the Partiya Karkeran Kurdistan, or PKK) and the Liberation Tigers of Tamil Eelam (LTTE). The PKK is an organization founded in 1974 with the aim of establishing an independent Kurdish state in southeastern Turkey. Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176, 1180-1181 (C.D. Cal.1998); Brief for Petitioners in No. 08-1498, p. 6 (hereinafter Brief for Government). The LTTE is an organization founded in 1976 for the purpose of creating an independent Tamil state in Sri Lanka. 9 F. Supp. 2d, at 1182; Brief for Government 6. The District Court in this action found that the PKK and the LTTE engage in political and humanitarian activities. See 9 F. Supp. 2d, at 1180-1182. The Government has presented evidence that both groups have also committed numerous terrorist attacks, some of which have harmed American citizens. See App. 128-133. The LTTE sought judicial review of its designation as a foreign terrorist organization; the D.C. Circuit upheld that designation. See People's Mojahedin Organization of Iran v. Dept. of State, 182 F.3d 17, 18-19, 25 (1999). The PKK did not challenge its designation. 9 F. Supp. 2d, at 1180.

Plaintiffs in this litigation are two U.S. citizens and six domestic organizations: the Humanitarian Law Project (HLP) (a human rights organization with consultative status to the United Nations); Ralph Fertig (the HLP's president, and a retired administrative law judge); Nagalingam Jeyalingam (a Tamil physician, born in Sri Lanka and a naturalized U.S. citizen); and five nonprofit groups dedicated to the interests of persons of Tamil descent. Brief for Petitioners in No. 09-89, pp. ii, 10 (hereinafter Brief for Plaintiffs); App. 48. In 1998, plaintiffs filed suit in federal court challenging the constitutionality of the material-support statute, § 2339B. Plaintiffs claimed that they wished to provide support for the humanitarian and political activities of the PKK and the LTTE in the form of monetary contributions, other tangible aid, legal training, and political advocacy, but that they could not do so for fear of prosecution under § 2339B. 9 F. Supp. 2d, at 1180-1184.

Plaintiffs claim, as a threshold matter, that we should affirm the Court of Appeals without reaching any issues of constitutional law. They contend that we should interpret the material-support statute, when applied to speech, to require proof that a defendant intended to further a foreign terrorist organization's illegal activities. That interpretation, they say, would end the litigation because plaintiffs' proposed activities consist of speech, but plaintiffs do not intend to further unlawful conduct by the PKK or the LTTE.

We reject plaintiffs' interpretation of § 2339B because it is inconsistent with the text of the statute. Section 2339B(a)(1) prohibits “knowingly” providing material support. It then specifically describes the type of knowledge that is required: “To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism. . . .”
Ibid. Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities.

We turn to the question whether the material-support statute, as applied to plaintiffs, is impermissibly vague under the Due Process Clause of the Fifth Amendment. “A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” United States v. Williams, 553 U.S. 285, 304 (2008). We consider whether a statute is vague as applied to the particular facts at issue, for “[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.” Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982). We have said that when a statute “interferes with the right of free speech or of association, a more stringent vagueness test should apply.” Id., at 499. “But ‘perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.’” Williams, supra, at 304 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)).

Under a proper analysis, plaintiffs’ claims of vagueness lack merit. Plaintiffs do not argue that the material-support statute grants too much enforcement discretion to the Government. We therefore address only whether the statute “provide[s] a person of ordinary intelligence fair notice of what is prohibited.” Williams, 553 U.S., at 304.

As a general matter, the statutory terms at issue here are quite different from the sorts of terms that we have previously declared to be vague. We have in the past “struck down statutes that tied criminal culpability to whether the defendant's conduct was ‘annoying’ or ‘indecent’ – wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.” Id., at 306; see also Papachristou v. Jacksonville, 405 U.S. 156, n.1 (1972) (holding vague an ordinance that punished “vagrants,” defined to include “rogues and vagabonds,” “persons who use juggling,” and “common night walkers” (internal quotation marks omitted)). Applying the statutory terms in this action – “training,” “expert advice or assistance,” “service,” and “personnel” – does not require similarly untethered, subjective judgments.

Congress also took care to add narrowing definitions to the material-support statute over time. These definitions increased the clarity of the statute's terms. See § 2339A(b)(2) (“‘training’ means instruction or teaching designed to impart a specific skill, as opposed to general knowledge”); § 2339A(b)(3) (“‘expert advice or assistance’ means advice or assistance derived from scientific, technical or other specialized knowledge”); § 2339B(h) (clarifying the scope of “personnel”). And the knowledge requirement of the statute further reduces any potential for vagueness, as we have held with respect to other statutes containing a similar requirement. See Hill v. Colorado, 530 U.S. 703, 732 (2000); Posters ‘N’ Things, Ltd. v. United States, 511 U.S. 513, 523, 526 (1994).

Of course, the scope of the material-support statute may not be clear in every application. But the dispositive point here is that the statutory terms are clear in their application to plaintiffs' proposed conduct, which means that plaintiffs' vagueness challenge must fail. Even assuming that a
heightened standard applies because the material-support statute potentially implicates speech, the statutory terms are not vague as applied to plaintiffs. See Grayned v. City of Rockford, 408 U.S. 104, 114-115 (1972) (rejecting a vagueness challenge to a criminal law that implicated First Amendment activities); Scales, 367 U.S., at 223 (same).

Most of the activities in which plaintiffs seek to engage readily fall within the scope of the terms “training” and “expert advice or assistance.” Plaintiffs want to “train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes,” and “teach PKK members how to petition various representative bodies such as the United Nations for relief.” 552 F.3d, at 921, n.1. A person of ordinary intelligence would understand that instruction on resolving disputes through international law falls within the statute's definition of “training” because it imparts a “specific skill,” not “general knowledge.” § 2339A(b)(2). Plaintiffs' activities also fall comfortably within the scope of “expert advice or assistance”: A reasonable person would recognize that teaching the PKK how to petition for humanitarian relief before the United Nations involves advice derived from, as the statute puts it, “specialized knowledge.” § 2339A(b)(3). In fact, plaintiffs themselves have repeatedly used the terms “training” and “expert advice” throughout this litigation to describe their own proposed activities, demonstrating that these common terms readily and naturally cover plaintiffs' conduct. See, e.g., Brief for Plaintiffs 10, 11; App. 56, 58, 59, 61, 62, 63, 80, 81, 98, 99, 106, 107, 117.

Plaintiffs respond by pointing to hypothetical situations designed to test the limits of “training” and “expert advice or assistance.” They argue that the statutory definitions of these terms use words of degree – like “specific,” “general,” and “specialized” – and that it is difficult to apply those definitions in particular cases. See Brief for Plaintiffs 27 (debating whether teaching a course on geography would constitute training); id., at 29. And they cite Gentile v. State Bar of Nev., 501 U.S. 1030 (1991), in which we found vague a state bar rule providing that a lawyer in a criminal case, when speaking to the press, “may state without elaboration . . . the general nature of the . . . defense.” id., at 1048 (internal quotation marks omitted).

Whatever force these arguments might have in the abstract, they are beside the point here. Plaintiffs do not propose to teach a course on geography, and cannot seek refuge in imaginary cases that straddle the boundary between “specific skills” and “general knowledge.” See Parker v. Levy, 417 U.S., at 756. We emphasized this point in Scales, holding that even if there might be theoretical doubts regarding the distinction between “active” and “nominal” membership in an organization – also terms of degree – the defendant's vagueness challenge failed because his “case present[ed] no such problem.” 367 U.S., at 223.

Gentile was different. There the asserted vagueness in a state bar rule was directly implicated by the facts before the Court: Counsel had reason to suppose that his particular statements to the press would not violate the rule, yet he was disciplined nonetheless. See 501 U.S., at 1049-1051. We did not suggest that counsel could escape discipline on vagueness grounds if his own speech were plainly prohibited.
Plaintiffs also contend that they want to engage in “political advocacy” on behalf of Kurds living in Turkey and Tamils living in Sri Lanka. 552 F.3d, at 921, n.1. They are concerned that such advocacy might be regarded as “material support” in the form of providing “personnel” or “service[s],” and assert that the statute is unconstitutionally vague because they cannot tell.

As for “personnel,” Congress enacted a limiting definition in IRTPA that answers plaintiffs' vagueness concerns. Providing material support that constitutes “personnel” is defined as knowingly providing a person “to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization.” § 2339B(h). The statute makes clear that “personnel” does not cover independent advocacy: “Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.” Ibid.

“[S]ervice” similarly refers to concerted activity, not independent advocacy. See Webster's Third New International Dictionary 2075 (1993) (defining “service” to mean “the performance of work commanded or paid for by another: a servant's duty: attendance on a superior”; or “an act done for the benefit or at the command of another”). Context confirms that ordinary meaning here. The statute prohibits providing a service “to a foreign terroristorganization.”§ 2339B(a)(1) (emphasis added). The use of the word “to” indicates a connection between the service and the foreign group. We think a person of ordinary intelligence would understand that independently advocating for a cause is different from providing a service to a group that is advocating for that cause.

[Ed.: The Court then considered the free speech challenge under strict scrutiny.] Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order. See Brief for Plaintiffs 51. Plaintiffs' complaint is that the ban on material support, applied to what they wish to do, is not “necessary to further that interest.” Ibid. The objective of combating terrorism does not justify prohibiting their speech, plaintiffs argue, because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism. Id., at 51-52.

Whether foreign terrorist organizations meaningfully segregate support of their legitimate activities from support of terrorism is an empirical question. When it enacted § 2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism. See AEDPA §§ 301(a)(1)-(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose). One of those findings explicitly rejects plaintiffs' contention that their support would not further the terrorist activities of the PKK and LTTE: “[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” § 301(a)(7) (emphasis added).

Material support meant to “promot[e] peaceable, lawful conduct,” Brief for Plaintiffs 51, can further terrorism by foreign groups in multiple ways. “Material support” is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks. “Terrorist organizations do not maintain organizational ‘firewalls' that would
prevent or deter . . . sharing and commingling of support and benefits.” McKune Affidavit, App. 135, ¶ 11. “[I]nvestigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts.” M. Levitt, Hamas: Politics, Charity, and Terrorism in the Service of Jihad 2-3 (2006). “Indeed, some designated foreign terrorist organizations use social and political components to recruit personnel to carry out terrorist operations, and to provide support to criminal terrorists and their families in aid of such operations.” McKune Affidavit, App. 135, ¶ 11; Levitt, supra, at 2 (“Muddying the waters between its political activism, good works, and terrorist attacks, Hamas is able to use its overt political and charitable organizations as a financial and logistical support network for its terrorist operations”).

Money is fungible, and “[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.” McKune Affidavit, App. 134, ¶ 9. But “there is reason to believe that foreign terrorist organizations do not maintain legitimate financial firewalls between those funds raised for civil, nonviolent activities, and those ultimately used to support violent, terrorist operations.” Id., at 135, ¶ 12. Thus, “[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.” Id., at 134, ¶ 10. See also Brief for Anti-Defamation League as Amicus Curiae 19–29 (describing fundraising activities by the PKK, LTTE, and Hamas); Regan v. Wald, 468 U.S. 222, 243 (1984) (upholding President's decision to impose travel ban to Cuba “to curtail the flow of hard currency to Cuba – currency that could then be used in support of Cuban adventurism”). There is evidence that the PKK and the LTTE, in particular, have not “respected the line between humanitarian and violent activities.” McKune Affidavit, App. 135, ¶ 13 (discussing PKK); see id., at 134 (LTTE).

The dissent argues that there is “no natural stopping place” for the proposition that aiding a foreign terrorist organization's lawful activity promotes the terrorist organization as a whole. Post, at 2736. But Congress has settled on just such a natural stopping place: The statute reaches only material support coordinated with or under the direction of a designated foreign terrorist organization. Independent advocacy that might be viewed as promoting the group's legitimacy is not covered.

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

Like the Court, and substantially for the reasons it gives, I do not think this statute is unconstitutionally vague. But I cannot agree with the Court's conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations' lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government's compelling interest in combating terrorism.

For the reasons I have set forth, I believe application of the statute as the Government interprets it would gravely and without adequate justification injure interests of the kind the First Amendment protects. Thus, there is “a serious doubt” as to the statute's constitutionality. Crowell, 285 U.S., at 62. And where that is so, we must “ascertain whether a construction of the statute is fairly possible

I believe that a construction that would avoid the constitutional problem is “fairly possible.” In particular, I would read the statute as criminalizing First-Amendment-protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions. Under this reading, the Government would have to show, at a minimum, that such defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims.

This reading is consistent with the statute's text. The statute prohibits “knowingly provid[ing] material support or resources to a foreign terrorist organization.” § 2339B(a)(1) (emphasis added). Normally we read a criminal statute as applying a mens rea requirement to all of the subsequently listed elements of the crime. See Flores-Figueroa v. United States, 129 S.Ct. 1886, 1891-1892 (2009). So read, the defendant would have to know or intend (1) that he is providing support or resources, (2) that he is providing that support to a foreign terrorist organization, and (3) that he is providing support that is material, meaning (4) that his support bears a significant likelihood of furthering the organization's terrorist ends.

The Court has noted that the concern with vagueness is less in cases involving government funding of speech, as opposed to government regulation of speech. Thus, in National Endowment for the Arts v. Finley,30 excerpted at § 4.2, the Court said that “when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.” And, of course, in every case some ambiguity is inherent in language. But the void-for-vagueness doctrine is an important aspect of First Amendment doctrine because of the more stringent application of the doctrine in the free speech context, and the fact that statutes, which otherwise might be constitutional under the First Amendment, can be challenged as being void for vagueness.

In general, liberal instrumentalist Justices, more strongly predisposed to protect free speech rights, have been more willing to use the vagueness doctrine to protect free speech rights. Conservative formalists, with their predisposition to defer to states, and conservative Holmesians, with their predisposition to defer to government in general, and states specifically, are typically less willing to use vagueness doctrine as vigorously.31 Liberal Holmesians, such as Justice White, tend to be


pulled in one direction by their liberal predisposition to protect free speech rights, but in the other direction by basic Holmesian deference-to-government principles. Liberal formalists and natural law Justices, based upon their analytic approach to law, are similarly concerned with truly vague statutes, but do not have the instrumentalist strong predisposition toward finding vagueness.32

2. **Substantial Overbreadth Doctrine**

One exception to the normal rule that parties cannot bring cases to vindicate the rights of third parties involves the application of the substantial overbreadth doctrine, which is only applicable to free speech cases. As explained by the Court in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*:

“[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing ‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.’ This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.”

In the development of the overbreadth doctrine the Court has been sensitive to the risk that the doctrine itself might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule. In order to decide whether the overbreadth exception is applicable in a particular case, we have weighed the likelihood that the statute’s very existence will inhibit free expression. “[T]here comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

"Simply put, the doctrine asserts that an overbroad regulation of speech or publication may be subject to facial review and invalidation, even though its application in the instant case is constitutionally unobjectionable. Thus, a person whose activity could validly be suppressed under a more narrowly drawn law is allowed to challenge an overbroad law because of its application to others. The bare possibility of unconstitutional application is not enough; the law is unconstitutionally overbroad only if it reaches substantially beyond the permissible scope of legislative regulation. Thus, the issue under the overbreadth doctrine is whether a government restriction of speech that is arguably valid as applied to the case at hand should nevertheless be invalidated to avoid the substantial prospect of unconstitutional application elsewhere."

. . . . In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.33

Given the purpose behind the substantial overbreadth doctrine, the Court has held that the doctrine does not apply in every free speech context. For example, because the incentive to engage in advertising is sufficiently strong to avoid worries that such speech will be chilled, the Court ruled in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.34 that “the overbreadth doctrine does not apply to commercial speech.” Further, particularly in cases of less protected speech, such as speech raising concerns of obscenity, the Court has been quite willing to allow courts wide latitude to construe a statute narrowly to limit any potential overbreadth problems. For example, in Osborne v. Ohio,35 the United States Supreme Court accepted a narrowing construction by the Ohio Supreme Court of an Ohio statute that literally made the possession of any photo of nude children unlawful, even “innocuous photographs” of babies. The Ohio Supreme Court adopted a narrowing construction that applied the statute only to “lewd exhibition” or “a graphic focus on the genitals” and “where the person depicted is neither the child nor the ward of the person charged.” Given this narrowing, the statute was not unconstitutionally overbroad.

The Court can avoid striking down a whole statute as unconstitutional by “severing” the substantially overbroad part of the statute, and then enforcing the rest of the statute. An example is Brockett v. Spokane Arcades, Inc.,36 where the Court upheld the rest of an obscenity law by severing out part of the statute that defined “lust,” which was “unduly broad.” As the Court observed in Virginia v. Hicks,37 a law that punishes a substantial amount of protected free speech

34 455 U.S. 489, 497 (1982).
37 539 U.S. 113, 118 (2003), quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). On various techniques to avoid a finding of overbreadth, see Stuart Buck & Mark L. Rienzi, Federal
“suffices to invalidate all enforcement of that law ‘until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.’”

Reflecting that the doctrine of overbreadth is an exception to application of standard First Amendment analysis, the challenger bears the burden of establishing overbreadth, as is standard for most defenses. This is true even for cases where the underlying First Amendment claim would be analyzed under an intermediate or strict scrutiny standard of review, where the burden is on the government. In determining overbreadth, the court must consider not merely whether the part of the law involved in the instant case is overbroad, but whether the law “taken as a whole, is substantially overbroad judged in relation to its plainly legitimate sweep.”

As with vagueness doctrine, liberal instrumentalist Justices typically have been more willing to use substantial overbreadth doctrine to protect free speech rights, while conservative formalists, focused on the literal application to the individual case, and conservative Holmesian Justices, more predisposed to defer to government, have been less willing to use this doctrine to strike down statutes.

---

United States v. Stevens
559 U.S. 460 (2010)

Chief Justice ROBERTS delivered the opinion of the Court.

Congress enacted 18 U.S.C. § 48 to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty. The statute does not address underlying acts harmful to animals, but only portrayals of such conduct. The question presented is whether the prohibition in the statute is consistent with the freedom of speech guaranteed by the First Amendment.

Section 48 establishes a criminal penalty of up to five years in prison for anyone who knowingly “creates, sells, or possesses a depiction of animal cruelty,” if done “for commercial gain” in interstate or foreign commerce. § 48(a). A depiction of “animal cruelty” is defined as one “in which
a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,” if that conduct violates federal or state law where “the creation, sale, or possession takes place.” § 48(c)(1). In what is referred to as the “exceptions clause,” the law exempts from prohibition any depiction “that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” § 48(b).

The legislative background of § 48 focused primarily on the interstate market for “crush videos.” According to the House Committee Report on the bill, such videos feature the intentional torture and killing of helpless animals, including cats, dogs, monkeys, mice, and hamsters. H.R. Rep. No. 106-397, p. 2 (1999) (hereinafter H.R. Rep.). Crush videos often depict women slowly crushing animals to death “with their bare feet or while wearing high heeled shoes,” sometimes while “talking to the animals in a kind of dominatrix patter” over “[t]he cries and squeals of the animals, obviously in great pain.” Ibid. Apparently these depictions “appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting.” Id., at 2-3. The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia. See Brief for United States 25, n.7 (listing statutes). But crush videos rarely disclose the participants’ identities, inhibiting prosecution of the underlying conduct. See H.R. Rep., at 3; accord, Brief for State of Florida et al. as Amici Curiae 11.

This case, however, involves an application of § 48 to depictions of animal fighting. Dogfighting, for example, is unlawful in all 50 States and the District of Columbia, see Brief for United States 26, n.8 (listing statutes), and has been restricted by federal law since 1976. Animal Welfare Act Amendments of 1976, § 17, 90 Stat. 421, 7 U.S.C. § 2156. Respondent Robert J. Stevens ran a business, “Dogs of Velvet and Steel,” and an associated Web site, through which he sold videos of pit bulls engaging in dogfights and attacking other animals. Among these videos were Japan Pit Fights and Pick-A-Winna: A Pit Bull Documentary, which include contemporary footage of dogfights in Japan (where such conduct is allegedly legal) as well as footage of American dogfights from the 1960’s and 1970’s. A third video, Catch Dogs and Country Living, depicts the use of pit bulls to hunt wild boar, as well as a “gruesome” scene of a pit bull attacking a domestic farm pig. 533 F.3d 218, 221 (C.A.3 2008) (en banc).

Stevens challenged § 48 on its face, arguing that any conviction secured under the statute would be unconstitutional. The court below decided the case on that basis, 533 F.3d, at 231, n.13, and we granted the Solicitor General's petition for certiorari to determine “whether 18 U.S.C. § 48 is facially invalid under the Free Speech Clause of the First Amendment,” Pet. for Cert. i.

To succeed in a typical facial attack, Stevens would have to establish “that no set of circumstances exists under which [§ 48] would be valid,” United States v. Salerno, 481 U.S. 739, 745 (1987), or that the statute lacks any “plainly legitimate sweep,” Washington v. Glucksberg, 521 U.S. 702, 740, n.7 (1997) (Stevens, J., concurring in judgments) (internal quotation marks omitted). Which standard applies in a typical case is a matter of dispute that we need not and do not address, and neither Salerno nor Glucksberg is a speech case. Here the Government asserts that Stevens cannot prevail because § 48 is plainly legitimate as applied to crush videos and animal fighting depictions. Deciding this case through a traditional facial analysis would require us to resolve whether these applications of § 48 are in fact consistent with the Constitution.
In the First Amendment context, however, this Court recognizes “a second type of facial challenge,” whereby a law may be invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.” Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449, n.6 (2008) (internal quotation marks omitted). Stevens argues that § 48 applies to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute. Brief for Respondent 22-25. The Government makes no effort to defend such a broad ban as constitutional. Instead, the Government's entire defense of § 48 rests on interpreting the statute as narrowly limited to specific types of “extreme” material. Brief for United States 8. As the parties have presented the issue, therefore, the constitutionality of § 48 hinges on how broadly it is construed. It is to that question that we now turn.

As we explained two Terms ago, “[t]he first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.” United States v. Williams, 553 U.S. 285, 293 (2008). Because § 48 is a federal statute, there is no need to defer to a state court's authority to interpret its own law.

We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute's ban on a “depiction of animal cruelty” nowhere requires that the depicted conduct be cruel. That text applies to “any . . . depiction” in which “a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.” § 48(c)(1). “[M]aimed, mutilated, [and] tortured” convey cruelty, but “wounded” or “killed” do not suggest any such limitation.

The Government contends that the terms in the definition should be read to require the additional element of “accompanying acts of cruelty.” Reply Brief 6; see also Tr. of Oral Arg. 17-19. (The dissent hinges on the same assumption.) The Government bases this argument on the definiendum, “depiction of animal cruelty,” cf. Leocal v. Ashcroft, 543 U.S. 1, 11 (2004), and on “‘the commonsense canon of noscitur a sociis.’” Reply Brief 7 (quoting Williams, 553 U.S., at 294). As that canon recognizes, an ambiguous term may be “given more precise content by the neighboring words with which it is associated.” Ibid. Likewise, an unclear definitional phrase may take meaning from the term to be defined, see Leocal, supra, at 11 (interpreting a “‘substantial risk’” of the “us[e]” of “physical force” as part of the definition of “‘crime of violence’”).

But the phrase “wounded . . . or killed” at issue here contains little ambiguity. The Government's opening brief properly applies the ordinary meaning of these words, stating for example that to “‘kill’ is ‘to deprive of life.’” Brief for United States 14 (quoting Webster's Third New International Dictionary 1242 (1993)). We agree that “wounded” and “killed” should be read according to their ordinary meaning. Cf. Engine Mfrs. Assn. v. South Coast Air Quality Management Dist., 541 U.S. 246, 252 (2004). Nothing about that meaning requires cruelty.

While not requiring cruelty, § 48 does require that the depicted conduct be “illegal.” But this requirement does not limit § 48 along the lines the Government suggests. There are myriad federal and state laws concerning the proper treatment of animals, but many of them are not designed to guard against animal cruelty. Protections of endangered species, for example, restrict even the
humane “wounding” or killing of “living animal[s].” § 48(c)(1). Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits, weight requirements) can be designed to raise revenue, preserve animal populations, or prevent accidents. The text of § 48(c) draws no distinction based on the reason the intentional killing of an animal is made illegal, and includes, for example, the humane slaughter of a stolen cow.

What is more, the application of § 48 to depictions of illegal conduct extends to conduct that is illegal in only a single jurisdiction. Under subsection (c)(1), the depicted conduct need only be illegal in “the State in which the creation, sale, or possession takes place, regardless of whether the . . . wounding . . . or killing took place in that State.” A depiction of entirely lawful conduct runs afoul of the ban if that depiction later finds its way into another State where the same conduct is unlawful. This provision greatly expands the scope of § 48, because although there may be “a broad societal consensus” against cruelty to animals, Brief for United States 2, there is substantial disagreement on what types of conduct are properly regarded as cruel. Both views about cruelty to animals and regulations having no connection to cruelty vary widely from place to place.


The only thing standing between defendants who sell such depictions and five years in federal prison – other than the mercy of a prosecutor – is the statute’s exceptions clause. Subsection (b) exempts from prohibition “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.” The Government argues that this clause substantially narrows the statute’s reach: News reports about animal cruelty have “journalistic” value; pictures of bullfights in Spain have “historical” value; and instructional hunting videos have “educational”
value. Reply Brief 6. Thus, the Government argues, § 48 reaches only crush videos, depictions of animal fighting (other than Spanish bullfighting, see Brief for United States 47-48), and perhaps other depictions of “extreme acts of animal cruelty.” Id., at 41.

The Government's attempt to narrow the statutory ban, however, requires an unrealistically broad reading of the exceptions clause. As the Government reads the clause, any material with “redeeming societal value,” id., at 9, 16, 23, “at least some minimal value,”” Reply Brief 6 (quoting H.R. Rep., at 4), or anything more than “scant social value,” Reply Brief 11, is excluded under § 48(b). But the text says “serious” value, and “serious” should be taken seriously. We decline the Government's invitation – advanced for the first time in this Court – to regard as “serious” anything that is not “scant.” (Or, as the dissent puts it, “trifling.”) As the Government recognized below, “serious” ordinarily means a good bit more. The District Court's jury instructions required value that is “significant and of great import,” App. 132, and the Government defended these instructions as properly relying on “a commonly accepted meaning of the word ‘serious.’” Brief for United States in No. 05-2497 (CA3), p. 50.

Not to worry, the Government says: The Executive Branch construes § 48 to reach only “extreme” cruelty, Brief for United States 8, and it “neither has brought nor will bring a prosecution for anything less,” Reply Brief 6-7. The Government hits this theme hard, invoking its prosecutorial discretion several times. See id., at 6-7, 10, and n.6, 19, 22. But the First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly. Cf. Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 473 (2001).

This prosecution is itself evidence of the danger in putting faith in government representations of prosecutorial restraint. When this legislation was enacted, the Executive Branch announced that it would interpret § 48 as covering only depictions “of wanton cruelty to animals designed to appeal to a prurient interest in sex.” See Statement by President William J. Clinton upon Signing H.R. 1887, 34 Weekly Comp. Pres. Doc. 2557 (Dec. 9, 1999). No one suggests that the videos in this case fit that description. The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Nor can we rely upon the canon of construction that “ ambiguous statutory language [should] be construed to avoid serious constitutional doubts.” FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009). “[T]his Court may impose a limiting construction on a statute only if it is ‘readily susceptible’ to such a construction.” Reno v. American Civil Liberties Union, 521 U.S. 844, 884 (1997). We “will not rewrite a . . . law to conform it to constitutional requirements,”” id., at 884-885 (quoting Virginia v. American Booksellers Assn., Inc., 484 U.S. 383, 397 (1988); omission in original), for doing so would constitute a “ serious invasion of the legislative domain,” United States v. Treasury Employees, 513 U.S. 454, 479, n.26 (1995), and sharply diminish Congress's “incentive to draft a narrowly tailored law in the first place,” Osborne, 495 U.S., at 121. To read § 48 as the Government desires requires rewriting, not just reinterpretation.
Justice ALITO, dissenting.

The Court strikes down in its entirety a valuable statute, 18 U.S.C. § 48, that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty – in particular, the creation and commercial exploitation of “crush videos,” a form of depraved entertainment that has no social value. The Court's approach, which has the practical effect of legalizing the sale of such videos and is thus likely to spur a resumption of their production, is unwarranted. Respondent was convicted under § 48 for selling videos depicting dogfights. On appeal, he argued, among other things, that § 48 is unconstitutional as applied to the facts of this case, and he highlighted features of those videos that might distinguish them from other dogfight videos brought to our attention. The Court of Appeals – incorrectly, in my view – declined to decide whether § 48 is unconstitutional as applied to respondent's videos and instead reached out to hold that the statute is facially invalid. Today's decision does not endorse the Court of Appeals' reasoning, but it nevertheless strikes down § 48 using what has been aptly termed the “strong medicine” of the overbreadth doctrine, United States v. Williams, 553 U.S. 285, 293 (2008) (internal quotation marks omitted), a potion that generally should be administered only as “a last resort.” Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32, 39 (1999) (internal quotation marks omitted).

Instead of applying the doctrine of overbreadth, I would vacate the decision below and instruct the Court of Appeals on remand to decide whether the videos that respondent sold are constitutionally protected. If the question of overbreadth is to be decided, however, I do not think the present record supports the Court's conclusion that § 48 bans a substantial quantity of protected speech.

In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals. See, e.g., id., at 301-302; see also Ferber, supra, at 773; Houston v. Hill, 482 U.S. 451, 466-467 (1987). Accordingly, we have repeatedly emphasized that an overbreadth claimant bears the burden of demonstrating, “from the text of [the law] and from actual fact,” that substantial overbreadth exists. Virginia v. Hicks, 539 U.S. 113, 122 (2003) (quoting New York State Club Assn., supra, at 14; emphasis added; internal quotation marks omitted; alteration in original). Similarly, “there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.” Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) (emphasis added).

. . . “When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.” Ferber, 458 U.S., at 769, n.24. See also Williams, supra, at 307 (Stevens, J., concurring) (“[T]o the extent the statutory text alone is unclear, our duty to avoid constitutional objections makes it especially appropriate to look beyond the text in order to ascertain the intent of its drafters”).

Applying this canon, I would hold that § 48 does not apply to depictions of hunting. First, because § 48 targets depictions of “animal cruelty,” I would interpret that term to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, not to depictions of
acts that happen to be illegal for reasons having nothing to do with the prevention of animal cruelty. See ante (interpreting “[t]he text of § 48(c)” to ban a depiction of “the humane slaughter of a stolen cow”). Virtually all state laws prohibiting animal cruelty either expressly define the term “animal” to exclude wildlife or else specifically exempt lawful hunting activities, so the statutory prohibition set forth in § 48(a) may reasonably be interpreted not to reach most if not all hunting depictions.

Second, even if the hunting of wild animals were otherwise covered by § 48(a), I would hold that hunting depictions fall within the exception in § 48(b) for depictions that have “serious” (i.e., not “trifling”) “scientific,” “educational,” or “historical” value. While there are certainly those who find hunting objectionable, the predominant view in this country has long been that hunting serves many important values, and it is clear that Congress shares that view. Since 1972, when Congress called upon the President to designate a National Hunting and Fishing Day, see S.J. Res. 117, 92d Cong., 2d Sess. (1972), 86 Stat. 133, Presidents have regularly issued proclamations extolling the values served by hunting. See Presidential Proclamation No. 8421, 74 Fed. Reg. 49305 (Pres. Obama 2009) (hunting and fishing are “ageless pursuits” that promote “the conservation and restoration of numerous species and their natural habitats”); Presidential Proclamation No. 8295, 73 Fed. Reg. 57233 (Pres. Bush 2008) (hunters and anglers “add to our heritage and keep our wildlife populations healthy and strong,” and “are among our foremost conservationists”); Presidential Proclamation No. 7822, 69 Fed. Reg. 59539 (Pres. Bush 2004) (“America's hunters and anglers represent the great spirit of our country”); Presidential Proclamation No. 4682, 44 Fed. Reg. 53149 (Pres. Carter 1979) (hunting promotes conservation and an appreciation of “healthy recreation, peaceful solitude and closeness to nature”); Presidential Proclamation No. 4318, 39 Fed. Reg. 35315 (Pres. Ford 1974) (hunting furthers “appreciation and respect for nature” and preservation of the environment). Thus, it is widely thought that hunting has “scientific” value in that it promotes conservation, “historical” value in that it provides a link to past times when hunting played a critical role in daily life, and “educational” value in that it furthers the understanding and appreciation of nature and our country's past and instills valuable character traits. . . .

Although the Court's overbreadth analysis rests primarily on the proposition that § 48 substantially restricts the sale and possession of hunting depictions, the Court cites a few additional examples, including depictions of methods of slaughter and the docking of the tails of dairy cows.

Such examples do not show that the statute is substantially overbroad, for two reasons. First, as explained above, § 48 can reasonably be construed to apply only to depictions involving acts of animal cruelty as defined by applicable state or federal law, and anti-cruelty laws do not ban the sorts of acts depicted in the Court's hypotheticals. See, e.g., Idaho Code § 25-3514 (Lexis 2000) (“No part of this chapter [prohibiting cruelty to animals] shall be construed as interfering with or allowing interference with . . . [t]he humane slaughter of any animal normally and commonly raised as food or for production of fiber . . . [or][n]ormal or accepted practices of ... animal husbandry”); Kan. Stat. Ann. § 21–4310(b) (2007) (“The provisions of this section shall not apply to . . . with respect to farm animals, normal or accepted practices of animal husbandry, including the normal and accepted practices for the slaughter of such animals”); Md. Crim. Law Code Ann. § 10-603 (Lexis 2002) (sections prohibiting animal cruelty “do not apply to . . . customary and normal veterinary and agricultural husbandry practices, including dehorning, castration, tail docking, and limit feeding”).
Second, nothing in the record suggests that anyone has ever created, sold, or possessed for sale a depiction of the slaughter of food animals or of the docking of the tails of dairy cows that would not easily qualify under the exception set out in § 48(b). Depictions created to show proper methods of slaughter or tail docking would presumably have serious “educational” value, and depictions created to focus attention on methods thought to be inhumane or otherwise objectionable would presumably have either serious “educational” or “journalistic” value or both. In short, the Court's examples of depictions involving the docking of tails and humane slaughter do not show that § 48 suffers from any overbreadth, much less substantial overbreadth.

The Court notes, finally, that cockfighting, which is illegal in all States, is still legal in Puerto Rico, and I take the Court's point to be that it would be impermissible to ban the creation, sale, or possession in Puerto Rico of a depiction of a cockfight that was legally staged in Puerto Rico. But assuming for the sake of argument that this is correct, this veritable sliver of unconstitutionality would not be enough to justify striking down § 48 in toto.

Subsequent to this case, Congress amended 42 U.S.C. § 48 to regulate only depictions of “animal crush videos” where the animal is “intentionally crushed, burned, drowned, suffocated, impaled, or otherwise subjected to serious bodily injury” and “is obscene.” The statute, as amended, would thus no longer apply to the “dogfighting” video involved in United States v. Stevens. On the overbreadth doctrine generally, see State v. Hensel, 901 N.W.2d 166 (Minn. 2017) (disorderly conduct statute prohibiting “disturb[ing] an assembly or meeting, not unlawful in character” impermissibly overbroad and not susceptible of being limited to fighting words, obscene speech, or true threats); Ex Parte Jones, 2018 WL 2228888 (Tex. Ct. App. - Tyler 2018) (Texas revenge pornography statute overbroad as it applies not only to initial sender but to anyone sharing picture even if they did not know picture was sent in violation of photographed individual’s reasonable expectation of privacy).

§ 5.4 Balancing Speech and Fair Trial Rights

In 1907, in Patterson v. Colorado,41 the author of editorials thought by a trial judge to have a tendency to interfere with the administration of justice in a pending case was held entitled to protection against a contempt citation only if the proceedings were arbitrary. However, in the 1941 case of Bridges v. California,42 the publishers of materials relating to a pending case were protected from a contempt citation by a version of the clear and present danger test which required the threat of an serious evil and an extremely high degree of imminence.

41 205 U.S. 454, 458-63 (1907).

42 314 U.S. 252, 260-63 (1941). See also Wood v. Georgia, 370 U.S. 375, 383-95 (1962) (sheriff could not be adjudged in contempt of court for publishing a news release questioning advisability of a grand jury investigation into block voting by blacks in Bibb County, Georgia).
The modern series of cases begin in 1966 with *Sheppard v. Maxwell*.\(^{43}\) Prejudicial publicity about the defendant had saturated the community in which he was tried. The Court said that the press must have a free hand if there is no threat to the integrity of a trial. However, where the accused might be prejudiced, the court can and should take appropriate steps. The court can limit the presence of the press at judicial proceedings. The judge can also continue the case until publicity subsides, transfer it to another county, or sequester the jury. Failure to protect the defendant from inherently prejudicial publicity, as in this case, will result in reversal of the conviction.

In contrast, direct efforts to stop pretrial publicity have been treated rather harshly by the Court. In *Nebraska Press Association v. Stuart*,\(^{44}\) the trial judge had restrained a news service from publishing or broadcasting accounts of confessions or admissions made by the accused or facts “strongly implicative” of the accused’s guilt. Reversing, the Court said that prior restraints are the most serious and least tolerable infringement of First Amendment rights and “it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it.” Here there had been no finding that alternative measures, such as those mentioned in *Sheppard*, would not have protected defendant’s rights. Also, to the extent the order reached evidence adduced at an open hearing, it plainly violated settled principles. Finally, as applied to “implicative” material, the order was too vague and too broad to survive scrutiny.

Despite these statements, protective orders that would enhance the litigation process have been approved. For example, in *Seattle Times Co. v. Rhinehart*,\(^{45}\) the Court allowed a protective order restraining the parties to civil litigation from publishing material obtained through the discovery process. The Court said this furthered a substantial interest unrelated to the suppression of expression, *i.e.*, a purpose to assist in the preparation of trial or settlement, and then concluded that intermediate review was met. The Court noted that this case did not involve the classic kind of prior restraint, to which strict scrutiny would be applied, because the protective order “prevents a party from disseminating only that information obtained through use of the discovery process. Thus, a party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court’s processes.”

Cases involving complete bans on persons, including the media, from criminal courtrooms have triggered strict scrutiny review. As the Court noted in *Globe Newspaper Co. v. Superior Court*,\(^{46}\) the Court’s precedents have “firmly established” that “the press and general public have a constitutional right of access to criminal trials.”


\(^{44}\) 427 U.S. 539, 557-61 (1976).


Justice BRENNAN delivered the opinion of the Court.

Section 16A of Chapter 278 of the Massachusetts General Laws, as construed by the Massachusetts Supreme Judicial Court, requires trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim. The question presented is whether the statute thus construed violates the First Amendment as applied to the States through the Fourteenth Amendment.

The case began when appellant, Globe Newspaper Co. (Globe), unsuccessfully attempted to gain access to a rape trial conducted in the Superior Court for the County of Norfolk, Commonwealth of Massachusetts. The criminal defendant in that trial had been charged with the forcible rape and forced unnatural rape of three girls who were minors at the time of trial-two 16 years of age and one 17. In April 1979, during hearings on several preliminary motions, the trial judge ordered the courtroom closed. Before the trial began, Globe moved that the court revoke this closure order, hold hearings on any future such orders, and permit appellant to intervene “for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions.” App. 12a-14a. The trial court denied Globe's motions, relying on Mass. Gen. Laws Ann., ch. 278, § 16A (West 1981), and ordered the exclusion of the press and general public from the courtroom during the trial. The defendant immediately objected to that exclusion order, and the prosecution stated for purposes of the record that the order was issued on the court's “own motion and not at the request of the Commonwealth.” App. 18a.

The Court's recent decision in Richmond Newspapers[. Inc. v. Virginia] firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment. 448 U.S., [555,] 558-581 [(1980)] (plurality opinion); id., at 584-598 (Brennan, J., concurring in judgment); id., at 598-601 (Stewart, J., concurring in judgment); id., at 601-604 (Blackmun, J., concurring in judgment).

Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment. But we have long eschewed any “narrow, literal conception” of the Amendment's terms, NAACP v. Button, 371 U.S. 415, 430 (1963), for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. Richmond Newspapers, Inc. v. Virginia, 448 U.S., at 579-580, and n.16 (plurality opinion) (citing cases); id., at 587-588, and n.4 (Brennan, J., concurring in judgment). Underlying the First Amendment right of access to criminal trials is the common understanding that “a major purpose of that Amendment was to protect the free discussion of governmental affairs,” Mills v. Alabama, 384 U.S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that
the individual citizen can effectively participate in and contribute to our republican system of self-government. See Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Richmond Newspapers, Inc. v. Virginia, 448 U.S., at 587-588 (Brennan, J., concurring in judgment). See also id., at 575 (plurality opinion) (the “expressly guaranteed freedoms” of the First Amendment “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government”). Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected “discussion of governmental affairs” is an informed one.

Two features of the criminal justice system, emphasized in the various opinions in Richmond Newspapers, together serve to explain why a right of access to criminal trials in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. “[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open.” Richmond Newspapers, Inc. v. Virginia, supra, at 569 (plurality opinion). And since that time, the presumption of openness has remained secure. Indeed, at the time of this Court's decision in In re Oliver, 333 U.S. 257 (1948), the presumption was so solidly grounded that the Court was “unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country.” Id., at 266 (footnote omitted). This uniform rule of openness has been viewed as significant in constitutional terms not only “because the Constitution carries the gloss of history,” but also because “a tradition of accessibility implies the favorable judgment of experience.” Richmond Newspapers, Inc. v. Virginia, supra, 448 U.S., at 589 (Brennan, J., concurring in judgment).

Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

Although the right of access to criminal trials is of constitutional stature, it is not absolute. See Richmond Newspapers, Inc. v. Virginia, supra, at 581, n.18 (plurality opinion); Nebraska Press Assn. v. Stuart, 427 U.S., at 570. But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. See, e.g., Brown v. Hartlage, 456 U.S. 45, 53-54 (1982); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 101-103 (1979); NAACP v. Button, 371 U.S., at 438, 83 S.Ct., at 340.17. We now consider the state interests advanced to support Massachusetts' mandatory rule barring press and public access to criminal sex-offense trials during the testimony of minor victims.
The state interests asserted to support § 16A, though articulated in various ways, are reducible to two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner. We consider these interests in turn.

We agree with appellee that the first interest – safeguarding the physical and psychological well-being of a minor – is a compelling one. But as compelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives. Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence. In the case before us, for example, the names of the minor victims were already in the public record, and the record indicates that the victims may have been willing to testify despite the presence of the press. If the trial court had been permitted to exercise its discretion, closure might well have been deemed unnecessary. In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.

Nor can § 16A be justified on the basis of the Commonwealth's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in § 16A will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities. Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense. Although § 16A bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner. And even if § 16A effectively advanced the State's interest, it is doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory closure rules designed to encourage victims to come forward: Surely it cannot be suggested that minor victims of sex crimes are the only crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify. The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in Richmond Newspapers: namely, “that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.” 448 U.S., at 573 (plurality opinion).
For the foregoing reasons, we hold that § 16A, as construed by the Massachusetts Supreme Judicial Court, violates the First Amendment to the Constitution.

Chief Justice BURGER, with whom Justice REHNQUIST joins, dissenting.

Historically our society has gone to great lengths to protect minors charged with crime, particularly by prohibiting the release of the names of offenders, barring the press and public from juvenile proceedings, and sealing the records of those proceedings. Yet today the Court holds unconstitutional a state statute designed to protect not the accused, but the minor victims of sex crimes. In doing so, it advances a disturbing paradox. Although states are permitted, for example, to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused.

The Court has tried to make its holding a narrow one by not disturbing the authority of state legislatures to enact more narrowly drawn statutes giving trial judges the discretion to exclude the public and the press from the courtroom during the minor victim's testimony. Ante, at 2622, n. 27. I also do not read the Court's opinion as foreclosing a state statute which mandates closure except in cases where the victim agrees to testify in open court. But the Court's decision is nevertheless a gross invasion of state authority and a state's duty to protect its citizens-in this case minor victims of crime. I cannot agree with the Court's expansive interpretation of our decision in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), or its cavalier rejection of the serious interests supporting Massachusetts' mandatory closure rule. Accordingly, I dissent.

For me, it seems beyond doubt, considering the minimal impact of the law on First Amendment rights and the overriding weight of the Commonwealth's interest in protecting child rape victims, that the Massachusetts law is not unconstitutional. The Court acknowledges that the press and the public have prompt and full access to all of the victim's testimony. Their additional interest in actually being present during the testimony is minimal. While denying it the power to protect children, the Court admits that the Commonwealth's interest in protecting the victimized child is a compelling interest. Ante, at 2621. This meets the test of Richmond Newspapers, supra.

The law need not be precisely tailored so long as the state's interest overrides the law's impact on First Amendment rights and the restrictions imposed further that interest. Certainly this law, which excludes the press and public only during the actual testimony of the child victim of a sex crime, rationally serves the Commonwealth's overriding interest in protecting the child from the severe-possibly permanent-psychological damage. It is not disputed that such injury is a reality.

The law also seems a rational response to the undisputed problem of the underreporting of rapes and other sexual offenses. The Court rejects the Commonwealth's argument that § 16A is justified by its interest in encouraging minors to report sex crimes, finding the claim “speculative in empirical terms [and] open to serious question as a matter of logic and common sense.” Ante, at 2622. There is no basis whatever for this cavalier disregard of the reality of human experience. It makes no sense to criticize the Commonwealth for its failure to offer empirical data in support of its rule; only by
allowing state experimentation may such empirical evidence be produced. “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See also Chandler v. Florida, 449 U.S. 560, 579-580 (1981); Reeves, Inc. v. Stake, 447 U.S. 429, 441 (1980); Whalen v. Roe, 429 U.S. 589, 597, and n.20 (1977).

The Court also concludes that the Commonwealth's assertion that the law might reduce underreporting of sexual offenses fails “as a matter of logic and common sense.” This conclusion is based on a misperception of the Commonwealth's argument and an overly narrow view of the protection the statute seeks to afford young victims. The Court apparently believes that the statute does not prevent any significant trauma, embarrassment, or humiliation on the part of the victim simply because the press is not prevented from discovering and publicizing both the identity of the victim and the substance of the victim's testimony. Ante, at 2622. Section 16A is intended not to preserve confidentiality, but to prevent the risk of severe psychological damage caused by having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers. In most states, that crowd may be expanded to include a live television audience, with reruns on the evening news. That ordeal could be difficult for an adult; to a child, the experience can be devastating and leave permanent scars.

The Commonwealth's interests are clearly furthered by the mandatory nature of the closure statute. Certainly if the law were discretionary, most judges would exercise that discretion soundly and would avoid unnecessary harm to the child, but victims and their families are entitled to assurance of such protection. The legislature did not act irrationally in deciding not to leave the closure determination to the idiosyncracies of individual judges subject to the pressures available to the media. The victim might very well experience considerable distress prior to the court appearance, wondering, in the absence of such statutory protection, whether public testimony will be required. The mere possibility of public testimony may cause parents and children to decide not to report these heinous crimes. If, as psychologists report, the courtroom experience in such cases is almost as traumatic as the crime itself, a state certainly should be able to take whatever reasonable steps it believes are necessary to reduce that trauma. Furthermore, we cannot expect victims and their parents to be aware of all of the nuances of state law; a person who sees newspaper, or perhaps even television, reports of a minor victim's testimony may very well be deterred from reporting a crime on the belief that public testimony will be required. It is within the power of the state to provide for mandatory closure to alleviate such understandable fears and encourage the reporting of such crimes.

Justice STEVENS, dissenting.

The duration of a criminal trial generally is shorter than the time it takes for this Court's jurisdiction to be invoked and our judgment on the merits to be announced. As a result, our power to review pretrial or midtrial orders implicating the freedom of the press has rested on the exception to the mootness doctrine for orders “capable of repetition, yet evading review.” See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 563; Gannett Co. v. DePasquale, 443 U.S. 368, 377-378; Nebraska Press Assn. v. Stuart, 427 U.S. 539, 546-547.
Today the Court expands that exception in order to pass on the constitutionality of a statute that, as presently construed, has never been applied in a live controversy. In this case, unlike the three cases cited above, the governing state law was materially changed after the trial court's order had expired by its own terms. There consequently is no possibility “that the same complaining party will be subject to the same action again.” Gannett Co. v. DePasquale, supra, 443 U.S., at 377 (quoting Weinstein v. Bradford, 423 U.S. 147, 149).

The Court does not hold that on this record a closure order limited to the testimony of the minor victims would have been unconstitutional. Rather, the Court holds only that if ever such an order is entered, it must be supported by adequate findings. Normally, if the constitutional deficiency is the absence of findings to support a trial order, the Court would either remand for factfinding, or examine the record itself, before deciding whether the order measured up to constitutional standards. The infeasibility of this course of action-since no such order was entered in this case and since the order that was entered has expired-further demonstrates that the Court's comment on the First Amendment issues implicated by the Massachusetts statute is advisory, hypothetical, and, at best, premature.

I would dismiss the appeal.

The Court has also held under a strict scrutiny approach that it is unconstitutional to exclude the public or the press from voir dire proceedings, since such proceedings are a key phase of a trial. The Court acknowledged in Press-Enterprise Co. v. Superior Court that closure might be justified to advance the compelling government interest of protecting prospective jurors from answering “deeply personal matters” in open court, but that “the presumption of openness may be overcome only by an overriding interest based on findings the closure is essential to preserve higher values and is narrowly tailored to serve that interest.” Under this standard, the Court said, closure should be regarded as the last resort, i.e., a “least restrictive alternative” approach.

In each of these cases the Court has treated the rights of the press and the rights of the public equally, confirming that for purposes of First Amendment law there is no difference in the standards of review applicable in “freedom of speech” and “freedom of the press” cases. Similarly, in Branzburg v. Hayes, the Court concluded that members of the press have no special protection to resist subpoenas requiring the disclosure of confidential sources, although the Court did note that for any person the relevant test to justify a subpoena in these circumstances was a strict scrutiny “compelling state interest” test, and that this was met in the case. In Zurcher v. Stanford Daily, the Court held that the press have no special right to resist searches and seizures of material in press rooms which are otherwise constitutional under the Fourth Amendment.


Reflecting a special solicitude for the press, Justice Stewart dissented in both *Branzburg* and *Zurcher*, as did a number of liberal instrumentalist Justices in each. Despite this view, the majority of the Court has not adopted doctrines granting the press special First Amendment protection. The press also have no special right of access to gather information, or exemption from antitrust laws, or exemption from the application of any general law. As a matter of state law, a large number of states have adopted shield laws to protected reporters from having to reveal their sources, but this is a matter of state law, not constitutional right. No such federal statute exists regarding prosecutions in the federal courts.

There is no evidence that the Court has changed its position with respect to the above matters in the post-instrumentalist era. However, there has been a slight retreat by the Court with respect to standards protecting the speech rights of defense attorneys. In *Gentile v. State Bar of Nevada*, a 1991 case, a defense attorney had said some six months before trial that the state had indicted his client as a scapegoat for crooked cops. For this speech he was discipline by the State Bar of Nevada. In an opinion by Chief Justice Rehnquist, a majority of the Court said that because lawyers are officers of the court, their speech, when representing clients in pending cases, may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press*. The Chief Justice said the Court should ask only whether the speech created “a substantial likelihood that his statements would materially prejudice the trial of his client,” an intermediate level of review, rather than a strict scrutiny level of review of “actual prejudice” or “an imminent threat to fair trial,” reflected in cases like *Nebraska Press*, discussed at § 5.4 n.44, and its cite to *New York Times Co. v. United States* (The Pentagon Papers Case), discussed at § 5.1 nn.4-5.

50 *Branzburg*, 408 U.S. at 711 (Douglas, J., dissenting); *id.* at 725 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting); *Zurcher*, 436 U.S. at 570-71 (Stewart, J., joined by Marshall, J., dissenting); *id.* at 577 (Stevens, J., dissenting).

51 See *Branzburg*, 408 U.S. at 682-86. See also *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006) (Governor’s directive forbidding all state executive employees to speak with two specific news reporters because of their perceived bias had only *de minimis* impact on reporters’ exercise of First Amendment rights to speak; no retaliation claim for activity "sufficient to chill the exercise of First Amendment rights” under 42 U.S.C. § 1983). *But see* Turner v. Driver, 848 F.3d 678, 688 (5th Cir. 2017) (“First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions”; qualified immunity granted since the right not clearly established before this case; 1st, 7th, and 11th had already held such a right exists; 3rd, 4th, and 10th had held right not clearly established under qualified immunity analysis; no Circuit has refused to recognize right).


Justice Kennedy dissented on this point, joined by the instrumentalist Justices Marshall, Blackmun, and Stevens. He would have applied “normal First Amendment principles” to the case, which would have required a strict scrutiny approach for this content-based regulation of speech. Justice Kennedy noted that the state has many avenues for disseminating information adverse to a criminal defendant, whereas defendants cannot speak without risking incrimination and their only means of countering prosecution statements is likely to be their defense counsel. These four Justices were joined by Justice O’Connor, however, regarding whether the State Bar’s rule under which the attorney was disciplined were unconstitutionally vague. Announcing the judgment of the Court which set aside disciplinary sanctions for making that statement, Justice Kennedy wrote that the rule on which the sanctions were based was unconstitutionally vague since it was not clear whether the attorney knew or reasonably should have known that his remarks created “a substantial likelihood of material prejudice” in a trial for which a jury was not to be empaneled for six months and at which no juror indicated any recollection of the lawyer or his press conference.

A separate issue arises when the press requests, and courts permit, either on their own motion or pursuant to statutory authorization, cameras to be placed in the courtroom to television court proceedings live. The Court has held there is no constitutional right to televise court proceedings. While in extreme circumstances such coverage can be viewed as interfering with the defendant’s Sixth Amendment right to a fair trial, all 50 states have some provision for televised access in their state courts in some circumstances, although that access may be limited in certain cases.

In contrast to this more receptive attitude regarding cameras in the courtroom in state courts, the federal courts, and United States Supreme Court, have continued their historic reluctance to permit cameras in the courtroom. Only a couple of federal Circuit Courts of Appeals, the Second Circuit and the Ninth Circuit, have rules providing for televising appellate proceedings in some limited circumstances, pursuant to authority granted them by the Judicial Conference in 1996. Beginning with the 2006 Term, the Supreme Court has made same-day written transcripts available of all oral arguments, and oral tapes are also made available in high profile cases.

54 Id. at 1053-56 (Kennedy, J., joined by Brennan, Marshall & Blackmun, JJ.).

55 Id. at 1048-51; id. at 1082 (O’Connor, J., concurring).


PART X: EXCEPTIONS TO STANDARD FREE SPEECH DOCTRINE

CHAPTER 6: SPEECH TRIGGERING LIMITED FIRST AMENDMENT REVIEW:
ADVOCACY OF ILLEGAL CONDUCT AND FIGHTING WORDS CASES

§ 6.1 No Free Speech Review, Except for Viewpoint Discrimination ............... 283

§ 6.2 Advocacy of Illegal Conduct and True Threats .................................. 292

§ 6.3 Fighting Words versus Hostile Audience Cases .................................. 315

§ 6.4 Hate Speech Legislation ........................................................................ 319

§ 6.1 No Free Speech Review, Except for Viewpoint Discrimination

The Court has identified certain categories of speech that, as traditionally defined, are not protected by the First Amendment. The four basic categories of such speech involve some advocacy of illegal conduct, discussed at § 6.2; fighting words, discussed at § 6.3; obscenity, discussed at § 7.1; and indecency involving use of children, discussed at § 7.3. While libel was also historically viewed as an additional category of “unprotected” speech, libelous speech has been entitled to some First Amendment protection since New York Times Co. v. Sullivan in 1964, discussed at § 8.1. In addition, while historically commercial speech received no First Amendment protection, since 1976, truthful, lawful representations involving commercial speech are provided First Amendment protection under the Central Hudson test for commercial speech, discussed at § 9.2.

There are four kinds of cases that fall generally under the category of speech involving the advocacy of illegal conduct. The classic case involves advocacy by a speaker to a group at a demonstration, or the distribution of leaflets or other literature, advocating lawless action, discussed at § 6.2.1. A second kind of case involves advocacy where the speaker indicates a possible intent for the speaker to commit violence. The Court has defined these cases as involving whether the speaker’s statement indicates a “true threat” to commit violence, discussed at § 6.2.2. A third kind of case involves speech concerning violence done in the context of on-going illegal actions. These cases involve application of special “hate crimes” statutes that make the related speech a crime independent of the on-going illegal action, discussed at § 6.4.1. Finally, sometimes statutes or government regulations have attempted to regulate or ban certain kinds of “hate speech” where no other illegal or violent conduct was taking place, discussed at § 6.4.2.

The Court has sometimes stated that all these categories of “unprotected” speech are not protected at all by the First Amendment. For example, in 1942, in Chaplinsky v. New Hampshire, a case involving fighting words, the Court noted, “There are certain well-defined and narrowly limited
classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

However, in 1992, that perspective was clarified in *R.A.V. v. City of St. Paul.*

Noting that viewpoint-based regulations are presumptively invalid, Justice Scalia said that this principle applied to impose upon even these kinds of proscribable speech a viewpoint discrimination limit.

**R.A.V. v. City of St. Paul**  
505 U.S. 377 (1992)

Justice SCALIA delivered the opinion of the Court.

In the predawn hours of June 21, 1990, petitioner and several other teenagers allegedly assembled a crudely made cross by taping together broken chair legs. They then allegedly burned the cross inside the fenced yard of a black family that lived across the street from the house where petitioner was staying. Although this conduct could have been punished under any of a number of laws, [FN 1: The conduct might have violated Minnesota statutes carrying significant penalties. See, e.g., Minn. Stat. § 609.713(1) (1987) (providing for up to five years in prison for terroristic threats); § 609.563 (arson) (providing for up to five years and a $10,000 fine, depending on the value of the property intended to be damaged); § 609.595 (Supp.1992) (criminal damage to property) (providing for up to one year and a $3,000 fine, depending upon the extent of the damage to the property)], one of the two provisions under which respondent city of St. Paul chose to charge petitioner (then a juvenile) was the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990), which provides: “Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”

Petitioner moved to dismiss this count on the ground that the St. Paul ordinance was substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment. The trial court granted this motion, but the Minnesota Supreme Court reversed. That court rejected petitioner's overbreadth claim because, as construed in prior Minnesota cases, see, e.g., In re Welfare of S.L.J., 263 N.W.2d 412 (Minn.1978), the modifying phrase “arouses anger, alarm or resentment in others” limited the reach of the ordinance to conduct that amounts to “fighting words,” i.e., “conduct that itself inflicts injury or tends to incite immediate violence,” In re Welfare of R.A.V., 464 N.W.2d 507, 510 (Minn.1991) (citing Chaplinsky v. New Hampshire, 315

---

U.S. 568, 572 (1942)), and therefore the ordinance reached only expression “that the first amendment does not protect,” 464 N.W.2d, at 511. The court also concluded that the ordinance was not impermissibly content based because, in its view, “the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.” Ibid. We granted certiorari, 501 U.S. 1204 (1991).

In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 339 (1986); New York v. Ferber, 458 U.S. 747, 769, n.24 (1982); Terminiello v. Chicago, 337 U.S. 1, 4 (1949). Accordingly, we accept the Minnesota Supreme Court's authoritative statement that the ordinance reaches only those expressions that constitute “fighting words” within the meaning of Chaplinsky. 464 N.W.2d, at 510-511. Petitioner and his amici urge us to modify the scope of the Chaplinsky formulation, thereby invalidating the ordinance as “substantially overbroad,” Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973). We find it unnecessary to consider this issue. Assuming, arguendo, that all of the expression reached by the ordinance is proscribable under the “fighting words” doctrine, we nonetheless conclude that the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.

Our cases surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government “may regulate [them] freely,” post, at 2552 (White, J., concurring in judgment). That would mean that a city council could enact an ordinance prohibiting only those legally obscene works that contain criticism of the city government or, indeed, that do not include endorsement of the city government. Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well. It is not true that “fighting words” have at most a “de minimis” expressive content, ibid., or that their content is in all respects “worthless and undeserving of constitutional protection,” post, at 2553; sometimes they are quite expressive indeed. We have not said that they constitute “no part of the expression of ideas,” but only that they constitute “no essential part of any exposition of ideas.” Chaplinsky, supra, 315 U.S., at 572 (emphasis added).

The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts. We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses – so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not. See Johnson, 491 U.S., at 406-407. Similarly, we have upheld reasonable “time, place, or manner” restrictions, but only if they are “justified without reference to the content of the regulated speech.” Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal quotation marks omitted); see also Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984) (noting that the O'Brien test differs little from the standard applied to time, place, or manner restrictions). And just as the power to proscribe particular speech on the basis of a noncontent element (e.g., noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the
power to proscribe it on the basis of *one* content element (e.g., obscenity) does not entail the power to proscribe it on the basis of *other* content elements.

In other words, the exclusion of “fighting words” from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a “nonspeech” element of communication. Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a “mode of speech,” Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (opinion concurring in result); both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed. Compare Frisby v. Schultz, 487 U.S. 474 (1988) (upholding, against facial challenge, a content-neutral ban on targeted residential picketing), with Carey v. Brown, 447 U.S. 455 (1980) (invalidating a ban on residential picketing that exempted labor picketing).

Even the prohibition against content discrimination that we assert the First Amendment requires is not absolute. It applies differently in the context of proscribable speech than in the area of fully protected speech. The rationale of the general prohibition, after all, is that content discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace,” Simon & Schuster, 502 U.S., at 116. But content discrimination among various instances of a class of proscribable speech often does not pose this threat.

When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. To illustrate: A State might choose to prohibit only that obscenity which is the most patently offensive in its *prurience* – i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages. See Kucharek v. Hanaway, 902 F.2d 513, 517 (CA7 1990), cert. denied, 498 U.S. 1041 (1991). And the Federal Government can criminalize only those threats of violence that are directed against the President, see 18 U.S.C. § 871 – since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President. See Watts v. United States, 394 U.S. 705, 707 (1969) (upholding the facial validity of § 871 because of the “overwhelmin[g] interest in protecting the safety of [the] Chief Executive and in allowing him to perform his duties without interference from threats of physical violence”). But the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities. And to take a final example (one mentioned by Justice Stevens, *post*, at 2563-2564), a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-772 (1976)) is in its view greater there. Cf. Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) (state regulation of

Another valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular “secondary effects” of the speech, so that the regulation is “justified without reference to the content of the . . . speech,” Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986). . . . A State could, for example, permit all obscene live performances except those involving minors. Moreover, since words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech. See id., at 571 (plurality opinion); id., at 577 (Scalia, J., concurring in judgment); id., at 582 (Souter, J., concurring in judgment). Thus, for example, sexually derogatory “fighting words,” among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices, 42 U.S.C. § 2000e-2; 29 CFR § 1604.11 (1991). See also18 U.S.C. § 242; 42 U.S.C. §§ 1981, 1982. Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.

. . . There may be other bases as well. Indeed, to validate such selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular “neutral” basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot. (We cannot think of any First Amendment interest that would stand in the way of a State’s prohibiting only those obscene motion pictures with blue-eyed actresses.)

[W]e conclude that, even as narrowly construed by the Minnesota Supreme Court, the ordinance is facially unconstitutional. Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality – are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects. See Simon & Schuster, 502 U.S., at 116; Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 229-230 (1987).

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words – odious racial epithets, for example – would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender – aspersions upon a person's mother, for example – would seemingly be usable ad libitum in the placards of those arguing in favor of racial,
color, etc., tolerance and equality, but could not be used by those speakers' opponents. One could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain (as the Minnesota Supreme Court repeatedly emphasized) messages of “bias-motivated” hatred and in particular, as applied to this case, messages “based on virulent notions of racial supremacy.” 464 N.W.2d, at 508, 511. One must wholeheartedly agree with the Minnesota Supreme Court that “[i]t is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear,” id., at 508, but the manner of that confrontation cannot consist of selective limitations upon speech. St. Paul's brief asserts that a general “fighting words” law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the “group hatred” aspect of such speech “is not condoned by the majority.” Brief for Respondent 25. The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.

Finally, St. Paul and its amici defend the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests. Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the “danger of censorship” presented by a facially content-based statute, Leathers v. Medlock, 499 U.S., at 448, requires that that weapon be employed only where it is “necessary to serve the asserted [compelling] interest,” Burson v. Freeman, 504 U.S. 191., 199 (1992) (plurality opinion) (emphasis added); Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). The existence of adequate content-neutral alternatives thus “undercut[s] significantly” any defense of such a statute, Boos v. Barry, supra, 485 U.S., at 329, casting considerable doubt on the government's protestations that “the asserted justification is in fact an accurate description of the purpose and effect of the law,” Burson, supra, 504 U.S., at 213 (Kennedy, J., concurring). See Boos, supra, 485 U.S., at 324-329. The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.

Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.
Justice WHITE, with whom Justice BLACKMUN and Justice O'CONNOR join, and with whom Justice STEVENS joins except as to Part I-A, concurring in the judgment.

This case could easily be decided within the contours of established First Amendment law by holding, as petitioner argues, that the St. Paul ordinance is fatally overbroad because it criminalizes not only unprotected expression but expression protected by the First Amendment. Instead, “find[ing] it unnecessary” to consider the questions upon which we granted review, ante, at 2542, the Court holds the ordinance facially unconstitutional on a ground that was never presented to the Minnesota Supreme Court, a ground that has not been briefed by the parties before this Court, a ground that requires serious departures from the teaching of prior cases and is inconsistent with the plurality opinion in Burson v. Freeman, 504 U.S. 191 (1992), which was joined by two of the five Justices in the majority in the present case.

This Court ordinarily is not so eager to abandon its precedents. Twice within the past month, the Court has declined to overturn longstanding but controversial decisions on questions of constitutional law. See Allied-Signal, Inc. v. Director, Division of Taxation, 504 U.S. 768 (1992); Quill Corp. v. North Dakota, 504 U.S. 298 (1992). In each case, we had the benefit of full briefing on the critical issue, so that the parties and amici had the opportunity to apprise us of the impact of a change in the law. And in each case, the Court declined to abandon its precedents, invoking the principle of stare decisis. Allied-Signal, Inc., supra, 504 U.S., at 783-786; Quill Corp., supra, 504 U.S., at 317-318.

But in the present case, the majority casts aside long-established First Amendment doctrine without the benefit of briefing and adopts an untried theory. This is hardly a judicious way of proceeding, and the Court's reasoning in reaching its result is transparently wrong.

I-A

This Court's decisions have plainly stated that expression falling within certain limited categories so lacks the values the First Amendment was designed to protect that the Constitution affords no protection to that expression. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), made the point in the clearest possible terms: “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Id., at 571-572. See also Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984) (citing Chaplinsky).

Thus, as the majority concedes, see ante, at 2543, this Court has long held certain discrete categories of expression to be proscribable on the basis of their content. For instance, the Court has held that the individual who falsely shouts “fire” in a crowded theater may not claim the protection of the First Amendment. Schenck v. United States, 249 U.S. 47, 52 (1919). The Court has concluded that neither child pornography nor obscenity is protected by the First Amendment. New York v. Ferber,
458 U.S. 747, 764 (1982); Miller v. California, 413 U.S. 15, 20 (1973). And the Court has observed that, “[l]eaving aside the special considerations when public officials [and public figures] are the target, a libelous publication is not protected by the Constitution.” Ferber, supra, 458 U.S., at 763 (citations omitted).

All of these categories are content based. But the Court has held that the First Amendment does not apply to them because their expressive content is worthless or of de minimis value to society. Chaplinsky, supra, 315 U.S., at 571-572. We have not departed from this principle, emphasizing repeatedly that, “within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.” Ferber, supra, 458 U.S., at 763-764; Bigelow v. Virginia, 421 U.S. 809, 819 (1975). This categorical approach has provided a principled and narrowly focused means for distinguishing between expression that the government may regulate freely and that which it may regulate on the basis of content only upon a showing of compelling need.

Today, however, the Court announces that earlier Courts did not mean their repeated statements that certain categories of expression are “not within the area of constitutionally protected speech.” Roth, supra, 354 U.S., at 483. See ante, at 2543, citing Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); Chaplinsky, supra, 315 U.S., at 571-572; Bose Corp., supra, 466 U.S., at 504; Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 124 (1989). The present Court submits that such clear statements “must be taken in context” and are not “literally true.” Ante, at 2543.

To the contrary, those statements meant precisely what they said: The categorical approach is a firmly entrenched part of our First Amendment jurisprudence. Indeed, the Court in Roth reviewed the guarantees of freedom of expression in effect at the time of the ratification of the Constitution and concluded, “In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.” 354 U.S., at 482-483.

In its decision today, the Court points to “[n]othing . . . in this Court's precedents warrant[ing] disregard of this longstanding tradition.” Burson, 504 U.S., at 216 (Scalia, J., concurring in judgment); Allied-Signal, Inc., supra, 504 U.S., at 783. Nevertheless, the majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection – at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. The Court announces that such content-based distinctions violate the First Amendment because “[t]he government may not regulate use based on hostility – or favoritism – towards the underlying message expressed.” Ante, at 2545. Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.

II

Although I disagree with the Court's analysis, I do agree with its conclusion: The St. Paul ordinance is unconstitutional. However, I would decide the case on overbreadth grounds.
We have consistently held that, because overbreadth analysis is “strong medicine,” it may be invoked to strike an entire statute only when the overbreadth of the statute is not only “real, but substantial as well, judged in relation to the statute's plainly legitimate sweep,” Broadrick, 413 U.S., at 615, and when the statute is not susceptible to limitation or partial invalidation, id., at 613. “When a federal court is dealing with a federal statute challenged as overbroad, it should . . . construe the statute to avoid constitutional problems, if the statute is subject to a limiting construction.” Ferber, 458 U.S., at 769, n.24. Of course, “[a] state court is also free to deal with a state statute in the same way.” Ibid. See, e.g., Osborne, 495 U.S., at 113-114.

In construing the St. Paul ordinance, the Minnesota Supreme Court drew upon the definition of fighting words that appears in Chaplinsky – words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Id., at 572. However, the Minnesota court was far from clear in identifying the “injur[ies]” inflicted by the expression that St. Paul sought to regulate. Indeed, the Minnesota court emphasized (tracking the language of the ordinance) that “the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias.” In re Welfare of R.A.V., 464 N.W.2d 507, 510 (1991). I therefore understand the court to have ruled that St. Paul may constitutionally prohibit expression that “by its very utterance” causes “anger, alarm or resentment.”

Our fighting words cases have made clear, however, that such generalized reactions are not sufficient to strip expression of its constitutional protection. The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected. See United States v. Eichman, 496 U.S. 310, 319 (1990); Texas v. Johnson, 491 U.S. 397, 409, 414 (1989).

In the First Amendment context, “[c]riminal statutes must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” Houston v. Hill, 482 U.S. 451, 459 (1987) (citation omitted). The St. Paul antibias ordinance is such a law. Although the ordinance reaches conduct that is unprotected, it also makes criminal expressive conduct that causes only hurt feelings, offense, or resentment, and is protected by the First Amendment. Cf. Lewis, supra, 415 U.S., at 132, 94 S. Ct., at 972. The ordinance is therefore fatally overbroad and invalid on its face.

Justice STEVENS, concurring in the judgment.

My colleagues today wrestle with two broad principles: first, that certain “categories of expression [including ‘fighting words’] are ‘not within the area of constitutionally protected speech,’” ante at 2552 (White, J., concurring in the judgment); and second, that “[c]ontent-based regulations [of expression] are presumptively invalid,” ante at 2542 (Majority opinion). Although in past opinions the Court has repeated both of these maxims, it has – quite rightly – adhered to neither with the absolutism suggested by my colleagues. Thus, while I agree that the St. Paul ordinance is unconstitutionally overbroad for the reasons stated in Part II of Justice White’s opinion, I write separately to suggest how the allure of absolute principles has skewed the analysis of both the majority and Justice White’s opinion. [Ed.: Justice Stevens then concluded based on precedents it was “just too simple” to declare speech “protected/unprotected” or “content based/content neutral.”]
§ 6.2 Advocacy of Illegal Conduct and True Threats

1. Advocacy of Illegal Conduct

The earliest and most historic line of cases dealing with content-based governmental restrictions on speech involved criminal sanctions imposed on the advocacy of lawless action, the so-called “seditious libel” cases, discussed at §§ 1.2.2 - 1.2.4. The ultimate outcome of these cases, as discussed at § 1.2.6, was that the Supreme Court applies strict scrutiny to content-based restrictions on speech in a public forum, whether imposed by the federal government or the states, unless the speech is determined to be “unprotected” speech. As discussed in Brandenburg v. Ohio,3 excerpted below at § 6.2.1, the test today to be “unprotected” speech regarding advocating illegal conduct under is whether the speech is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” If the speech meets this test, the speech is “unprotected” and there is no further First Amendment review, unless viewpoint discrimination is involved, which always triggers strict scrutiny, as noted in R.A.V. v City of St. Paul, excerpted at § 6.1.

There were no First Amendment decisions regarding the advocacy of illegal conduct during the original natural law era, as noted at § 1.2.1. During the formalist era, in Schenck v. United States,4 discussed at § 1.2.2 nn.15-16, the Court upheld punishment for distributing circulars urging conscripts not to submit to intimidation and saying the United States had no power to send citizens abroad to fight. In oft-quoted language, Holmes said that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."5 In 1941, the Court took a step toward firmly accepting the clear and present danger test when in Bridges v. California,6 the Court set aside the contempt fine imposed on Harry Bridges and a newspaper for publications that tended to interfere with the fair and orderly administration of justice. Justice Black said that the Holmes test amounted to a working principle that, at a minimum, "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." In fact, this phrasing was a step beyond the language adopted by Holmes and Brandies in Whitney v. California7 for regulation to be a clear and present danger under the Schenck test, which only required that the threat be “relatively serious” and “imminent.”

5 Id. at 52.
6 314 U.S. 252, 263 (1941) (emphasis added).
7 274 U.S. 357, 376-77 (1927) (emphasis added).
A step backwards was taken in 1951, in *Dennis v. United States*, when a plurality of the Court characterized the situation as one involving a party designed and dedicated to the overthrow of the Government, the Communist Party, in the context of a world crises. The Smith Act was held validly applicable to convict the leaders of the Communist Party for advocating violent overthrow with intent to cause it as soon as circumstances permit because "the gravity of the evil, discounted by its improbability, justified such invasion of free speech as was necessary to avoid the danger." The plurality opinion said that neither Holmes nor Brandeis ever envisioned that their test should be an absolute, applied without regard to its reasons. Justice Frankfurter agreed, where the type of speech ranks low in the scale of values. Adopting even a more extreme limitation on the clear and present danger test, Justice Jackson wrote that he would use a clear and present danger test only for street corner cases, leaving the problem to the executive and legislative branches for larger, organized conspiracies. Justices Black and Douglas, dissenting, would require, as did Holmes, that some immediate injury to society be imminent.

Reflecting the liberal instrumentalist predisposition in favor of free speech, discussed at § 1.2.4, the Court adopted tests after 1954 that provided greater protection for speech than either the majorities in *Schenck* or *Dennis*, or that advocated by Holmes and Brandeis, as reflected in *Whitney* or *Bridges*. In 1957, the Court cautioned in *Yates v. United States* that advocacy of overthrow as a doctrine, divorced from efforts to instigate action, is protected by the Constitution, even if there is evil intent. Thus, the Smith Act was read to apply only where there is incitement to illegal action and a sufficient orientation toward action that it likely will occur. The Court read *Dennis* as holding that even incitement is protected unless the group being indoctrinated is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances reasonably justify apprehension that action will occur.

In 1961, as the perception of any imminent threat by the Communist Party receded, the Court imposed in *Scales v. United States* rigorous proof requirements for punishing membership in the Communist Party. The member must be active, know of the party's illegal advocacy, and have a specific intent to bring about overthrow as speedily as circumstances permit. On the question of constitutionality as applied, the Court said there must be evidence of teaching forcible overthrow, accompanied by directions as to the type of illegal action which must be taken when the time for the revolution is reached, or teaching conduct to render effective the later illegal activity which is advocated. This requirement was so difficult to meet that the prosecution of Communists shortly came to an end.

---

8 341 U.S. 494, 510 (1951) (plurality opinion of Vinson, C.J., joined by Reed, Burton & Minton, JJ.); *id.* at 544-45 (Frankfurter, J., concurring in the judgment); *id.* at 567-69 (Jackson, J., concurring); *id.* at 580 (Black, J., dissenting); *id.* at 584-86 (Douglas, J., dissenting). Justice Clark took no part in the consideration or decision of the case. *Id.* at 517.


In 1964, addressing itself to the value of political speech, the Court said in *New York Times Co. v. Sullivan*\(^\text{11}\) that the First Amendment reflects a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open.” Consistent with such a commitment, the Court formulated in 1969 a new test for regulating the advocacy of illegal action. In *Brandenburg v. Ohio*,\(^\text{12}\) the Court held that a state may not proscribe advocacy of force or law violation except where such advocacy is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

Interpreted in terms of the Court's currently used levels of review, this test is consistent with strict scrutiny because avoiding lawless action would be a compelling governmental interest and banning only the advocacy of imminent lawless action likely to be incited is the least restrictive alternative necessary to advance that compelling interest. In practice, the same result is achieved under current doctrine by holding that for speech which meets the *Brandenburg* definition of illegal advocacy there is no further First Amendment review and the statute survives a First Amendment challenge.

---

**Brandenburg v. Ohio**  
395 U.S. 444 (1969)

---

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for “advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” Ohio Rev. Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal, sua sponte, “for the reason that no substantial constitutional question exists herein.” It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U.S. 948 (1968). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan “rally” to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.
The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows: “This is an organizers' meeting. We have had quite a few members here today which are – we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.”

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of “revengeance” was omitted, and one sentence was added: “Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.” Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal. Penal Code §§ 11400-11402, the text of which is quite similar to that of the laws of Ohio. Whitney v. California, 274 U.S. 357 (1927). The Court upheld the statute on the ground that, without more, “advocating” violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. Cf. Fiske v. Kansas, 274 U.S. 380 (1927). But Whitney has been thoroughly discredited by later decisions. See Dennis v. United States, 341 U.S. 494, 507 (1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in Noto v. United States, 367 U.S. 290, 297-298 (1961), “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and stealing it to such action.” A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. Cf. Yates v. United States, 354 U.S. 298 (1957); De Jonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931).
Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who “advocate or teach the duty, necessity, or propriety” of violence “as a means of accomplishing industrial or political reform”; or who publish or circulate or display any book or paper containing such advocacy; or who “justify” the commission of violent acts “with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism”; or who “voluntarily assemble” with a group formed “to teach or advocate the doctrines of criminal syndicalism.” Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of Whitney v. California, supra, cannot be supported, and that decision is therefore overruled.

Justice BLACK, concurring.

I agree with the views expressed by Mr. Justice Douglas in his concurring opinion in this case that the “clear and present danger” doctrine should have no place in the interpretation of the First Amendment. I join the Court's opinion, which, as I understand it, simply cites Dennis v. United States, 341 U.S. 494 (1951), but does not indicate any agreement on the Court's part with the “clear and present danger” doctrine on which Dennis purported to rely.

Justice DOUGLAS, concurring.

While I join the opinion of the Court, I desire to enter a caveat.

The “clear and present danger” test was adumbrated by Justice Holmes in a case arising during World War I – a war “declared” by the Congress, not by the Chief Executive. The case was Schenck v. United States, 249 U.S. 47, 52, where the defendant was charged with attempts to cause insubordination in the military and obstruction of enlistment. The pamphlets that were distributed urged resistance to the draft, denounced conscription, and impugned the motives of those backing the war effort. The First Amendment was tendered as a defense. Mr. Justice Holmes in rejecting that defense said: “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”

Justice Holmes, though never formally abandoning the “clear and present danger” test, moved closer to the First Amendment ideal when he said in dissent in Gitlow (Gitlow v. People of State of New York, 268 U.S. 652): “Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be
thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”

Out of the “clear and present danger” test came other offspring. Advocacy and teaching of forcible overthrow of government as an abstract principle is immune from prosecution. Yates v. United States, 354 U.S. 298, 318. But an “active” member, who has a guilty knowledge and intent of the aim to overthrow the Government by violence, Noto v. United States, 367 U.S. 290, may be prosecuted. Scales v. United States, 367 U.S. 203, 228. And the power to investigate, backed by the powerful sanction of contempt, includes the power to determine which of the two categories fits the particular witness. Barenblatt v. United States, 360 U.S. 109, 130. And so the investigator roams at will through all of the beliefs of the witness, ransacking his conscience and his innermost thoughts.

Judge Learned Hand, who wrote for the Court of Appeals in affirming the judgment in Dennis, coined the “not improbable” test, United States v. Dennis, 2 Cir., 183 F.2d 201, 214, which this Court adopted and which Judge Hand preferred over the “clear and present danger” test. Indeed, in his book, The Bill of Rights 59 (1958), in referring to Holmes' creation of the “clear and present danger” test, he said, “I cannot help thinking that for once Homer nodded.”

My own view is quite different. I see no place in the regime of the First Amendment for any “clear and present danger” test, whether strict and tight as some would make it, or free-wheeling as the Court in Dennis rephrased it.

When one reads the opinions closely and sees when and how the “clear and present danger” test has been applied, great misgivings are aroused. First, the threats were often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous. Second, the test was so twisted and perverted in Dennis as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.

One's beliefs have long been thought to be sanctuaries which government could not invade. Barenblatt is one example of the ease with which that sanctuary can be violated. The lines drawn by the Court between the criminal act of being an “active” Communist and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators. That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known.
The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.

This is, however, a classic case where speech is brigaded with action. See Speiser v. Randall, 357 U.S. 513, 536-537 (Douglas, J., concurring.) They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution.

The Court applied the Brandenburg test in Hess v. Indiana. In Hess, the Court set aside a conviction for disorderly conduct based upon the fact that defendant, an antiwar demonstrator who with his companions had been moved off a street by the sheriff, said in a loud voice, “We’ll take the fucking street later.” In a 6-3 per curiam opinion, the Court noted, “At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.” Thus, although the words might tend toward violence, this did not satisfy the requirement that advocacy be directed to inciting or producing imminent lawless action that is likely to be produced. Justice Rehnquist, dissenting with Chief Justice Burger and Justice Blackmun, said that the Court had exceeded the proper scope of judicial review in not considering the evidence in the light most favorable to the appellee state. No imminence was also found in Cohen v. California. In Cohen, the Court reversed a conviction for disorderly conduct. In a corridor outside a courtroom the defendant had worn a jacket which bore the words “Fuck the Draft.” The Court said that at least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, defendant could not, consistently with the First Amendment, be punished for asserting his opposition to the draft. The word was not an obscenity since it was in no sense erotic. It could not be regarded as fighting words, since no individual could have found it to be a personal insult.

Since 1986, the Court has not had a major case on advocacy of illegal conduct. Most of the post-1986 cases on political speech have involved the question of whether a standard lower than strict scrutiny should be applied because the speech was possibly uttered in a nonpublic forum, an issue discussed at §§ 3.1 - 3.2, or because of audience reactions, e.g., where the audience was hostile, and thus the case might involve fighting words, discussed at § 6.3. The Court has said a number of

---

14 Id. at 111-12 (Rehnquist, J., joined by Burger, C.J., and Blackmun, J., dissenting).
times, as in Boos v. Barry,\(^\text{16}\) that if the Brandenburg test for what speech constitutes “advocacy of illegal conduct” is not met, then content-based restrictions on political speech in a public forum are given strict scrutiny, i.e., the government must show that the regulation is necessary to serve a compelling state interest and narrowly drawn to achieve that end. In passing, Justice Thomas noted in Lorillard Tobacco Co. v. Reilly\(^\text{17}\) that regulations banning tobacco ads within 1,000 feet of schools or playgrounds, as part of an effort to proscribe solicitation for unlawful conduct, the sale of cigarettes to minors, “clearly fail the Brandenburg test” as not involving speech likely to incite imminent lawless action of cigarette purchases by minors.

Because the Court has not had a recent major case on the advocacy of illegal conduct, possible limits on a Brandenburg analysis for larger, organized conspiracies, rather than street corner cases, as suggested by Justice Jackson in his concurrence in Dennis, discussed at § 1.2.3 n.45, have not been tested. It seems not far fetched to predict that conservative formalists and Holmesians, who tend to be more deferential to the government than other Justices, might be willing to follow Justice Jackson and use a standard lower than Brandenburg if the defendant advocator were a large, well organized conspiracy and a legislature had found that its speech were a danger. Liberal instrumentalists would predictably disagree, leaving the matter in the hands of the natural law Justices. Based upon their respect for precedent, as well as the traditional natural law respect for freedom of speech, it is likely that these Justices would support application of Brandenburg in every case.

However, it is unresolved whether Brandenburg would be applied to groups, including terrorist groups, better organized and more effective than the Communist Party, whose members in retrospect posed not as great an internal threat to the stability and security of the United States during the 1950s as was feared at the time. Similarly, although the Brandenburg rule would likely apply, it is unresolved whether Brandenburg would be used in a prosecution involving religious speech advocating the violent overthrow of government, such as a cleric's speech or sermons regarding jihad, that went beyond mere abstract doctrine and was directed to advocacy of action.\(^\text{18}\) A statute banning “material support” to terrorist groups, including “advice” or “personnel,” but permitting “independent advocacy,” was upheld in Holder v. Humanitarian Law Project, excerpted at § 5.3.1.

Even more so than in cases of speech by terrorists, it is likely that Brandenburg supplies the relevant precedent for cases of “media-inspired violence,” whether based on a movie or a violent video game. For example, in Byers v. Edmondson,\(^\text{19}\) the producers of the film Natural Born Killers were not held


\(^{17}\) 533 U.S. 525, 579-80 (Thomas, J., concurring in part and concurring in the judgment).


\(^{19}\) 712 So.2d 681, 689-92 (La. App. 1st Cir. 1998). See also Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (no liability against Hustler for publishing article on autoerotic asphyxiation found on floor beneath 14-year-old found hanging in his closet); Olivia N. v. National
liable for distributing a film which "glorif[ied]" violence and treated “individuals who commit such violence as celebrities and heroes,” because no intent to cause immediate harm could be shown under *Brandenburg.* In contrast, in *Rice v. Palladin Enterprises,* liability found against a publisher of a book, entitled *Hit Man,* that offered detailed instructions on how to commit a contract murder, because the publisher had “the intent that the book would immediately be used by criminals.”

2. True Threats

A second kind of case involving advocacy of illegal conduct occurs where the speaker indicates an intent for the speaker to commit violence, rather than advocating for third parties to commit violence, as in *Brandenburg.* The Court has defined these cases as involving whether the speaker’s statement indicates a “true threat” to commit violence.

**Virginia v. Black**  
**538 U.S. 343 (2003)**

Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which THE CHIEF JUSTICE, Justice STEVENS, and Justice BREYER join.

[Parts I - III]

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with “an intent to intimidate a person or group of persons” violates the First Amendment. Va. Code Ann. § 18.2-423 (1996). We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision . . . treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

Broadcasting Co., 178 Cal. Rptr 888 (Ct. App. 1981) (no liability against NBC for showing movie, *Born Innocent,* that depicted a rape scene using a “plumber’s helper,” when copy-cats teenage boys soon thereafter raped a nine-year-old girl in the same fashion); Interactive Digital Software Ass’n v. St. Louis Cty., Mo., 329 F.3d 954, 958-60 (8th Cir. 2003) (ordinance making it unlawful to distribute graphically violent video games to minors without parental consent unconstitutional, since no “imminent” incitement to violence, and under standard First Amendment doctrine the state did not establish that its compelling interest in protecting the psychological well-being of minors was “real, not merely conjectural”); Brown v. Entertainment Merchants Ass’n, 131 S. Ct. 2729 (2011) (state ban on selling violent videos games to children unconstitutional), discussed at § 7.4 nn. 94-97.

---

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating Virginia's cross-burning statute, § 18.2-423. [It] provides: “It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a “few” of which stopped to ask the sheriff what was happening on the property. App. 71. Eight to ten houses were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, “sat and watched to see what was going on” from the lawn of her in-laws' house. She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself. Id., at 103.

During the rally, Sechrist heard Klan members speak about “what they were” and “what they believed in.” Id., at 106. The speakers “talked real bad about the blacks and the Mexicans.” Id., at 109. One speaker told the assembled gathering that “he would love to take a .30/.30 and just randomly shoot the blacks.” Ibid. The speakers also talked about “President Clinton and Hillary Clinton,” and about how their tax money “goes to . . . the black people.” Ibid. Sechrist testified that this language made her “very . . . scared.” Id., at 110.

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of § 18.2-423. At his trial, the jury was instructed that “intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim.” Id., at 146. The trial court also instructed the jury that “the burning of a cross by itself is sufficient evidence from which you may infer the required intent.” Ibid. When Black objected to this last instruction on First Amendment grounds, the prosecutor responded that the instruction was “taken straight out of the [Virginia] Model Instructions.” Id., at 134. The jury found Black guilty, and fined him $2,500. The Court of Appeals of Virginia affirmed Black's conviction. Rec. No. 1581-99-3 (Va.App., Dec. 19, 2000), App. 201.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process. Soon the Klan imposed “a veritable reign of terror” throughout the South. S. Kennedy, Southern Exposure 31 (1991) (hereinafter Kennedy). The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. W. Wade, The Fiery Cross: The Ku Klux Klan in America 48–49 (1987) (hereinafter Wade). The Klan's victims included blacks, southern whites who disagreed with the Klan, and “carpetbagger” northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, “President Grant sent a message to Congress indicating that the Klan's reign of terror in the Southern States had rendered life and property insecure.” Jett v. Dallas Independent School Dist., 491 U.S. 701, 722 (1989) (internal quotation marks and alterations omitted). In response, Congress passed what is now known as the Ku Klux Klan Act. See “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,” 17 Stat. 13 (now codified at 42 U.S.C. §§ 1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's The Clansmen: An Historical Romance of the Ku Klux Klan. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes “saving” the South from blacks and the “horrors” of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. Id., at 324-326; see also Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 770-771 (1995) (Thomas, J., concurring). Cross burning thereby became associated with the first Ku Klux Klan. When D.W. Griffith turned Dixon's book into the movie The Birth of a Nation in 1915, the association between cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. Wade 127. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. See Kennedy 163. This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a “gigantic cross” on Stone Mountain that was “visible throughout” Atlanta. Wade 144 (internal quotation marks omitted).

The new Klan's ideology did not differ much from that of the first Klan. As one Klan publication emphasized, “We avow the distinction between [the] races, . . . and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in
any and all things.” Id., at 147-148 (internal quotation marks omitted). Violence was also an
elemental part of this new Klan. By September 1921, the New York World newspaper documented
152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings. Wade 160.
Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For
example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. See
Kennedy 175. After one cross burning at a synagogue, a Klan member noted that if the cross burning
did not “shut the Jews up, we'll cut a few throats and see what happens.” Ibid. (internal quotation
marks omitted). In Miami in 1941, the Klan burned four crosses in front of a proposed housing
project, declaring, “We are here to keep niggers out of your town . . . . When the law fails you, call
on us.” Id., at 176 (internal quotation marks omitted). And in Alabama in 1942, in “a whirlwind
climax to weeks of flogging and terror,” the Klan burned crosses in front of a union hall and in front
of a union leader's home on the eve of a labor election. Id., at 180. These cross burnings embodied
threats to people whom the Klan deemed antithetical to its goals. And these threats had special force
given the long history of Klan violence.

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an
African-American “school teacher who recently moved his family into a block formerly occupied
only by whites asked the protection of city police . . . after the burning of a cross in his front yard.”
Richmond News Leader, Jan. 21, 1949, p. 19, App. 312. And after a cross burning in Suffolk,
Virginia, during the late 1940's, the Virginia Governor stated that he would “not allow any of our
people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other
(hereinafter Chalmers). These incidents of cross burning, among others, helped prompt Virginia to
enact its first version of the cross-burnng statute in 1950.

The protections afforded by the First Amendment, however, are not absolute . . . . Thus, for example,
a State may punish those words “which by their very utterance inflict injury or tend to incite an
immediate breach of the peace.” Chaplinsky v. New Hampshire, supra, at 572; see also R.A.V. v.
City of St. Paul, supra, at 383 (listing limited areas where the First Amendment permits restrictions
on the content of speech). We have consequently held that fighting words – “those personally
abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common
knowledge, inherently likely to provoke violent reaction” – are generally proscribable under the First
Amendment. Cohen v. California, 403 U.S. 15, 20 (1971); see also Chaplinsky v. New Hampshire,
supra, at 572. Furthermore, “the constitutional guarantees of free speech and free press do not permit
a State to forbid or proscribe advocacy of the use of force or of law violation except where such
advocacy is directed to inciting or producing imminent lawless action and is likely to incite or
produce such action.” Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). And the First
Amendment also permits a State to ban a “true threat.” Watts v. United States, 394 U.S. 705, 708
(1969) (per curiam) (internal quotation marks omitted); accord, R.A.V. v. City of St. Paul, supra,
at 388 (“[T]hreats of violence are outside the First Amendment”).

“True threats” encompass those statements where the speaker means to communicate a serious
expression of an intent to commit an act of unlawful violence to a particular individual or group of
individuals. See Watts v. United States, supra, at 708 (“political hyberbole” is not a true threat);
R.A.V. v. City of St. Paul, 505 U.S., at 388. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” Ibid. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so.

In R.A.V., we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would “‘arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender’” was unconstitutional. Id., at 380 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who “provoke violence” on a basis specified in the law. 505 U.S., at 391. The ordinance did not cover “[t]hose who wish to use ‘fighting words' in connection with other ideas – to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality.” Ibid. This content-based discrimination was unconstitutional because it allowed the city “to impose special prohibitions on those speakers who express views on disfavored subjects.” Ibid.

We did not hold in R.A.V. that the First Amendment prohibits all forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment: “When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.” Id., at 388.

Indeed, we noted that it would be constitutional to ban only a particular type of threat: “[T]he Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President.” Ibid. And a State may “choose to prohibit only that obscenity which is the most patently offensive in its prurience – i.e., that which involves the most lascivious displays of sexual activity.” Ibid. (emphasis in original). Consequently, while the holding of R.A.V. does not permit a State to ban only obscenity based on “offensive political messages,” ibid., or “only those threats against the President that mention his policy on aid to inner cities,” ibid., the First Amendment permits content discrimination “based on the very reasons why the particular class of speech at issue . . . is proscribable,” id., at 393.

Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in R.A.V., the Virginia statute does not single out for opprobrium only that speech directed toward “one of the specified disfavored topics.” Id., at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's “political affiliation, union
membership, or homosexuality.” Ibid. Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. See, e.g., supra, at 1545 (noting the instances of cross burnings directed at union members); State v. Miller, 629 P.2d 748 (Kan. App. 1981) (describing the case of a defendant who burned a cross in the yard of the lawyer who had previously represented him and who was currently prosecuting him). Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus. See 262 Va., at 791, 553 S.E.2d, at 753 (Hassell, J., dissenting) (noting that “these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliott's yard, not because of any racial animus”).

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in R.A.V. and is proscribable under the First Amendment.

[Parts IV-V]

The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that “[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” Va. Code Ann. § 18.2-423 (1996). The Commonwealth added the prima facie provision to the statute in 1968. The court below did not reach whether this provision is severable from the rest of the cross-burning statute under Virginia law. See § 1-17.1 (“The provisions of all statutes are severable unless . . . it is apparent that two or more statutes or provisions must operate in accord with one another”). In this Court, as in the Supreme Court of Virginia, respondents do not argue that the prima facie evidence provision is unconstitutional as applied to any one of them. Rather, they contend that the provision is unconstitutional on its face.

As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, “[b]urning a cross at a political rally would almost certainly be protected expression.” R.A.V. v. St. Paul, 505 U.S., at
402, n. 4 (White, J., concurring in judgment) (citing Brandenburg v. Ohio, 395 U.S., at 445. Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as Mississippi Burning, and in plays such as the stage adaptation of Sir Walter Scott's The Lady of the Lake.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. To this extent I agree with Justice Souter that the prima facie evidence provision can “skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning.” Post, at 1561 (opinion concurring in judgment and dissenting in part).

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, “The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law.” Casper, Gerry, 55 Stan. L. Rev. 647, 649 (2002) (internal quotation marks omitted). The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate.

Justice SCALIA, with whom Justice THOMAS joins as to Parts I and II, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with the Court that, under our decision in R.A.V. v. St. Paul, 505 U.S. 377 (1992), a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate. Accordingly, I join Parts I–III of the Court's opinion. I also agree that we should vacate and remand the judgment of the Virginia Supreme Court so that that court can have an opportunity authoritatively to construe the prima-facie-evidence provision of Va. Code Ann. § 18.2-423 (1996). I write separately, however, to describe what I believe to be the correct interpretation of § 18.2-423, and to explain why I believe there is no justification for the plurality's apparent decision to invalidate that provision on its face.

Typically, “prima facie evidence” is defined as: “Such evidence as, in the judgment of the law, is sufficient to establish a given fact . . . and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence.” Black's Law Dictionary 1190 (6th ed.1990).
The Virginia Supreme Court has, in prior cases, embraced this canonical understanding of the pivotal statutory language. E.g., Babbitt v. Miller, 64 S.E.2d 718, 722 (Va. 1951) (“Prima facie evidence is evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted”). For example, in Nance v. Commonwealth, 124 S.E.2d 900 (Va. 1962), the Virginia Supreme Court interpreted a law of the Commonwealth that (1) prohibited the possession of certain “burglarious” tools “with intent to commit burglary, robbery, or larceny . . . ,” and (2) provided that “[t]he possession of such burglarious tools . . . shall be prima facie evidence of an intent to commit burglary, robbery or larceny.” Va. Code Ann. § 18.1–87 (1960). The court explained that the prima-facie-evidence provision “cuts off no defense nor interposes any obstacle to a contest of the facts, and ‘relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence.’” Nance v. Commonwealth, 124 S.E.2d, at 903-904. . . . “Prima facie evidence of a fact is such evidence as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose.” 7B Michie's Jurisprudence of Virginia and West Virginia § 32 (1998) (emphasis added).

To be sure, Virginia is entirely free, if it wishes, to discard the canonical understanding of the term “prima facie evidence.” Its courts are also permitted to interpret the phrase in different ways for purposes of different statutes. In this case, however, the Virginia Supreme Court has done nothing of the sort. To the extent that tribunal has spoken to the question of what “prima facie evidence” means for purposes of § 18.2-423, it has not deviated a whit from its prior practice and from the ordinary legal meaning of these words. Rather, its opinion explained that under § 18.2-423, “the act of burning a cross alone, with no evidence of intent to intimidate, will . . . suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief.” 553 S.E.2d 738, 746 (Va. 2001). Put otherwise, where the Commonwealth has demonstrated through its case in chief that the defendant burned a cross in public view, this is sufficient, at least until the defendant has come forward with rebuttal evidence, to create a jury issue with respect to the intent element of the offense.

It is important to note that the Virginia Supreme Court did not suggest that a jury may, in light of the prima-facie-evidence provision, ignore any rebuttal evidence that has been presented and, solely on the basis of a showing that the defendant burned a cross, find that he intended to intimidate. Nor, crucially, did that court say that the presentation of prima facie evidence is always sufficient to get a case to a jury, i.e., that a court may never direct a verdict for a defendant who has been shown to have burned a cross in public view, even if, by the end of trial, the defendant has presented rebuttal evidence. Instead, according to the Virginia Supreme Court, the effect of the prima-facie-evidence provision is far more limited. It suffices to “insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief,” but it does nothing more. 553 S.E.2d, at 746 (emphasis added). That is, presentation of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate only until the defendant comes forward with some evidence in rebuttal.

[T]oday's opinion properly focuses on the question of who may be convicted, rather than who may be arrested and prosecuted, under § 18.2-423. Thus, it notes that “[t]he prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their
constitutional right not to put on a defense. *Ante*, at 1550 (emphasis added). In such cases, the plurality explains, “[t]he provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.” *Ante*, at 1550–1551. (emphasis added). And this, according to the plurality, is constitutionally problematic because “a burning cross is not always intended to intimidate,” and nonintimidating cross burning cannot be prohibited. *Ante*, at 1551. In particular, the opinion notes that cross burning may serve as “a statement of ideology” or “a symbol of group solidarity” at Ku Klux Klan rituals, and may even serve artistic purposes as in the case of the film Mississippi Burning. Ibid.

The plurality is correct in all of this — and it means that some individuals who engage in protected speech may, because of the prima-facie-evidence provision, be subject to conviction. Such convictions, assuming they are unconstitutional, could be challenged on a case-by-case basis. The plurality, however, with little in the way of explanation, leaps to the conclusion that the possibility of such convictions justifies facial invalidation of the statute.

Justice SOUTER, with whom Justice KENNEDY and Justice GINSBURG join, concurring in the judgment in part and dissenting in part.

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression, the very type of distinction we considered in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). I disagree that any exception should save Virginia's law from unconstitutionality under . . . *R.A.V.* or any acceptable variation of it.

The ordinance struck down in *R.A.V.*, as it had been construed by the State's highest court, prohibited the use of symbols (including but not limited to a burning cross) as the equivalent of generally proscribable fighting words, but the ordinance applied only when the symbol was provocative “‘on the basis of race, color, creed, religion or gender.’” Id., at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)). Although the Virginia statute in issue here contains no such express “basis of” limitation on prohibited subject matter, the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate. To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning crosses with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it. As the majority points out, the burning cross can broadcast threat and ideology together, ideology alone, or threat alone, as was apparently the choice of respondents Elliott and O'Mara. *Ante*, at 1545-1547, 1549-1550.

The issue is whether the statutory prohibition restricted to this symbol falls within one of the exceptions to *R.A.V.*'s general condemnation of limited content-based proscription within a broader category of expression proscribable generally. Because of the burning cross's extraordinary force as a method of intimidation, the *R.A.V.* exception most likely to cover the statute is the first of the
three mentioned there, which the \textit{R.A.V.} opinion called an exception for content discrimination on a basis that “consists entirely of the very reason the entire class of speech at issue is proscribable.” 505 U.S., at 388. This is the exception the majority speaks of here as covering statutes prohibiting “particularly virulent” proscribable expression. \textit{Ante}, at 1549.

I do not think that the Virginia statute qualifies for this virulence exception as \textit{R.A.V.} explained it. The statute fits poorly with the illustrative examples given in \textit{R.A.V.}, none of which involves communication generally associated with a particular message, and in fact, the majority's discussion of a special virulence exception here moves that exception toward a more flexible conception than the version in \textit{R.A.V.} I will reserve judgment on that doctrinal development, for even on a pragmatic conception of \textit{R.A.V.} and its exceptions the Virginia statute could not pass muster, the most obvious hurdle being the statute's prima facie evidence provision. That provision is essential to understanding why the statute's tendency to suppress a message disqualifies it from any rescue by exception from \textit{R.A.V.}'s general rule.

To the extent the prima facie evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. Thus, the appropriate way to consider the statute's prima facie evidence term, in my view, is not as if it were an overbroad statutory definition amenable to severance or a narrowing construction. The question here is not the permissible scope of an arguably overbroad statute, but the claim of a clearly content-based statute to an exception from the general prohibition of content-based proscriptions, an exception that is not warranted if the statute's terms show that suppression of ideas may be afoot. Accordingly, the way to look at the prima facie evidence provision is to consider it for any indication of what is afoot. And if we look at the provision for this purpose, it has a very obvious significance as a mechanism for bringing within the statute's prohibition some expression that is doubtfully threatening though certainly distasteful.

It is difficult to conceive of an intimidation case that could be easier to prove than one with cross burning, assuming any circumstances suggesting intimidation are present. The provision, apparently so unnecessary to legitimate prosecution of intimidation, is therefore quite enough to raise the question whether Virginia's content-based statute seeks more than mere protection against a virulent form of intimidation. It consequently bars any conclusion that an exception to the general rule of \textit{R.A.V.} is warranted on the ground “that there is no realistic [or little realistic] possibility that official suppression of ideas is afoot,” 505 U.S., at 390. Since no \textit{R.A.V.} exception can save the statute as content based, it can only survive if narrowly tailored to serve a compelling state interest, id., at 395–396, a stringent test the statute cannot pass; a content-neutral statute banning intimidation would achieve the same object without singling out particular content.

Justice THOMAS, dissenting.

That in the early 1950's the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror is not surprising: Although the cross took on some religious significance in the 1920's when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function “as an instrument of intimidation.” W. Wade, \textit{The Fiery Cross: The Ku Klux Klan in America} 185, 279 (1987).
Strengthening Delegate Godwin's explanation, as well as my conclusion, that the legislature sought to criminalize terrorizing conduct is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia. And, just two years after the enactment of this statute, Virginia's General Assembly embarked on a campaign of “massive resistance” in response to Brown v. Board of Education, 347 U.S. 483 (1954). See generally Griffin v. School Bd. of Prince Edward Cty., 377 U.S. 218, 221 (1964); Harrison v. Day, 106 S.E.2d 636, 644-648 (Va. 1959) (describing massive resistance as legislatively mandated attempt to close public schools rather than desegregate).

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

A case where a “true threat” was not found is Watts v. United States. This case involved a demonstrator in Washington, D.C. protesting the draft in 1966, who yelled out, “And now I have already received my draft classification as 1A – and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” Interpreting a statute that embodied the constitutional requirement of a “true threat” for the government to regulate, the Court stated, “But whatever the ‘willfullness’ requirement implies, the statute initially requires the Government to prove a true ‘threat.’ We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose ‘against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’ The language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was ‘a kind of very crude offensive method of stating a political opposition to the President.’”

In applying the “true threat” test, the courts have adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm. But see Elonis v. United States, 135 S. Ct. 2001 (2015) (interpreting 18

---

U.S.C. § 875(c) to require defendant have “subject intent” to issue threat or “know” communication would be viewed as a threat; whether “reckless disregard” would count as “knowledge” left unanswered). However, there is a split among courts in determining from whose viewpoint the statement should be interpreted. Some courts ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient's shoes would view the threat.

Those courts who adopt the speaker’s viewpoint have noted that this “standard not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the ‘reasonable-recipient standard,’ namely that the jury will consider the unique sensitivity of the recipient. We find it particularly untenable that, were we to apply a standard guided from the perspective of the recipient, a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant.”22

On the other hand, if the concern is to "protect individuals from the fear of violence" and "from the disruption that fear engenders,“ as stated by the Supreme Court in Virginia v. Black, the perspective of recipients seems the better perspective. Under that perspective, courts have set forth “a non-exhaustive list of factors relevant to how a reasonable recipient would view the purported threat. Those factors include: 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.”23 Such factors should diminish the threat that the analysis will focus on a “uniquely sensitive” recipient, but rather on a reasonable recipient of the speech.

In most circumstances, of course, either test will yield the same result in practice, since both focus on objective evidence regarding the individuals’ speech. As the Eighth Circuit Court of Appeals noted, “the result will differ only in the extremely rare case when a recipient suffers from some unique sensitivity and that sensitivity is unknown to the speaker.”24 In addition, the Ninth Circuit has noted that even under the speaker’s viewpoint standard “[a]lleged threats should be considered in light of their entire factual context, including the surrounding events and the reaction of the listeners.” (‘So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific . . . as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.’)”25

---

22 United States v. Fulmer, 108 F.3d 1486, 1491-92 (1st Cir. 1997).
23 Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622-23 (8th Cir. 2002) (citations omitted).
Courts have had to face whether speech represents a “true threat.” While the issue is not without dispute, the better argument is that to constitute a “true threat” the speaker must threaten that the speaker will cause the harm, or someone with whom the speaker controls, directs, or otherwise is involved in a conspiracy. If the speaker merely advocates violence by others, that speech is governed by the Brandenburg test, excerpted at § 6.2.1. For example, in Virginia v. Black, excerpted above at § 6.2.2, the Supreme Court applied “true threat” analysis because the relevant statute made it a crime “for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place.” This is consistent with the test for a “true threat” in Black that “the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” This requires that the “speaker . . . commit an act,” not some third party.

Despite this analysis, it has been suggested that as long as a reasonable person would perceive a threat has been made, a true threat exists no matter who would carry out the threat. This has been particularly suggested for threats made on the Internet because “the unique characteristics of the Internet blur the distinction between threats and incitement by allowing speakers to threaten by incitement – that is, creating fear by increasing the likelihood of ensuing violence without actually threatening to carry out the violence themselves.” While no Supreme Court case supports this theory, a case used to support the theory is the Ninth Circuit’s en banc opinion in Planned Parenthood v. American Coalition of Life Activists (ACLA). This case involved the posting on an Internet web site the names and addresses of doctors performing abortions, with a context suggesting harm be done. While superficially this case may suggest that advocating that third persons do harm

26 See, e.g., Brewington v. Indiana, 7 N.E.3d 946 (Ind. 2014) (“true threats” to district court judge, judge’s wife, and psychologist who was an expert witness in divorce case); United States v. Alaboud, 347 F.3d 1293 (11th Cir. 2003) (threats to Jewish lawyer and his law firm by former, disgruntled Iraqi client, including statements you “will burn” and “ax and sledgehammers would be used to make justice,” held to constitute “true threat”); National Organization for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) (abortion protestors who had physically assaulted abortion clinic staff, and destroyed some clinic property, including medical equipment, made “true threats” when they sent letters to other clinics saying they would be subjected to similar attacks); United States v. Hanna, 293 F.3d 1080 (9th Cir. 2002) (case remanded for new trial on true threat issue for handwritten words, drawings, and other notes such as “Kill the Beast,” referring to President Clinton and his pro-choice selection of Ruth Bader Ginsburg to be on the Supreme Court); United States v. Landham, 251 F.3d 1072 (6th Cir. 2001) (sequence of harassing statements made by estranged husband, including that wife will not get to raise the children, not a true threat, as no communication of intent to kidnap children or physically harm wife).


28 290 F.3d 1058 (9th Cir. 2002).
to these doctors could constitute a ‘true threat,'” in fact the Ninth Circuit did find a direct connection between the web site and harm to doctors sufficient to satisfy a “harm, or caused to be harmed” analysis, as in Black. The en banc Ninth Circuit 6-5 majority opinion noted:

After a "WANTED" poster on Dr. David Gunn appeared, he was shot and killed. After a "WANTED" poster on Dr. George Patterson appeared, he was shot and killed. After a "WANTED" poster on Dr. John Britton appeared, he was shot and killed. None of these "WANTED" posters contained threatening language, either. Neither did they identify who would pull the trigger. But knowing this pattern, knowing that unlawful action had followed "WANTED" posters on Gunn, Patterson and Britton, and knowing that "wanted"-type posters were intimidating and caused fear of serious harm to those named on them, ACLA published a "GUILTY" poster in essentially the same format on Dr. Crist and a Deadly Dozen "GUILTY" poster in similar format naming Dr. Hern, Dr. Elizabeth Newhall and Dr. James Newhall because they perform abortions. Physicians could well believe that ACLA would make good on the threat.29

The Justices in dissent in Planned Parenthood similarly noted, “Although the majority's definition does not specify who is to inflict the threatened harm, use of the active verb ‘inflict’ rather than a passive phrase, such as ‘will be harmed,’ strongly suggests that the speaker must indicate he will take an active role in the inflicting. Recent academic commentary supports the view that this requirement is an integral component of a ‘true threat’ analysis.”30 Further, the Supreme Court has squarely rejected in the context of child pornography the view that different First Amendment standards should apply for speech on the Internet. After an extensive review of the Internet, the Court stated, without dissent, in Reno v. American Civil Liberties Union,31 “[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”

A similar case of a “true threat” occurred in United States v. Dillard.32 The district court concluded in Dillard that a Kansas woman’s letter meant to dissuade a doctor from providing abortion services, which used language threatening the individual with statements such as “[w]e will not let this

29  Id. at 1085.

30  Id. at 1089 n.2 (Kozinski, J., joined by Reinhardy, O'Scannlain, Kleinfeld & Berzon, JJ., dissenting), citing Steven G. Gey, The Nuremberg Files and the First Amendment Value of Threats, 78 Tex. L. Rev. 541, 590 (2000) (part of what "separates constitutionally unprotected true threats from constitutionally protected . . . political intimidation is [that] the speaker communicates the intent to carry out the threat personally or to cause it to be carried out"); Jennifer E. Rothman, Freedom of Speech and True Threats, 25 Harv. J.L. & Pub. Pol'y 283, 289 (2001) (“determining what is a true threat [should] require[ ] proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat”).


abomination continue,” raised a triable issue of fact of whether the statements constituted a true threat. The court noted that the doctor was receiving training to provide abortion services after her friend, Dr. George Tiller, a prominent provider of abortion services, had been killed by an anti-abortion activist.

Another “true threat” case occurred in United States v. Turner. In this case, a blogger was unhappy with the Seventh Circuit’s decision in NRA of America v. City of Chicago, which held that the Second Amendment was not incorporated into the 14th Amendment Due Process Clause, and thus applicable against the states, a decision later reversed by the Supreme Court. The blogger wrote that the Seventh Circuit judges on the panel “deserve to be killed,” were “traitors” to the United States, and judges should “Obey the Constitution or die.” The court held that the individual could be convicted under 18 U.S.C. § 115(a)(1)(B), which makes it unlawful to threaten to “assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or [other covered federal official”). In the absence of a “true threat,” normal First Amendment doctrine would apply.

A number of cases involving “true threats” have occurred in the context of schools. Typically, threats of violence against other students or teachers, or violent images relating to students or teachers, have been held to create “true threats.” In other cases, without regard to “true threat” analysis, courts have regulated such speech under the Tinker standard, discussed at § 3.4 text following n.48, of a “substantial and material disruption” to the school environment.
§ 6.3 Fighting Words versus Hostile Audience Cases

No free speech cases involving fighting words came before the Supreme Court during the original natural law era. Further, no fighting words cases were decided during the formalist era, although the Court did state in Near v. Minnesota\(^{37}\) that "[t]he security of the community life may be protected against incitements to acts of violence," which presumably would include a regulation of fighting words. During the first part of the Holmesian era, the Court held in Cantwell v. Connecticut\(^{38}\) that the principle of freedom of speech does not sanction incitement to riot where there is a clear and present danger of riot or other immediate threat to public safety. However, a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Thus, a state could not convict a person of breach of the peace where there was only an effort to persuade a listener to buy a book or contribute money to a religion, and there was no assault or threatening bodily harm, no truculent bearing, no intentional discourtesy, and no personal abuse.

In 1942, the Court unanimously sustained a conviction in Chaplinsky v. New Hampshire for calling a police officer a "damned Fascist," where a statute banning annoying words was construed to ban only such words as ordinary men know are likely to cause a fight – a breach of the peace.

Chaplinsky v. New Hampshire
315 U.S. 568 (1942)

Justice MURPHY delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, Section 2, of the Public Laws of New Hampshire: “No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.”

The complaint charged that appellant ‘with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, “You are a God damned racketeer’ and ‘a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists' the same being offensive, derisive and annoying words and names.”

\(^{37}\) 283 U.S. 697, 716 (1931).

\(^{38}\) 310 U.S. 296, 308-11 (1940).
There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a “racket.” Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way they encountered Marshal Bowering who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint with the exception of the name of the Deity.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libellous, and the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. “Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.” Cantwell v. Connecticut, 310 U.S. 296, 309, 310.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions – the first relates to words or names addressed to another in a public place; the second refers to noises and exclamations. The court (91 N.H. 310, 18 A.2d 757) said: “The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional.” We accept that construction of severability and limit our consideration to the first provision of the statute.

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being “forbidden except such as have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed.” It was further said: “The word ‘offensive’ is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are ‘fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings.
Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . .” The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker – including “classical fighting words,” words in current use less “classical” but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.”

We are unable to say that the limited scope of the statute as thus construed contravenes the constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. Cf. Fox v. Washington, 236 U.S. 273, 277.

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations ‘damn racketeer’ and ‘damn Fascist’ are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

In 1949, in Terminiello v. Chicago,39 the Court declared unconstitutional an ordinance that defined disorderly conduct to include conduct which, as put by the trial judge in his instructions to the jury, “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.” This language had been approved by the Illinois Supreme Court. For the United States Supreme Court, Justice Douglas said that one function of free speech is to stir people to anger. Thus, speech is protected unless it is “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”40 Accordingly, the ordinance, as interpreted by the Illinois courts, was unconstitutional.

Two years later, in Feiner v. New York,41 the Court upheld a disorderly conduct conviction where the speaker, describing President Truman as a "bum" and urging blacks to "rise up in arms and fight for equal rights," refused a police request to stop speaking after the crowd became stirred up and one person threatened to stop the speaker if the police did not. The Court's opinion said the police were not censoring content, but merely preventing a breach of the peace where a speaker was undertaking

39 337 U.S. 1, 3 (1949).

40 Id. at 4.

41 340 U.S. 315, 316-19 (1951); id. at 325-27 (Black, J., dissenting); id. at 330-31 (Douglas, J., joined by Minton, J., dissenting).
incitement to riot. Justices Black, Douglas, and Minton dissented. They concluded that there was only a minimal threat of violence, and the police’s duty was to dissuade those threatening violence, not to arrest the speaker.

Reflecting their greater predisposition in favor of free speech rights, the instrumentalist Court refused to expand the doctrine regarding punishing remarks not directed at an individual which stirred the public to anger. Indeed, in 1963, the instrumentalist Court began to back away from *Feiner*. In *Edwards v. South Carolina*, 42 the Court held that civil rights demonstrators on State House grounds, who were singing, but being urged by some in the audience to go to segregated lunch counters, could not be prosecuted because there were no fighting words directed at an individual and the hostile audience doctrine of *Feiner* did not apply. Several other cases during the instrumentalist era reached similar conclusions. 43

In 1964, Justice Brennan moved away from *Chaplinsky* with respect to libel, and prefaced greater constitutional protection for speakers by referring in *New York Times Co. v. Sullivan*, 44 excerpted at § 8.1, to "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." During the years of the Burger Court, 1969-1986, the Court avoided considering whether the *Chaplinsky* phrasing of what constitutes fighting words should be overruled, in part by using the vagueness and overbreadth doctrines, discussed at § 5.3, to overturn several convictions. 45

Even under the *Chaplinsky* phrasing, the Court found in several cases that fighting words were not used. For example, in 1971, in *Cohen v. California*, 46 the Court held that defendant could not be convicted of disturbing the peace by offensive conduct where he wore in a courthouse corridor a jacket bearing the plainly visible words, "Fuck the Draft," but where there was no evidence that any person had objected or that defendant intended such a result. For the Court, Justice Harlan distinguished *Chaplinsky*. Here, the words did not communicate a direct personal insult. And,

---


45 Gooding v. Wilson, 405 U.S. 518, 524 (1972) (state law was not limited to punishing words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed); Lewis v. City of New Orleans, 415 U.S. 130, 133-34 (1974) (words conveying or intended to convey disgrace are not fighting words).

Unlike *Feiner v. New York*, there was no evidence that the speaker was intentionally provoking a group to hostile reaction. Harlan said that forbidding particular words ran the risk of suppressing ideas in the process. Words could be banned to protect others from hearing them only by a particularized law that protected substantial privacy interests from invasion in an essentially intolerable manner. Offended persons could simply avert their eyes.

In 1972, in *Lewis v. New Orleans*, the Court held a mother did not utter fighting words when she yelled at police who were arresting her son, “god-damn-mother-fucker-police.” In 1973, in *Hess v. Indiana*, the Court said that a statement during an antiwar protest that "[w]e'll take the fucking street later" was constitutionally protected where the words were not aimed at anyone in particular. Indeed, not since *Chaplinsky* has the Court sustained a conviction on the basis of fighting words alone. In 1987, the Court noted in *City of Houston v. Hill* that an ordinance that made it unlawful to "oppose, molest, abuse or interrupt any policeman in the execution of his duty" was not limited to fighting words or obscene language, and held that the Constitution does not allow such speech to be made a crime. Such a law, the Court said, is substantially overbroad.

Despite this limited use of *Chaplinsky*, a few lower federal courts and state courts have upheld convictions, or otherwise failed to protect speech by denying actions for wrongful arrest for speech or imposing civil fines, based upon a “fighting words” rationale, particularly for derogatory comments addressed to police officers, with many of those reported cases involving comments by racial minorities. Even when the defendant prevailed, time, money, and energy had to be expended on the defense. For these reasons, some commentators have argued that *Chaplinsky* continues to represent a threat to free speech values and should be overruled.

### § 6.4 Hate Speech Legislation

1. **Hate Speech Used to Enhance Sentencing versus Hate Speech as a Crime**

In addition to cases involving the advocacy of illegal conduct, or cases involving true threats, another category of speech raising similar concerns involves “hate speech” made in the context of on-going problematic conduct. While on-going conduct can be regulated without regard to the First Amendment, since it involves conduct, not speech, as discussed at § 2.1, if the government attempts to make the related “hate speech” an independent violation, that raises First Amendment concerns.

---

47 408 U.S. 913, 913 (1972) (Powell, J., concurring in the result).


Such a law was involved in the 1992 decision in *R.A.V. v. City of St. Paul, Minnesota*,\(^51\) excerpted at § 6.1, that punished speech that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.” The Minnesota Supreme Court said the law reached only fighting words and, thus, triggered that exception to “unprotected speech,” discussed at § 6.3. The only question then was whether the statute was viewpoint discrimination, as discussed at § 6.1.

In other cases, “hate crimes” statutes have gone beyond regulating mere fighting words, and thus have triggered a more extended First Amendment analysis. In many of these cases, however, courts have interpreted the statutes so that the “hate crimes” aspect of the statute only applied to “true threats,” and thus met that test for “unprotected speech.” For example, in *Lovell By and Through Lovell v. Poway United School District*,\(^52\) the Ninth Circuit observed:

> California courts have also considered the issue of First Amendment protection for threats. See, e.g., *In re M.S.*, 10 Cal.4th 698, 42 Cal. Rptr.2d 355, 896 P.2d 1365 (1995) (upholding the constitutionality of state hate crimes statutes that punish threats if the speaker has the apparent ability to carry out the threat and has reasonably induced fear of violence in the victim); *People v. Fisher*, 12 Cal. App.4th 1556, 15 Cal. Rptr.2d 889 (1993) (upholding a conviction . . . "as long as the circumstances are such that the threats are so unambiguous and have such immediacy that they convincingly express an intention of being carried out."). In these cases, the California courts [determined] whether a threat is a "true threat" and therefore may be criminalized.

In the modern post-1954 age, the Court has never held that regulating “hate speech” is constitutional unless narrowly defined to reach categories of “unprotected speech” or “reasonable regulation” of time, place, or manner. See, e.g., *Papish v. Board of Curators of Univ. of Missouri*, 410 U.S. 667 (1973). The best chance would be to relate the “hate speech” to certain “secondary effects” to trigger intermediate review under standard First Amendment doctrine, as the University of Michigan attempted in *Doe v. University of Michigan*,\(^53\) discussed at § 6.4 nn.56-58. See *O’Brien v. Welty*, 818 F.3d 920 (9th Cir. 2016) (upholding California regulation allowing state universities to discipline students for behavior that “threatens or endangers the health or safety of any person . . . including . . . intimidation [or] harassment”; law not vague or overbroad; valid under intermediate review); *Yeasin v. Durham*, 719 Fed. App’x 844 (10th Cir. 2018) (qualified immunity applies because no case clearly establishes a university student has a right to make disparaging/threatening tweets about an ex-girlfriend when a university official could reasonably believe his continuing presence at the school would interfere with her right to an education free from sexual harassment).

On the other hand, the Supreme Court made it clear in *Wisconsin v. Mitchell* that if the relevant statute merely enhances the penalty for a crime based on bias-inspired conduct, rather than making that bias an independent crime, that does not trigger a First Amendment analysis.

---


\(^{52}\) 90 F.3d 367, 372 (9th Cir. 1996).

Wisconsin v. Mitchell  
508 U.S. 476 (1993)

Chief Justice REHNQUIST delivered the opinion of the Court.

On the evening of October 7, 1989, a group of young black men and boys, including Mitchell, gathered at an apartment complex in Kenosha, Wisconsin. Several members of the group discussed a scene from the motion picture “Mississippi Burning,” in which a white man beat a young black boy who was praying. The group moved outside and Mitchell asked them: “Do you all feel hyped up to move on some white people?” Brief for Petitioner 4. Shortly thereafter, a young white boy approached the group on the opposite side of the street where they were standing. As the boy walked by, Mitchell said: “You all want to fuck somebody up? There goes a white boy; go get him.” Id., at 4-5. Mitchell counted to three and pointed in the boy's direction. The group ran toward the boy, beat him severely, and stole his tennis shoes. The boy was rendered unconscious and remained in a coma for four days.

The State argues that the statute does not punish bigoted thought, as the Supreme Court of Wisconsin said, but instead punishes only conduct. While this argument is literally correct, it does not dispose of Mitchell's First Amendment challenge. To be sure, our cases reject the “view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.” United States v. O'Brien, 391 U.S. 367, 376 (1968). Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment. See Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984) (“[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection”); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) (“The First Amendment does not protect violence”).

But the fact remains that under the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained. Thus, although the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all. Because the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim, Mitchell argues (and the Wisconsin Supreme Court held) that the statute violates the First Amendment by punishing offenders' bigoted beliefs.

Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. See Payne v. Tennessee, 501 U.S. 808, 820-821 (1991); United States v. Tucker, 404 U.S. 443, 446 (1972). The defendant's motive for committing the offense is one important factor. See 1 W. LeFave & A. Scott, Substantive Criminal Law § 3.6(b), p. 324 (1986) (“Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives”); cf. Tison v. Arizona, 481 U.S. 137, 156 (1987) (“Deeply ingrained in our legal tradition is the idea
that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the
more severely it ought to be punished”). Thus, in many States the commission of a murder, or other
capital offense, for pecuniary gain is a separate aggravating circumstance under the capital

But it is equally true that a defendant's abstract beliefs, however obnoxious to most people, may not
be taken into consideration by a sentencing judge. Dawson v. Delaware, 503 U.S. 159 (1992). In
Dawson, the State introduced evidence at a capital sentencing hearing that the defendant was a
member of a white supremacist prison gang. Because “the evidence proved nothing more than [the
defendant's] abstract beliefs,” we held that its admission violated the defendant's First Amendment
rights. Id., at 167. In so holding, however, we emphasized that “the Constitution does not erect a per
se barrier to the admission of evidence concerning one's beliefs and associations at sentencing
simply because those beliefs and associations are protected by the First Amendment.” Id., at 165.
Thus, in Barclay v. Florida, 463 U.S. 939 (1983) (plurality opinion), we allowed the sentencing
judge to take into account the defendant's racial animus towards his victim. The evidence in that case
showed that the defendant's membership in the Black Liberation Army and desire to provoke a “race
war” were related to the murder of a white man for which he was convicted. See id., at 942-944.
Because “the elements of racial hatred in [the] murder” were relevant to several aggravating factors,
we held that the trial judge permissibly took this evidence into account in sentencing the defendant
to death. Id., at 949, and n.7.

Mitchell suggests that Dawson and Barclay are inapposite because they did not involve application
of a penalty-enhancement provision. But in Barclay we held that it was permissible for the
sentencing court to consider the defendant's racial animus in determining whether he should be
sentenced to death, surely the most severe “enhancement” of all. And the fact that the Wisconsin
Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum
penalties across the board does not alter the result here. For the primary responsibility for fixing
United States, 357 U.S. 386, 393 (1958).

Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the
defendant's discriminatory motive, or reason, for acting. But motive plays the same role under the
Wisconsin statute as it does under federal and state antidiscrimination laws, which we have
previously upheld against constitutional challenge. See Roberts v. United States Jaycees, supra, 468
160, 176 (1976). Title VII of the Civil Rights Act of 1964, for example, makes it unlawful for an
employer to discriminate against an employee “because of such individual's race, color, religion,
sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In Hishon, we rejected the
argument that Title VII infringed employers' First Amendment rights. And more recently, in R.A.V.
1981 and 1982) as an example of a permissible content-neutral regulation of conduct.
Nothing in our decision last Term in *R.A.V.* compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of ‘‘fighting words' that insult, or provoke violence, ‘on the basis of race, color, creed, religion or gender.’’” 505 U.S., at 391, 112 S.Ct., at 2547 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). Because the ordinance only proscribed a class of “fighting words” deemed particularly offensive by the city – *i.e.*, those “that contain . . . messages of ‘bias-motivated’ hatred,” 505 U.S., at 392, we held that it violated the rule against content-based discrimination. See id., at 392–394. But whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (*i.e.*, “speech” or “messages”), id., at 392, the statute in this case is aimed at conduct unprotected by the First Amendment.

Moreover, the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. See, *e.g.*, Brief for Petitioner 24-27; Brief for United States as *Amicus Curiae* 13-15; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 18-22; Brief for the American Civil Liberties Union as *Amicus Curiae* 17-19; Brief for the Anti-Defamation League et al. as *Amici Curiae* 9-10; Brief for Congressman Charles E. Schumer et al. as *Amici Curiae* 8-9. The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, “it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.” 4 W. Blackstone, Commentaries *16.

Finally, there remains to be considered Mitchell's argument that the Wisconsin statute is unconstitutionally overbroad because of its “chilling effect” on free speech. Mitchell argues (and the Wisconsin Supreme Court agreed) that the statute is “overbroad” because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should in the future commit a criminal offense covered by the statute. We find no merit in this contention.

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional “overbreadth” cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement. To stay within the realm of rationality, we must surely put to one side minor misdemeanor offenses covered by the statute, such as negligent operation of a motor vehicle (Wis. Stat. § 941.01 (1989-1990)); for it is difficult, if not impossible, to conceive of a situation where such offenses would be racially motivated. We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.
A related issue involves the enforcement of laws, such as banning racially or sexually hostile work environments, where the hostile work environment is caused by speech. Without much extended analysis, the Court has permitted such hostile work environment cases to go forward, implicitly viewing the underlying hostile work environment as produced by discriminatory conduct, not speech.54 Regarding other kinds of issues that can arise in the employment context, alternatives to direct regulation of offensive speech might involve counter-speech promoting the opposite viewpoint; economic boycotts of companies or individuals supporting controversial causes; or adverse employment decisions, particularly for spokesperson-entertainers or radio/television commentators. Without regard to any statutory ban on employment discrimination based on race, sex, religion, or other such grounds, existing social norms pressure most employers to tolerate a wide-range of viewpoints among their workforce, even if the employer disagrees with those viewpoints, as long as the employees do their jobs well.55

2. “Pure” Hate Speech Legislation

In some cases, statutes or government regulations have attempted to regulate or ban certain kinds of “hate speech” where no illegal or other violent conduct was taking place. In many of these cases, courts have viewed such “hate speech” statutes as unconstitutionally vague. For example, in Doe v. University of Michigan,56 a district court concluded that words in a university policy that required the language must "stigmatize" or "victimize" are “general and elude precise definition.” Further, the "secondary effects" clause of the law required that the language in order to be sanctionable had to "involve an express or implied threat” affecting “an individual's academic efforts, employment, ...

54 See, e.g., Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993) (holding that a company president's repeated comments to an employee were sufficient under Title VII: (1) to be viewed subjectively as harassment by the victim and (2) were severe or pervasive enough that an objective reasonable person would agree that it is harassment); R.A.V. v. St. Paul, 505 U.S. 377, 389 (1992) (noting that "sexually derogatory 'fighting words,' . . . may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices"); Jennie Randall, “Don’t You Say That!”: Injunctions Against Speech Found to Violate Title VII Are Not Prior Restraints, 3 U. Pa. J. Const. L. 990 (2001) (similar analysis applied to cases of racially hostile work environments under Title VII). Many European countries ban any workplace speech or conduct that constitutes an insult to human dignity, or “mobbing,” in addition to the American model of workplace harassment based on the “status” of race, gender, religion, or national origin. See generally Vicki Schultz, Gabrielle S. Friedman, Abigail C. Saguy, Tanya K Hernandez & David Yamada, Global Perspectives on Workplace Harassment Law, 8 Employee Rts. & Emp. Pol’y J. 151 (2004).


participation in University sponsored extra-curricular activities or personal safety.” As the court noted, “It is not clear what kind of conduct would constitute a ‘threat’ to an individual's academic efforts. It might refer to an unspecified threat of future retaliation by the speaker. Or it might equally plausibly refer to the threat to a victim's academic success because the stigmatizing and victimizing speech is so inherently distracting. Certainly the former would be unprotected speech. However, it is not clear whether the latter would.” Further, under the policy it was not clear what conduct would be held to “interfere” with an individual's academic efforts. The court noted, “The language of the policy alone gives no inherent guidance. The one interpretive resource the University provided was withdrawn as ‘inaccurate,’ an implicit admission that even the University itself was unsure of the precise scope and meaning of the Policy.” Thus, the court concluded that the terms of the policy were so vague that its enforcement would violate due process. The court also concluded in *Doe v. University of Michigan* that independent of the vagueness problem, the policy was substantially overbroad in reaching protected speech, such as not exempting statements made in the course of classroom discussions from the sanctions of the policy.

A similar conclusion was reached by the Third Circuit in *Saxe v. State College Area School District*57 regarding a school’s anti-harassment policy that prohibited a substantial amount of non-vulgar, non-sponsored student speech that would not cause a substantial disruption of the work of the school. As discussed at § 3.4, vulgar or school-sponsored speech could be regulated under *Fraser*, while speech causing a substantial disruption could be regulated under *Tinker*.

As with “hate crimes” statutes, discussed at § 6.4 nn.51-53, in the modern post-1954 era the Court has never held that any “hate speech” statute is constitutional unless it was narrowly defined to reach only other categories of “unprotected speech,” such as advocacy of illegal conduct, true threats, or fighting words. An old 5-4 Holmesian-era deference-to-government decision, *Beaurharnais v. Illinois*,58 did uphold a “group libel” law that made it unlawful to expose “the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.” Since 1954, *Beauharnais* has not been followed in the United States. Even from an instrumentalist perspective, perhaps more receptive on policy grounds to supporting certain “hate speech” statutes as part of advancing an agenda of “politically correct” speech, Justice Douglas cautioned that free speech may "best serve its high purpose when it induces a condition of unrest,

---


58 343 U.S. 250, 251-61 (1952); id. at 267-70 (Black, J., joined by Douglas, J., dissenting) (absolutist view that “no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss); id. at 277, 283-84 (Reed, J., joined by Douglas, J., dissenting) (statute unconstitutionally vague); id. at 303-04 (Jackson, J., dissenting) (state could regulate only if these words constituted “clear and present danger” of fomenting “racial or sectarian hatreds.”).
creates dissatisfaction with conditions as they are, or even stirs people to anger."59 Even for “politically incorrect” speech, such as displaying the Confederate Flag given the Confederacy’s support for rebellion and slavery, the First Amendment would likely protect such displays, absent the context suggesting advocacy of illegal conduct, true threat, or fighting words, or a specialized 13th Amendment claim based on Congress’ power to define the “badges or incidents of slavery.”60


ROSEMARY M. COLLYER, District Judge.

Plaintiffs contracted with the Washington Metropolitan Area Transit Authority (“WMATA”) to display an advertisement in four 43 x 62 inch dioramas on subway platforms. The ads state:

IN ANY WAR BETWEEN THE CIVILIZED MAN AND THE SAVAGE,
SUPPORT THE CIVILIZED MAN.
SUPPORT ISRAEL.
DEFEAT JIHAD.

The ads were to be displayed for approximately one month starting on September 24, 2012. Before that date, however, an American-made movie trailer that disgraced the Prophet Mohammad went viral on the Internet and caused large and dangerous anti-American demonstrations across multiple continents. Advised by the Department of Homeland Security (“DHS”) to be wary of a risk of violence in the United States and abroad in response to the video, warned by the Transportation Security Administration (“TSA”) that the Metro subway is a unique target for terrorist attacks, and knowledgeable about previous threats to the Metro subway, WMATA advised Plaintiffs that it would postpone display of their ad. Plaintiffs promptly sued.


60 Prior to the Supreme Court’s decision in Walker v. Texas Div. Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2245-46 (2015), that specialty license plates are government speech, discussed at § 4.3.1, the Fourth Circuit held that banning the Confederate battle flag on license plates was unconstitutional viewpoint discrimination. Sons of Confederate Veterans, Inc. v. Commission of Virginia Dept. of Motor Vehicles, 288 F.3d 610, 623-27 (4th Cir. 2002). But see Alexander Tsesis, The Problem of Confederate Symbols: A Thirteenth Amendment Approach, 75 Temple L. Rev. 539 (2002) (bans on use of the Confederate flag on license plates or in other places should be constitutional under a 13th Amendment analysis as a “badge or incident” of slavery); United States v. Metcalf, 881 F.3d 641 (8th Cir. 2018) (Congressional hate crimes statute providing for up to 10 years in prison for willfully causing bodily injury based on “race, color, religion, or national origin” valid under Congress’ power to enforce the 13th Amendment as a “badge or incident” of slavery).
It cannot be said that WMATA acted unreasonably in considering the degree of anti-American anger roiling the Muslim world, previous threats to the subway system, the immediate advice from DHS and TSA, and its paramount responsibility to the safety of its passengers, when it decided to postpone display of Plaintiffs' advertisement. In the face of protected speech, which the Court finds is a combination of political speech in favor of Israel and hate speech directed to Muslims, WMATA certainly presents a compelling government interest in the safety of its passengers and employees. However, its concerns – no matter how rational – were prompted by the content of Plaintiffs' advertisement. And, even if WMATA's concerns were sufficiently compelling to support a content-based restriction on speech, the Court concludes that WMATA's failure to consider alternative placements plus the open-ended and purely subjective duration of its postponement were not narrowly tailored as required.

A district court may grant a preliminary injunction “to preserve the relative positions of the parties until a trial on the merits can be held.” Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981). An injunction is an equitable remedy so its issuance is one which falls within the sound discretion of the district court. See Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). A plaintiff seeking a preliminary injunction must establish that: (a) he is likely to succeed on the merits; (b) he is likely to suffer irreparable harm in the absence of preliminary relief; (c) the balance of equities tips in his favor; and (d) an injunction is in the public interest.


A. Likelihood of Success on the Merits

Plaintiffs claimed that WMATA's decision to delay posting Plaintiffs' ad restricted their speech based on its content in violation of the First Amendment. WMATA responded that Plaintiffs' ad is not protected by the First Amendment because it constitutes “fighting words.” In the alternative, WMATA argued that if Plaintiffs' ad is protected speech, its restriction was content-neutral and a reasonable time, place, and manner restriction. To determine Plaintiffs' likelihood of success on the merits, the Court must consider: (1) whether Plaintiffs' ad is speech protected by the First Amendment, (2) whether the forum is public or nonpublic, and (3) whether the justifications for the restriction satisfy the requisite standard. See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985). Since WMATA conceded that it provides a public forum for advertising, the Court considers that aspect of the standard satisfied.

1. Plaintiffs' Ad Is Protected Speech

Plaintiffs' ad contains elements of both political and hate speech. The phrase “Support Israel” certainly sends a political message. The remainder of the ad, however, sends an anti-Muslim message, as it equates all Muslims with “savages.” It is unnecessary to decide whether the advertisement is predominantly one type of speech or the other, because on these facts, the First Amendment protects speech from government intrusion in either case. While political speech
receives the highest form of protection under the First Amendment, hate speech also can receive First Amendment protections. See R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (“Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”); Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (per curiam) (protecting racist speech that constituted “mere advocacy not distinguished from incitement to imminent lawless action” (emphasis added)). Additionally, WMATA imposed a prior restraint because it prevented Plaintiffs from displaying their ad in WMATA stations; a prior restraint “bear[s] a heavy presumption against its constitutional validity.” Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); see also Lebron, 749 F.2d at 896 (“Because WMATA, a government agency, tried to prevent Mr. Lebron from exhibiting his poster in advance of actual expression, WMATA's action can be characterized as a ‘prior restraint . . . .’” (internal quotation marks and citations omitted)).

WMATA asserted that Plaintiffs' ad constitutes “fighting words” and therefore falls in an unprotected category of speech. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), carved out “fighting words” as a category of speech unprotected by the First Amendment. Fighting words include “the insulting or ‘fighting’ words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Id. at 572. Chaplinsky addressed a state law that the New Hampshire Supreme Court had limited by interpretation to “do[ ] no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker.” Id. at 573. Since Chaplinsky, the Court has further narrowed the nature of unprotected “fighting words” to speech that is “directed to the person of the hearer” and likely to evoke a violent response. Cohen v. California, 403 U.S. 15, 20 (1971) (internal quotation marks and citation omitted); see also Madsen v. Women's Health Ctr., 512 U.S. 753, 774 (1994) (holding that “[a]bsent evidence that the [antiabortion] protesters' speech is independently proscribable (i.e., ‘fighting words' or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm,” a ban on all uninvited approaches to persons coming to a clinic could not stand (citation omitted)). As a message communicated in advertising space, Plaintiffs' speech does not meet the Court's description of this category of unprotected speech.

2. WMATA's Restriction Fails to Meet Strict Scrutiny

The analysis of a restriction on speech in a public forum depends, in the first instance, on whether the restriction is based on the message itself (“content-based”) or based on a concern that exists irrespective of the message (“content-neutral”). A content-based restriction must meet strict constitutional scrutiny to stand, i.e., the restriction must be “necessary to serve a compelling state interest . . . [and be] narrowly drawn to achieve that end.” Perry, 460 U.S. at 45. In contrast, reasonable time, place, or manner restrictions on expression can be imposed when a restriction is content-neutral, provided that any restriction is narrowly tailored to serve a significant government interest and leaves open ample alternative channels for communication. Id.; see also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The parties disputed whether the restriction in this case was content-based or content-neutral.
Plaintiffs contended that WMATA restricted their speech “based on the subjective belief that others might object to Plaintiffs' message” and thereby acted purely because of its message. Pls.' Mot. for Prelim. Inj. [Dkt. 2] at 11. There is no doubt that content-based restrictions can rarely pass constitutional review although the language of the Supreme Court has varied over time from flat-out prohibition to a presumption against restriction and a recognition that some government interests may presumably be “sufficiently ‘compelling’ to support a content-based restriction on speech.” Boos v. Barry, 485 U.S. 312, 324 (1988). Compare Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content”), with R.A.V., 505 U.S. at 382 (“Content-based regulations are presumptively invalid.”). Further, when a restriction on speech is content-based, the burden is on the government to prove that the restriction is the least restrictive alternative to achieve its compelling interest. See Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 665-68 (2004) (finding that filtering software would be less restrictive and possibly more effective than barriers to adult free speech imposed by the Child Online Protection Act that sought to regulate the Internet). Neither party points to a case concerning a content-based restriction where the Supreme Court concluded that the government had a compelling interest and the restriction could be approved because it was sufficiently narrowly tailored.

WMATA claimed that its delay of Plaintiffs' ads was content-neutral, based on “situations happening around the world at this time” and “due to world events and a concern for the security of their passengers,” without regard to the content of the ads. The argument misreads the Supreme Court's definition of a content-neutral restriction. In City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the Court described “‘content-neutral’ speech regulations as those that ‘are justified without reference to the content of the regulated speech.’” Id. at 48 (citation omitted). In Renton, the Court concluded that a regulation on the location of adult motion picture theaters was content-neutral because it was aimed at the secondary effects of such theaters – specifically to “prevent crime, protect the city's retail trade, maintain property values, and generally [protect and preserve neighborhoods]” – and was neutral to the content of the films themselves. Id. at 48. In the instant situation, WMATA had rational concerns associated with displaying Plaintiffs' ads because their content could add fuel to escalating anti-American and terrorist activities, thus endangering the Metro system and its passengers. The direct connection between the content of Plaintiffs’ ad and WMATA's fears of an attack on the subway is clearly demonstrated by WMATA's earlier recognition of the First Amendment protections at issue when its General Counsel authorized posting the ads. See Boos, 485 U.S. at 321 (concluding that a D.C. statute's restriction on speech was content-based because the “justification focuses only on the content of the speech and the direct impact that speech has on its listeners'); see also Madsen, 512 U.S. at 763 (“Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech ‘without reference to the content of the regulated speech.’” (quoting Ward, 491 U.S. at 791)).

WMATA argued that Madsen shows that a restriction can be “content-neutral” even when it is necessary to ascertain the content of a communication in order to enforce a court order. Madsen challenged a court injunction which placed time, place, and manner restrictions on demonstrations by antiabortion protesters outside a health clinic that performed abortions. “[T]he state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly
violated the court's original order,” id. at 763, which had enjoined blocking public access to the clinic or physically abusing persons entering or leaving the clinic. Id. at 758. The broadened injunction under review by the Supreme Court addressed petitioners' actions and only incidentally their speech. Thus, Madsen is distinguishable from WMATA's prior restriction on speech.

Because the delay in displaying Plaintiffs' ad constituted a content-based restriction, WMATA must demonstrate that it was “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.” Perry, 460 U.S. at 45; see also Boos, 485 U.S. at 321. In this regard, WMATA bears the same burden of proof that would apply at trial. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 429 (2006). (“[T]he burdens at the preliminary injunction stage track the burdens at trial.”). Accordingly, WMATA must establish that its content-based restriction meets strict scrutiny. See Ashcroft, 542 U.S. at 666.

WMATA posited the safety of its passengers and its employees as the compelling interest which justifies its temporary restriction on Plaintiffs' speech. Specifically, WMATA cited two ways in which the ad could threaten public safety: (1) inter-passenger disputes on subway platforms that could result in passengers falling into the tracks or (2) a terrorist attack. Neither of these concerns is directly based on the potential offense felt by a viewer of the ad but, instead, is based on the consequences to the subway system that might occur as a result of that offense. Without disagreement from Plaintiffs, WMATA noted that “[t]he Metrorail system is an extremely porous system, with multiple entry points, many of which are unmonitored for periods of time throughout the hours of revenue service.” See Taborn Aff. ¶ 7. Additionally, “its close association with the federal government” makes it a “unique target” for terrorist attacks. Id. ¶ 8. And, while Plaintiffs denigrated the seriousness of such warnings, there is no dispute that WMATA received notice from DHS to be wary of anti-American violence in the United States because of the video and that TSA expressed concern regarding posting Plaintiffs' ad on September 24 as scheduled.

[T]he Court easily concludes that WMATA's concern for the safety of its passengers and employees constituted a compelling government interest. Thus, it becomes necessary to address the last element of the analysis and determine whether WMATA's chosen restriction was narrowly drawn to serve this interest. Perry, 460 U.S. at 45. “[T]he restriction must be the ‘least restrictive means among available, effective alternatives.’” United States v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (quoting Ashcroft, 542 U.S. at 666). “The First Amendment requires that the Government's chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest.” Id. at 2549 (citation omitted). WMATA argued that “[t]here [were] no less restrictive content-neutral means to prevent the AFDI Ad from inciting violence and endangering the public.” Opp'n at 33. The Court disagrees.

WMATA's concern for passenger safety from inter-passenger disputes recognized the risk that passengers on its subway platforms could fall down into the energized tracks. However, it could serve its compelling interest in the safety of passengers on subway platforms by placing Plaintiffs' ads elsewhere. While, indeed, the contract was for advertising in the illuminated dioramas on subway platforms, a content-neutral and less restrictive answer to concerns about disputes on the platforms would surely have been to put the ads elsewhere in one of WMATA's numerous other advertising venues.
Not insensibly, WMATA noted that its second compelling interest lay in protecting the Metro system generally and its concerns with Plaintiffs' ads extended to the entire system. But WMATA's approach to addressing this concern, albeit compelling, failed to be narrowly drawn. WMATA could have decided to distance itself from Plaintiffs' sentiments with accompanying statements and/or advertisements which conveyed its disagreement and explained its constitutional obligations. Most particularly, WMATA provided no sensible timeframe after which the delay would expire. Initially, WMATA told Plaintiffs that their ads would be postponed until “a future date to be determined.” In its papers in court, WMATA modified its position and promised to conduct a reassessment and “run the advertisement beginning on November 1, unless the reassessment demonstrates a verified likelihood of an attack against United States transit systems relating to the video.” Tabborn Aff. ¶ 11. Such an open-ended and subjective standard for the delay of Plaintiffs' ad was not the least restrictive means of serving WMATA's compelling interest.

The First Amendment protects obnoxious and offensive speech; some might say that the Amendment's protections are needed more strongly for such speech than otherwise. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.” (alteration in original) (internal quotation mark and citation omitted)). WMATA, however, could rest on its compelling safety concerns to limit these protections but only to restrict Plaintiffs' speech in the least degree necessary to achieve its purpose. Daily verification through federal government sources of the nature and imminence of any threat would have assured a delay no longer than truly necessary. In its original form, WMATA assumed the unilateral right to decide how much interference it could impose on Plaintiffs' First Amendment rights. In its modified form, WMATA set a comfortable but arbitrary timeline, not tied to the waxing or waning of anti-American sentiment or danger and not based on any objective evaluation of necessity. See Ashcroft, 542 U.S. at 666 (“The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished.”).

Although WMATA has provided the Court with a compelling interest in public safety under the circumstances, it has not used the least restrictive means of serving this interest. Plaintiffs are therefore likely to succeed on the merits of their claim.

B. Irreparable Harm

Plaintiffs cite Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion), and simply claim victory. Elrod proclaimed that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Id. at 373 (Brennan, J.).

[The D.C. Circuit] has construed Elrod to require movants to do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong . . . moving parties must also establish they are or will be engaging in constitutionally protected behavior to demonstrate that the allegedly impermissible government action would chill allowable individual conduct. Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 301 (D.C. Cir.2006). Whether the plurality
opinion in *Elrod* would find close adherents on the Court today, in light of the more recent caselaw cited above, is unclear. See, e.g., *Alvarez*, 132 S. Ct. at 2549 (a restriction on speech that is “actually necessary” and relies on “a direct causal link between the restriction imposed and the injury to be prevented” might be approved); id. at 2556–57 (Alito, J., dissenting) (“The statute reaches only knowingly false statements about hard facts directly within a speaker's personal knowledge. These lies have no value in and of themselves, and proscribing them does not chill any valuable speech.”).

Regardless, Plaintiffs have demonstrated that their “First Amendment interests [were] either threatened or in fact being impaired at the time relief [was] sought.” Nat'l Treas. Emps. Union v. United States, 927 F.2d 1253, 1254-55 (D.C.Cir.1991) (internal quotation marks and citation omitted); see also England, 454 F.3d at 301 (“Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.”) (quoting *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349-50 (2d Cir.2003)). Because the Court concludes that WMATA did not fashion its restriction narrowly to serve its compelling interest as actually necessary, the Court concludes that Plaintiffs have shown irreparable harm that supports the injunction they seek.

C. Balance of the Equities & the Public Interest

Plaintiffs argued that WMATA would suffer no harm if the Court granted the preliminary injunction because Plaintiffs' exercise of their constitutional rights could not harm WMATA's interests. As to the public interest, Plaintiffs glibly stated that “it is always in the public interest to prevent the violation of a party's constitutional rights.” Pls.' Mot. at 15-16 (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Commn.*, 23 F.3d 1071, 1079 (6th Cir.1994)). The public in Washington, D.C., that rides the subway daily might not be so easily persuaded. WMATA presented a compelling concern for the safety of its passengers and its system, from individual disputes with calamitous consequences to a terrorist attack. But its means to protect this interest were not the least restrictive necessary to achieve the goal. The Court must balance Plaintiffs' First Amendment right with WMATA's concern for a possible threat to public safety. “To assess speech in a public forum some balancing may be necessary, but ‘the thumb of the [c]ourt [should] be on the speech side of the scales.’ ” *Lebron*, 749 F.2d at 898 (alterations in original) (internal quotation marks and citation omitted). Under the facts before the Court, Plaintiffs' First Amendment right prevails.

In *American Freedom Defense Initiative v. Metropolitan Transit Authority*, 109 F. Supp. 3d 626, 631-33 (S.D.N.Y. 2015), aff'd 815 F.3d 105 (2d Cir. 2016), the Court held that by deciding to reject all political ads, rather than opening the forum to ads as long as they did not create an imminent incitement to violence, the government changed the forum from a public to a nonpublic forum. This made the new regulation a content-based, subject-matter regulation subject to reasonableness review, not strict scrutiny. Rejecting a similar pro-Israeli ad was constitutional on that basis.

In *Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (Ill. 1978), an injunction was denied to prevent a neo-Nazi party from holding a demonstration and march through Skokie, Illinois, which has a large Jewish population. Anticipation of a hostile audience cannot justify a prior restraint.
CHAPTER 7: SPEECH TRIGGERING LIMITED FIRST AMENDMENT REVIEW: OBSCenity AND INDECENCY INVOLVING USE OF CHILDREN

§ 7.1 Obscenity Doctrine ................................................................. 333

§ 7.2 Regulating Adult Material That is Not Obscene ......................... 343

§ 7.3 Indecency Involving Use of Children ..................................... 361

§ 7.4 Indecency Not Involving Use of Children, But Children May Be in Audience . . . 371

§ 7.1 Obscenity Doctrine


Originally, Congress was not very active in dealing with obscenity, and did not bar the import of obscene pictorial matter until 1842. In response to publishers sending material to Union soldiers during the Civil War, that statute was extended in 1865 to barring obscene material from the mails.1 As recounted by the Court in Roth v. United States,2 some colonies regulated obscenity, such as Massachusetts, which had passed a statute banning obscene speech in 1712. More general regulation of obscenity in the states began in 1821. After 1868, a few states adopted the English test, found in Regina v. Hicklin, which involved asking whether even isolated passages in a publication had a tendency to corrupt minds open to immoral influences. However, no obscenity case came before the Supreme Court during the original natural law period.

At the beginning of the formalist era in 1873, Congress passed the Comstock Act. It barred from the mails any “obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character, or any article or thing designed or intended for the prevention of conception or procuring of abortion, nor any article or thing intended or adapted for any indecent or immoral use or nature.”3 In Ex parte Jackson,4 a case involving use of the mail to support an illegal lottery, the Court noted, referring to the Comstock Act, that “the object of Congress has not


2 354 U.S. 476, 482-90 (1957), citing, inter alia, Regina v. Hicklin, L.R. 3 Q.B. 360, 368 (1868).


4 96 U.S. 727, 736-37 (1877).
been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals.” In 1925, the Court did assume in *Gitlow v. New York*⁵ that freedom of speech and the press were among the fundamental personal liberties protected from state action by the Fourteenth Amendment Due Process Clause. In 1931, reflecting the limited view of the First Amendment, the Court indicated in *Near v. Minnesota*⁶ that protections from prior restraint do not apply to obscenity, saying that "the primary requirements of decency may be enforced . . . against obscene publications."

Toward the end of the formalist era in 1934, the Second Circuit rejected *Regina v. Hicklin* and, in an opinion widely followed thereafter, suggested concentrating on how the dominant theme of the work “taken as a whole” affects the “objective” reader, rather than a focus on mere “isolated passages” on particularly sensitive readers “open to immoral influences.”⁷ During the Holmesian era, the Court did not define "obscenity" any further by any specific test. In 1942, the Court did state in *Chaplinsky*⁸ that the "lewd and obscene" are among "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." In 1948, a divided 4-4 Court affirmed a New York conviction for obscenity.⁹ In 1952, the Court reaffirmed that obscenity, like libel, is not protected speech.¹⁰

During the instrumentalist era, the Court gave potentially obscene speech much greater protection by limiting the amount of speech that could be defined as constitutionally obscene. The Court's first effort to define obscenity for both state and federal statutes was made in 1957 by Justice Brennan, writing for the Court in *Roth v. United States*.¹¹ *Roth* held that obscene material is “utterly without redeeming social importance,” and that material is obscene and without constitutional protection if "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."¹² Under *Roth*, obscenity was clearly different

---

⁵ 268 U.S. 652, 666 (1925).

⁶ 283 U.S. 697, 716 (1931).

⁷ United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933), aff'd, 72 F.2d 705, 706-09 (2nd Cir. 1934) (opinion by Judge Augustus Hand, joined by Judge Learned Hand, his cousin, with Judge Manton dissenting).


¹² Id. at 484, 489.
than immorality, because New York could not refuse under Roth to license a film on the ground that it presented adultery as a desirable, acceptable, and proper pattern of behavior. However, applying the Roth standard, the petitioner’s convictions were upheld in Roth for distributing material that would not likely be viewed as patently offensive obscene material under the current Miller test, excerpted below, at § 7.1.2.

In 1959, the Court required in Smith v. California that scienter, i.e., intent or recklessness, be found before a bookseller could be convicted of possessing obscenity. In 1964, the Court created an added check in Jacobellis v. Ohio by holding that appellate courts must make an independent judgment on whether materials are protected, and not defer to jury judgment on that issue. On the other hand, the Court said in Ginzburg v. United States in 1966 that it may be decisive in proving material is obscene that "the purveyor's sole emphasis [is] on the sexually provocative aspects of his publications." In addition, the Court pointed out in 1974 in Hamling v. United States regarding the scienter requirement, "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials [that is, he knew the materials were obscene] would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law."

By 1966, there was no longer majority support for the definition of obscenity given in Roth. In the Memoirs case, Justice Douglas and Justice Black continued with their view that there could be no censorship of expression not intertwined with illegal conduct. Justices Brennan, joined by Chief Justice Warren and Justice Fortas, transformed a reason given in Roth for regulating obscenity into part of its definition, by saying that material could not be found obscene under Roth unless it was "utterly without redeeming social value." Justice Stewart, concurring, also seemed to go beyond Roth based upon his dissent in Ginzburg v. United States, which had spoken in terms of "hard core" pornography. He had said two years earlier in Jacobellis v. State of Ohio that he could not define obscenity, but "I know it when I see it." Giving some greater content to that test, Justice Stewart

---

19 Id. at 419 (plurality opinion of Brennan, J., joined by Warren, C.J., and Fortas, J.).
noted in *Ginzburg* that problematic materials include “photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value.”

Three Holmesian dissents in *Memoirs* indicated that each wanted continued adherence to the views they had expressed in *Roth*. Thereafter, in 31 cases, the Court reversed obscenity convictions when five members of the Court, applying their own tests, deemed the material not to be obscene. This was said to be the *Redrup* approach, after *Redrup v. New York*, decided in 1967.


The awkward *Redrup* practice finally came to an end during the years of the Burger Court, 1969-1986. Once the 5-Justice majority of extreme liberal instrumentalists on the Court came to an end with the retirements of Chief Justice Warren and Justice Fortas in 1969, the Court pulled back on the definition of obscenity. In 1973, a majority of the Court agreed in *Miller v. California* on a revised version that is more protective of free speech than *Roth*, but less protective than Justice Brennan’s variation of *Roth* in *Memoirs*.

**Miller v. California**  
413 U.S. 15 (1973)

Chief Justice BURGER delivered the opinion of the Court.

This is one of a group of “obscenity-pornography” cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Justice Harlan called “the intractable obscenity problem.” Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called “adult” material. After a jury trial, he was convicted of violating California Penal Code § 311.2(a), a misdemeanor, by knowingly distributing obscene matter, and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment.

---


21 *Id.* at 441-42 (Clark, J., dissenting); *id.* at 455-56 (Harlan, J., dissenting); *id.* at 460-61 (White, J., dissenting).

22 386 U.S. 767, 768-71 (1967).
without opinion. Appellant's conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled “Intercourse,” “Man-Woman,” “Sex Orgies Illustrated,” and “An Illustrated History of Pornography,” and a film entitled “Marital Intercourse.” While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

In *Roth v. United States*, 354 U.S. 476 (1957), the Court sustained a conviction under a federal statute punishing the mailing of “obscene, lewd, lascivious or filthy . . .” materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating: “All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the (First Amendment) guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance” 354 U.S., at 484-485.

Nine years later, in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court veered sharply away from the Roth concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the Roth definition “as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.” Id., at 418.

While Roth presumed “obscenity” to be “utterly without redeeming social importance,” Memoirs required that to prove obscenity it must be affirmatively established that the material is “utterly without redeeming social value.” Thus, even as they repeated the words of Roth, the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was “utterly without redeeming social value” – a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Justice Harlan to wonder if the “utterly without redeeming social value” test had any meaning at all. See Memoirs v. Massachusetts, id., at 459 (Harlan, J., dissenting). See also id., at 461 (White, J., dissenting); United States v. Groner, 479 F.2d 577, 579-581 (CA5 1973).

Apart from the initial formulation in the Roth case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., Redrup v. New York, 386 U.S., at 77-771. We have seen “a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.” Interstate Circuit, Inc. v. Dallas, 390 U.S., at 704-705.
(Harlan, J., concurring and dissenting) (footnote omitted. This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc. v. Dallas, supra, 390 U.S., at 682-685. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, 408 U.S., at 230, quoting Roth v. United States, supra, 354 U.S., at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the “utterly without redeeming social value” test of Memoirs v. Massachusetts, 383 U.S., at 419; that concept has never commanded the adherence of more than three Justices at one time. See supra, at 2613. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See Kois v. Wisconsin, supra, 408 U.S., at 232; New York Times Co. v. Sullivan, 376 U.S. 254, 284-285 (1964).

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See Kois v. Wisconsin, supra, 408 U.S., at 230-232; Roth v. United States, supra, 354 U.S., at 487; Thornhill v. Alabama, 310 U.S. 88, 101-102 (1940). For example, medical books for
the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive ‘hard core’ sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S., at 491-492.

Justice DOUGLAS, dissenting.

Today we leave open the way for California to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law.

Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime – whether the old standards or the new ones are used – the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That was done in Ginzburg and has all the evils of an ex post facto law.

My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained.

If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does and my views on the issue have been stated over and over again. But at least a criminal prosecution brought at that juncture would not violate the time-honored void-for-vagueness test.

No such protective procedure has been designed by California in this case. Obscenity – which even we cannot define with precision – is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.
Justice BRENNAN, with whom Justice STEWART and Justice MARSHALL join, dissenting.

In my dissent in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 [(1973)], decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, appellant was convicted of distributing obscene matter in violation of California Penal Code § 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in Paris Adult Theatre, I, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face. “[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing ‘attacks on overly broad statutes with no requirement that the person making the attack demonstate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.’” Gooding v. Wilson, 405 U.S. 518, 521 (1972), quoting from Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). Since my view in Paris Adult Theatre I represents a substantial departure from the course of our prior decisions, and since the state courts have as yet had no opportunity to consider whether a “readily apparent construction suggests itself as a vehicle for rehabilitating the [statute] in a single prosecution,” Dombrowski v. Pfister, supra, 380 U.S., at 491, I would reverse the judgment of the Appellate Department of the Superior Court and remand the case for proceedings not inconsistent with this opinion.

The Miller definition of obscenity requires the trier of fact to decide: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Under Miller, the “contemporary community standards” need not be national; a jury can be instructed to apply standards of their state — but the impact of the materials will be judged by their effect on an average person, rather than one particularly susceptible or sensitive. The Court has said that prurient material is that which tends to excite lustful thoughts, including "having itching, morbid or lascivious longings; of desire, curiosity, or propensity, lewd."23

This new test differs from Roth, as interpreted by Brennan, in that it shifts away from requiring that the work be "utterly" without social value to requiring only that it “lack serious" value; it returns the decision on obscenity more to juries applying the majority’s definition of obscenity, rather than ad hoc court review as under the Redrup approach; and it adds the requirement that statutes regulating obscenity “specifically define" the regulated conduct to minimize possible vagueness or overbreadth problems with the statute.

Soon after *Miller* was decided, the Court clarified *Miller* in *Jenkins v. Georgia* by refusing to find obscene a movie, “Carnal Knowledge,” starring Jack Nicholson, Ann Margaret, Candice Bergen, and Art Garfunkel, that did not fall within either of the two illustrations given in *Miller* of what is obscene: (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, and (b) patently offensive representations of masturbation, excretory functions, and lewd exhibitions of the genitals. The Court said that no one can be subjected to prosecution for the sale or exposure of obscene materials unless they depict or describe patently offensive, *i.e.*, "hard core" sexual conduct, such as conduct described in the *Miller* examples.

In 1973, the Court reaffirmed in *Paris Adult Theatre I v. Slaton* that states could ban obscenity even if distributed only to consenting adults. The majority held that state legislators can sanction obscenity because they may reasonably find a link between obscenity and the quality of community life; privacy interests do not prevail where there is commercial exhibition, as distinguished from private viewing at home; and not all conduct involving consenting adults is beyond state regulation. Joined by Justices Marshall and Stewart, Justice Brennan said in dissent in *Slaton* that because of problems of fair notice, chilling protected speech, and institutional stress in drawing lines, he would limit states to barring distribution to juveniles and offensive exposure to unconsenting adults. Justice Douglas continued his view not to allow the suppression of expression to consenting adults because of its sexual nature. Today's post-instrumentalist Court does not include any extreme instrumentalists who, like Justices Brennan, Marshall, and Douglas, came to believe that the First and 14th Amendments prohibit the state and federal governments from suppressing obscene materials except in the interest of protecting children or unwilling viewers. Nor does the current Court include any liberal formalists, like Justice Black, whose absolutist views would prevent any government regulation of obscenity.

Since 1973, the Court has refined *Miller* by holding that the community standard applies only to the first branch of the test, which relates to prurient interest. Whether the work is “patently offensive” under the second branch must be determined by reference to the examples given in *Miller* of such patently offensive conduct, not “unbridled” jury discretion. Whether the work “lacks serious value" is determined from a reasonable person perspective, not contemporary community standards.

---


26 413 U.S. 49, 57-64 (1973).

27 *Id.* at 112-13 (1973) (Brennan, J., joined by Marshall, J., & Stewart. J, dissenting); *id* at 114 (Douglas, J., dissenting).


In recent years, the number of Supreme Court cases on obscenity has declined. Perhaps not as many prosecutions are being brought. Local communities may be dealing with adult movies by zoning laws, as discussed at § 7.2, rather than by bans. Perhaps the Court feels that it has little to add to what it has already said. Thus, the law regarding obscenity seems to have become stabilized. Despite this stabilization, Professor Tribe has predicted that over the long run the definition of obscenity will not be at rest until the Court allows regulation only in the interest of unwilling viewers, captive audiences, young children, and beleaguered neighborhoods, but not in the interest of a uniform vision of how human sexuality should be regarded and portrayed.30

While Professor Tribe’s vision has not been formally adopted by the Supreme Court, as a practical matter the amount of sexually explicit material available to consenting adults today mirrors his standard. Whether through VHS, DVD, or Internet access, the adult pornography industry is a multi-billion dollar industry, and even “hard-core” pornography, although officially banned, as a practical matter is available to most who wish to acquire it, in the same manner as many illegal drugs as a practical matter are available to those who wish to purchase them. This fact is important because, as the Court held in Stanley v. Georgia,31 an individual has a right under the First Amendment to possess obscene material in the privacy of one’s home, and such possession cannot be made the subject of a criminal prosecution. For this reason, despite an occasional prosecution for obscenity involving the sale of adult pornography to a consenting adult, the focus of constitutional law in this area has turned principally to the issue, discussed at §§ 7.3-7.4, of child pornography and keeping obscene, indecent, or patently offensive images away from children.32

Despite some arguments made to the contrary, the courts apply the same “obscenity” doctrine for pornography depicting women in subordinate sexually explicit imagery. In American Booksellers v. Hudnut,33 the Seventh Circuit declared invalid an ordinance that sanctioned pornography, defined as the subordination of women in sexually explicit ways, including various kinds of sadomasochistic

imagery in pictures or words. The statute also provided that “use of men, children, or transsexuals in the place of women” shall constitute pornography under this section. There was no effort to fit pornography, so defined, into the Miller definition of obscenity, because the ordinance did not refer to prurient interests, community standards, or whether the work, as a whole, had any value. Given that the law was not limited to regulating “obscenity” as defined in Miller, the court applied standard First Amendment doctrine. Characterizing the ordinance as viewpoint discrimination, the Seventh Circuit stated that the ordinance violated strict scrutiny. The court held that the government does not have a compelling interest in barring opinions it thinks wrong or harmful. The court noted that this is so even if the depictions of subordination of women tend to perpetuate subordination, and, like racial bigotry, anti-Semitism, or violence on television, “influence the culture and shape our socialization.” It is also true even if the speech is not directly answerable by more speech. The court said that any other approach would leave the government “in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.” Of course, the government could punish the causing of injury during the course of producing such pornography. The Seventh Circuit's opinion was summarily affirmed, with Chief Justice Burger, and Justices Rehnquist and O'Connor, saying the case should have been set for argument.

Similar issues have arisen regarding art work pushing the boundaries of societal conventions, such as Robert Mapplethorpe's famous images of sadomasochistic sex, Andres Serrano’s “Piss Christ” (a photograph of a crucifix submerged in urine), or Karen Finley’s nude performances, where Finely "places, dabs, smears, pours and sprinkles food on her body to symbolize the violation of the female characters whose tales she shrieks” on stage. While such works are granted First Amendment protection, one author has noted the “potential consequences of a continued failure to afford Postmodern and Contemporary art sufficient protection, namely arbitrary law enforcement, self-censorship, and regulation based on secondary effects.”

§ 7.2 Regulation of Adult Material That is Not Obscene

In 1989, in Sable Communications of California, Inc. v. FCC, the Court made clear that material which is "indecent" but not "obscene" cannot be barred from an adult audience. A city may require dispersal of adult theaters, as in Young v. American Mini Theatres, Inc., or a city may concentrate adult theaters in one area, as in City of Renton v. Playtime Theatres, Inc. Such ordinances, treated

---


as content-neutral regulations concerned with the secondary affects of adult theaters, are justified under an intermediate standard of review if they serve a substantial state interest in preserving the quality of life, provided that they are narrowly tailored and allow reasonable alternative avenues of communication.

In 1990, in *FW/PBS v. City of Dallas*, the Court relaxed application of the *Freedman* procedural tests where a city licensing official reviewed the qualifications of each license applicant to engage in a sexually oriented business, but did not pass judgment on the content of any particular speech. Under *Freedman*, as discussed at § 5.1, the government has the burden of initiating court proceedings and the burden of proof during those proceedings. Under *FW/PBS*, the burdens remain with the challenger, despite the case being one of heightened scrutiny. A better approach, applied in 2002 to content-neutral government licensing and fee permit cases in *Thomas v. Chicago Park District*, excerpted at § 5.1, provides that the burden remains on the government, but review should be at the intermediate level, rather than the strict scrutiny approach of *Freedman*.

**Renton v. Playtime Theatres, Inc.**  
475 U.S. 41 (1986)

Justice REHNQUIST delivered the opinion of the Court.

This case involves a constitutional challenge to a zoning ordinance, enacted by appellant city of Renton, Washington, that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school.

In our view, the resolution of this case is largely dictated by our decision in *Young v. American Mini Theatres, Inc.*, [427 U.S. 50 (1976)]. There, although five Members of the Court did not agree on a single rationale for the decision, we held that the city of Detroit's zoning ordinance, which prohibited locating an adult theater within 1,000 feet of any two other “regulated uses” or within 500 feet of any residential zone, did not violate the First and Fourteenth Amendments. Id., 427 U.S., at 72-73 (plurality opinion of Stevens, J., joined by Burger, C.J., and White and Rehnquist, JJ.); id., at 84 (Powell, J., concurring). The Renton ordinance, like the one in *American Mini Theatres*, does not ban adult theaters altogether, but merely provides that such theaters may not be located within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. The ordinance is therefore properly analyzed as a form of time, place, and manner regulation. Id., at 63, and n.18; id., at 78-79 (Powell, J., concurring).

Describing the ordinance as a time, place, and manner regulation is, of course, only the first step in our inquiry. This Court has long held that regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. See *Carey v. Brown*, 447 U.S. 455, 462-463, and n.7 (1980). On the other hand, so-called “content-neutral” time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental

---


[T]he Renton ordinance, like the ordinance in *American Mini Theatres*, does not appear to fit neatly into either the “content-based” or the “content-neutral” category. To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theaters. Nevertheless, as the District Court concluded, the Renton ordinance is aimed not at the content of the films shown at “adult motion picture theatres,” but rather at the secondary effects of such theaters on the surrounding community. The District Court found that the City Council’s “predominate concerns” were with the secondary effects of adult theaters, and not with the content of adult films themselves. App. to Juris. Statement 31a (emphasis added). But the Court of Appeals, relying on its decision in *Tovar v. Billmeyer*, 721 F.2d 1260, 1266 (CA9 1983), held that this was not enough to sustain the ordinance. According to the Court of Appeals, if “a motivating factor” in enacting the ordinance was to restrict respondents' exercise of First Amendment rights the ordinance would be invalid, apparently no matter how small a part this motivating factor may have played in the City Council's decision. 748 F.2d, at 537 (emphasis in original). This view of the law was rejected in *United States v. O'Brien*, 391 U.S., at 382-386, the very case that the Court of Appeals said it was applying: “It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.” Id., at 383-384.

The District Court's finding as to “predominate” intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally “protect[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,” not to suppress the expression of unpopular views. See App. to Juris. Statement 90a. As Justice Powell observed in *American Mini Theatres*, “[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.” 427 U.S., at 82, n.4.

In short, the Renton ordinance is completely consistent with our definition of “content-neutral” speech regulations as those that “are justified without reference to the content of the regulated speech.” Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (emphasis added). The ordinance does not contravene the fundamental principle that underlies our concern about “content-based” speech regulations: that “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.” Mosley, supra, 408 U.S., at 95-96.

It was with this understanding in mind that, in *American Mini Theatres*, a majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to “content-neutral” time, place, and manner regulations.
Justice Stevens, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters “without violating the government’s paramount obligation of neutrality in its regulation of protected communication,” 427 U.S., at 70, noting that “[i]t is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of ‘offensive’ speech,” id., at 71, n.34. Justice Powell, in concurrence, elaborated: “[T]he dissent misconceives the issue in this case by insisting that it involves an impermissible time, place, and manner restriction based on the content of expression. It involves nothing of the kind. We have here merely a decision by the city to treat certain movie theaters differently because they have markedly different effects upon their surroundings. Id., at 82, n.6.

The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. See Community for Creative Non-Violence, 468 U.S., at 293. It is clear that the ordinance meets such a standard. As a majority of this Court recognized in American Mini Theatres, a city’s “interest in attempting to preserve the quality of urban life is one that must be accorded high respect.” 427 U.S., at 71 (plurality opinion); see id., at 80 (Powell, J., concurring) (“Nor is there doubt that the interests furthered by this ordinance are both important and substantial”).

The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to “the particular problems or needs of Renton,” the city's justifications for the ordinance were “conclusory and speculative.” 748 F.2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof. The record in this case reveals that Renton relied heavily on the experience of, and studies produced by, the city of Seattle. In Seattle, as in Renton, the adult theater zoning ordinance was aimed at preventing the secondary effects caused by the presence of even one such theater in a given neighborhood. See Northend Cinema, Inc. v. Seattle, 585 P.2d 1153 (Wash. 1978). The opinion of the Supreme Court of Washington in Northend Cinema, which was before the Renton City Council when it enacted the ordinance in question here, described Seattle's experience as follows:

[T]he City's zoning code which are at issue here are the . . . culmination of a long period of study and discussion of the problems of adult movie theaters in residential areas of the City. . . . [T]he City's Department of Community Development made a study of the need for zoning controls of adult theaters. . . . The study analyzed the City's zoning scheme, comprehensive plan, and land uses around existing adult motion picture theaters. . . .” Id., at 1155.

[T]he [trial] court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theaters has a harmful effect on the area and contribute to neighborhood blight, are supported by substantial evidence in the record.” Id., at 1156.

The record is replete with testimony regarding the effects of adult movie theater locations on residential neighborhoods.” Id., at 1159.
We hold that Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the “detailed findings” summarized in the Washington Supreme Court's *Northend Cinema* opinion, in enacting its adult theater zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theaters does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

We also find no constitutional defect in the method chosen by Renton to further its substantial interests. Cities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. “It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas. . . . The city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.” American Mini Theatres, 427 U.S., at 71 (plurality opinion). Moreover, the Renton ordinance is “narrowly tailored” to affect only that category of theaters shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

Respondents contend that the Renton ordinance is “underinclusive,” in that it fails to regulate other kinds of adult businesses that are likely to produce secondary effects similar to those produced by adult theaters. On this record the contention must fail. There is no evidence that, at the time the Renton ordinance was enacted, any other adult business was located in, or was contemplating moving into, Renton. In fact, Resolution No. 2368, enacted in October 1980, states that “the City of Renton does not, at the present time, have any business whose primary purpose is the sale, rental, or showing of sexually explicit materials.” App. 42. That Renton chose first to address the potential problems created by one particular kind of adult business in no way suggests that the city has “singled out” adult theaters for discriminatory treatment. We simply have no basis on this record for assuming that Renton will not, in the future, amend its ordinance to include other kinds of adult businesses that have been shown to produce the same kinds of secondary effects as adult theaters. See *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 488-489 (1955).

Finally, turning to the question whether the Renton ordinance allows for reasonable alternative avenues of communication, we note that the ordinance leaves some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theater sites. The District Court found, and the Court of Appeals did not dispute the finding, that the 520 acres of land consists of “ample, accessible real estate,” including “acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space that is criss-crossed by freeways, highways, and roads.” App. to Juris. Statement 28a.

Justice BLACKMUN concurs in the result.
Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there. The constitutionality of the ordinance is therefore not correctly analyzed under standards applied to content-neutral time, place, and manner restrictions. But even assuming that the ordinance may fairly be characterized as content neutral, it is plainly unconstitutional under the standards established by the decisions of this Court. Although the Court's analysis is limited to cases involving "businesses that purvey sexually explicit materials," ante, at 929, and n.2, and thus does not affect our holdings in cases involving state regulation of other kinds of speech, I dissent.

"[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech." Consolidated Edison Co. v. Public Service Comm'n of N.Y., 447 U.S. 530, 536 (1980). The Court asserts that the ordinance is "aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters on the surrounding community," ante, at 929 (emphasis in original), and thus is simply a time, place, and manner regulation. This analysis is misguided.

The fact that adult movie theaters may cause harmful "secondary" land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral. Because the ordinance imposes special restrictions on certain kinds of speech on the basis of content, I cannot simply accept, as the Court does, Renton's claim that the ordinance was not designed to suppress the content of adult movies. "[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" Consolidated Edison Co., supra, at 536 (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result)). "[B]efore deferring to [Renton's] judgment, [we] must be convinced that the city is seriously and comprehensively addressing" secondary-land use effects associated with adult movie theaters. Metromedia, Inc. v. San Diego, 453 U.S. 490, 531 (1981) (Brennan, J., concurring in judgment). In this case, both the language of the ordinance and its dubious legislative history belie the Court's conclusion that "the city's pursuit of its zoning interests here was unrelated to the suppression of free expression." Ante, at 929.

Shortly after this lawsuit commenced, the Renton City Council amended the ordinance, adding a provision explaining that its intention in adopting the ordinance had been "to promote the City of Renton's great interest in protecting and preserving the quality of its neighborhoods, commercial districts, and the quality of urban life through effective land use planning." App. to Juris. Statement 81a. The amended ordinance also lists certain conclusory "findings" concerning adult entertainment land uses that the Council purportedly relied upon in adopting the ordinance. Id., at 81a-86 a. The city points to these provisions as evidence that the ordinance was designed to control the secondary effects associated with adult movie theaters, rather than to suppress the content of the films they exhibit. However, the "legislative history" of the ordinance strongly suggests otherwise.

Page 348
Prior to the amendment, there was no indication that the ordinance was designed to address any “secondary effects” a single adult theater might create. In addition to the suspiciously coincidental timing of the amendment, many of the City Council's “findings” do not relate to legitimate land-use concerns. As the Court of Appeals observed, “[b]oth the magistrate and the district court recognized that many of the stated reasons for the ordinance were no more than expressions of dislike for the subject matter.” 748 F.2d 527, 537 (CA9 1984). That some residents may be offended by the content of the films shown at adult movie theaters cannot form the basis for state regulation of speech. See Terminiello v. Chicago, 337 U.S. 1 (1949).

Some of the “findings” added by the City Council do relate to supposed “secondary effects” associated with adult movie theaters. However, the Court cannot, as it does, merely accept these post hoc statements at face value. “[T]he presumption of validity that traditionally attends a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment.” Schad v. Mount Ephraim, 452 U.S. 61, 77 (1981) (Blackmun, J., concurring). As the Court of Appeals concluded, “[t]he record presented by Renton to support its asserted interest in enacting the zoning ordinance is very thin.” 748 F.2d, at 536.

The Court finds that the ordinance was designed to further Renton's substantial interest in “preserv[ing] the quality of urban life.” Ante, at 930. As explained above, the record here is simply insufficient to support this assertion. The city made no showing as to how uses “protected” by the ordinance would be affected by the presence of an adult movie theater. Thus, the Renton ordinance is clearly distinguishable from the Detroit zoning ordinance upheld in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976). The Detroit ordinance, which was designed to disperse adult theaters throughout the city, was supported by the testimony of urban planners and real estate experts regarding the adverse effects of locating several such businesses in the same neighborhood. Id., at 55; see also Northend Cinema, Inc. v. Seattle, 585 P.2d 1153, 1154-1155 ([Wash.] 1978), cert. denied sub nom. Apple Theatre, Inc. v. Seattle, 441 U.S. 946 (1979) (Seattle zoning ordinance was the “culmination of a long period of study and discussion”). Here, the Renton Council was aware only that some residents had complained about adult movie theaters, and that other localities had adopted special zoning restrictions for such establishments. These are not “facts” sufficient to justify the burdens the ordinance imposed upon constitutionally protected expression.

Finally, the ordinance is invalid because it does not provide for reasonable alternative avenues of communication. The District Court found that the ordinance left 520 acres in Renton available for adult theater sites, an area comprising about five percent of the city. However, the Court of Appeals found that because much of this land was already occupied, “[l]imiting adult theater uses to these areas is a substantial restriction on speech.” 748 F.2d, at 534. Many “available” sites are also largely unsuited for use by movie theaters. See App. 231, 241. Again, these facts serve to distinguish this case from American Mini Theatres, where there was no indication that the Detroit zoning ordinance seriously limited the locations available for adult businesses. See American Mini Theatres, supra, 427 U.S., at 71, n.35 (plurality opinion) (“The situation would be quite different if the ordinance had the effect of . . . greatly restricting access to . . . lawful speech”); see also Basiardanes v. City of Galveston, 682 F.2d 1203, 1214 (CA5 1982) (ordinance effectively banned adult theater by
restricting them to “‘the most unattractive, inaccessible, and inconvenient areas of a city’”); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1217 (ND Ga. 1981) (proposed sites for adult entertainment uses were either “unavailable, unusable, or so inaccessible to the public that . . . they amount to no locations”).

Despite the evidence in the record, the Court reasons that the fact “[t]hat respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.” Ante, at 932. However, respondents are not on equal footing with other prospective purchasers and lessees, but must conduct business under severe restrictions not imposed upon other establishments. The Court also argues that the First Amendment does not compel “the government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.” Ibid. However, respondents do not ask Renton to guarantee low-price sites for their businesses, but seek only a reasonable opportunity to operate adult theaters in the city. By denying them this opportunity, Renton can effectively ban a form of protected speech from its borders. The ordinance “greatly restrict[s] access to . . . lawful speech,” American Mini Theatres, supra, 427 U.S., at 71, n.35 (plurality opinion), and is plainly unconstitutional.

Two nude dancing cases help clarify the distinction between content-based and content-neutral regulations of speech in the context of adult entertainment. The first such case was Barnes v. Glen Theatre, Inc. 39 There the Court, by a 5-4 vote, upheld Indiana’s ban on nudity in places of public accommodation. Chief Justice Rehnquist announced the judgment and delivered an opinion joined by Justices O’Connor and Kennedy. The Chief Justice said that nude dancing is symbolic speech marginally within the First Amendment. To this symbolic speech he applied the O’Brien test, and the ban satisfied that test. The Court concluded that the state’s interest in morality was substantial and unrelated to suppressing free expression, since it was nudity and not dancing that was prohibited. Further, the law was narrowly tailored as its requirement that dancers wear at least “pasties and a G-string” was the “bare minimum needed to achieve the state’s purpose.” Justice Souter, concurring, said that the purpose of the law, as in Renton, was combating secondary effects, such as prostitution, sexual assault, and associated crimes, which flow not from the expression inherent in nude dance but, rather, from crowds of predisposed men. Justice Scalia, also concurring, said that since this was a general law not targeting expressive activity, but only conduct, the First Amendment did not apply at all, and only rational basis scrutiny under the Due Process Clause was required. Moral opposition to nudity supplied a legitimate basis for the regulation.40


40 Id. at 572-74, 580-81 (Scalia, J., concurring in the judgment); id. at 583-87 (Souter, J., concurring in the judgment), citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (upholding the zoning of adult theaters under an intermediate standard of review).
Justice White dissented with Justices Marshall, Blackmun, and Stevens. Justice White said that nudity is an expressive component of nude dancing so that ban was related to expressive conduct. Indeed, the real purpose was a content-based purpose to protect viewers from what the state believed is a harmful erotic message. Thus, strict scrutiny should be applied, and the law could not survive that level of scrutiny.\(^{41}\) The majority opinion had anticipated this argument and sought to answer it by saying that “the requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.”\(^{42}\)

Nine years later a similar case came before the Court and a similar result was reached in *City of Erie v. Pap’s A.M.*

*City of Erie v. Pap’s A.M.*
529 U.S. 277 (2000)

Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, and an opinion with respect to Parts III and IV, in which THE CHIEF JUSTICE, Justice KENNEDY, and Justice BREYER join.

The city of Erie, Pennsylvania, enacted an ordinance banning public nudity. Respondent Pap's A.M. (hereinafter Pap's), which operated a nude dancing establishment in Erie, challenged the constitutionality of the ordinance and sought a permanent injunction against its enforcement.

[Parts III - IV]

Being “in a state of nudity” is not an inherently expressive condition. As we explained in *Barnes*, however, nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection. See *Barnes v. Glen Theatre, Inc.*, 501 U.S., at 565-566 (plurality opinion); *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981).

To determine what level of scrutiny applies to the ordinance at issue here, we must decide “whether the State's regulation is related to the suppression of expression.” *Texas v. Johnson*, 491 U.S. 397, 403 (1989); see also *United States v. O'Brien*, 391 U.S., at 377. If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy the “less stringent” standard from *O'Brien* for evaluating restrictions on symbolic speech. *Texas v. Johnson*, supra, at 403; *United States v. O'Brien*, supra, at 377. If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the *O'Brien* test and must be justified under a more demanding standard. *Texas v. Johnson*, supra, at 403.

---

\(^{41}\) *Id.* at 593-96 (White, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).

\(^{42}\) *Id.* at 571.
In *Barnes*, we analyzed an almost identical statute, holding that Indiana's public nudity ban did not violate the First Amendment, although no five Members of the Court agreed on a single rationale for that conclusion. We now clarify that government restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech.

The city of Erie argues that the ordinance is a content-neutral restriction that is reviewable under *O'Brien* because the ordinance bans conduct, not speech; specifically, public nudity. Respondent counters that the ordinance targets nude dancing and, as such, is aimed specifically at suppressing expression, making the ordinance a content-based restriction that must be subjected to strict scrutiny.

The ordinance here, like the statute in *Barnes*, is on its face a general prohibition on public nudity. 719 A.2d, at 277. By its terms, the ordinance regulates conduct alone. It does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity. And like the statute in *Barnes*, the Erie ordinance replaces and updates provisions of an “Indecency and Immorality” ordinance that has been on the books since 1866, predating the prevalence of nude dancing establishments such as Kandyland. Pet. for Cert. 7a; see *Barnes v. Glen Theatre, Inc.*, supra, at 568.

Respondent and Justice Stevens contend nonetheless that the ordinance is related to the suppression of expression because language in the ordinance's preamble suggests that its actual purpose is to prohibit erotic dancing of the type performed at Kandyland. *Post*, at 1406 (dissenting opinion). That is not how the Pennsylvania Supreme Court interpreted that language, however. In the preamble to the ordinance, the city council stated that it was adopting the regulation “for the purpose of limiting a recent increase in nude live entertainment within the City, which activity adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases and other deleterious effects.” 719 A.2d, at 279.

The Pennsylvania Supreme Court construed this language to mean that one purpose of the ordinance was “to combat negative secondary effects.” Ibid.

Although the Pennsylvania Supreme Court acknowledged that one goal of the ordinance was to combat the negative secondary effects associated with nude dancing establishments, the court concluded that the ordinance was nevertheless content based, relying on Justice White's position in dissent in *Barnes* for the proposition that a ban of this type necessarily has the purpose of suppressing the erotic message of the dance. Because the Pennsylvania court agreed with Justice White's approach, it concluded that the ordinance must have another, “unmentioned” purpose related to the suppression of expression. 719 A.2d, at 279. That is, the Pennsylvania court adopted the dissent's view in *Barnes* that “[s]ince the State permits the dancers to perform if they wear pasties and G-strings but forbids nude dancing, it is precisely because of the distinctive, expressive content of the nude dancing performances at issue in this case that the State seeks to apply the statutory prohibition.” 719 A.2d, at 279 (quoting *Barnes, supra*, at 592 (White, J., dissenting)). A majority of the Court rejected that view in *Barnes*, and we do so again here.
Respondent's argument that the ordinance is “aimed” at suppressing expression through a ban on nude dancing – an argument that respondent supports by pointing to statements by the city attorney that the public nudity ban was not intended to apply to “legitimate” theater productions – is really an argument that the city council also had an illicit motive in enacting the ordinance. As we have said before, however, this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive. O'Brien, supra, at 382-383; Renton v. Playtime Theatres, Inc., supra, at 47-48 (that the “predominate” purpose of the statute was to control secondary effects was “more than adequate to establish” that the city's interest was unrelated to the suppression of expression).

In light of the Pennsylvania court's determination that one purpose of the ordinance is to combat harmful secondary effects, the ban on public nudity here is no different from the ban on burning draft registration cards in O'Brien, where the Government sought to prevent the means of the expression and not the expression of antiwar sentiment itself.

The State's interest in preventing harmful secondary effects is not related to the suppression of expression. In trying to control the secondary effects of nude dancing, the ordinance seeks to deter crime and the other deleterious effects caused by the presence of such an establishment in the neighborhood. See Renton, supra, at 50-51. In Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), we held that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment when applied to prohibit demonstrators from sleeping in Lafayette Park and the Mall in Washington, D.C., in connection with a demonstration intended to call attention to the plight of the homeless. Assuming, arguendo, that sleeping can be expressive conduct, the Court concluded that the Government interest in conserving park property was unrelated to the demonstrators' message about homelessness. Id., at 299. So, while the demonstrators were allowed to erect “symbolic tent cities,” they were not allowed to sleep overnight in those tents. Even though the regulation may have directly limited the expressive element involved in actually sleeping in the park, the regulation was nonetheless content neutral.

Similarly, even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is de minimis. And as Justice Stevens eloquently stated for the plurality in Young v. American Mini Theatres, Inc., 427 U.S. 50, 70 (1976), “even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate,” and “few of us would march our sons and daughters off to war to preserve the citizen's right to see” specified anatomical areas exhibited at establishments like Kandyland. If States are to be able to regulate secondary effects, then de minimis intrusions on expression such as those at issue here cannot be sufficient to render the ordinance content based. See Clark v. Community for Creative Non-Violence, supra, at 299; Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (even if regulation has an incidental effect on some speakers or messages but not others, the regulation is content neutral if it can be justified without reference to the content of the expression).
Justice Stevens claims that today we “[f]or the first time” extend Renton's secondary effects doctrine to justify restrictions other than the location of a commercial enterprise. Post, at 1406 (dissenting opinion). Our reliance on Renton to justify other restrictions is not new, however. In Ward, the Court relied on Renton to evaluate restrictions on sound amplification at an outdoor bandshell, rejecting the dissent's contention that Renton was inapplicable. See Ward v. Rock Against Racism, supra, at 804, n.1 (Marshall, J., dissenting) (“Today, for the first time, a majority of the Court applies Renton analysis to a category of speech far afield from that decision's original limited focus”). Moreover, Erie's ordinance does not effect a “total ban” on protected expression. Post, at 1407.

We conclude that Erie's asserted interest in combating the negative secondary effects associated with adult entertainment establishments like Kandyland is unrelated to the suppression of the erotic message conveyed by nude dancing. The ordinance prohibiting public nudity is therefore valid if it satisfies the four-factor test from O'Brien for evaluating restrictions on symbolic speech.

Applying that standard here, we conclude that Erie's ordinance is justified under O'Brien. The first factor of the O'Brien test is whether the government regulation is within the constitutional power of the government to enact. Here, Erie's efforts to protect public health and safety are clearly within the city's police powers. The second factor is whether the regulation furthers an important or substantial government interest. The asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important. And in terms of demonstrating that such secondary effects pose a threat, the city need not “conduct new studies or produce evidence independent of that already generated by other cities” to demonstrate the problem of secondary effects, “so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.” Renton v. Playtime Theatres, Inc., supra, at 51-52. Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in Renton, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), and California v. LaRue, 409 U.S. 109 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in Renton and American Mini Theatres to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See Renton v. Playtime Theatres, Inc., supra, at 51-52 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient). In fact, Erie expressly relied on Barnes and its discussion of secondary effects, including its reference to Renton and American Mini Theatres. Even in cases addressing regulations that strike closer to the core of First Amendment values, we have accepted a state or local government's reasonable belief that the experience of other jurisdictions is relevant to the problem it is addressing. See Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 393, n.6 (2000) Regardless of whether Justice Souter now wishes to disavow his opinion in Barnes on this point, see post, at 1406 (opinion concurring in part and dissenting in part), the evidentiary standard described in Renton controls here, and Erie meets that standard.

In any event, Erie also relied on its own findings. The preamble to the ordinance states that “the Council of the City of Erie has, at various times over more than a century, expressed its findings that certain lewd, immoral activities carried on in public places for profit are highly detrimental to the
public health, safety and welfare, and lead to the debasement of both women and men, promote violence, public intoxication, prostitution and other serious criminal activity.” Pet. for Cert. 6a (emphasis added). The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects. Analogizing to the administrative agency context, it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such “legislative facts” within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment. See FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); 2 K. Davis & R. Pierce, Administrative Law Treatise § 10.6 (3d ed.1994). Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited. And the study relied on by amicus curiae does not cast any legitimate doubt on the Erie city council's judgment about Erie. See Brief for First Amendment Lawyers Association as Amicus Curiae 16–23.

The ordinance also satisfies O'Brien's third factor, that the government interest is unrelated to the suppression of free expression, as discussed supra, at 1390-1395. The fourth and final O'Brien factor – that the restriction is no greater than is essential to the furtherance of the government interest – is satisfied as well. The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is de minimis. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message. See Barnes v. Glen Theatre, Inc., 501 U.S., at 572 (plurality opinion of Rehnquist, C. J., joined by O'Connor and Kennedy, JJ.); id., at 587 (Souter, J., concurring in judgment). Justice Souter points out that zoning is an alternative means of addressing this problem. It is far from clear, however, that zoning imposes less of a burden on expression than the minimal requirement implemented here. In any event, since this is a content-neutral restriction, least restrictive means analysis is not required. See Ward, 491 U.S., at 798-799, n 6.

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

The city of Erie self-consciously modeled its ordinance on the public nudity statute we upheld against constitutional challenge in Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), calculating (one would have supposed reasonably) that the courts of Pennsylvania would consider themselves bound by our judgment on a question of federal constitutional law. In Barnes, I voted to uphold the challenged Indiana statute “not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all.” Id., at 572 (opinion concurring in judgment). Erie's ordinance, too, by its terms prohibits not merely nude dancing, but the act – irrespective of whether it is engaged in for expressive purposes – of going nude in public. The facts that a preamble to the
ordinance explains that its purpose, in part, is to “limi[t] a recent increase in nude live entertainment,” App. to Pet. for Cert. 42a, that city councilmembers in supporting the ordinance commented to that effect, see post, at 1412-1413, and n.16 (Stevens, J., dissenting), and that the ordinance includes in the definition of nudity the exposure of devices simulating that condition, see post, at 1413, neither make the law any less general in its reach nor demonstrate that what the municipal authorities really find objectionable is expression rather than public nakedness. As far as appears (and as seems overwhelmingly likely), the preamble, the councilmembers' comments, and the chosen definition of the prohibited conduct simply reflect the fact that Erie had recently been having a public nudity problem not with streakers, sunbathers or hot dog vendors, see Barnes, supra, at 574 (Scalia, J., concurring in judgment), but with lap dancers.

Moreover, even were I to conclude that the city of Erie had specifically singled out the activity of nude dancing, I still would not find that this regulation violated the First Amendment unless I could be persuaded (as on this record I cannot) that it was the communicative character of nude dancing that prompted the ban. When conduct other than speech itself is regulated, it is my view that the First Amendment is violated only “[w]here the government prohibits conduct precisely because of its communicative attributes.” Barnes, 501 U.S., at 577 (emphasis deleted). Here, even if one hypothesizes that the city's object was to suppress only nude dancing, that would not establish an intent to suppress what (if anything) nude dancing communicates. I do not feel the need, as the Court does, to identify some “secondary effects” associated with nude dancing that the city could properly seek to eliminate. (I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease.) The traditional power of government to foster good morals (bonos mores), and the acceptability of the traditional judgment (if Erie wishes to endorse it) that nude public dancing itself is immoral, have not been repealed by the First Amendment.

Justice SOUTER, concurring in part and dissenting in part.

In several recent cases, we have confronted the need for factual justifications to satisfy intermediate scrutiny under the First Amendment. See, e.g., Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000); Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) (Turner II); Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) (Turner I). Those cases do not identify with any specificity a particular quantum of evidence, nor do I seek to do so in this brief concurrence. What the cases do make plain, however, is that application of an intermediate scrutiny test to a government's asserted rationale for regulation of expressive activity demands some factual justification to connect that rationale with the regulation in issue.

In Turner I, for example, we stated that “[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.’” Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (C.A.D.C.1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” Id., at 664 (plurality opinion).
The upshot of these cases is that intermediate scrutiny requires a regulating government to make some demonstration of an evidentiary basis for the harm it claims to flow from the expressive activity, and for the alleviation expected from the restriction imposed. See, e.g., Edenfield v. Fane, 507 U.S. 761, 770-773 (1993) (striking down regulation of commercial speech for failure to show direct and material efficacy). That evidentiary basis may be borrowed from the records made by other governments if the experience elsewhere is germane to the measure under consideration and actually relied upon. I will assume, further, that the reliance may be shown by legislative invocation of a judicial opinion that accepted an evidentiary foundation as sufficient for a similar regulation. What is clear is that the evidence of reliance must be a matter of demonstrated fact, not speculative supposition.

By these standards, the record before us today is deficient in its failure to reveal any evidence on which Erie may have relied, either for the seriousness of the threatened harm or for the efficacy of its chosen remedy. The plurality does the best it can with the materials to hand, see ante, at 1395–1396, but the pickings are slim. The plurality quotes the ordinance's preamble asserting that over the course of more than a century the city council had expressed “findings” of detrimental secondary effects flowing from lewd and immoral profitmaking activity in public places. But however accurate the recital may be and however honestly the councilors may have held those conclusions to be true over the years, the recitation does not get beyond conclusions on a subject usually fraught with some emotionalism. The plurality recognizes this, of course, but seeks to ratchet up the value of mere conclusions by analogizing them to the legislative facts within an administrative agency's special knowledge, on which action is adequately premised in the absence of evidentiary challenge. Ante, at 1395-1396. The analogy is not obvious; agencies are part of the executive branch and we defer to them in part to allow them the freedom necessary to reconcile competing policies. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-845 (1984). That aside, it is one thing to accord administrative leeway as to predictive judgments in applying “‘elusive concepts'” to circumstances where the record is inconclusive and “evidence . . . is difficult to compile,” FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 796-797 (1978), and quite another to dispense with evidence of current fact as a predicate for banning a subcategory of expression. As to current fact, the city council's closest approach to an evidentiary record on secondary effects and their causes was the statement of one councilor, during the debate over the ordinance, who spoke of increases in sex crimes in a way that might be construed as a reference to secondary effects. See App. 44. But that reference came at the end of a litany of concerns (“free condoms in schools, drive-by shootings, abortions, suicide machines,” and declining student achievement test scores) that do not seem to be secondary effects of nude dancing. Ibid. Nor does the invocation of Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), in one paragraph of the preamble to Erie's ordinance suffice. App. to Pet. for Cert. 42a. The plurality opinion in Barnes made no mention of evidentiary showings at all, and though my separate opinion did make a pass at the issue, I did not demand reliance on germane evidentiary demonstrations, whether specific to the statute in question or developed elsewhere. To invoke Barnes, therefore, does not indicate that the issue of evidence has been addressed.

Careful readers, and not just those on the Erie City Council, will of course realize that my partial dissent rests on a demand for an evidentiary basis that I failed to make when I concurred in Barnes,
I should have demanded the evidence then, too, and my mistake calls to mind Justice Jackson's foolproof explanation of a lapse of his own, when he quoted Samuel Johnson, "Ignorance, sir, ignorance." McGrath v. Kristensen, 340 U.S. 162, 178 (1950) (concurring opinion). I may not be less ignorant of nude dancing than I was nine years ago, but after many subsequent occasions to think further about the needs of the First Amendment, I have come to believe that a government must toe the mark more carefully than I first insisted. I hope it is enlightenment on my part, and acceptable even if a little late. See Henslee v. Union Planters Nat. Bank & Trust Co., 335 U.S. 595, 600 (1949) (per curiam) (Frankfurter, J., dissenting).

Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

Far more important than the question whether nude dancing is entitled to the protection of the First Amendment are the dramatic changes in legal doctrine that the Court endorses today. Until now, the "secondary effects" of commercial enterprises featuring indecent entertainment have justified only the regulation of their location. For the first time, the Court has now held that such effects may justify the total suppression of protected speech.

The reason we have limited our secondary effects cases to zoning and declined to extend their reasoning to total bans is clear and straightforward: A dispersal that simply limits the places where speech may occur is a minimal imposition, whereas a total ban is the most exacting of restrictions. The State's interest in fighting presumed secondary effects is sufficiently strong to justify the former, but far too weak to support the latter, more severe burden. Yet it is perfectly clear that in the present case – to use Justice Powell's metaphor in American Mini Theatres – the city of Erie has totally silenced a message the dancers at Kandyland want to convey. The fact that this censorship may have a laudable ulterior purpose cannot mean that censorship is not censorship. For these reasons, the Court's holding rejects the explicit reasoning in American Mini Theatres and Renton and the express holding in Schad.

The Court's use of the secondary effects rationale to permit a total ban has grave implications for basic free speech principles. Ordinarily, laws regulating the primary effects of speech, i.e., the intended persuasive effects caused by the speech, are presumptively invalid. Under today's opinion, a State may totally ban speech based on its secondary effects – which are defined as those effects that "happen to be associated" with speech, Boos v. Barry, 485 U.S. 312, 320-321 (1988); see ante, at 1392 – yet the regulation is not presumptively invalid. Because the category of effects that "happen to be associated" with speech includes the narrower subset of effects caused by speech, today's holding has the effect of swallowing whole a most fundamental principle of First Amendment jurisprudence.

It is clear beyond a shadow of a doubt that the Erie ordinance was a response to a more specific concern than nudity in general, namely, nude dancing of the sort found in Kandyland. Given that the Court has not even tried to defend the ordinance's total ban on the ground that its censorship of protected speech might be justified by an overriding state interest, it should conclude that the ordinance is patently invalid. For these reasons, as well as the reasons set forth in Justice White's dissent in Barnes, I respectfully dissent.
The struggle to settle upon a perspective for dealing with zoning regulations that attempt to deal with secondary effects of adult business continued in 2002 in *City of Los Angeles v. Alameda Books, Inc.* There the Court held that it was error to grant a summary judgment to the operators of multiple adult businesses in a single building who had challenged a zoning ordinance which barred the operation in the same building of an adult bookstore and adult arcade or any two such operations.

The plurality opinion written by Justice O’Connor was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. Citing *Renton v. Playtime Theatres, Inc.*, Justice O’Connor said that the ordinance was not content-based because it was aimed at the secondary effects of a concentration of adult businesses. Thus, the inquiry is whether it is designed to serve a substantial governmental interest and does not unreasonably limit alternative lines of communication. Here, the city based the ordinance on a 1977 study by the police department which showed that crime rates grew much faster in Hollywood, which had the largest concentration of adult establishments in the city. Justice O’Connor said it was rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or one large establishment, would reduce crime rates. It is enough for the city to rely on evidence that is reasonably believed to be relevant to demonstrate a connection between speech and the content-neutral governmental interest. Justice Scalia said that he joined the plurality opinion because it correctly applied the Court’s jurisprudence on secondary effects. However, as he had said in *Pap’s A.M.*, this was an unnecessary step because the First Amendment does not prevent a city from regulating the conduct of pandering sex.

Justice Kennedy, with his slightly more speech-protecting perspective, concurred only in the judgment. Justice Kennedy emphasized that the claim to which the evidence must relate is that the ordinance will suppress secondary effects, but not by suppressing speech. The claim must therefore be that the ordinance will cause two businesses to split, rather than one to close, and the secondary effects will be significantly reduced. Reviewing the city’s study in light of common experience, Justice Kennedy said it was sufficiently likely that dispersing two adult businesses under one roof is reasonably likely to cause a substantial reduction in secondary effects while reducing speech very little. Of course, if this could be proved unsound at trial—either that there was no substantial benefit from the ordinance (and thus a problem with the second prong of the intermediate scrutiny test), or that it did substantially burden operations of the businesses (and thus a problem with the third prong of the intermediate scrutiny test)—the ordinance might not withstand intermediate scrutiny.

---


46 *Id.* at 449-53 (Kennedy, J., concurring in the judgment).
Justice Souter dissented, with Justices Stevens and Ginsburg, and with Justice Breyer as to Part II of the dissent. In Part I of the dissent, Justice Souter called for the application of a slightly higher standard of intermediate review than that suggested by Justice O’Connor. That slightly higher standard, not adopted by a majority of the Court, and probably unwise in practice to adopt, is discussed at § 2.4.4. In Part II of his dissenting opinion in *Alameda Books*, Justice Souter contended that even under the assumptions of the plurality opinion, the city had not met its burden of showing that the restriction on speech was no greater than essential to realizing an important objective, in this case policing crime. He pointed out that no study conducted by the city has reported that this type of traditional business, combining a bookstore and adult video booths, any more than any other adult business, has a correlation with secondary effects in the absence of concentration with other adult establishments in the neighborhood. He said that the reasonable supposition is that splitting some of these businesses up will have no consequence for secondary effects whatever.47 Justice O’Connor replied to Justice Souter’s dissent by saying that it would be unwise to depart from the *Renton* framework because none of the parties had requested it, the courts have not had difficulty working with it, it would be inappropriate for the Court to reach the question of content neutrality or content-based before permitting the lower court to pass on it, and because it is unclear what kind of evidence cities could rely upon to meet the evidentiary burden he would impose.48

As an intermediate scrutiny test, the government does have the burden to make the showing of a substantial governmental interest and a substantial relationship, which is what Justice Souter required in his dissent in *Pap’s A.M.*.49 In applying this test, Justice O’Connor is right in stating in her plurality opinion in *Pap’s A.M.* that the government need not always conduct its own studies, “so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.”50 But the ultimate burden of proof should remain on the government, as it was in both *O’Brien* and *Renton*. As stated in *O’Brien*, “In conclusion, we find that because of the Government’s substantial interest . . ., a sufficient government interest has been shown to justify O’Brien’s conviction.”51 In *Renton*, the Court noted that while the “Court of Appeals imposed on the city an unnecessarily rigid burden of proof,” the burden still remained on Renton, which was “entitled to rely on the experiences of Seattle and other cities, and in particular

47 *Id.* at 460-66 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., as to Part II, dissenting).

48 *Id.* at 440-43 (plurality opinion of O’Connor, J., joined by Rehnquist, C.J., and Scalia & Thomas, JJ.). See also Center for Fair Public Policy v. Maricopa County, Arizona, 336 F.3d 1153, 1159-62 (9th Cir. 2003), *cert. denied*, 541 U.S. 973 (2004) (statute requiring sexually oriented businesses to close at 1 a.m. constitutional under *Alameda Books* as substantially related to reducing negative secondary effects of late-night operations of such businesses).

49 *Pap’s A.M.*, 529 U.S. at 313-15 (Souter, J., concurring in part and dissenting in part).


51 *O’Brien*, 381 U.S. at 382.
on the ‘detailed findings’ summarized in the Washington Supreme Court’s *Northern Cinema* opinion, in enacting its adult theater zoning ordinance.” It appears in *Alameda Books* that the ultimate burden does remain on the government even in Justice O’Connor’s opinion. Justice O’Connor stated, “If plaintiff succeed in casting doubt on the municipality’s rationale . . . either by demonstrating that the municipality’s evidence does not support its rationale or by furnishing evidence that disputes the municipality’s factual findings, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies the ordinance.”

For recent adult entertainment cases, see, e.g., *Entertainment Productions Inc. v. Shelby County, Tennessee*, 721 F.3d 729 (6th Cir. 2013) (governments may rely on “land-use studies, prior judicial opinions, surveys of real-estate professionals (such as real-estate appraisers), anecdotal testimony, police reports, and other direct and circumstantial evidence” that do not satisfy the scientific validity requirements of *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993)). But see *Annex Books, Inc. v. City of Indianapolis*, 740 F.3d 1136 (7th Cir. 2014) (city cannot force adult bookstores to close overnight, if other businesses allowed to remain open, because its claim of “fewer armed robberies” was not statistically significant); *Foxxy Ladyz Adult World, Inc. v. Village of Dix, Illinois*, 779 F.3d 706 (7th Cir. 2015) (village must present evidence that nude dancing has adverse secondary effects on “health, welfare, and safety of its citizens”). Cf. *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015) (city must present evidence that its ban on soliciting funds at all intersections is not substantially too burdensome response to traffic safety/flow concerns). But see *Luce v. Town of Campbell*, 872 F.3d 512 (7th Cir. 2017) (ban on signs displayed on overpasses constitutional; it does not take a double-blind empirical study or linear regression analysis to know overhead signs tend to cause some drivers to slow down to read the signs, causing traffic safety/flow problems).

### § 7.3 Indecency Involving Use of Children

Child pornography refers primarily to the use of children in the production of pornography, including live performances and depictions of children engaging in sexual acts or displays. Such material falls into the category of “unprotected speech,” as noted at § 6.1. A related concern involves “indecent” or “patently offensive” material that is considered harmful for children to hear or view. Such material is not “unprotected speech,” but rather is analyzed under standard First Amendment doctrine with the understanding that the state has a compelling government interest with preventing such material from being viewed by children, as discussed at § 7.4.

---

52 *Renton*, 475 U.S. at 50-51.


Justices during both the instrumentalist era and the modern natural law era have recognized that the exploitive use of children in the production of pornographic material continues to be a serious national problem. See, e.g., New York v. Ferber, 458 U.S. 747, 749 & nn.1-2 (1982). The Court has held that child pornography is not protected speech, and although governments may not criminalize possession of obscene material depicting adult activity in the home, a state may bar the possession and viewing of child pornography even in the home. Further, the advertising or selling of child pornography can be barred to advance the state's interest in preventing sexual exploitation of children, the Court explaining that closing the channels of communication is necessary to control initial production of the material.

Given that the purpose of the ban on distribution of materials depicting sexual acts or displays of children is to protect the sexual exploitation of children, the Court held in 1982 in New York v. Ferber that the Miller test is modified so as not to require that the sexual depiction appeal to the prurient interest, or that the conduct be portrayed in a patently offensive manner, or that the material need be considered as a whole. Thus, isolated depictions of children engaging in sexual acts or displays can constitute child pornography under Ferber. Further, while under Miller, material that “does no more than arouse, ‘good, old fashioned, healthy’ interest in sex” cannot be obscene, the Court has never indicated that any form of child pornography could meet that test.

New York v. Ferber

Justice WHITE delivered the opinion of the Court.

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

In recent years, the exploitive use of children in the production of pornography has become a serious national problem. The Federal Government and 47 States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States Congress have also passed legislation prohibiting the distribution of such materials; 20 States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.


New York is one of the 20. In 1977, the New York Legislature enacted Article 263 of its Penal Law. N.Y. Penal Law, Art. 263 (McKinney 1980). Section 263.05 criminalizes as a class C felony the use of a child in a sexual performance: “A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.” A “[s]exual performance” is defined as “any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.” § 263.00(1). “Sexual conduct” is in turn defined in § 263.00(3): “‘Sexual conduct’ means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.” A performance is defined as “any play, motion picture, photograph or dance” or “any other visual representation exhibited before an audience.” § 263.00(4).

At issue in this case is § 263.15, defining a class D felony: “A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.” To “promote” is also defined: “‘Promote’ means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.” § 263.00(5). A companion provision bans only the knowing dissemination of obscene material. § 263.10.

This case arose when Paul Ferber, the proprietor of a Manhattan bookstore specializing in sexually oriented products, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young boys masturbating. Ferber was indicted on two counts of violating § 263.10 and two counts of violating § 263.15, the two New York laws controlling dissemination of child pornography. After a jury trial, Ferber was acquitted of the two counts of promoting an obscene sexual performance, but found guilty of the two counts under § 263.15, which did not require proof that the films were obscene. Ferber's convictions were affirmed without opinion by the Appellate Division of the New York State Supreme Court. 424 N.Y.S.2d 967 (1980).

The Miller standard, like its predecessors, was an accommodation between the State's interests in protecting the “sensibilities of unwilling recipients” from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.

First. It is evident beyond the need for elaboration that a State's interest in “safeguarding the physical and psychological well-being of a minor” is “compelling.” Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982). “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.” Prince v. Massachusetts, 321 U.S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at
protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince v. Massachusetts*, [321 U.S. 158 (1944)], the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg v. New York*, [390 U.S. 629 (1968)], we sustained a New York law protecting children from exposure to nonobscene literature. Most recently, we held that the Government's interest in the “well-being of its youth” justified special treatment of indecent broadcasting received by adults as well as children. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern: “[T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.” 1977 N.Y.Laws, ch. 910, § 1.

We shall not second-guess this legislative judgment. Respondent has not intimated that we do so. Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combating “child pornography.” The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

*Second.* The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions. Cf. *United States v. Darby*, 312 U.S. 100 (1941) (upholding federal restrictions on sale of goods manufactured in violation of Fair Labor Standards Act).

Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach
properly accommodates its interests, it does not follow that the First Amendment prohibits a State from going further. The Miller standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be “patently offensive” in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. “It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.” Memorandum of Assemblyman Lasher in Support of § 263.15. We therefore cannot conclude that the Miller standard is a satisfactory solution to the child pornography problem.

Third. The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. “It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.” Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949). We note that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws has not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. As a state judge in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized. Simulation outside of the prohibition of the statute could provide another alternative. Nor is there any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more “realistic” by utilizing or photographing children.

the target, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), a libelous publication is not protected by the Constitution. Beauharnais v. Illinois, 343 U.S. 250 (1952). Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combated requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age. The category of “sexual conduct” proscribed must also be suitably limited and described.

The test for child pornography is separate from the obscenity standard enunciated in Miller, but may be compared to it for the purpose of clarity. The Miller formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. Smith v. California, 361 U.S. 147 (1959); Hamling v. United States, 418 U.S. 87 (1974).

Section 263.15’s prohibition incorporates a definition of sexual conduct that comports with the above-stated principles. The forbidden acts to be depicted are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.” § 263.00(3). The term “lewd exhibition of the genitals” is not unknown in this area and, indeed, was given in Miller as an example of a permissible regulation. 413 U.S., at 25. A performance is defined only to include live or visual depictions: “any play, motion picture, photograph or dance . . . [or] other visual representation exhibited before an audience.” § 263.00(4). Section 263.15 expressly includes a scienter requirement.

It remains to address the claim that the New York statute is unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific, or educational value or material which does not threaten the harms sought to be combated by the State.
The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is “strong medicine” and have employed it with hesitation, and then “only as a last resort.” Broadrick, 413 U.S., at 613. We have, in consequence, insisted that the overbreadth involved be “substantial” before the statute involved will be invalidated on its face.

Applying these principles, we hold that § 263.15 is not substantially overbroad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. New York, as we have held, may constitutionally prohibit dissemination of material specified in § 263.15. While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on “lewd exhibition[s] of the genitals.” Under these circumstances, § 263.15 is “not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.” Broadrick v. Oklahoma, 413 U.S., at 615-616.

Justice BLACKMUN concurs in the result.

Justice O'CONNOR, concurring.

I write separately to stress that the Court does not hold that New York must except “material with serious literary, scientific, or educational value” from its statute. The Court merely holds that, even if the First Amendment shelters such material, New York's current statute is not sufficiently overbroad to support respondent's facial attack. The compelling interests identified in today's opinion suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph “edifying” or “tasteless.” The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.

On the other hand, it is quite possible that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court. For example, clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks, might not involve the type of sexual exploitation and abuse targeted by New York's statute. Nor might such depictions feed the poisonous “kiddie porn” market that New York and other States have attempted to regulate.
Similarly, pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of the National Geographic, might not trigger the compelling interests identified by the Court. It is not necessary to address these possibilities further today, however, because this potential overbreadth is not sufficiently substantial to warrant facial invalidation of New York's statute.

Justice BRENNAN, with whom Justice MARSHALL joins, concurring in the judgment.

I agree with much of what is said in the Court's opinion. As I made clear in the opinion I delivered for the Court in Ginsburg v. New York, 390 U.S. 629 (1968), the State has a special interest in protecting the well-being of its youth. Id., at 638-641. This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material. Ginsburg v. New York, supra, at 637, 638, n.6, 642-643, n.10. I also agree with the Court that the "tiny fraction," ante, at 3363, of material of serious artistic, scientific, or educational value that could conceivably fall within the reach of the statute is insufficient to justify striking the statute on the grounds of overbreadth. See Broadrick v. Oklahoma, 413 U.S. 601, 630 (1973) (Brennan, J., dissenting).

But in my view application of § 263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment. As the Court recognizes, the limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly "slight social value," and the State has a compelling interest in their regulation. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942). The First Amendment value of depictions of children that are in themselves serious contributions to art, literature, or science, is, by definition, simply not "de minimis." See ante, at 3355-3357. At the same time, the State's interest in suppression of such materials is likely to be far less compelling. For the Court's assumption of harm to the child resulting from the "permanent record" and "circulation" of the child's "participation," ante, at 3355, lacks much of its force where the depiction is a serious contribution to art or science. The production of materials of serious value is not the "low-profile, clandestine industry" that according to the Court produces purely pornographic materials. See ante, at 3356. In short, it is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed "material outside the protection of the First Amendment." See ante, at 3358.

I, of course, adhere to my view that, in the absence of exposure, or particular harm, to juveniles or unconsenting adults, the State lacks power to suppress sexually oriented materials. See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting). With this understanding, I concur in the Court's judgment in this case.

Justice STEVENS, concurring in the judgment.

Two propositions seem perfectly clear to me. First, the specific conduct that gave rise to this criminal prosecution is not protected by the Federal Constitution; second, the state statute that
respondent violated prohibits some conduct that is protected by the First Amendment. The critical question, then, is whether this respondent, to whom the statute may be applied without violating the Constitution, may challenge the statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the Court. I agree with the Court's answer to this question but not with its method of analyzing the issue.

I would refuse to apply overbreadth analysis for reasons unrelated to any prediction concerning the relative number of protected communications that the statute may prohibit. Specifically, I would postpone decision of my hypothetical case until it actually arises.

My reasons for avoiding overbreadth analysis in this case are more qualitative than quantitative. When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.

In 1990, the Court held in *Osborne v. Ohio* that as long as a state's law requires proof of *scienter*, i.e., intent or recklessness, it may bar the possession and viewing of child pornography which involves a lewd exhibition or a graphic focus on the genitals, as long as the statute is sufficiently narrowly tailored. The statute in *Osborne* was narrowly tailored because it did not apply to nude photos where the person depicted is “the child or the ward of the person charged,” i.e., unobjectionable family photos, or if “the material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergymen, prosecutor, judge, or other person having a proper interest in the material or performance.” The Court explained that states have a compelling interest in the physical and psychological well-being of minors, can determine that using children in pornography is harmful, and can proscribe possession because it is difficult, if not impossible, to solve the child pornography problem by attacking only production and distribution.

The Court’s concern with a *scienter* requirement was evidenced in *United States v. X-Citement Video, Inc.*, where the Court held that the term “knowingly” in the statutes being reviewed extended both to the sexually explicit nature of the material and the age of the performer. This made it easier to uphold the statute, since the *scienter* requirement applied to both the age of the performer and the nature of the material.

---

62 Id. at 109-11.
For *Ferber* to apply, children must actually be involved. In *Ashcroft v. The Free Speech Coalition*, 64 the Court considered whether the Child Pornography Prevention Act of 1996 was unconstitutionally overbroad insofar as it criminalized the production or possession of images that appear to depict minors engaged in sexual intercourse, even though those images may have been computer images. Because no actual minors were involved in the case, the Court rejected an analysis based on viewing the speech as “unprotected,” and instead applied standard First Amendment analysis. The Court held the government did not show a strong enough connection between the thoughts that might be generated and subsequent illegal actions that would justify a restriction based on a “secondary effects” rationale of discouraging pedophiles from engaging in illegal conduct.

In a subsequent pandering and solicitation Act, 18 U.S.C. § 2252A (2003), Congress focused on prohibiting the expression of an intent to distribute or to acquire what was believed to be child pornography. In *United States v. Williams*, 65 the Court upheld the Act against an overbreadth and vagueness challenge. The Act punished any person who knowingly promotes or solicits in interstate commerce any material in a manner that reflects a belief or is intended to cause another to believe that the material contains an obscene visual depiction of a minor engaged in sexually explicit conduct or an actual minor engaged in such conduct. A 7-2 Court upheld the law as it was limited to regulating the recommendation of a particular piece of purported child pornography with the intent of initiating a transfer. Nor was the Act vague since it required a jury make findings on clear questions of fact, i.e., that the defendant hold the belief and make a statement that reflects a belief that the material is child pornography, or that he communicate in a manner intended to cause another so to believe. Justice Stevens concurred with Justice Breyer, saying that when the Act is interpreted to save its constitutionality, it is limited to situations where materials are advertised, promoted, presented, distributed, or solicited with a lascivious purpose – that is, with the intention of inciting sexual arousal. Justice Souter dissented, with Justice Ginsburg. Souter found overbreadth because the Act could apply to a proposal with regard to a representation which did not involve an actual child. He agreed that a defendant could be convicted where there was no such photograph because no protected speech would exist. However, where a picture is a simulation of a child, the proposal would be for a transaction that could not itself be made criminal under *Free Speech Coalition*.

On the issue of regulating child pornography, see also People v. Kent, 970 N.E.2d 833 (N.Y. 2012) (merely accessing Web images of child pornography, which the user does not intentionally store, but which are automatically stored in the computer, does not constitute procurement of child pornography); People v. Gumila, 981 N.E.2d 507 (Ill. App. – 2nd Dist., 2012) (images automatically stored not enough to prove possession, but can be used as evidence that the defendant viewed the original images and intended that they be stored in the cache, from which he could view them at a later time). See generally United States v. Fugit, 703 F.3d 248 (4th Cir. 2102) (defendant who induced preteen girls into having sexually inappropriate telephone and online conversations with other children)

---

65 128 S. Ct. 1830, 1841-47 (2008); id. at 1847-48 (Stevens, J., joined by Breyer, J., concurring); id. at 1854-55 (Souter, J., joined by Ginsburg, J., dissenting).
him violated federal law making it a crime to entice a minor to engage in “sexual activity” even though there was no proof he intended to engage in physical conduct with the victims); United States v. Howard, 766 F.3d 414 (5th Cir. 2014) (elaborate discussion of what “grooming” conduct, in absence of firm plans to meet, is sufficient to establish “substantial step” to prove enticement; sending sexual explicit photo to minor girl may be enough, but not to intermediary to give to girl).

A related issue is the extent to which victims of child pornography can sue viewers in restitution for harm caused by the viewing, even when the viewer and victim have no pre-existing relationship. On this issue, see Paroline v. United States, 134 S. Ct. 1710 (2014) (restitution for pornography possession under 18 U.S.C. § 2259 should be awarded in amount comporting with defendant’s role in “causal process” underlying victim’s losses, those losses possibly including $3 million in lost income and $500,000 in future treatment and counseling in dealing with knowledge filmed sexual assault has been, and continues to be, viewed by thousands of persons online; imposing all these losses on single or a few defendants actually convicted would likely be “excessive”; on the other hand, defendants should be “made aware, through the concrete mechanism of restitution, of the impact of child-pornography possession on victims,” and thus award should not be “trivial”); id. at 1730 (Roberts, C.J., joined by Scalia and Thomas, J.J., dissenting) (by being one of thousands who viewed the post, defendant did not literally “cause” the harm, so no damages should be awarded; Congress should redraft statute); id. at 1735 (Sotomayor, J., dissenting) (by viewing the post the defendant did “cause” the harm, and single or few convicted defendants should be jointly and severally liable under § 2259 for all of the victim’s losses). See also United States v. Dunn, 777 F.3d 1171, 1180-81 (10th Cir. 2015) (district court must use multifactored approach to determine defendant’s share of responsibility for posting child pornography picture to shared file).

§ 7.4 Indecency Not Involving Use of Children, But Children May Be in Audience

Unlike obscenity, which eventually became reasonably well-defined in Miller, excerpted at § 7.1, “indecent” has no single authoritative definition. It is a very broad term, as it can relate to anything contrary to “common propriety” or “deprave the morals” in the direction of “impure sexual relations.” Similarly, what is “patently offensive” speech is not subject to precise definition. As the Court noted in Reno v. American Civil Liberties Union, the term “patently offensive” is qualified only to the extent that it involves "sexual or excretory activities or organs" taken "in context" and "measured by contemporary community standards." As for any differences between “indecent” and “patently offensive” speech, the Court "assumed arguendo" in Reno that the "patently offensive" standard was “synonymous” with the "indecent" standard."

Black’s Law Dictionary (6th Ed., West Publishing Co. 1999) opens its material on indecency by the words “offensive to common propriety; offending against modesty or delicacy; grossly vulgar.” In Dunlop v. United States, 165 U.S. 486, 501 (1896), there is a reference to indecency as calculated to “deprave the morals” in the direction of “impure sexual relations.”


Id. at 873.
The government can make some indecency unlawful under an intermediate scrutiny approach based on the content-neutral reason of preventing its being viewed by unwilling listeners, such as public nudity.\(^{69}\) Further, with respect to broadcast television and radio regulation, which triggers only intermediate scrutiny for content-based regulations, not strict scrutiny, as discussed at § 9.1, the Court was willing in \textit{FCC v. Pacifica Foundation},\(^{70}\) excerpted at § 9.1, to allow time restrictions on broadcasts that included indecent swear words because radio broadcasts are uniquely accessible to children. In addition, without regard to broadcast regulation, an unwilling listeners argument might have triggered intermediate review in \textit{Pacifica} in any event.

In 1968, in \textit{Ginsberg v. New York},\(^{71}\) the Court noted that the test for what is “unprotected” obscene speech is slightly different for children, rather than adults. Applied literally, regulations that protect children from speech obscene to them would trigger no further First Amendment review, but merely rational review under the Equal Protection Clause or Due Process Clause. This \textit{Ginsburg} doctrine in 1968 of a different test for obscenity as applied to children, as opposed to adults, has not been further developed since the Court agreed in 1973 in \textit{Miller} on a general test for obscene material in the context of adult pornography. In 1997, in \textit{Reno v. American Civil Liberties Union},\(^{72}\) the Court focused on how the statute at issue in \textit{Ginsburg} was narrowly tailored to meet intermediate scrutiny in any event, thus minimizing the rational review aspect of that case.

Even in the absence of reasons justifying less than strict scrutiny review, the Court has indicated that the government has a compelling government interest in protecting children from viewing indecent or patently offensive material. However, consistent with strict scrutiny, the government must adopt the “least restrictive alternative” in order to take steps to avoid infringing the free speech rights of adults, while protecting children from indecent and patently offensive material. Thus, even while protecting children from indecency, the state may not reduce the adult population to reading only what is fit for children.\(^{73}\) For example, wearing a jacket in a courthouse corridor that contained the phrase “Fuck the Draft” could not be the basis of a conviction for disturbing the peace, when there was no evidence of any disturbance, even if some child might read the jacket.\(^{74}\)

The post-instrumentalist Court has reviewed indecency limits with respect to live performances and electronic communications, including a number of cases involving the Internet. An early case of this

\(^{69}\) See, e.g., \textit{Erznoznik v. City of Jacksonville}, 422 U.S. 205, 206-07 (1995) (noting that the Court has been willing to permit banning public nudity to protect unwilling parties).


\(^{71}\) 390 U.S. 629, 633 (1968).


kind is *Sable Communications of California, Inc. v. FCC.* There the Court struck down a congressional ban intended to protect children from indecent dial-a-porn telephone services because the ban also affected adults and yet was not limited to *Miller*-defined obscenity. The Court distinguished *FCC v. Pacifica Foundation* on the grounds that affirmative steps would have to be taken to access the service, rather than the intrusion just coming in when the radio or television station was turned on. Thus, a content-neutral, unwilling listener intermediate standard could not apply. The Court did suggest that if a total ban were the only effective way to protect juveniles from such calls, the law might be upheld despite its invasion of adult First Amendment rights.

More recent legislative efforts to deal with child pornography at the national level have concentrated on the Internet. The problem for lawmakers has been to erect barriers that protect children and yet do not unconstitutionally interfere with the free speech rights of adults.

The first of these cases to come before the Supreme Court was *Reno v. American Civil Liberties Union.* There the Court struck down portions of the Telecommunications Act of 1996 that prohibited (1) the knowing transmission to a person under 18 years of age any obscene or indecent message or any patently offensive depiction of sexual or excretory activities or organs, or (2) knowingly permitting any telecommunications facility under a person’s control to be used for such activity. Justice Stevens wrote for the Court that the Act was a content-based blanket restriction on speech and, thus, could not be analyzed under an intermediate standard of review, as in *Pacifica,* excerpted at § 9.1, or *Renton,* excerpted at § 7.2. The Act could not pass strict scrutiny because it lacked the necessary precision and, thus, was not narrowly tailored. In support of this conclusion, Justice Stevens provided several examples. He pointed out, for example, that knowledge that one or more members of a 100-person group will be minor would burden communication among adults. And he added that the district court had found that at the time of trial existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults. Justice Stevens explained, “In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.” Justice O’Connor, with Chief Justice Rehnquist, agreed that the Act violated the First Amendment because with current technology a speaker could not be reasonably assured that his or her speech could be confined in an “adult zone.” However, she would uphold the Act insofar as it applied to indecent speech in communications between an adult and one or more minors.

---


78 Id. at 874.

79 Id. at 886-87 (O’Connor, J., joined by Rehnquist, C.J., concurring in the judgment in part and dissenting in part).
The second case in a series of five cases to come before the Court dealing with child access to indecent material on the Internet was *United States v. Playboy Entertainment Group, Inc.*

*United States v. Playboy Entertainment Group, Inc.*
529 U.S. 803 (2000)

Justice KENNEDY delivered the opinion of the Court.

This case presents a challenge to § 505 of the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 136, 47 U.S.C. § 561 (1994 ed., Supp. III). Section 505 requires cable television operators who provide channels “primarily dedicated to sexually-oriented programming” either to “fully scramble or otherwise fully block” those channels or to limit their transmission to hours when children are unlikely to be viewing, set by administrative regulation as the time between 10 p.m. and 6 a.m. 47 U.S.C. § 561(a) (1994 ed., Supp. III); 47 CFR § 76.227 (1999). Even before enactment of the statute, signal scrambling was already in use. Cable operators used scrambling in the regular course of business, so that only paying customers had access to certain programs. Scrambling could be imprecise, however; and either or both audio and visual portions of the scrambled programs might be heard or seen, a phenomenon known as “signal bleed.” The purpose of § 505 is to shield children from hearing or seeing images resulting from signal bleed.

To comply with the statute, the majority of cable operators adopted the second, or “time channeling,” approach. The effect of the widespread adoption of time channeling was to eliminate altogether the transmission of the targeted programming outside the safe harbor period in affected cable service areas. In other words, for two-thirds of the day no household in those service areas could receive the programming, whether or not the household or the viewer wanted to do so.

Appellee Playboy Entertainment Group, Inc., challenged the statute as unnecessarily restrictive content-based legislation violative of the First Amendment. After a trial, a three-judge District Court concluded that a regime in which viewers could order signal blocking on a household-by-household basis presented an effective, less restrictive alternative to § 505. 30 F.Supp.2d 702, 719 (D.Del.1998). Finding no error in this conclusion, we affirm.

Two essential points should be understood concerning the speech at issue here. First, we shall assume that many adults themselves would find the material highly offensive; and when we consider the further circumstance that the material comes unwanted into homes where children might see or hear it against parental wishes or consent, there are legitimate reasons for regulating it. Second, all parties bring the case to us on the premise that Playboy's programming has First Amendment protection. As this case has been litigated, it is not alleged to be obscene; adults have a constitutional right to view it; the Government disclaims any interest in preventing children from seeing or hearing it with the consent of their parents; and Playboy has concomitant rights under the First Amendment to transmit it. These points are undisputed.

The speech in question is defined by its content; and the statute which seeks to restrict it is content based. Section 505 applies only to channels primarily dedicated to “sexually explicit adult
programming or other programming that is indecent.” The statute is unconcerned with signal bleed from any other channels. See 945 F. Supp., at 785 (“[Section 505] does not apply when signal bleed occurs on other premium channel networks, like HBO or the Disney Channel”). The overriding justification for the regulation is concern for the effect of the subject matter on young viewers. Section 505 is not “justified without reference to the content of the regulated speech.” Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). It “focuses only on the content of the speech and the direct impact that speech has on its listeners.” Boos v. Barry, 485 U.S. 312, 321 (1988) (opinion of O'Connor, J.). This is the essence of content-based regulation.

Not only does § 505 single out particular programming content for regulation, it also singles out particular programmers. The speech in question was not thought by Congress to be so harmful that all channels were subject to restriction. Instead, the statutory disability applies only to channels “primarily dedicated to sexually-oriented programming.” 47 U.S.C. § 561(a) (1994 ed., Supp. III). One sponsor of the measure even identified appellee by name. See 141 Cong. Rec. 15587 (1995) (statement of Sen. Feinstein) (noting the statute would apply to channels “such as the Playboy and Spice channels”). Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles. Section 505 limited Playboy's market as a penalty for its programming choice, though other channels capable of transmitting like material are altogether exempt.

The effect of the federal statute on the protected speech is now apparent. It is evident that the only reasonable way for a substantial number of cable operators to comply with the letter of § 505 is to time channel, which silences the protected speech for two-thirds of the day in every home in a cable service area, regardless of the presence or likely presence of children or of the wishes of the viewers. According to the District Court, “30 to 50% of all adult programming is viewed by households prior to 10 p.m.,” when the safe-harbor period begins. 30 F. Supp.2d, at 711. To prohibit this much speech is a significant restriction of communication between speakers and willing adult listeners, communication which enjoys First Amendment protection. It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.

Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. Ibid. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative. Reno, 521 U.S., at 874 (“[The CDA's Internet indecency provisions'] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve”); Sable Communications, supra, at 126 (“The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest”). To do otherwise would be to restrict speech without an adequate justification, a course the First Amendment does not permit.
In *Sable Communications*, for instance, the feasibility of a technological approach to controlling minors' access to “dial-a-porn” messages required invalidation of a complete statutory ban on the medium. 492 U.S., at 130-131. And, while mentioned only in passing, the mere possibility that user-based Internet screening software would “soon be widely available” was relevant to our rejection of an overbroad restriction of indecent cyberspeech. Reno, supra, at 876-877. Compare *Rowan v. Post Office Dept.*, 397 U.S. 728, 729-730 (1970) (upholding statute “whereby any householder may insulate himself from advertisements that offer for sale ‘matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative’” (quoting then 39 U.S.C. § 4009(a) (1964 ed., Supp. IV))), with *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 75 (1983) (rejecting blanket ban on the mailing of unsolicited contraceptive advertisements). Compare also *Ginsberg v. New York*, 390 U.S. 629, 631 (1968) (upholding state statute barring the sale to minors of material defined as “obscene on the basis of its appeal to them”), with *Butler v. Michigan*, 352 U.S. 380, 381 (1957) (rejecting blanket ban of material “tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth” (quoting then Mich. Penal Code § 343)). Each of these cases arose in a different context – *Sable Communications* and *Reno*, for instance, also note the affirmative steps necessary to obtain access to indecent material via the media at issue – but they provide necessary instruction for complying with accepted First Amendment principles.

Our zoning cases, on the other hand, are irrelevant to the question here. *Post*, at 1899 (Breyer, J., dissenting) (citing *Renton v. Playtime Theatres*, Inc., 475 U.S. 41 (1986), and *Young v. American Mini Theatres*, Inc., 427 U.S. 50 (1976)). We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech. Reno, supra, at 867-868; *Boos*, 485 U.S., at 320-321. The statute now before us burdens speech because of its content; it must receive strict scrutiny.

There is, moreover, a key difference between cable television and the broadcasting media, which is the point on which this case turns: Cable systems have the capacity to block unwanted channels on a household-by-household basis. The option to block reduces the likelihood, so concerning to the Court in *Pacifica*, supra, at 744, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem. The corollary, of course, is that targeted blocking enables the Government to support parental authority without affecting the First Amendment interests of speakers and willing listeners-listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests. This is not to say that the absence of an effective blocking mechanism will in all cases suffice to support a law restricting the speech in question; but if a less restrictive means is available for the Government to achieve its goals, the Government must use it.

When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals. The Government has not met that burden here. In support of its position, the Government cites empirical
evidence showing that § 504, as promulgated and implemented before trial, generated few requests for household-by-household blocking. Between March 1996 and May 1997, while the Government was enjoined from enforcing § 505, § 504 remained in operation. A survey of cable operators determined that fewer than 0.5% of cable subscribers requested full blocking during that time. Id., at 712. The uncomfortable fact is that § 504 was the sole blocking regulation in effect for over a year; and the public greeted it with a collective yawn.

The District Court was correct to direct its attention to the import of this tepid response. Placing the burden of proof upon the Government, the District Court examined whether § 504 was capable of serving as an effective, less restrictive means of reaching the Government's goals. Id., at 715, 718-719. It concluded that § 504, if publicized in an adequate manner, could be. Id., at 719-720.

The District Court employed the proper approach. When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. Greater New Orleans Broadcasting Assn., Inc. v. United States, 527 U.S. 173, 183 (1999) (“[T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction”); Reno, 521 U.S., at 879 (“The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . .”); Edenfield v. Fane, 507 U.S. 761, 770-771 (1993) (“[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree”); Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (“[T]he State bears the burden of justifying its restrictions . . . .”); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509 (1969) (“In order for the State . . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”). When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed. “Content-based regulations are presumptively invalid,” R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992), and the Government bears the burden to rebut that presumption.

This is for good reason. “[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.” Speiser v. Randall, 357 U.S. 513, 525 (1958). Error in marking that line exacts an extraordinary cost. It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control.

When a student first encounters our free speech jurisprudence, he or she might think it is influenced by the philosophy that one idea is as good as any other, and that in art and literature objective standards of style, taste, decorum, beauty, and esthetics are deemed by the Constitution to be inappropriate, indeed unattainable. Quite the opposite is true. The Constitution no more enforces a relativistic philosophy or moral nihilism than it does any other point of view. The Constitution exists
precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.

With this burden in mind, the District Court explored three explanations for the lack of individual blocking requests. 30 F. Supp. 2d, at 719. First, individual blocking might not be an effective alternative, due to technological or other limitations. Second, although an adequately advertised blocking provision might have been effective, § 504 as written did not require sufficient notice to make it so. Third, the actual signal bleed problem might be far less of a concern than the Government at first had supposed. Ibid.

To sustain its statute, the Government was required to show that the first was the right answer. According to the District Court, however, the first and third possibilities were “equally consistent” with the record before it. Ibid. As for the second, the record was “not clear” as to whether enough notice had been issued to give § 504 a fighting chance. Ibid. The case, then, was at best a draw. Unless the District Court's findings are clearly erroneous, the tie goes to free expression.

Justice THOMAS, concurring.

It would seem to me that, with respect to at least some of the cable programming affected by § 505 of the Telecommunications Act of 1996, the Government has ample constitutional and statutory authority to prohibit its broadcast entirely. A governmental restriction on the distribution of obscene materials receives no First Amendment scrutiny. Roth v. United States, 354 U.S. 476, 485 (1957). Though perhaps not all of the programming at issue in the case is obscene as this Court defined the term in Miller v. California, 413 U.S. 15, 24 (1973), one could fairly conclude that, under the standards applicable in many communities, some of the programming meets the Miller test.

However, . . . this case has been litigated on the assumption that the programming at issue is not obscene, but merely indecent. We have no factual finding that any of the materials at issue are, in fact, obscene. Indeed, the District Court described the materials as indecent but not obscene. 945 F. Supp. 772, 774, n.4 (D. Del.1996). The Government does not challenge that characterization in this Court, Tr. of Oral Arg. 9-10, but instead asks this Court to ratify the statute on the assumption that this is protected speech. I am unwilling, in the absence of factual findings or advocacy of the position, to rely on the view that some of the relevant programming is obscene.

Justice BREYER, with whom THE CHIEF JUSTICE, Justice O'CONNOR, and Justice SCALIA join, dissenting.

The basic, applicable First Amendment principles are not at issue. The Court must examine the statute before us with great care to determine whether its speech-related restrictions are justified by a “compelling interest,” namely, an interest in limiting children's access to sexually explicit material. In doing so, it recognizes that the Legislature must respect adults' viewing freedom by “narrowly
tailoring” the statute so that it restricts no more speech than necessary, and choosing instead any alternative that would further the compelling interest in a “less restrictive” but “at least as effective” way. See ante, at 1886; Reno v. American Civil Liberties Union, 521 U.S. 844, 874 (1997).

Applying these principles, the majority invalidates § 505 for two reasons. It finds that (1) the “Government has failed to establish a pervasive, nationwide problem justifying its nationwide daytime speech ban,” ante, at 1891, and (2) the “Government . . . failed to prove” the “ineffective [ness]” of an alternative, namely, notified viewers requesting that the broadcaster of sexually explicit material stop sending it, ante, at 1891. In my view, the record supports neither reason.

The majority first concludes that the Government failed to prove the seriousness of the problem – receipt of adult channels by children whose parents did not request their broadcast. Ante, at 1889-1891. This claim is flat-out wrong. For one thing, the parties concede that basic RF scrambling does not scramble the audio portion of the program. 30 F. Supp. 2d, at 707. For another, Playboy itself conducted a survey of cable operators who were asked: “Is your system in full compliance with Section 505 (no discernible audio or video bleed)?” To this question, 75% of cable operators answered “no.” See Def. Exh. 254, 2 Record 2. Further, the Government's expert took the number of homes subscribing to Playboy or Spice, multiplied by the fraction of cable households with children and the average number of children per household, and found 29 million children are potentially exposed to audio and video bleed from adult programming. Def. Exh. 82, 10 Record 11-12. Even discounting by 25% for systems that might be considered in full compliance, this left 22 million children in homes with faulty scrambling systems. See id., at 12. And, of course, the record contains additional anecdotal evidence and the concerns expressed by elected officials, probative of a larger problem. See 30 F. Supp. 2d, at 709, and n.10; 141 Cong. Rec. 15586 (1995).

The majority's second claim – that the Government failed to demonstrate the absence of a “less restrictive alternative” – presents a closer question. The specific question is whether § 504's “opt-out” amounts to a “less restrictive,” but similarly practical and effective, way to accomplish § 505's child-protecting objective. As Reno tells us, a “less restrictive alternative[el]” must be “at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” 521 U.S., at 874.

The words I have just emphasized, “similarly” and “effective,” are critical. In an appropriate case they ask a judge not to apply First Amendment rules mechanically, but to decide whether, in light of the benefits and potential alternatives, the statute works speech-related harm (here to adult speech) out of proportion to the benefits that the statute seeks to provide (here, child protection).

These words imply a degree of leeway, however small, for the Legislature when it chooses among possible alternatives in light of predicted comparative effects. Without some such empirical leeway, the undoubted ability of lawyers and judges to imagine some kind of slightly less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being. As Justice Blackmun pointed out, a “judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.” Illinois Bd. of Elections v.
Socialist Workers Party, 440 U.S. 173, 188-189 (1979) (concurring opinion). Used without a sense of the practical choices that face legislatures, “the test merely announces an inevitable [negative] result, and the test is no test at all.” Id., at 188.

The majority, in describing First Amendment jurisprudence, scarcely mentions the words “at least as effective” – a rather surprising omission since they happen to be what this case is all about. But the majority does refer to Reno's understanding of less restrictive alternatives, ante, at 1886, and it addresses the Government's effectiveness arguments, ante, at 1891-1893. I therefore assume it continues to recognize their role as part of the test that it enunciates.

Unlike the majority, I believe the record makes clear that § 504's opt-out is not a similarly effective alternative. Section 504 (opt-out) and § 505 (opt-in) work differently in order to achieve very different legislative objectives. Section 504 gives parents the power to tell cable operators to keep any channel out of their home. Section 505 does more. Unless parents explicitly consent, it inhibits the transmission of adult cable channels to children whose parents may be unaware of what they are watching, whose parents cannot easily supervise television viewing habits, whose parents do not know of their § 504 “opt-out” rights, or whose parents are simply unavailable at critical times. In this respect, § 505 serves the same interests as the laws that deny children access to adult cabarets or X-rated movies. E.g., Del. Code Ann., Tit. 11, § 1365(i)(2) (1995); D.C.Code Ann. § 22-2001(b)(1)(B) (1996). These laws, and § 505, all act in the absence of direct parental supervision.

This legislative objective is perfectly legitimate. Where over 28 million school age children have both parents or their only parent in the work force, where at least 5 million children are left alone at home without supervision each week, and where children may spend afternoons and evenings watching television outside of the home with friends, § 505 offers independent protection for a large number of families. See U.S. Dept. of Education, Office of Research and Improvement, Bringing Education into the After-School Hours 3 (summer 1999). I could not disagree more when the majority implies that the Government's independent interest in offering such protection-preventing, say, an 8-year-old child from watching virulent pornography without parental consent-might not be “compelling.” Ante, at 1892-1893. No previous case in which the protection of children was at issue has suggested any such thing. Indeed, they all say precisely the opposite. See Reno, supra, at 865 (State has an “independent interest in the well-being of its youth”); Denver Area, 518 U.S., at 743; New York v. Ferber, 458 U.S. 747, 756-757 (1982); Ginsberg, 390 U.S., at 640; Prince v. Massachusetts, 321 U.S. 158, 165 (1944). They make clear that Government has a compelling interest in helping parents by preventing minors from accessing sexually explicit materials in the absence of parental supervision. See Ginsberg, supra, at 640.

The record, moreover, sets forth empirical evidence showing that the two laws are not equivalent with respect to the Government's objectives. As the majority observes, during the 14 months the Government was enjoined from enforcing § 505, “fewer than 0.5% of cable subscribers requested full blocking” under § 504. Ante, at 1888. The majority describes this public reaction as “a collective yawn,” ibid., adding that the Government failed to prove that the “yawn” reflected anything other than the lack of a serious signal bleed problem or a lack of notice which better information about § 504 might cure. The record excludes the first possibility – at least in respect to exposure, as
discussed above. See supra, at 1900-1901. And I doubt that the public, though it may well consider the viewing habits of adults a matter of personal choice, would “yawn” when the exposure in question concerns young children, the absence of parental consent, and the sexually explicit material here at issue. See ante, at 1896-1897 (Scalia, J., dissenting).

Neither is the record neutral in respect to the curative power of better notice. Section 504's opt-out right works only when parents (1) become aware of their § 504 rights, (2) discover that their children are watching sexually explicit signal “bleed,” (3) reach their cable operator and ask that it block the sending of its signal to their home, (4) await installation of an individual blocking device, and, perhaps (5) (where the block fails or the channel number changes) make a new request. Better notice of § 504 rights does little to help parents discover their children's viewing habits (step 2). And it does nothing at all in respect to steps 3 through 5. Yet the record contains considerable evidence that those problems matter, i.e., evidence of endlessly delayed phone call responses, faulty installations, blocking failures, and other mishaps, leaving those steps as significant § 504 obstacles. See, e.g., Deposition of J. Cavalier in Civ. Action No. 96-94, pp. 17-18 (D. Del., Dec. 5, 1997) (“It's like calling any utilities; you sit there, and you wait and wait on the phone. . . . It took three weeks, numerous phone calls . . . . Every time I call Cox Cable . . . I get different stories”); Telephonic Deposition of M. Bennett, id., at 10-11 (D. Del., Dec. 9, 1997) (“After two failed installations, I don't recall calling them again. I just said well, I guess this is something I'm going to have to live with”).

Further, the District Court's actual plan for “better notice” – the only plan that makes concrete the majority's “better notice” requirement – is fraught with difficulties. The District Court ordered Playboy to insist that cable operators place notice of § 504 in “inserts in monthly billing statements, barker channels . . . and on-air advertising.” 30 F. Supp. 2d, at 719. But how can one say that placing one more insert in a monthly billing statement stuffed with others, or calling additional attention to adult channels through a “notice” on “barker” channels, will make more than a small difference? More importantly, why would doing so not interfere to some extent with the cable operators' own freedom to decide what to broadcast? And how is the District Court to supervise the contracts with thousands of cable operators that are to embody this requirement?

Even if better notice did adequately inform viewers of their § 504 rights, exercise of those rights by more than 6% of the subscriber base would itself raise Playboy's costs to the point that Playboy would be forced off the air entirely, 30 F. Supp. 2d, at 713 – a consequence that would not seem to further anyone's interest in free speech. The majority, resting on its own earlier conclusion that signal bleed is not widespread, denies any likelihood that more than 6% of viewers would need § 504. But that earlier conclusion is unsound. The majority also relies on the fact that Playboy, presumably aware of its own economic interests, “is willing to incur the costs of an effective § 504.” Ante, at 1892. Yet that denial, as the majority admits, may simply reflect Playboy's knowledge that § 504, even with better notice, will not work. Section 504 is not a similarly effective alternative to § 505 (in respect to the Government's interest in protecting children), unless more than a minimal number of viewers actually use it; yet the economic evidence shows that if more than 6% do so, Playboy's programming would be totally eliminated. The majority provides no answer to this argument in its opinion – and this evidence is sufficient in and of itself to dispose of this case.
Of course, it is logically possible that “better notice” will bring about near perfect parental knowledge (of what children watch and § 504 opt-out rights), that cable operators will respond rapidly to blocking requests, and that still 94% of all informed parents will decide not to have adult channels blocked for free. But the probability that this remote possibility will occur is neither a “draw” nor a “tie.” Ante, at 1889. And that fact is sufficient for the Government to have met its burden of proof.

All these considerations show that § 504’s opt-out, even with the Court’s plan for “better notice,” is not similarly effective in achieving the legitimate goals that the statute was enacted to serve.

The third case in this series of five cases was Ashcroft v. American Civil Liberties Union (Ashcroft I). Decided in 2002, the Court’s narrow holding was that in defining material that is harmful to minors and displayed on the Internet for commercial purposes, Congress could refer to the prurient interest with respect to minors in view of “contemporary community standards” without thereby violating the First Amendment. As discussed below, a variety of reasons were given by different Justices in support of that conclusion. As might be expected, views most supportive of the government were taken by Chief Justice Rehnquist and Justices Scalia and Thomas. Justices O’Connor and Breyer lent close support to their views. Justice Kennedy was more protective of free speech, in company with Justices Souter and Ginsburg. Most speech protective of all was Justice Stevens, who dissented from a judgment supported by all other members of the Court.

In his opinion, Justice Thomas, with Chief Justice Rehnquist and Justice Scalia, relied primarily on an analogy to Hamling v. United States and Sable Communications of California, Inc. v. FCC. In these cases the Court had held that the First Amendment is not violated by requiring a speaker to observe varying community standards when disseminating material to a national audience. In response to the argument of the court below, and of Justices Kennedy and Stevens, that these cases were distinguishable because they involved use of the mails (Hamling) and the telephone (Sable), Justice Thomas replied that the opinions in those cases took no account of ability to target the release of material, and he saw no reason to believe that the practical effect of varying community standards would be greater here than under the federal obscenity statutes. In short, a publisher’s

80 535 U.S. 564, 566-73 (2002). The Act made illegal as harmful to minors “any communication, picture, image, graphic image, file, article, recording, writing or other matter of any kind that is obscene or that (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appear to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.” Id. at 570, citing 47 U.S.C. § 231(e)(6).

81 Id. at 575-78, citing Hamling, 418 U.S. 87 (1974); Sable, 492 U.S. 115 (1989).
burden does not change simply because it decides to distribute its material to every community in the nation. Finally, the challengers had failed at this stage in the litigation to prove that any overbreadth in the statute was not only real but, also, substantial as well. However, the injunction against enforcement of the statute entered by the court below should remain in effect while further action is considered by the lower courts.

Justice O’Connor agreed with the plurality that the challengers had not shown that the law is overbroad on its face simply because the Act defined what was harmful to minors in terms of local community standards. However, she foresaw future problems in evaluating the effect of using community standards, and she called for adoption of a national standard as a constitutionally permissible and reasonable basis for regulation of the Internet.82 Justice Breyer also concurred in Ashcroft I, saying that he believed Congress intended the statutory word “community” to refer to the Nation’s adult community, taken as a whole, and that would not violate the First Amendment. He relied on a report filed in the House of Representatives.83 Consistent with these concerns, in 2009, the Ninth Circuit adopted the view in United States v. Kilbride84 that a national contemporary community standards approach, rather than local community standards, should be applied to determining whether images transmitted over the Internet were obscene.

Justice Kennedy concurred only in the judgment in Ashcroft I, with Justices Souter and Ginsburg. He agreed that in its current state the record did not require holding the statute overbroad merely because community standards may vary across the country. However, he disagreed with Justice Thomas that the effect of using community standards should be resolved by analogy to Hamling and Sable because, said Justice Kennedy, each medium has distinctive attributes. In order to determine whether a law governing the Internet restricts substantially more speech than is justified, a number of questions must first be determined. They included how to judge material on the Internet “as a whole,” the venues in which prosecution can be brought, and the extent of speech covered, e.g., what is communication for commercial purposes, and must the material be offered for sale. Justice Kennedy was concerned with laws that have the practical effect of foreclosing an entire medium of expression, as might be true here for some speech. However, in view of Congress’ reasoned effort to comply with the Reno case, the judiciary should proceed with caution and identify any overbreadth with care before invalidating the Act.85

Justice Stevens, dissenting, found the Act invalid because even the narrowest version of the statute abridged a substantial amount of protected speech that many communities would not find harmful to minors. Because internet speakers cannot limit access to those specific communities, the statute

---

82 Id. at 586-88 (O’Connor, J., concurring in the judgment and concurring in part).

83 Id. at 589-90 (Breyer, J., concurring in the judgment).

84 584 F.3d 1240 (2009).

85 535 U.S. at 591-602 (Kennedy, J., joined by Souter & Ginsburg, JJ., concurring in the judgment).
is substantially overbroad regardless of how its other provisions are construed. Explaining, Justice Stevens said that the Act extends to a wide range of prurient appeals in advertisements, online magazines, internet-based bulletin boards and chat rooms, stock photo galleries, internet diaries, and a variety of illustrations encompassing a vast number of messages that are unobjectionable in most of the country and yet provide no “serious value” to minors. Concluding, Justice Stevens said, “It is quite wrong to allow the standards of a minority consisting of the least tolerant communities to regulate access to relatively harmless messages in this burgeoning market.”

In the fourth case in this series of cases, United States v. American Library Association, Inc., the Court rejected in 2003 a facial attack on the Children’s Internet Protection Act insofar as it denied federal funds to a public library unless it installed software to block images that constitute obscenity or child pornography, and prevented minors from obtaining access to material that is harmful to them. A plurality of four Justices, Chief Justice Rehnquist, and Justices O’Connor, Scalia, and Thomas, who have typically taken a more limited view of what is a public forum versus a nonpublic forum, as noted at §§ 3.1-3.2, concluded that Internet access in public libraries is neither a traditional nor a designated public forum because government creates a public forum only by intentionally opening a non-traditional forum for public discourse. However, libraries are more restricted. They provide Internet access to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. As a nonpublic forum, only rational review applied since the regulations did not involve viewpoint discrimination. Insofar as adults may be concerned, an adult patron need only ask a librarian to unblock it or disable the filter.

Justice Kennedy concurred on the grounds that a patron need only ask a librarian to unblock it or disable the filter, but did not agree that the library is a nonpublic forum, or that only a rational review standard applied. Justice Breyer, concurring, indicated his view that intermediate scrutiny should be applied based on the content-neutral reason of not interfering with “the discretion necessary to create, maintain, or select a library’s ‘collection.’” Justices Souter and Ginsburg dissented, applying strict scrutiny, viewing libraries as a public forum and the regulation as content-based. Justice Stevens also dissented, viewing the statute as an unconstitutional condition on users of public libraries.

86 Id. at 611-12 (Stevens, J., dissenting).


88 Id. at 214-15 (Kennedy, J., concurring in the judgment); id. at 217-18 (Breyer, J., concurring in the judgment).

89 Id. at 225-31 (Stevens, J., dissenting) (Souter and Ginsburg said they also agreed “in the main” with this rationale, id. at 231); id. at 231-33 (Souter, J., joined by Ginsburg, J., dissenting).
In 2004, in *Ashcroft v. American Civil Liberties Union (Ashcroft II)*, a 5-4 Court held the district court did not abuse its discretion in entering a preliminary injunction against the Child Online Protection Act. The Act imposed criminal penalties for knowingly posting on the Internet for commercial purposes material that is harmful to minors. Because the Act was a content-based speech restriction, strict scrutiny applied. In view of the existence of filters, which impose selective restrictions on speech at the receiving end, not universal restrictions at the source, the Court noted filters may well be more effective in protecting children than criminal penalties, especially since filters can protect against material posted in other countries, verification systems can be subject to evasion, and filters can be applied to all forms of Internet communication, including e-mail. Thus, factual issues remained for trial, thus the government had not yet met its burden to justify the Act.

Holmesian Chief Justice Rehnquist, along with Justices O'Connor and Breyer, dissented. They acknowledged that strict scrutiny applied, but concluded that the government had met their burden. Justice Breyer wrote in dissent, “Nonetheless, my examination of (1) the burdens the Act imposes on protected expression, (2) the Act's ability to further a compelling interest, and (3) the proposed "less restrictive alternatives" convinces me that the Court is wrong. I cannot accept its conclusion that Congress could have accomplished its statutory objective – protecting children from commercial pornography on the Internet – in other, less restrictive ways.” Justice Scalia also dissented, arguing strict scrutiny should not be applied. Relying on *Ginzburg v. United States*, a 1966 case, discussed at § 7.1.n.16, which predated both the *Miller* test for obscenity in 1973, excerpted at § 7.1, and the protection given commercial speech after 1976, discussed at § 9.2, he reiterated his long-held position that "[c]ommercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior." An issue related to protecting children from viewing “indecent” material concerns the process of editing motion pictures to remove various kinds of objectionable content in terms of images or words, and then selling or renting such “sanitized” versions of the original work. Under the Family Movie Act of 2005, Congress immunized filtering editors (which filter out objectionable content) from copyright infringement litigation, as long as it is clear to the viewer that the original work is being edited, limiting the “moral right” of authors and producers to their initial unedited work.

---


91  *Id.* at 677 (Breyer, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

92  *Id.* at 676 (Scalia, J., dissenting), *quoting Ginzburg* 383 U.S. at 467, 472.

In *Brown v. Entertainment Merchants Ass’n*,94 a 7-2 Court used a content-based, strict scrutiny analysis to hold unconstitutional a California law that banned the sale of “violent video games” to children. California could not show a direct causal link between violent video games and harm to minors, and thus the law was not directly related to any compelling government interest. It was also overbroad, and thus not the least burdensome effective alternative. Two Justices concurred, but suggested the Court should be more deferential to legislatures who “may be in a better position” to assess “the implications of new technology” and “the experience of playing violent video games just might be very different from reading a book, listening to the radio, or watching a movie or a television show.”95 In dissent, Justice Thomas said the “original understanding” of free speech does not include a right to speak to minors, or a right of minors to access speech, without going through the minor’s parents or guardians.96 In his dissent, Justice Breyer said that California has compelling interests in supporting parental child-rearing and the well-being of children; there is sufficient evidence that exposure to video games is associated with aggressive behavior; and permitting parents to buy such games and given them to children was the least restrictive effective alternative.97

In *Doe v. Prosecutor, Marion County, Indiana*,98 the Seventh Circuit held unconstitutional a law that prohibited sex offenders from accessing chat rooms and social media websites that permit minors to be members, like Facebook or Twitter. Using intermediate review, since the law applied without reference to content of offender’s speech, the court held the law was substantially more burdensome than necessary, given other better targeted methods to combat unwarranted and inappropriate communication between minors and sex offenders. *Accord* Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (similar regulation substantially overbroad given reality of social media use today). *See also* Ex Parte Lo, 424 S.W.2d 10 (Tex. Crim. App. 2013) (law making it illegal for adults to engage minor in sexually explicit online communications, as opposed to conduct of solicitation, content-based regulation, triggering strict scrutiny; not narrowly drawn to protect children from sexual abuse); United States v. Gnirke, 775 F.3d 1155 (9th Cir. 2015) (supervised release condition for child molester from possessing any sexual explicit material overbroad; limited to any material involving children or material deemed inappropriate by probation officer); United States v. Anderson, 759 F.3d 891 (8th Cir. 2014) (strict scrutiny satisfied; conviction for distributing child pornography where the accused digitally morphed actual face of a minor onto body of adult having sex upheld); People v. Minnis, 67 N.E.3d 272 (Ill. 2016) (requirement that convicted sex offenders disclose their internet identities, such as e-mail, instant messaging, and chat room identities, as well any blog or other website to which they have posted content during the previous registration period (no more than 4 times a year, in this case once a year), constitutional under intermediate review).

---

95 *Id.* at 2742 (Alito, J., joined by Roberts, C.J., concurring in the judgment).
96 *Id.* at 2751 (Thomas, J., dissenting).
97 *Id.* at 2761 (Breyer, J., dissenting).
98 705 F.3d 694 (7th Cir. 2013).
§ 8.1 Defamation

Cases of defamation and related torts involve laws that regulate on the basis of the content of the individual’s speech. Nonetheless, these cases do not involve application of a strict scrutiny approach normally applicable to content-based regulations of speech. Instead, in cases involving defamation and related torts, the Court has developed a number of tests that balance the state’s interest in an effective tort law against the individual’s interest in the freedom of speech.

There were no First Amendment decisions in the original natural law era. In 1806, a common law prosecution of newspaper editors for libel of President Jefferson and Congress was filed in a federal court. The Court avoided the First Amendment issues when it held that federal courts have no common law criminal jurisdiction.¹ Indeed, before 1964, a speaker’s only protection as defendant in an action for defamation was provided by the common law. As with obscenity or fighting words, once the case involved defamatory speech, there was no further First Amendment review.² That changed dramatically in 1964 when the Court decided New York Times Co. v. Sullivan.

New York Times Co. v. Sullivan
376 U.S. 254 (1964)

Justice BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

---


² See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . . .”).
Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was “Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.” He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of $500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala. 656, 144 So.2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960. Entitled “Heed Their Rising Voices,” the advertisement began by stating that “As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights.” It went on to charge that “in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . .” Succeeding paragraphs purported to illustrate the ‘wave of terror’ by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, “the struggle for the right-to-vote,” and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading “We in the south who are struggling daily for dignity and freedom warmly endorse this appeal,” appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South,” and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph: “In Montgomery, Alabama, after students sang ‘My Country, Tis of Thee’ on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.”

Sixth paragraph: “Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times – for ‘speeding,’ ‘loitering’ and similar ‘offenses.’ And now they have charged him with ‘perjury’ – a felony under which they could imprison him for ten years. . . .”
Although neither of these statements mentions respondent by name, he contended that the word “police” in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of “ringing” the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission. As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement “They have arrested (Dr. King) seven times” would be read as referring to him; he further contended that the “They” who did the arresting would be equated with the “They” who committed the other described acts and with the “Southern violators.” Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with “intimidation and violence,” bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capital steps, they sang the National Anthem and not “My Country, Tis of Thee.” Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time “ring” the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel. One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he “would want to be associated with anybody who would be a party to such things that are stated in that ad,” and that he would not re-employ respondent if he believed “that he
allowed the Police Department to do the things that the paper say he did.” But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in Pennekamp v. Florida, 328 U.S. 331, 348-349, that “when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants,” implied no view as to what remedy might constitutionally be afforded to public officials. In Beauharnais v. Illinois, 343 U.S. 250, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and “liable to cause violence and disorder.” But the Court was careful to note that it “retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel”; for “public men, are, as it were, public property,” and “discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.” Id., at 263-264. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. Schenectady Union Pub. Co. v. Sweeney, 316 U.S. 642. In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet “libel” than we have to other “mere labels” of state law. N.A.A.C.P. v. Button, 371 U.S. 415, 429. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations.

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions – and to do so on pain of libel judgments virtually unlimited in amount – leads to a comparable “self-censorship.” Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, e.g., Post Publishing Co. v. Hallam, 59 F. 530, 540 (C.A.6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which “steer far wider of the unlawful zone.” Speiser v. Randall, supra, 357 U.S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with “actual malice” – that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts, is found in the Kansas case of Coleman v. MacLennan,
The Supreme Court of Kansas, in an opinion by Justice Burch, reasoned as follows (98 P., at 286): “It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great and the chance of injury to private character so small that such discussion must be privileged.”

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is “presumed.” Such a presumption is inconsistent with the federal rule. “The power to create presumptions is not a means of escape from constitutional restrictions,” Bailey v. Alabama, 219 U.S. 219, 239; “[t]he showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff . . . .” Lawrence v. Fox, 97 N.W.2d 719, 725 (Mich. 1959). Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned[; thus] the judgment must be reversed and the case remanded.

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across “the line between speech unconditionally guaranteed and speech which may legitimately be regulated.” Speiser v. Randall, 357 U.S. 513, 525. In cases where that line must be drawn, the rule is that we “examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.” Pennekamp v. Florida, 328 U.S. 331, 335. We must “make an independent examination of the whole record,” Edwards v. South Carolina, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless.
As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement (from which), the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct" – although respondent's own proofs tend to show that it was – that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. First, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. Second, it was not a final refusal, since it asked for an explanation on this point – a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

[T]here is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character"; their failure to reject it on this ground was not unreasonable. We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf. Charles Parker Co. v. Silver City Crystal Co., 116 A.2d 440, 446 (Conn. 1955); Phoenix Newspapers, Inc. v. Choisser, 312 P.2d 150, 154-155 (Ariz. 1957).

Justice BLACK, with whom Justice DOUGLAS joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." Ante, p. 727. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against
critics of their official conduct” but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if “actual malice” can be proved against them. “Malice,” even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials.

Justice GOLDBERG, with whom Mr. Justice DOUGLAS joins, concurring in the result.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right “to speak one's mind,” cf. Bridges v. California, 314 U.S. 252, 270, about public officials and affairs needs “breathing space to survive,” N.A.A.C.P. v. Button, 371 U.S. 415, 433. The right should not depend upon a probing by the jury of the motivation of the citizen or press. The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity against liability for defamatory words uttered in the discharge of their public duties. See, e.g., Barr v. Matteo, 360 U.S. 564; City of Chicago v. Tribune Co., 139 N.E., at 91.

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. “Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech . . . .” Wood v. Georgia, 370 U.S. 375, 389.

The public official certainly has equal if not greater access than most private citizens to media of communication. [D]espite the possibility that some excesses and abuses may go unremedied, we must recognize that “the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.” Cantwell v. Connecticut, 310 U.S. 296, 310. As Justice Brandeis correctly observed, “sunlight is the most powerful of all disinfectants.” [FN 7: Freund, The Supreme Court of the United States 61 (1949).]
It has been noted that to prove actual malice, the Supreme Court has enumerated:

several kinds of evidence that may be utilized by plaintiffs, including proof that the defendant entertained serious doubts as to the truth of his or her publication, proof that the statement was fabricated by the defendant, proof that the statement was the product of the defendant's imagination, or proof that there exist obvious reasons to doubt the veracity of the informant upon whom the statement is based or the accuracy of the statement being relied upon. The courts have conceded that where proof of actual malice is at issue, information and facts that would tend to shed light on the reporter's state of mind are discoverable. To balance the defamation plaintiff's necessity to prove this element with society's interest in protecting the marketplace, the U.S. Supreme Court requires that proof of actual malice be made by clear and convincing evidence.3

In practice, it has been very difficult for plaintiffs to prove that defendants acted with the “actual malice” required under the Sullivan precedent, particularly as the decision on “actual malice,” as an “ultimate” constitutional fact, is for the court to determine as a matter of law, not the jury as a trier of fact.4 Indeed, it has been noted that, given Sullivan, the law of libel “poses little serious threat to the First Amendment rights of the media.” On the other hand, “fear of the relentless deep-pocket plaintiff, who pursues a libel claim despite having only a small chance of winning; the thinly-capitalized defendant, who is only one big judgment away from bankruptcy; and the high cost of discovery” remain “threats.”5

See also Obsidian Finance Group, LLC v. Cox, 740 F.3d 1284 (9th Cir. 2014) (liability for defamatory post blog involving matter of public concern must meet same New York Times v. Sullivan standard applied to institutionalized press). Cf. Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014) (lawsuit against Facebook for failing promptly to take down page calling for violence against Jews preempted by Communications Decency Act, which provides “interactive computer service” cannot be viewed as “publisher” of information posted online); Weigand v. NLRB, 783 F.3d 889 (D.C. Cir. 2015) (union not liable for members’ remarks on union’s Facebook page).


Although Justice Brennan would have preferred to adhere to the “actual malice” rule in all defamation cases, he could not long hold a majority to that view, even during the instrumentalist era. Between 1963-69, there was always a working 5-Judge majority on the Court that permitted the instrumentalist view to prevail in almost every case. However, with the retirement from the Court in 1969 of Chief Justice Warren and his replacement by Chief Justice Burger, that core instrumentalist period of 1963-69 came to an end.

Reflecting this change, in 1974, a 5-4 Court held in *Gertz v. Robert Welch*\(^6\) that where the plaintiff is a private person and the substance of a defamatory statement makes substantial danger to reputation apparent, the state need not require more than proof of fault, *i.e.*, negligence, to permit recovery for compensatory damages, even though the case involves a matter of public concern. However, in recognition of danger from excessive damage awards, a state could permit recovery of presumed or punitive damages only on proof of actual malice. Justice Brennan, dissenting, said that the *Sullivan* rule should apply in all civil actions concerning media reports on the involvement of private individuals in events of public or general interest. Justice Douglas continued his absolutist view stating that any libel law was unconstitutional. At the other extreme, Chief Justice Burger and Justice White disagreed that a negligence requirement should be imposed for cases involving private figures. However, the majority supported Justice Powell’s reasoning that private individuals need more protection than do public figures because they have less opportunity to correct a lie or error and they have not thrust themselves into the public eye, and thus they have not voluntarily exposed themselves to the increased risk of injury assumed by public figures, but that negligence is a bare minimum requirement for recovery of damages in a defamation or libel suit.\(^7\)

In 1985, the Court once again limited *New York Times Co. v. Sullivan*. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Court addressed the protection given private individuals in a defamation action where the matter in question was not of public concern. The Court held that states can impose liability if fault is shown, and there can be recovery of presumed or punitive damages without showing actual malice.

---


\(^7\) *Id.* at 354-45 (Burger, C.J., dissenting); *id.* at 356 (Douglas, J., dissenting); *id.* at 361 (Brennan, J., dissenting); *id.* at 369-71 (White, J., dissenting).
prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows “actual malice,” that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of \textit{Gertz} applies when the false and defamatory statements do not involve matters of public concern.

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976, to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent “continued in business as usual.” Respondent told petitioner that it was dissatisfied with the notice, and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a 17-year-old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it. After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial.

In \textit{New York Times Co. v. Sullivan}, supra, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned “one of the major public issues of our time.” Id., 376 U.S., at 271. Noting that “freedom of expression upon public questions is secured by the First Amendment,” id., at 269 (emphasis added), and that “debate on public issues should be uninhibited, robust, and wide-open,” id., at 270 (emphasis added), the Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with “‘actual malice’ – that is, with knowledge that it was false or with reckless disregard for its truth.”
of whether it was false or not,” id., at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a “matter of public or general interest,” Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (1971) (opinion of Brennan, J).

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), we held that the protections of New York Times did not extend as far as Rosenbloom suggested. Gertz concerned a libelous article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the “frame-up” of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, Gertz involved expression on a matter of undoubted public concern.

In Gertz, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of New York Times. These protections, we found, were not “justified solely by reference to the interest of the press and broadcast media in immunity from liability.” 418 U.S., at 343. Rather, they represented “an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons.” Ibid. In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, id., at 345, we found that the State possessed a “strong and legitimate . . . interest in compensating private individuals for injury to reputation.” Id., at 348-349. Balancing this stronger state interest against the same First Amendment interest at stake in New York Times, we held that a State could not allow recovery of presumed and punitive damages absent a showing of “actual malice.” Nothing in our opinion, however, indicated that this same balance would be struck regardless of the type of speech involved.

We have never considered whether the Gertz balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in Gertz and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in Gertz. There we found that it was “strong and legitimate.” 418 U.S., at 348. A State should not lightly be required to abandon it “for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name ‘reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .’” Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (concurring opinion).” Id., at 341.
The First Amendment interest, on the other hand, is less important than the one weighed in \textit{Gertz}. We have long recognized that not all speech is of equal First Amendment importance. It is speech on “‘matters of public concern’” that is “at the heart of the First Amendment’s protection.” First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978), citing Thornhill v. Alabama, 310 U.S. 88, 101 (1940). . . .

In contrast, speech on matters of purely private concern is of less First Amendment concern. Id., at 146-147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated \textit{New York Times} and \textit{Gertz} are absent. In such a case, “[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling.” Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977).

While such speech is not totally unprotected by the First Amendment, its protections are less stringent. In \textit{Gertz}, we found that the state interest in awarding presumed and punitive damages was not “substantial” in view of their effect on speech at the core of First Amendment concern. 418 U.S., at 349. This interest, however, is “substantial” relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common-law rules has been the experience and judgment of history that “proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.” W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971); accord, Rowe v. Metz, supra, 195 Colo., at 425-426; Note, Developments in the Law-Defamation, 69 Harv. L. Rev. 875, 891-892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications. Restatement of Torts § 568, Comment \textit{b}, p. 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages – even absent a showing of “actual malice.”

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that “[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record.” Connick v. Myers, supra, 461 U.S., at 147-148. These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. Cf. Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 561 (1980). This particular interest warrants no special protection when-as in this case-the speech is wholly false and clearly damaging to the victim's business reputation. Cf. id., at 566; Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771-772 (1976). Moreover, since the credit report was made available to only five subscribers, who,
under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any “strong interest in the free flow of commercial information.” Id., at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that “debate on public issues [will] be uninhibited, robust, and wide-open.” New York Times Co. v. Sullivan, 376 U.S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S., at 771-772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. Ibid. Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See ibid. In any case, the market provides a powerful incentive to a credit reporting agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental “chilling” effect of libel suits would be of decreased significance.

Chief Justice BURGER, concurring in the judgment.

I dissented in Gertz because I believed that, insofar as the “ordinary private citizen” was concerned, 418 U.S., at 355, the Court's opinion “abandon[ed] the traditional thread,” id., at 354-355, that had been the theme of the law in this country up to that time. I preferred “to allow this area of law to continue to evolve as it [had] up to [then] with respect to private citizens rather than embark on a new doctrinal theory which [had] no jurisprudential ancestry.” Ibid. Gertz, however, is now the law of the land, and until it is overruled, it must, under the principle of stare decisis, be applied . . . .

The single question before the Court today is whether Gertz applies to this case. The plurality opinion holds that Gertz does not apply because, unlike the challenged expression in Gertz, the alleged defamatory expression in this case does not relate to a matter of public concern. I agree that Gertz is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance, and that the expression in question here relates to a matter of essentially private concern. I therefore agree with the plurality opinion to the extent that it holds that Gertz is inapplicable in this case for the two reasons indicated.

I continue to believe, however, that Gertz was ill-conceived, and therefore agree with Justice White that Gertz should be overruled. I also agree generally with Justice White's observations concerning New York Times Co. v. Sullivan. New York Times, however, equates “reckless disregard of the truth” with malice; this should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue. But since the Court has not applied the literal language of New York Times in this way, I agree with Justice White that it should be reexamined. The great rights guaranteed by the First Amendment carry with them certain responsibilities as well.

Consideration of these issues inevitably recalls an aphorism of journalism that “too much checking on the facts has ruined many a good news story.”
Justice WHITE, concurring in the judgment.

_New York Times Co. v. Sullivan_ was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. Under the rule announced in that case, a public official suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved “malice,” which was defined as a knowing falsehood or a reckless disregard for the truth. 376 U.S., at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in “uninhibited, robust, and wide-open” debate on public issues. Id., at 270. Three years later, the same rule was applied to plaintiffs who were not public officials, but who were termed public figures. Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

In 1971, four Justices took the view that the _New York Times_ rules should apply wherever a publication concerned any manner of general or public interest, even though the plaintiff was a private person. Rosenbloom v. Metromedia, Inc., 403 U.S. 29. That view did not command a majority. But in _Gertz v. Robert Welch, Inc._, 418 U.S. 323 (1974), the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some “fault,” at least negligence. Id., at 347, 350. Even with that proof, damages were not presumed but had to be proved. Id., at 349. Furthermore, no punitive damages were available without proof of _New York Times_ malice. 418 U.S., at 350. This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.

I joined the judgment and opinion in _New York Times_. I also joined later decisions extending the _New York Times_ standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in _Rosenbloom_, and I dissented in _Gertz_, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that _Gertz_ was erroneously decided. I have also become convinced that the Court struck an improvident balance in the _New York Times_ case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government.
In *New York Times*, instead of escalating the plaintiff’s burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as Justice Harlan suggested in *Rosenbloom, supra*, 403 U.S., at 77, or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, as in *Gertz*. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name. In this way, both First Amendment and reputational interests would have been far better served.

Justice BRENNAN, with whom Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, dissenting.

This case involves a difficult question of the proper application of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), to credit reporting – a type of speech at some remove from that which first gave rise to explicit First Amendment restrictions on state defamation law — and has produced a diversity of considered opinions, none of which speaks for the Court. Justice Powell's plurality opinion affirming the judgment below would not apply the *Gertz* limitations on presumed and punitive damages to this case; rather, the three Justices joining that opinion would hold that the First Amendment requirement of actual malice — a clear and convincing showing of knowing falsehood or reckless disregard for the truth — should have no application in this defamation action because the speech involved a subject of purely private concern and was circulated to an extremely limited audience. Establishing this exception, the opinion reaffirms *Gertz* for cases involving matters of public concern, *ante*, at 2944, and reaffirms *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for cases in which the challenged speech allegedly libels a public official or a public figure. *Ante*, at 2943-2944. Justice White also would affirm; he would not apply *Gertz* to this case on the ground that the subject matter of the publication does not deal with a matter of general or public importance. *Ante*, at 2953 (concurring in judgment). The Chief Justice apparently agrees with Justice White. *Ante*, at 2948 (concurring in judgment). The four who join this opinion would reverse the judgment of the Vermont Supreme Court. We believe that, although protection of the type of expression at issue is admittedly not the “central meaning of the First Amendment,” 376 U.S., at 273, *Gertz* makes clear that the First Amendment nonetheless requires restraints on presumed and punitive damages awards for this expression. The lack of consensus in approach to these idiosyncratic facts should not, however, obscure the solid allegiance the principles of *New York Times Co. v. Sullivan* continue to command in the jurisprudence of this Court. See also Bose Corp. v. Consumer's Union of the United States, Inc., 466 U.S. 485 (1984).

The credit reporting of Dun & Bradstreet falls within any reasonable definition of “public concern” consistent with our precedents. Justice Powell's reliance on the fact that Dun & Bradstreet publishes credit reports “for profit,” *ante*, at 2947, is wholly unwarranted. Time and again we have made clear that speech loses none of its constitutional protection “even though it is carried in a form that is
‘sold’ for profit.” Virginia Pharmacy Bd., 425 U.S., at 761. See also Smith v. California, 361 U.S. 147, 150 (1959); Joseph Burstyn, Inc. v. Wilson, supra, 343 U.S., at 501. . . . It is difficult to suggest that a bankruptcy is not a subject matter of public concern when federal law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

Although the Court does not make reference to this fact, the balancing done in these cases tracks in rigor the balancing done in dormant commerce clause review, discussed at § 13.3 of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2 (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials). In Dormant Commerce Clause cases, the Court similarly balances the state’s interests, in those cases the state’s interest in various kinds of economic regulations, against the constitutional interests at stake, in those cases an interest in free trade. For commercial regulations that involve facial discrimination against free trade, or a discriminatory purpose, as under the Maine v. Taylor test, discussed id. at § 13.3.1(D) nn.37-38, 41, there is virtual per se rule of unconstitutionality. For non-discriminatory regulations, the easier to meet Pike v. Bruce Church test is used to determine if a regulation is a “clearly excessive” burden on free trade, discussed id. at § 13.3.1(D) nn.39-40. Similarly, under New York Times Co. v. Sullivan, excerpted at § 8.1, where the defamatory act concerns speech about a public official and the constitutional interest in freedom of speech is at its highest, there is a very difficult “actual malice” test to meet. In other cases, where the governmental interest is stronger and the constitutional interest is less strong, as in cases that do not involve public officials or matters of public concern, such as Dun & Bradstreet, excerpted at § 8.1, the constitutional test is easier for the government to meet. In all defamation cases, the challenger retains the burden of establishing the tort law is unconstitutional. Thus, under the “base plus six” model of review, discussed at § 1.4.2 & Table 4, each defamation case reflects a 2nd-order kind of reasonableness review.

No important defamation cases have subsequently been before the Court. Thus, it remains uncertain what rule should be applied if plaintiff is a public official or public figure, but the defamation did not relate to a matter of public concern. Professor Tribe, who has criticized the Court for its retreat from the actual malice rule, has stated that the actual malice rule should be applied whenever the plaintiff is a public official or public figure. However, it can be argued that the Dun & Bradstreet rule should apply to all defamation cases involving private conduct not a matter of public concern, since even a public person should be able to protect private matters from false public comment without having to meet the difficult “actual malice” standard.

In practice, it would be unlikely for any matter involving a public official or public figure to be viewed as not a matter of public concern, since the conduct of public persons tends to be viewed as triggering matters of public concern. More broadly, it has been noted: “The cases suggest that generally the following will be considered matters of public concern in terms of the Dun &

8 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 874 (2nd ed. 1988).
Bradstreet definition: politics and campaigns; operations of financial institutions; conduct of government and public officials; illegal or questionable business practices with ramifications for the general public; public health and safety; criminality and criminal justice; recruitment methods of a religious cult; pornography; and athletics. The following matters have been held not to be of public concern: employers' allegations of wrongdoing by employees or customers without ramifications for the general public; personal disputes between businesses and disgruntled customers; job recommendations; intra-professional disputes; intra- or inter-organizational business without ramifications for the general public; a paternity claim; a recommendation on tenure at a state university; inaccurate credit reports; and aspersions made in commercial advertising.9

See also Obsidian Finance Group, LLC v. Cox, 740 F.3d 1284 (9th Cir. 2014) (liability for defamatory post blog involving matter of public concern must meet same New York Times v. Sullivan standard applied to institutionalized press). Cf. Klayman v. Zuckerberg, 753 F.3d 1354 (D.C. Cir. 2014) (lawsuit against Facebook for failing promptly to take down page calling for violence against Jews blocked by Communications Decency Act, which provides “interactive computer service” is not a “publisher” of information); Weigand v. NLRB, 783 F.3d 889 (D.C. Cir. 2015) (union not liable for members’ remarks on union’s Facebook page); Fields v. Twitter, Inc., 200 F. Supp. 3d 964 (N.D. Cal. 2016) (Communications Decency Act blocks suit by family members of deceased United States government contractors shot by Jordanian police officer, responsibility for which was claimed by a terrorist organization (ISIS), against Twitter for allowing ISIS to use its social network to spread propaganda, raise funds, and recruit fighters); Fields v. Twitter, Inc., 881 F.3d 739 (9th Cir. 2018) (Anti-Terrorism Act requires individuals show direct relationship, not mere foreseeability, between injuries by terrorists and Twitter’s conduct to establish “proximate causation” necessary to prove element of “material support”; general use by ISIS of Twitter does not establish a direct relationship between use of Twitter and this individual attack).

§ 8.2 Related Torts

1. False Light Cases

Three years after New York Times Co. v. Sullivan, the Supreme Court decided Time, Inc. v. Hill.10 This was an action to redress invasion of privacy based on false reports regarding matters of public interest. The Court held that truth is a complete defense and that the First Amendment bars recovery in the absence of proof that the defendant published the report with “actual malice,” the Sullivan standard of knowledge of its falsity or in reckless disregard of the truth. Justice Brennan explained that erroneous statements are no less inevitable in entertaining the public as in informing the public and, if innocent and merely negligent, such speech must be protected if the freedoms of expression are to have the breathing space they need to survive.

---


Although the Supreme Court has never ruled on the issue, lower courts have split on whether the actual malice standard must be met even if the case does not involve a public official or public figure.\(^{11}\) It can be argued that \textit{Gertz} impliedly overruled \textit{Time, Inc. v. Hill} for false light cases involving non-public figures, just as \textit{Gertz} limited the \textit{Sullivan} actual malice doctrine for cases of defamation. Similarly, no Supreme Court case addresses the proper standard where the false light relates only to a matter of private concern. Using \textit{Dun & Bradstreet} as an analogy suggests that a showing of fault would be sufficient for liability and that courts could permit recovery of presumed or punitive damages without a showing of actual malice. With regard to public official or public figure cases, application of the actual malice rule of \textit{Hill} is clear. For example, in 1988, the Court ruled in \textit{Hustler Magazine v. Falwell}\(^{12}\) that the First Amendment bars recovery for intentionally inflicting emotional distress by a parody cartoon on a plaintiff who is a public official or a public figure unless the cartoon contains a false statement of fact made with actual malice.

Proof of actual malice is difficult enough in ordinary circumstances. In false light cases, proof of actual malice was made more difficult by \textit{Masson v. New Yorker Magazine}.\(^{13}\) In \textit{Masson}, the Court ruled that a deliberate alteration of words in a quote does not equate with the actual malice rule unless the alteration results in a material change in the meaning conveyed by the statement.

\textbf{2. Invasion of Privacy by Truth}

In 1975, the Court held in \textit{Cox Broadcasting Corp. v. Cohn}\(^{14}\) that civil liability for invasion of privacy by a true publication may not be imposed on a broadcaster for accurately publishing information released to the public in official court records. In 1989, this ruling was extended in \textit{Florida Star v. B.J.F.} to protect a newspaper from liability for publishing the name of a rape victim obtained from a police report made available in the press room.

\begin{itemize}
\item \footnotesize{\textit{See} Victor A. Kovner, Suzanne L. Telsey & Camille Calman, \textit{Newsgathering, Invasion of Privacy and Related Torts}, 810 Practicing Law Institute, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, PLI Order Number 2981, 499, 787-88 (2004) (“Courts applying the law of ten states have held that \textit{Gertz} limits the actual malice standard to false light claims asserted by a public figure. . . . But courts applying the law of thirteen other states have followed \textit{Hill} or have required an actual malice standard as a matter of state tort law.”).}
\item \footnotesize{\textit{But see} Rodney K. Smith & Patrick A. Shea, \textit{Religion and the Press: Keeping First Amendment Values in Balance}, 2002 Utah L. Rev. 177 (2002) (arguing that given the special importance of moral integrity to religious figures, courts should be willing to more-often apply \textit{Gertz} standards for false-light cases involving religious figures).}
\item \footnotesize{501 U.S. 496, 510-16 (1991).}
\item \footnotesize{420 U.S. 469, 490-92 (1975).}
\end{itemize}
Florida Stat. § 794.03 (1987) makes it unlawful to “print, publish, or broadcast . . . in any instrument of mass communication” the name of the victim of a sexual offense. Pursuant to this statute, appellant The Florida Star was found civilly liable for publishing the name of a rape victim which it had obtained from a publicly released police report. The issue presented here is whether this result comports with the First Amendment. We hold that it does not.

The Florida Star is a weekly newspaper which serves the community of Jacksonville, Florida, and which has an average circulation of approximately 18,000 copies. A regular feature of the newspaper is its “Police Reports” section. That section, typically two to three pages in length, contains brief articles describing local criminal incidents under police investigation.

On October 20, 1983, appellee B.J.F. reported to the Duval County, Florida, Sheriff's Department (Department) that she had been robbed and sexually assaulted by an unknown assailant. The Department prepared a report on the incident which identified B.J.F. by her full name. The Department then placed the report in its pressroom. The Department does not restrict access either to the pressroom or to the reports made available therein.

A Florida Star reporter-trainee sent to the pressroom copied the police report verbatim, including B.J.F.'s full name, on a blank duplicate of the Department's forms. A Florida Star reporter then prepared a one-paragraph article about the crime, derived entirely from the trainee's copy of the police report. The article included B.J.F.'s full name. . . . In printing B.J.F.'s full name, The Florida Star violated its internal policy of not publishing the names of sexual offense victims.

On September 26, 1984, B.J.F. filed suit in the Circuit Court of Duval County against the Department and The Florida Star, alleging that these parties negligently violated § 794.03. See n. 1, supra. Before trial, the Department settled with B.J.F. for $2,500. The Florida Star moved to dismiss, claiming, inter alia, that imposing civil sanctions on the newspaper pursuant to § 794.03 violated the First Amendment. The trial judge rejected the motion. App. 4.

At the ensuing daylong trial, B.J.F. testified that she had suffered emotional distress from the publication of her name. She stated that she had heard about the article from fellow workers and acquaintances; that her mother had received several threatening phone calls from a man who stated that he would rape B.J.F. again; and that these events had forced B.J.F. to change her phone number and residence, to seek police protection, and to obtain mental health counseling. In defense, The Florida Star put forth evidence indicating that the newspaper had learned B.J.F.'s name from the incident report released by the Department, and that the newspaper's violation of its internal rule against publishing the names of sexual offense victims was inadvertent.
At the close of B.J.F.'s case, and again at the close of its defense, The Florida Star moved for a directed verdict. On both occasions, the trial judge denied these motions. . . . The jury awarded B.J.F. $75,000 in compensatory damages and $25,000 in punitive damages. Against the actual damages award, the judge set off B.J.F.'s settlement with the Department.

The First District Court of Appeal affirmed in a three-paragraph *per curiam* opinion. 499 So.2d 883 (1986). [T]he court stated that the directed verdict for B.J.F. had been properly entered because, under § 794.03, a rape victim's name is “of a private nature and not to be published as a matter of law.” Id., at 884, citing Doe v. Sarasota-Bradenton Florida Tele. Co., 436 So.2d 328, 330 (Fla. App. 1983) (footnote omitted). The Supreme Court of Florida denied discretionary review. The Florida Star appealed to this Court. We noted probable jurisdiction, 488 U.S. 887 (1988), and now reverse.

The parties to this case frame their contentions in light of a trilogy of cases which have presented, in different contexts, the conflict between truthful reporting and state-protected privacy interests. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), we found unconstitutional a civil damages award entered against a television station for broadcasting the name of a rape-murder victim which the station had obtained from courthouse records. In *Oklahoma Publishing Co. v. Oklahoma County District Court*, 430 U.S. 308 (1977), we found unconstitutional a state court's pretrial order enjoining the media from publishing the name or photograph of an 11-year-old boy in connection with a juvenile proceeding involving that child which reporters had attended. Finally, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), we found unconstitutional the indictment of two newspapers for violating a state statute forbidding newspapers to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender. The papers had learned about a shooting by monitoring a police band radio frequency and had obtained the name of the alleged juvenile assailant from witnesses, the police, and a local prosecutor.

We conclude that imposing damages on appellant for publishing B.J.F.'s name violates the First Amendment . . . . Despite the strong resemblance this case bears to *Cox Broadcasting*, that case cannot fairly be read as controlling here. The name of the rape victim in that case was obtained from courthouse records that were open to public inspection, a fact which Justice White's opinion for the Court repeatedly noted. 420 U.S., at 492 (noting “special protected nature of accurate reports of judicial proceedings”) (emphasis added); see also id., at 493, 496. Significantly, one of the reasons we gave in *Cox Broadcasting* for invalidating the challenged damages award was the important role the press plays in subjecting trials to public scrutiny and thereby helping guarantee their fairness. Id., at 492-493. That role is not directly compromised where, as here, the information in question comes from a police report prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified.

Nor need we accept appellant's invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment. Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. See, e.g., *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (hypothesizing “publication of the sailing dates of transports or the number and location of troops”); see also *Garrison v. Louisiana*, 379 U.S. 64, 72, n.8 (1964) (endorsing absolute defense of truth
“where discussion of public affairs is concerned,” but leaving unsettled the constitutional implications of truthfulness “in the discrete area of purely private libels”); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978). Indeed, in Cox Broadcasting, we pointedly refused to answer even the less sweeping question “whether truthful publications may ever be subjected to civil or criminal liability” for invading “an area of privacy” defined by the State. 420 U.S., at 491. Respecting the fact that press freedom and privacy rights are both “plainly rooted in the traditions and significant concerns of our society,” we instead focused on the less sweeping issue “whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records-more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.” Ibid. We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

In our view, this case is appropriately analyzed with reference to such a limited First Amendment principle. It is the one, in fact, which we articulated in Daily Mail in our synthesis of prior cases involving attempts to punish truthful publication: “[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.” 443 U.S., at 103. Applied to the instant case, the Daily Mail principle clearly commands reversal. The first inquiry is whether the newspaper “lawfully obtain[ed] truthful information about a matter of public significance.” 443 U.S., at 103. It is undisputed that the news article describing the assault on B.J.F. was accurate. In addition, appellant lawfully obtained B.J.F.’s name.

The second inquiry is whether imposing liability on appellant pursuant to § 794.03 serves “a need to further a state interest of the highest order.” Daily Mail, 443 U.S., at 103. Appellee argues that a rule punishing publication furthers three closely related interests: the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure. Brief for Appellee 29-30.

At a time in which we are daily reminded of the tragic reality of rape, it is undeniable that these are highly significant interests, a fact underscored by the Florida Legislature's explicit attempt to protect these interests by enacting a criminal statute prohibiting much dissemination of victim identities. We accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance these interests as to satisfy the Daily Mail standard. For three independent reasons, however, imposing liability for publication under the circumstances of this case is too precipitous a means of advancing these interests to convince us that there is a “need” within the meaning of the Daily Mail formulation for Florida to take this extreme step. Cf. Landmark Communications, supra (invalidating penalty on publication despite State's expressed interest in nondissemination, reflected in statute prohibiting unauthorized divulging of names of judges under investigation).
First is the manner in which appellant obtained the identifying information in question. As we have noted, where the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize, far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. That assumption is richly borne out in this case. B.J.F.'s identity would never have come to light were it not for the erroneous, if inadvertent, inclusion by the Department of her full name in an incident report made available in a pressroom open to the public. Florida's policy against disclosure of rape victims' identities, reflected in § 794.03, was undercut by the Department's failure to abide by this policy. Where, as here, the government has failed to police itself in disseminating information, it is clear under Cox Broadcasting, Oklahoma Publishing, and Landmark Communications that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity. Once the government has placed such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast," Cox Broadcasting, 420 U.S., at 496, and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence.

A second problem with Florida's imposition of liability for publication is the broad sweep of the negligence per se standard applied under the civil cause of action implied from § 794.03. Unlike claims based on the common law tort of invasion of privacy, see Restatement (Second) of Torts § 652D (1977), civil actions based on § 794.03 require no case-by-case findings that the disclosure of a fact about a person's private life was one that a reasonable person would find highly offensive. On the contrary, under the per se theory of negligence adopted by the courts below, liability follows automatically from publication. This is so regardless of whether the identity of the victim is already known throughout the community; whether the victim has voluntarily called public attention to the offense; or whether the identity of the victim has otherwise become a reasonable subject of public concern—because, perhaps, questions have arisen whether the victim fabricated an assault by a particular person. Nor is there a scienter requirement of any kind under § 794.03, engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods: those involving purely private figures, where liability is evaluated under a standard, usually applied by a jury, of ordinary negligence. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). We have previously noted the impermissibility of categorical prohibitions upon media access where important First Amendment interests are at stake. See Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596, 608 (1982) (invalidating state statute providing for the categorical exclusion of the public from trials of sexual offenses involving juvenile victims). More individualized adjudication is no less indispensable where the State, seeking to safeguard the anonymity of crime victims, sets its face against publication of their names.

Third, and finally, the facial underinclusiveness of § 794.03 raises serious doubts about whether Florida is, in fact, serving, with this statute, the significant interests which appellee invokes in support of affirmance. Section 794.03 prohibits the publication of identifying information only if this information appears in an "instrument of mass communication," a term the statute does not define. Section 794.03 does not prohibit the spread by other means of the identities of victims of
sexual offenses. An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers. See Tr. of Oral Arg. 49-50 (appellee acknowledges that § 794.03 would not apply to “the backyard gossip who tells 50 people that don't have to know”).

When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant. Where important First Amendment interests are at stake, the mass scope of disclosure is not an acceptable surrogate for injury. A ban on disclosures effected by “instrument[s] of mass communication” simply cannot be defended on the ground that partial prohibitions may effect partial relief. See Daily Mail, 443 U.S., at 104-105 (statute is insufficiently tailored to interest in protecting anonymity where it restricted only newspapers, not the electronic media or other forms of publication, from identifying juvenile defendants); id., at 110 (Rehnquist, J., concurring in judgment) (same); cf. Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 229 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983). Without more careful and inclusive precautions against alternative forms of dissemination, we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose.

Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under § 794.03 to appellant under the facts of this case.

Justice SCALIA, concurring in part and concurring in the judgment.

I think it sufficient to decide this case to rely upon the third ground set forth in the Court's opinion, ante, at 15-16: that a law cannot be regarded as protecting an interest “of the highest order,” Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979), and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited. In the present case, I would anticipate that the rape victim's discomfort at the dissemination of news of her misfortune among friends and acquaintances would be at least as great as her discomfort at its publication by the media to people to whom she is only a name. Yet the law in question does not prohibit the former in either oral or written form. Nor is it at all clear, as I think it must be to validate this statute, that Florida's general privacy law would prohibit such gossip. Nor, finally, is it credible that the interest meant to be served by the statute is the protection of the victim against a rapist still at large – an interest that arguably would extend only to mass publication. There would be little reason to limit a statute with that objective to rape alone; or to extend it to all rapes, whether or not the felon has been apprehended and confined. In any case, the instructions here did not require the jury to find that the rapist was at large.
This law has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself. Such a prohibition does not protect an interest “of the highest order.” For that reason, I agree that the judgment of the court below must be reversed.

Justice WHITE, with whom THE CHIEF JUSTICE and Justice O'CONNOR join, dissenting.

“Short of homicide, [rape] is the ‘ultimate violation of self.’” Coker v. Georgia, 433 U.S. 584, 597 (1977) (opinion of White, J.). For B.J.F., however, the violation she suffered at a rapist's knifepoint marked only the beginning of her ordeal. A week later, while her assailant was still at large, an account of this assault – identifying by name B.J.F. as the victim – was published by The Florida Star. As a result, B.J.F. received harassing phone calls, required mental health counseling, was forced to move from her home, and was even threatened with being raped again. Yet today, the Court holds that a jury award of $75,000 to compensate B.J.F. for the harm she suffered due to the Star's negligence is at odds with the First Amendment. I do not accept this result.

At issue in this case is whether there is any information about people, which – though true – may not be published in the press. By holding that only “a state interest of the highest order” permits the State to penalize the publication of truthful information, and by holding that protecting a rape victim's right to privacy is not among those state interests of the highest order, the Court accepts appellant's invitation, see Tr. of Oral Arg. 10-11, to obliterate one of the most noteworthy legal inventions of the 20th century: the tort of the publication of private facts. W. Prosser, J. Wade, & V. Schwartz, Torts 951-952 (8th ed. 1988). Even if the Court's opinion does not say as much today, such obliteration will follow inevitably from the Court's conclusion here. If the First Amendment prohibits wholly private persons (such as B.J.F.) from recovering for the publication of the fact that she was raped, I doubt that there remain any “private facts” which persons may assume will not be published in the newspapers or broadcast on television.

I would strike the balance rather differently. Writing for the Ninth Circuit, Judge Merrill put this view eloquently: “Does the spirit of the Bill of Rights require that individuals be free to pry into the unnewsworthy private affairs of their fellowmen? In our view it does not. In our view, fairly defined areas of privacy must have the protection of law if the quality of life is to continue to be reasonably acceptable. The public's right to know is, then, subject to reasonable limitations so far as concerns the private facts of its individual members.” Virgil v. Time, Inc., 527 F.2d 1122, 1128 (1975), cert. denied, 425 U.S. 998 (1976).

Ironically, this Court, too, had occasion to consider this same balance just a few weeks ago, in United States Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989). There, we were faced with a press request, under the Freedom of Information Act, for a “rap sheet” on a person accused of bribing a Congressman – presumably, a person whose privacy rights would be far less than B.J.F.’s. Yet this Court rejected the media's request for disclosure of the “rap sheet,” saying: “The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of ‘what the government is up to,’ the privacy interest . . . is . . . at its apex while the . . . public interest in
disclosure is at its nadir.” Id., at 780. The Court went on to conclude that disclosure of rap sheets “categorical[ly]” constitutes an “unwarranted” invasion of privacy. Ibid. The same surely must be true – indeed, much more so – for the disclosure of a rape victim’s name.

I do not suggest that the Court's decision today is a radical departure from a previously charted course. The Court's ruling has been foreshadowed. In *Time, Inc. v. Hill*, 385 U.S. 374, 383-384, n.7 (1967), we observed that – after a brief period early in this century where Brandeis' view was ascendant – the trend in “modern” jurisprudence has been to eclipse an individual's right to maintain private any truthful information that the press wished to publish. More recently, in *Cox Broadcasting*, 420 U.S. at 491, we acknowledged the possibility that the First Amendment may prevent a State from ever subjecting the publication of truthful but private information to civil liability. Today, we hit the bottom of the slippery slope.

I would find a place to draw the line higher on the hillside: a spot high enough to protect B.J.F.'s desire for privacy and peace-of-mind in the wake of a horrible personal tragedy. There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime – and no public interest in immunizing the press from liability in the rare cases where a State's efforts to protect a victim's privacy have failed. Consequently, I respectfully dissent.

If private information is illegally intercepted and then delivered to a broadcaster who publishes it, can the federal government sanction that broadcast? In *Bartnicki v. Vopper*, decided in 2001, the Court held that the privacy interests protected by the federal statute were not sufficient to justify its application to a broadcaster of an illegally intercepted communication containing information of public concern where the broadcaster did not illegally intercept the private communication or arrange for its interception. The Court noted that the constitutional interests at stake in *Bartnicki* concerning making public information about a public concern were similar to the interests at stake in *Sullivan*. The Court noted, however, that is was not deciding whether privacy interests would be strong enough to justify the application of the statute to “disclosures of trade secrets or domestic gossip or other information of purely private concern.”

In a concurrence, Justices Breyer and O’Connor underscored that this kind of case does not involve “strict scrutiny,” but rather a rational review balancing of interests, asking whether “the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences.” In determining this “reasonable” balance, Justice Breyer indicated that a court should ask whether the relevant statutes “impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?” In dissent, Chief Justice Rehnquist, joined by Justices Scalia and Thomas,

---


16 *Id.* at 536-37, 541 (Breyer, J., joined by O’Connor, J., concurring).
accused the majority of “tacit application of strict scrutiny.”17 Contrary to this view, the majority did not adopt strict scrutiny, as noted by Justices Breyer and O’Connor. The majority did indicate, however, that to prevent a newspaper from publishing truthful information on a matter of public concern when the media played no part in the unlawful recording of the information would require a reason “of the highest order.”18 Such language is similar to that used in dormant commerce clause cases, where there is the virtual per se rule of invalidity for burdens against interstate commerce under Maine v. Taylor, which can be overcome by strong state interests. The scrutiny in Bartnicki is best viewed as second-order reasonableness review, rather than the review of Taylor, because the challenger in Bartnicki bore the burden of proving the statute unconstitutional.

3. Unlawful Appropriation of Name or Likeness

Courts have had to struggle with the interplay between First Amendment doctrine and a number of other tort causes of action. For example, in 1977, in Zacchini v. Scripps-Howard Broadcasting Co.,19 the Court allowed a defendant to be found liable for videotaping 15 seconds of the plaintiff’s human cannonball act and playing it on the nightly news. The Court held this was a form of unlawful appropriation of plaintiff’s property. Justice Powell, joined by Justices Brennan and Marshall, dissenting, would have held that “the First Amendment protects the station from a ‘right of publicity’ or ‘appropriation’ suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation.” Justice Stevens would have remanded the case to permit the lower state court to clarify whether its opinion rested on federal constitutional grounds or state common law tort grounds.

4. Miscellaneous Other Tort or Contract Theories

Post-instrumentalist decisions have also allowed liability to be imposed for speech under the contract doctrine of promissory estoppel and the tort doctrine of negligence. For example, in Cohen v Cowles Media Co.,20 the Court held that the First Amendment does not bar damages against a newspaper for breaching a promise of confidentiality to a source who relied on the promise in providing information to the paper, even for matters of public concern relating to a candidate in the upcoming election. A four-Justice dissent would have held “the State's interest in enforcing a newspaper's promise of confidentiality insufficient to outweigh the interest in unfettered publication

17 Id. at 544-45 (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting).
19 433 U.S. 562, 569-78 (1977); id. at 581 (Powell, J., joined by Brennan & Marshall, JJ., dissenting); id. at 583 (Stevens, J., dissenting).
of the information revealed in this case.” The Fourth Circuit held in Rice v. Paladin Enterprises\textsuperscript{21} that there can be liability for negligence if a defendant author publishes methods for doing illegal things, e.g., how to be a hit man, and that publication results in others using the methods to injure someone. The publication was not protected under Brandenburg, as discussed at § 6.2.1 n.20.

In cases where the Court has allowed liability to be imposed for speech that injured another, the facts did not suggest to a majority of the Court that allowing recovery would seriously intrude on the press’ right to make judgments regarding printing or broadcasting matters in which the public might be interested. Regarding possible constitutional protection of the press where it intruded on privacy by truthful matters obtained from sources other than official records, Justice White pointed out in Cox Broadcasting Corp. v. Cohn\textsuperscript{22} that the Court has left open the question whether the Constitution requires that truth be recognized as a defense in a defamation action brought by a private person. Also open is the question whether truthful publication of very private matters unrelated to public affairs may be proscribed by the Constitution.

§ 8.3 Government Regulation of Speech of Public Employees

1. Pickering Balancing Test

In the original natural law period there were no Supreme Court decisions on the extent to which the government, as employer, could regulate the speech of its employees. In 1892, during the formalist era, Justice Holmes, then on the Supreme Court of Massachusetts, explained in McAuliffe v. Mayor of New Bedford\textsuperscript{23} why a policeman had no constitutional claim after being fired for public remarks critical of his department. Holmes said, “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him.”

Holmes’ analysis was widely adopted prior to the instrumentalist era. For example, in Scopes v. State,\textsuperscript{24} the famous “Monkey Trial” case, the court said, “In dealing with its own employees engaged upon its own work, the State is not hampered by the limitations of the Fourteenth Amendment to the Constitution of the United States.” Even during the formalist era, however, statements appeared in some Supreme Court cases which foretold limits on government power to condition employment on the giving up of rights to speech or association. For example, in Frost & Frost Trucking Co. v.

\textsuperscript{21} 128 F.3d 233, 243-50 (4th Cir. 1997).

\textsuperscript{22} 420 U.S. 469, 490 (1975).

\textsuperscript{23} 29 N.E. 517, 518 (Mass. 1892).

\textsuperscript{24} 289 S.W. 363, 364-65 (Tenn. 1927).
Railroad Commission, Justice Sutherland wrote for the Court, “It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege the state threatens otherwise to withhold.”

As with the law regarding defamation, discussed at § 8.1, the shift on the Court during the 1960s reflected in New York Times Co. v. Sullivan altered the constitutional doctrine regarding speech of government employees on matters of public concern. The foundational case for modern doctrine, decided in 1968, was Pickering v. Board of Education of Will County, Illinois.

Pickering v. Board of Education of Will County, Illinois
391 U.S. 563 (1968)

Justice MARSHALL delivered the opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was “detrimental to the efficient operation and administration of the schools of the district” and hence, under the relevant Illinois statute, Ill. Rev. Stat., c. 122, § 10-22.4 (1963), that “interests of the schools require[d] [his dismissal].”

Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overruled appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. 36 Ill.2d 568, 225 N.E.2d 1 (1967). We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments. 389 U.S. 925 (1967). We reverse.

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. E.g., Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Board of Regents, 385 U.S. 589 [, 605-06 (1967) (“[T]he theory that public employment which may

be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."]]. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

The Board contends that “the teacher by virtue of his public employment has a duty of loyalty to support his superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience.” Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made “with knowledge that [they were] . . . false or with reckless disregard of whether [they were] . . . false or not,’ New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964), should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)-(4) of appellant's letter, see Appendix, infra, may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted
by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false, see Appendix, infra) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely . . . without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of
the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

The public interest in having free and unhindered debate on matters of public importance – the core value of the Free Speech Clause . . . – is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The same test has been applied to suits for invasion of privacy based on false statements where a “matter of public interest” is involved. Time, Inc. v. Hill, 385 U.S. 374 (1967). It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in New York Times.

This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. Garrison v. State of Louisiana, 379 U.S. 64 (1964); Wood v. Georgia, 370 U.S. 375 (1962). In Garrison, the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, see Appendix, infra, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion. It is so ordered.

2. Early Applications of Pickering

As developed in cases after Pickering, to establish a claim of unlawful First Amendment retaliation a public employee must show that he or she suffered an adverse employment action that was
causally connected to participation in a protected activity, i.e., speaking out on an issue of public concern. Once the employee satisfies this initial burden, the burden shifts to the government employer to show a legitimate nondiscriminatory reason for the action, e.g., that the interest of the government in the efficient delivery of its services outweighs the interest of the employee in speaking out, or that the adverse action would have been taken even without the employee’s speech having been made. If the government meets this burden, the burden shifts back to the employee to show that the employer’s actions were in fact a pretext for illegal retaliation.26

Because the government has the primary burden under Pickering of defending its decision once the plaintiff has established a prima facie case, this kind of balance reflects what the “base plus six” model of standards of review, discussed at § 1.4.2 & Table 4, describes as third-order rational review. Under third-order rational review, there is a balancing of governmental interests versus individual constitutional rights, with the burden on the government to justify the constitutionality of its action. Where there is a similar balancing of governmental interests versus individual interests, but the burden is placed on the challenger to prove the statute is unconstitutional, the “base plus six” model describes the level of scrutiny as second-order rational review.

Cases decided since 1973 have fleshed out Pickering in terms of its application to wide variety of government employers and to various speech situations. For example, in Mt. Healthy City School District Board of Education v. Doyle,27 a district court judgment had reinstated a teacher with back pay on the ground that the Board's decision not to renew was based in substantial part on the teacher having communicated to a local television station the principal's memo on teacher dress and appearance. Justice Rehnquist’s opinion for the Court began by saying that since the communication did not violate an established policy of the Board it was protected by the First and 14th Amendments. This being so, the teacher was entitled to win if he showed that his expressive conduct was a motivating factor in the decision not to rehire provided, however, that the Board did not show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Since the Court could not tell what conclusion the lower courts would have reached if they had applied these principles, the judgment was vacated and the case remanded for proceedings consistent with the Court's opinion.

The effect of speaking in private about a matter of public concern was dealt with in Givhan v. Western Line Consolidated School District.28 There the Court held that a public school teacher, dismissed for criticizing the school's employment policies as racially discriminatory in private meetings with her principal, had engaged in expression protected by the First Amendment. Thus, the teacher was entitled to be reinstated unless the Board could show, in accord with Mt. Healthy, that the decision not to rehire would have been made even absent consideration of her criticism.

26 See generally Duffy v. McPhillips, 276 F.3d 988, 991 (8th Cir. 2002) (citations omitted).


Decisions since 1986 have followed *Pickering* for the speech activities of government employees and their rights to expressive association. For example, in *Rankin v. McPherson*, the Court held that a deputy constable was not properly discharged even though she remarked, after hearing of the attempted assassination of President Reagan, “If they go for him again, I hope they get him.” For the Court, Justice Marshall repeated the *Pickering* test, stating: "The determination ... requires a balance between the interests of the employee, as citizen, in commenting on matters of public concern, and the interest of the state, as employer, in promoting the efficiency of the public services it performs through its employees." Here, coming on the heels of a news bulletin on a matter of heightened public attention, the statement dealt with a matter of public concern. Pertinent factors in the balance included whether the statement impaired discipline by superiors or harmony among co-workers, had a detrimental affect on close working relationships for which personal loyalty and confidence are necessary, impeded the performances of the speaker's duties, or interfered with the regular operation of the enterprise. Here, there was no evidence of interference with discipline, nor danger of discrediting the office, and the employee served no confidential, policy-making, or public contact role. She was purely clerical and worked in a room to which the public did not have access. Justice Powell, concurring, said it was unnecessary to engage in any extensive analysis where the statement was made to a co-worker who was her boyfriend, with no intention or expectation it would be overheard or acted on by others. It “borders on the fanciful” to think that this single, offhand comment would lower morale, disrupt the work force, or undermine the mission of the office.

Justice Scalia dissented with Chief Justice Rehnquist and Justices White and O'Connor. Justice Scalia first said that the statement does not constitute speech on a matter of "public concern." He supported that conclusion by making a comparison with statements found to fit that description in prior cases: *Pickering* (criticism of the board for financing school construction; *Connick* (did co-workers ever feel pressured to work in a political campaign); *Mt. Healthy* (memo given to radio station on teacher dress and appearance); and *Givhan* (complaints about school board policies and practices). Even if it was speech on a matter of public concern, the issue is whether the employer's interest in preventing expression of such statements outweighed the employee’s First Amendment interest free speech. Justice Scalia said that "it boggles the mind" to think that she had a right to make the statement, particularly working in a constable’s office devoted to law enforcement.

3. **Speech on a Matter of Public Concern**

How to determine whether speech relates to a matter of public concern was the main focus in the 1983 case of *Connick v. Myers*. Justice White wrote for the Court that a district attorney could fire

---


30 *Id.* at 393-94 (Powell, J., concurring).

31 *Id.* at 397-400 (Scalia, J., joined by Rehnquist, C.J., and White & O'Connor, J.J., dissenting) (citations omitted).

an assistant district attorney without regard to *Pickering* for circulating a questionnaire to co-workers that could most accurately be characterized as an employee grievance concerning internal office policy, if the district attorney reasonably believed that the questionnaire would disrupt the office, undermine his authority, or destroy close working relationships. Justice White said government officials should be given wide latitude in managing their offices without intrusive oversight, even if the reasons for dismissal are mistaken or unreasonable, if the speech was not on a matter of public concern.

The Court noted, however, that with respect to one aspect of the speech First Amendment review was required. This involved determining whether the discharge was justified because one question touched on a matter of public concern, *i.e.*, did assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." On this issue, the Court concluded that while there was no showing that the questionnaire impeded the employee's ability to perform her responsibilities, weight must be given to the supervisor's reasonable belief that the questionnaire, arising from an employment dispute, was an act of insubordination that interfered with working relationships essential to fulfilling public responsibilities.

Justice Brennan dissented with Justices Marshall, Blackmun and Stevens. Justice Brennan said that the questionnaire addressed matters of public concern because it discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which the district attorney, an elected official, was discharging his responsibilities, especially with regard to the impact of transfer policies. That was so because the employee did not violate a rule of confidentiality or office policy, most copies were distributed during lunch, and no evidence showed that the employee's work performance was adversely affected by her expression. Analogizing the case to student speech at school, Justice Brennan called for applying the intermediate review standard of *Tinker,* allowing regulation only if the expression causes material and substantial interference with the requirements of discipline in the operation of the enterprise. He thought that an undesirable result of the Court's decision would be the public's deprivation of valuable information with which to evaluate the performance of elected officials.

Moving into the 1990s, the Court faced in *Waters v. Churchill* a situation in which a school superintendent had fired a teacher who had sent a letter of public interest to the local newspaper, but the superintendent, relying on a mistaken report about the letter, thought it was on a private matter, *i.e.*, alleged personal mistreatment. The teacher sued for reinstatement. The Court split on how the *Pickering* test should be applied. Justices Scalia, Kennedy, and Thomas approached the question of retaliation as a matter of the literal intent of the government actor. Because of the mistake, the

---

33 *Id.* at 149.

34 *Id.* at 166 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting).

35 511 U.S. 661, 677-79 (1994) (plurality opinion of O’Connor, J., joined by Rehnquist, C.J., and Souter & Ginsburg, JJ.); *Id.* at 689-92 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring); *Id.* at 694-99 (Stevens, J., joined by Blackmun, J., concurring).
decision here was not retaliatory from a subjective literal intent perspective. At the other extreme, Justice Stevens and Blackmun said that *Pickering* applies to protect the employee since, but for the exercise of First Amendment rights, the employee would not have suffered any injury. In the decisive middle-ground opinion, Justice O’Connor, joined by Chief Justice Rehnquist, and Justices Souter and Ginsburg, said that *Pickering* does not apply if the decision-maker acted in good faith and reasonably, but that was not done here since the decision-maker did not make a reasonable inquiry before acting to determine whether the speech was on a matter of public concern.

Another case involving whether speech was work-related occurred in *City of San Diego v. Roe*.36 In this case, a police officer has been discharged for selling videos over the Internet which showed him stripping off a police uniform and masturbating. The Ninth Circuit had held that, because the tape was not an internal workplace grievance and took place while he was off-duty, away from his employer’s premises, it was unrelated to employment and on a matter of public concern. The Ninth Circuit analogized the case to *United States v. National Treasury Employees Union*, 513 U.S. 454, 470-79 (1995), a case where the Supreme Court struck down a ban on honoraria being received by lower-level federal employees, even as to speeches not related to their work responsibilities.

The Supreme Court reversed. The Court held in *City of San Diego v. Roe*37 that the speech was linked to his official status as a police officer and designed to exploit his employer’s image. Thus, the speech was viewed as work-related, and therefore different than *Treasury Employees*. Because the video was widely distributed, it was harmful to the proper functioning of the police department. The Court then held that because the speech was not on a matter of public concern the *Pickering* balance test did not apply. In defining what is a matter of public concern, the Court noted: “Public concern is something that is a subject of legitimate news interest; that is, a subject of general interest of value and concern to the public at the time of publication.”

4. *Garcetti* and Work-Related Speech

**Garcetti v. Ceballos**


Justice KENNEDY delivered the opinion of the Court.

The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

---

36 City of San Diego v. Roe, 356 F.2d 1108, 1112-13 (9th Cir. 2004).

37 City of San Diego v. Roe, 543 U.S. 77, 80-84 (2005). *See also* Communications Workers of America v. Ector County Hosp. Dist., 2006 WL 2831142 (5th Cir. 2006) (13-4 *en banc*) (employee wearing “Union Yes” button assumed to be matter of public concern, but public hospital’s interest in maintaining a tranquil and peaceful atmosphere outweighed employee’s rights).
Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he had filed a motion to traverse, or challenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos’ statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case. Despite Ceballos’ concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California, asserting, as relevant here, a claim under Rev. Stat. § 1979, 42 U.S.C. § 1983. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.
Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. It held in the alternative that even if Ceballos' speech was constitutionally protected, petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.

As the Court's decisions have noted, for many years “the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights.” Connick, 461 U.S., at 143. That dogma has been qualified in important respects. See id., at 144-145. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, e.g., Pickering, supra, at 568; Connick, supra, at 147; Rankin v. McPherson, 483 U.S. 378, 384 (1987); United States v. Treasury Employees, 513 U.S. 454, 466 (1995).

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See id., at 568. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See Connick, supra, at 147. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See Pickering, 391 U.S., at 568.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of “the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal.” Id., at 569. The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, e.g., Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion) (“[T]he government as employer indeed has far broader powers than does the government as sovereign”). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. Connick, supra, at 143 (“[G]overnment offices could not function if every employment decision became a constitutional matter”). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.
At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See Perry v. Sindermann, 408 U.S. 593, 597. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, e.g., Connick, supra, at 147 (“Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government”).

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. See, e.g., Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 414 (1979). Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like “any member of the general public,” Pickering, 391 U.S., at 573, to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. See, e.g., ibid.; Givhan, supra, at 414. As the Court noted in Pickering: “Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.” 391 U.S., at 572. The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 (“Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'”). That consideration – the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case – distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) (“[W]hen the government appropriates public funds to
promote a particular policy of its own it is entitled to say what it wishes”). Contrast, for example, the expressions made by the speaker in Pickering, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

Justice STEVENS, dissenting.

The proper answer to the question “whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,” ante, at 1955, is “Sometimes,” not “Never.” Of course a supervisor may take corrective action when such speech is “inflammatory or misguided,” ante, at 1960-1961. But what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?

As Justice Souter explains, public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous Court, rejected “the conclusion that a public employee forfeits
his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly.” Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 414 (1979). We had no difficulty recognizing that the First Amendment applied when Bessie Givhan, an English teacher, raised concerns about the school's racist employment practices to the principal. See id., at 414-16. Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, dissenting.

The Court holds that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” Ante, at 1960. I respectfully dissent.

I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment. See, e.g., Schenck v. Pro-Choice Network of Western N. Y., 519 U.S. 357, 377 (1997). At the other extreme, a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee. See Connick v. Myers, 461 U.S. 138, 147 (1983). In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or public benefit thought to flow from the statements. Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568 (1968). Entitlement to protection is thus not absolute.

This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose. “Government employees are often in the best position to know what ails the agencies for which they work.” Waters v. Churchill, 511 U.S. 661, 674 (1994).
The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities. It is one thing for an office clerk to say there is waste in government and quite another to charge that his own department pays full-time salaries to part-time workers. Even so, we have regarded eligibility for protection by Pickering balancing as the proper approach when an employee speaks critically about the administration of his own government employer. In Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979), we followed Pickering when a teacher was fired for complaining to a superior about the racial composition of the school's administrative, cafeteria, and library staffs, 439 U.S., at 413-414, and the same point was clear in Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976). That case was decided, in part, with reference to the Pickering framework, and the Court there held that a schoolteacher speaking out on behalf of himself and others at a public school board meeting could not be penalized for criticizing pending collective-bargaining negotiations affecting professional employment. Madison noted that the teacher “addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government.” 429 U.S., at 174-175.

As all agree, the qualified speech protection embodied in Pickering balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.

Indeed, the very idea of categorically separating the citizen's interest from the employee's interest ignores the fact that the ranks of public service include those who share the poet's “object . . . to unite [m]y avocation and my vocation”; these citizen servants are the ones whose civic interest rises highest when they speak pursuant to their duties, and these are exactly the ones government employers most want to attract. There is no question that public employees speaking on matters they are obliged to address would generally place a high value on a right to speak.

Nothing, then, accountable on the individual and public side of the Pickering balance changes when an employee speaks “pursuant” to public duties. On the side of the government employer, however, something is different, and to this extent, I agree with the majority of the Court. The majority is rightly concerned that the employee who speaks out on matters subject to comment in doing his own work has the greater leverage to create office uproars and fracture the government's authority to set policy to be carried out coherently through the ranks. “Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.” Ante, at 1960. Up to a point, then, the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service.
Two reasons in particular make me think an adjustment using the basic Pickering balancing scheme is perfectly feasible here. First, the extent of the government's legitimate authority over subjects of speech required by a public job can be recognized in advance by setting in effect a minimum heft for comments with any claim to outweigh it. Thus, the risks to the government are great enough for us to hold from the outset that an employee commenting on subjects in the course of duties should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it. The examples I have already given indicate the eligible subject matter, and it is fair to say that only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor. If promulgation of this standard should fail to discourage meritless actions premised on 42 U.S.C. § 1983 (or Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)) before they get filed, the standard itself would sift them out at the summary-judgment stage.

My second reason for adapting Pickering to the circumstances at hand is the experience in Circuits that have recognized claims like Ceballos's here. First Amendment protection less circumscribed than what I would recognize has been available in the Ninth Circuit for over 17 years, and neither there nor in other Circuits that accept claims like this one has there been a debilitating flood of litigation. There has indeed been some: as represented by Ceballos's lawyer at oral argument, each year over the last five years, approximately 70 cases in the different Courts of Appeals and approximately 100 in the various District Courts. Tr. of Oral Arg. 58–59. But even these figures reflect a readiness to litigate that might well have been cooled by my view about the importance required before Pickering treatment is in order.

For that matter, the majority's position comes with no guarantee against factbound litigation over whether a public employee's statements were made “pursuant to . . . official duties,” ante, at 1960. In fact, the majority invites such litigation by describing the enquiry as a “practical one,” ante, at 1961, apparently based on the totality of employment circumstances. Are prosecutors' discretionary statements about cases addressed to the press on the courthouse steps made “pursuant to their official duties”? Are government nuclear scientists' complaints to their supervisors about a colleague's improper handling of radioactive materials made “pursuant” to duties?

Justice BREYER, dissenting.

This case asks whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job. I write separately to explain why I cannot fully accept either the Court's or Justice Souter's answer to the question presented.

Like the majority, I understand the need to “affor[d] government employers sufficient discretion to manage their operations.” Ibid. And I agree that the Constitution does not seek to “displace[e] . . . managerial discretion by judicial supervision.” Ante, at 1961. Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available – to the point where the majority's fears of department management by lawsuit are
misplaced. In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.

This is such a case. The respondent, a government lawyer, complained of retaliation, in part, on the basis of speech contained in his disposition memorandum that he says fell within the scope of his obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). The facts present two special circumstances that together justify First Amendment review.

First, the speech at issue is professional speech – the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. Cf. Legal Services Corporation v. Velazquez, 531 U.S. 533, 544 (2001) ("Restricting LSC [Legal Services Corporation] attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). See also Polk County v. Dodson, 454 U.S. 312, 321 (1981) ("[A] public defender is not amenable to administrative direction in the same sense as other employees of the State"). See generally Post, Subsidized Speech, 106 Yale L.J. 151, 172 (1996) ("[P]rofessionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards"). The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.

Second, the Constitution itself here imposes speech obligations upon the government's professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Brady*, *supra*. So, for example, might a prison doctor have a similar constitutionally related professional obligation to communicate with superiors about seriously unsafe or unsanitary conditions in the cellblock. Cf. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). There may well be other examples.

While I agree with much of Justice Souter's analysis, [it] fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes. The standard would instruct courts to apply *Pickering* balancing in all cases, but says that the government should prevail unless the employee (1) “speaks on a matter of unusual importance,” and (2) “satisfies high standards of responsibility in the way he does it.” *Ante*, at 1967 (dissenting opinion). Justice Souter adds that “only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor.” Ibid.

There are, however, far too many issues of public concern, even if defined as “matters of unusual importance,” for the screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved? . . .
Moreover, the speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function . . . .

Since *Garcetti* was decided, lower courts have split over whether the determination that a government employee’s speech is made in the capacity of a citizen, and thus entitled to free speech protection if on a matter of public concern, or as an employee, and thus not entitled to protection under *Garcetti*, is a question of law for the court, or a mixed question of law and fact to be resolved by the trier of fact, which would sometimes be a jury. The Fifth, Tenth, and District of Columbia Circuits have held the determination is a question of law for the court. The Third, Seventh, and Eighth Circuits have held the determination is a mixed question of law and fact. In *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121 (9th Cir. 2008), discussing the circuit split, the Ninth Circuit joined the Circuits who had held the issue is a mixed question of law and fact.

After *Garcetti*, there are two separate issues to consider to trigger *Pickering* balancing – (1) is the speech as an employee under *Garcetti*, and thus unprotected, and (2) if instead, as a citizen, is it on a matter of public concern. See, e.g., *Lane v. Franks*, 134 S. Ct. 2369 (2014) (director’s testimony at former employee’s corruption trial is (1) speech as a citizen and (2) on a matter of public concern, even though information learned in the course of employment). See, e.g., *Garcia v. Hartford Police Dep’t*, 706 F.3d 120 (2nd Cir. 2013) (police sergeant speaks as a citizen on a matter of public concern when complaining of other officers’ bias against Hispanics); *Jackler v. Byrne*, 658 F.3d 225 (2nd Cir. 2011) (probationary police officer’s refusal to follow alleged orders of his supervisors to withdraw his report confirming that another officer used excessive force was as a citizen on a matter of public concern); *Westmoreland v. Sutherland*, 662 F.3d 714 (6th Cir. 2011) (city firefighter and former dive rescue team leader was speaking as a citizen on a matter of public concern when he said a drowned 7-year-old boy could have been saved if the city had not disbanded the dive team for budgetary reasons). But see *Quint v. University of Oregon*, 2013 WL 363782 (D. Oregon 2013) (not reported in F. Supp. 2d) (instructor who asked students if they wanted him to shoot them for violating no-talking rule (1) is made as employee and (2) did not show speech related to matter of public concern about tolerance of other’s rules); *Nubiak v. City of Chicago*, 810 F.3d 476 (7th Cir. 2016) (female officer complaint about sexual harassment against her is (1) as an employee and (2) also is not a matter of public concern); *Crouse v. Town of Moncks Corner*, 848 F.3d 576 (4th Cir. 2017) (qualified immunity applies since not clearly established that speech was as a citizen on a matter of public concern, and not work-related, when officers encouraged citizen to file a complaint of excessive force against their lieutenant); *Lincoln v. Maketa*, 880 F.3d 533 (10th Cir. 2018) (qualified immunity applies since not clearly established that speech was as a citizen on a matter of public concern, and not work-related, when lieutenant did not follow Sheriff’s orders to give a false account to the media stating that an Internal Affairs document had been stolen by political opponents). See also *Montero v. City of Yonkers*, 890 F.3d 386 (2nd Cir. 2018) (whether union official who criticizes employer is acting within the scope of employment should be considered case-by-case, rejecting the Sixth, Seventh, and Ninth’s Circuits which have held union official always speaks as a private citizen and not as part of employee job responsibilities).
For cases applying *Pickering*, see *Graziosi v. City of Greenville, Mississippi*, 775 F.3d 731 (5th Cir. 2015) (police officer’s interest in posting on mayor’s public Facebook page comments critical of police chief for not allowing police officers to use police cars to attend slain police officer’s funeral outweighed by city’s interest in good working relationships, justifying firing); *Lalowski v. City of Des Plaines*, 789 F.3d 784 (7th Cir. 2015) (police officer’s off-duty verbal altercation with anti-abortion protestor, as well as history of using profane language against citizens, justified firing); *Rock v. Levinski*, 791 F.3d 1215 (10th Cir. 2015) (school district interest in good working relationships justified firing principal who spoke at public meeting in opposition to plan to close her school); *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017) (workplace disruption caused by inflammatory Facebook posts, such as suggesting “beating a liberal to death with another liberal” to get liberals outlawed like guns, justified firing of fire department battalion chief). *But see* *Golodner v. Berliner*, 770 F.3d 196 (2nd Cir. 2014) (contractor with city alleging retaliation because he complained of prior arrests without probable cause survives summary judgment under *Pickering*); *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016) (department policy that prohibits essentially all speech critical of the department overbroad under *Pickering*); *Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017) (policy against officers discussing canine program with “anyone” outside the department unreasonably overbroad). *Cf. Oyama v. University of Hawaii*, 813 F.3d 850 (9th Cir. 2015) (student teacher candidate who was denied application to become a student teacher in part because of his views that online child predation should be legal, and real life child predation should be legal after puberty begins, involves aspects of *Tinker, Pickering*, and professional “certification”; court adopts hybrid test of whether government action was “related directly to defined and established professional standards, was narrowly tailored to serve the [school’s] mission of evaluating [candidate’s] suitability for teaching, and reflected reasonable professional judgment”).

In *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488 (2011), excerpted at § 11.1, the Court held that *Garcetti* applies when the complaint is brought for retaliation against a government employee in violation of a First Amendment right to petition for a redress of grievances, as well as a free speech case. In *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009), a Fifth Circuit panel held that the entire *Pickering/Garcetti* line of analysis does not apply to public officials (i.e., elected officials), as opposed to other kinds of government employees. Instead, standard free speech analysis applies, meaning content-based regulations in a public forum trigger strict scrutiny, not the *Pickering* balancing test. Because the official subsequently left office, the panel decision was vacated and the case dismissed as moot *en banc* by the Fifth Circuit. *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009).

Regarding First Amendment rights of legislators, in *Nevada Comm’ n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011), the Court considered Nevada’s Ethics in Government Law, which requires public officials to recuse themselves from voting on, or advocating the passage or failure of, a matter in which the judgment of a reasonable person the individual would have a personal conflict of interest. The Court held that a legislator has no First Amendment interest at stake because “the legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it.” *Id.* at 2350. *See also* *Loftus v. Bobzien*, 848 F.3d 278 (4th Cir. 2017) (since no constitutional right to elective office, county attorney who lost her job based on conflict of interest with new position on city council has no claim).
§ 8.4 Government Regulation of Political Activities of Government Employees

Prior to the 1960s, the government was given wide latitude to regulate the political activities of government employees under a simple rational basis kind of review. For example, in 1947, in *United Public Workers of American (C.I.O.) v. Mitchell*, the Court upheld the Hatch Act which bars federal employees from active participation in political management and political campaigns. The Act was upheld on its face and as applied to a federal employee who wanted to engage in political activity when not at work. Justice Reed said, “[T]his Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government. . . . [I]t is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service.” Justice Black, dissenting, said that the First Amendment leaves people at liberty to speak their own thoughts about government and to work for their own candidates and parties. Justice Douglas, also dissenting, said that free speech rights are “too basic and fundamental in our democratic political society to be sacrificed or qualified for anything short of a clear and present danger to the civil service system.” These dissenting views have not found their way into majority status.

After *Pickering* in 1968, legislative barriers to participation in partisan political campaigns by lower-level government employees have been analyzed under *Pickering*.

**United States Civil Service v. National Association of Letter Carriers**

413 U.S. 548 (1973)

Justice WHITE delivered the opinion of the Court.

[W]e noted probable jurisdiction of this appeal, 409 U.S. 1058, based on a jurisdictional statement presenting the single question whether the prohibition in § 9(a) of the Hatch Act, now codified in 5 U.S.C. § 7324(a)(2), against federal employees taking “an active part in political management or in political campaigns,” is unconstitutional on its face. Section 7324(a) provides: “An employee in an Executive agency or an individual employed by the government of the District of Columbia may not – (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or (2) take an active part in political management or in political campaigns. For the purpose of this subsection, the phrase ‘an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.”

A divided three-judge court sitting in the District of Columbia had held the section unconstitutional. 346 F. Supp. 578 (1972). We reverse the judgment of the District Court.

---

38 330 U.S. 75, 96 (1947); *id.* at 115 (Black, J., dissenting); *id.* at 126 (Douglas, J., dissenting in part).
Early in our history, Thomas Jefferson was disturbed by the political activities of some of those in the Executive Branch of the Government. See 10 J. Richardson, Messages and Papers of the Presidents 98 (1899). The heads of the executive departments, in response to his directive, issued an order stating in part that “[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.” Id., at 98-99.

There were other voices raised in the 19th century against the mixing of partisan politics and routine federal service. But until after the Civil War, the spoils system under which federal employees came and went, depending upon party service and changing administrations, rather than meritorious performance, was much the vogue and the prevalent basis for governmental employment and advancement. 1 Report of Commission on Political Activity of Government Personnel, Findings and Recommendations 7-8 (1968). That system did not survive. Congress authorized the President to prescribe regulations for the creation of a civil service of federal employees in 1871, 16 Stat. 514; but it was the Civil Service Act of 1883, c. 27, 22 Stat. 403, known as the Pendleton Act, H. Kaplan, The Law of Civil Service 9-10 (1958), that declared that “no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service” and that “no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.” 22 Stat. 404. That Act authorized the President to promulgate rules to carry the Act into effect and created the Civil Service Commission as the agency or administrator of the Act under the rules of the President.

The original Civil Service rules were promulgated on May 7, 1883, by President Arthur. Civil Service Rule I repeated the language of the Act that no one in the executive service should use his official authority or influence to coerce any other person or to interfere with an election, but went no further in restricting the political activities of federal employees. 8 J. Richardson, Messages and Papers of the Presidents 161 (1899). Problems with political activity continued to arise, Twenty-fourth Annual Report of the Civil Service Commission 7-9 (1908), and one form of remedial action was taken in 1907 when, in accordance with Executive Order 642 issued by President Theodore Roosevelt, 1 Report of Commission on Political Activity, supra, at 9, § 1 of Rule I was amended to read as follows: “No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.” Twenty-fourth Annual Report of the Civil Service Commission, supra, at 104 (emphasis added).

It was under this rule that the Commission thereafter exercised the authority it had to investigate, adjudicate, and recommend sanctions for federal employees thought to have violated the rule. See Howard, Federal Restrictions on the Political Activity of Government Employees, 35 Am. Pol. Sci. Rev. 470, 475 (1941). In the course of these adjudications, the Commission identified and developed a body of law with respect to the conduct of federal employees that was forbidden by the prohibition
against taking an active part in political management or political campaigning. Adjudications under Civil Service Rule I spelled out the scope and meaning of the rule in the mode of the common law, 86 Cong. Rec. 2341-2342; and the rules fashioned in this manner were from time to time stated and restated by the Commission for the guidance of the federal establishment. Civil Service Form 1236 of September 1939, for example, purported to publish and restate the law of ”Political Activity and Political Assessments” for federal officeholders and employees.

Civil Service Rule I covered only the classified service. The experience of the intervening years, particularly that of the 1936 and 1938 political campaigns, convinced a majority in Congress that the prohibition against taking an active part in political management and political campaigns should be extended to the entire federal service. 84 Cong. Rec. 4303, 9595, 9604, and 9610. A bill introduced for this purpose, S.1871, “to prevent pernicious political activities,” easily passed the Senate, 84 Cong. Rec. 4191-4192; but both the constitutionality and the advisability of purporting to restrict the political activities of employees were heatedly debated in the House. Id., at 9594-9639. The bill was enacted, however. 53 Stat. 1147. This was the so-called Hatch Act, named after the Senator who was its chief proponent. In its initial provisions, §§ 1 and 2, it forbade anyone from coercing or interfering with the vote of another person and prohibited federal employees from using their official positions to influence or interfere with or affect the election or nomination of certain federal officials. Sections 3 and 4 of the Act prohibited the promise of, or threat of termination of, employment or compensation for the purpose of influencing or securing political activity, or support or opposition for any candidate.

Section 9(a), which provided the prohibition against political activity now found in 5 U.S.C. § 7324(a)(2), with which we are concerned in this case, essentially restated Civil Service Rule I, with an important exception. It made it “unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects.”

Excepted from the restriction were the President, Vice President, and specified officials in policy-making positions. Section 9(b) required immediate removal for violators and forbade the use of appropriated funds thereafter to pay compensation to such persons.

Section 9 differed from Civil Service Rule I in important respects. It applied to all persons employed by the Federal Government, with limited exceptions; it made dismissal from office mandatory upon an adjudication of a violation; and, whereas Civil Service Rule I had stated that persons retained the right to express their private opinions on all political subjects, the statute omitted the word “private” and simply privileged all employees “to express their opinions on all political subjects.”

In 1966, Congress determined to review the restrictions of the Hatch Act on the partisan political activities of public employees. For this purpose, the Commission on Political Activity of Government Personnel was created. 80 Stat. 868. The Commission reported in 1968, recommending
some liberalization of the political-activity restrictions on federal employees, but not abandoning the fundamental decision that partisan political activities by government employees must be limited in major respects. 1 Report of Commission on Political Activity of Government Personnel, supra. Since that time, various bills have been introduced in Congress, some following the Commission's recommendations and some proposing much more substantial revisions of the Hatch Act. In 1972, hearings were held on some proposed legislation; but no new legislation has resulted.

This account of the efforts by the Federal Government to limit partisan political activities by those covered by the Hatch Act should not obscure the equally relevant fact that all 50 States have restricted the political activities of their own employees.

Until now, the judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences. E.g., 84 Cong. Rec. 9598, 9603; 86 Cong. Rec. 2360, 2621, 2864, 9376. The restrictions so far imposed on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

But, as the Court held in Pickering v. Board of Education, 391 U.S. 563, 568 (1968), the government has an interest in regulating the conduct and “the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.” Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.

It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government – the impartial execution of the laws – it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government. See 84 Cong. Rec. 9598; 86 Cong. Rec. 2433-2434, 2864; Hearings on S. 3374 and S. 3417 before the Senate Committee on Post Office and Civil Service, 92d Cong., 2d Sess., 171.

There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.
Another major concern of the restriction against partisan activities by federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. The experience of the 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against the party in power – or the party out of power, for that matter – using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its political structure and political campaigns. E.g., 84 Cong. Rec. 9595, 9598, 9604, 9610.

A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another... Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it.

We have set out the pertinent regulations in the margin. [FN 21: “PERMISSIBLE ACTIVITIES. § 733.111 (a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to – (1) Register and vote in any election; (2) Express his opinion as an individual privately and publicly on political subject and candidates; (3) Display a political picture, sticker, badge, or button; (4) Participate in nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization; (5) Be a member of a political party or other political organization and participate in activities to the extent consistent with law; (6) Attend a political convention rally, fund-raising function, or other political gathering; (7) Sign a political petition as an individual; (8) Make a financial contribution to a political party or organization; (9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124; (10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election; (11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character; (12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and (13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency. (b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official
duties, or create a conflict or apparent conflict of interests. PROHIBITED ACTIVITIES. § 733.121. An employee may not use his official authority or influence for the purpose of interfering with or affecting the result of an election. § 733.122 (a) An employee may not take active part in political management or in a political campaign, except as permitted by this subpart. (b) Activities prohibited by paragraph (a) of this section include but are not limited to – (1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions; (2) Organizing or reorganizing a political party organization or political club; (3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose; (4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club; (5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office; (6) Becoming a partisan candidate for, or campaigning for, an elective public office; (7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office; (8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate; (9) Driving voters to the polls on behalf of a political party or partisan candidate; (10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material; (11) Serving as a delegate, alternate, or proxy to a political party convention; (12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and (13) Initiating or circulating a partisan nominating petition.”] We see nothing impermissibly vague in 5 CFR § 733.122 . . . . There might be quibbles about the meaning of taking an “active part in managing” or about “actively participating in . . . fund-raising” or about the meaning of becoming a “partisan” candidate for office; but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. “[T]he general class of offenses to which . . . [the provisions are] directed is plainly within [their] terms, . . . [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise.” United States v. Harriss, 347 U.S. 612, 618 (1954).

The Act permits the individual employee to “express his opinion on political subjects and candidates” 5 U.S.C. § 7324(b); and the corresponding regulation, 5 CFR § 733.111(a)(2), privileges the employee to “[e]xpress his opinion as an individual privately and publicly on political subjects and candidates.” The section of the regulations which purports to state the partisan acts that are proscribed, id., § 733.122, forbids in subparagraph (a)(10) the endorsement of “a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material,” and in subparagraph (a)(12), prohibits “[a]ddressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office.” Arguably, there are problems in meshing § 733.111(a)(2) with §§ 733.122(a)(10) and (12), but we think the latter prohibitions sufficiently clearly carve out the prohibited political conduct from the expressive activity permitted by the prior section to survive any attack on the ground of vagueness.
It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned.

Neither do we discern anything fatally overbroad about the statute . . . . The major difficulties . . . relate to the prohibition in §§ 733.122(a) (10) and (12) on endorsements in advertisements, broadcasts, and literature and on speaking at political party meetings in support [of] partisan candidates for public or party office. But these restrictions are clearly stated, they are political acts normally performed only in the context of partisan campaigns by one taking an active role in them, and they are sustainable for the same reasons that the other acts of political campaigning are . . . proscribable. They do not, therefore, render . . . the statute vulnerable by reason of overbreadth.

Justice DOUGLAS, with whom Justice BRENNA N and Justice MARSHALL concur, dissenting.

The Hatch Act by § 9(a) prohibits federal employees from taking “an active part in political management or in political campaigns.” Some of the employees, whose union is speaking for them, want “to run in state and local elections for the school board, for city council, for mayor”; “to write letters on political subjects to newspaper”; “to be a delegate in a political convention”; “to run for an office and hold office in a political party or political club”; “to campaign for candidates for political office”; [and] “to work at polling places in behalf of a political party.”

There is no definition of what “an active part . . . in political campaigns” means. The Act incorporates over 3,000 rulings of the Civil Service Commission between 1886 and 1940 and many hundreds of rulings since 1940. But even with that gloss on the Act, the critical phrases lack precision. In 1971 the Commission published a three-volume work entitled Political Activities Reporter which contains over 800 of its decisions since the enactment of the Hatch Act. One can learn from studying those volumes that it is not “political activity” to march in a band during a political parade or to wear political badges or to “participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.” 5 CFR § 733.111(a) (13).

That is to say, some things, like marching in a band, are clear. Others are pregnant with ambiguity as “participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise,” etc. Permission to “[t]ake an active part . . . in a nonpartisan election,” 5 CFR § 733.111(a)(10), also raises large questions of uncertainty because one may be partisan for a person, an issue, a candidate without feeling an identification with one political party or the other.

In 1976, the Court held in Elrod v. Burns, 427 U.S. 347, 359-73 (1976), that public employees may not be discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation. Because they were being fired because of their political association, Elrod involved burdens on individual’s freedom of association, discussed at § 11.2.
CHAPTER 9: CONTENT-BASED REGULATIONS OF SPEECH TRIGGERING VERSIONS OF INTERMEDIATE REVIEW, NOT STRICT SCRUTINY

§ 9.1 Intermediate Review: The Government as Trustee of the Airwaves Regarding Broadcast Radio and Television Regulation ........................................... 439

§ 9.2 Intermediate Review with Bite: Commercial Speech Regulation Under Central Hudson Gas: 1976-1986 ................................................................. 452


§ 9.4 Commercial Speech Cases Rejecting Posadas: 1996-Today .................. 474

§ 9.1 Intermediate Review: The Government as Trustee of the Airwaves Regarding Broadcast Radio and Television Regulation

In the beginning of radio and television broadcast regulation, the Court distinguished between the freedom guaranteed to newspapers and the need for government regulation of the airwaves, based on the rationales of scarcity of broadcast stations and public ownership of the airwaves. Those cases are addressed here at § 9.1. As scarcity has become a less significant issue, the Court has tended to treat broadcast stations, particularly cable and satellite, more like newspapers, discussed at § 10.1.

The Court’s concern about scarcity in the public airwaves has been used to justify a standard of review less than strict scrutiny for a content-based regulation of speech. For example, in Red Lion Broadcasting Company v. FCC,1 decided in 1969, the Court held that broadcasters can be required to allow free reply time to persons who have been personally attacked on their station. The Court said that because of limited frequencies, the persons licensed to broadcast have no constitutional right to monopolize a radio frequency. The Court said, "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." To the argument that allowing free reply time would force broadcasters into self-censorship and limited coverage of public issues, the Court said this was at best speculative.

This decision can be contrasted with a similar kind of access regulation applied to newspapers. In 1974, in Miami Herald Publishing Co. v. Tornillo,2 the Court held that a law requiring newspapers to grant political candidates equal space in which to reply to criticism or to attacks on their personal character or official record was an invalid content-based restriction on editorial judgment. The reasoning in the two cases was different, since in Tornillo the Court applied standard First Amendment doctrine adopting strict scrutiny for a content-based regulation of speech.


Red Lion Broadcasting Company v. FCC
395 U.S. 367 (1969)

Justice WHITE delivered the opinion of the Court.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. Red Lion involves the application of the fairness doctrine to a particular broadcast, and RTNDA arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the Red Lion litigation had begun.

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a “Christian Crusade” series. A book by Fred J. Cook entitled ‘Goldwater – Extremist on the Right’ was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a “book to smear and destroy Barry Goldwater.” When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine as expressed in Times-Mirror Broadcasting Co., 24 P & F Radio Reg. 404 (1962), to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit, the FCC’s position was upheld as constitutional . . . . 127 U.S. App. D.C. 129, 381 F.2d 908 (1967).

Not long after the Red Lion litigation was begun, the FCC issued a Notice of Proposed Rule Making, 31 Fed. Reg. 5710, with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specifying its rules relating to political editorializations. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed, 32 Fed. Reg. 10303. Twice amended, 32 Fed. Reg. 11531, 33 Fed. Reg. 5362, the rules were held unconstitutional in the RTNDA litigation by the Court of Appeals for the Seventh Circuit, on review of the rulemaking proceeding, as abridging the freedoms of speech and press. 400 F.2d 1002 (1968).
As they now stand amended, the regulations read as follows:

“Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack, and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.” 47 CFR §§ 73.123, 73.300, 73.598, 73.679 (all identical).

Although broadcasting is clearly a medium affected by a First Amendment interest, United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948), differences in the characteristics of new media justify differences in the First Amendment standards applied to them. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination. Kovacs v. Cooper, 336 U.S. 77 (1949).

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others. Associated Press v. United States, 326 U.S. 1, 20 (1945).
When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934, as the Court has noted at length before. National Broadcasting Co. v. United States, 319 U.S. 190, 210-214 (1943). It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users. Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same “right” to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.

Not having heard oral argument, Justice DOUGLAS took no part in the Court's decision.

In 1987, the FCC repealed both the “balanced coverage” and “right of reply” provisions of the fairness doctrine on grounds that they “chilled” the free speech rights of broadcasters. See generally Kenneth Karst, Equality as a Central Principle in the First Amendment, 43 U. Chi. L. Rev. 20, 49 (1975) (“[C]ontinuing governmental surveillance over broadcasting content presents truly grave dangers. [E]ven the right-of-reply portion [gives] added encouragement to editorial blandness.”).
See also Radio-Television News Directors Ass’n v. FCC, 229 F.3d 269 (D.C. Cir. 2000) (repeal of the entire “personal attack” and “political editorializing” aspects of the fairness doctrine); T. Trevor Hall & James C. Phillips, The Fairness Doctrine in Light of Hostile Media Perception, 19 CommLaw Conspectus 395 (2011) (discussion of demise of the “fairness doctrine” and rise of “right-wing” and “left-wing” talk radio and cable news, but noting difficulty in modern radio, television, and Internet climate for any effective re-implementation of the fairness doctrine).

In 1984, the Court clarified that the lower standard of review for content-based regulations of speech on over-the-airwaves radio and television stations in Red Lion involved intermediate scrutiny. In FCC v. League of Women Voters, the Court was faced with a statute that forbade any noncommercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting to engage in editorializing. Faced with this content-based regulation, the district court in the case had applied strict scrutiny review. However, relying upon Red Lion and other cases which had held that a different standard applied to radio and television, the Court held that the correct standard was whether the regulation was “narrowly tailored to further a substantial governmental interest, such as ensuring adequate and balanced coverage of public issues.” Applying this intermediate scrutiny test resulted in the government’s ban on editorializing still being declared unconstitutional because “the specific interests sought to be advanced by [the ban] are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgement of important journalistic freedoms which the First Amendment jealously protects.”

See also Minority Television Project, Inc. v. FCC, 736 F.3d 1192 (9th Cir. 2013) (9-2 en banc decision) (prohibition against for-profit and political advertisements on public broadcasting stations constitutional under intermediate standard of review of Red Lion and League of Women Voters; regulation was narrowly tailored to further government’s substantial interest in maintaining educational mission and nature of public broadcasting).

FCC v. Pacifica Foundation
438 U.S. 726 (1978)

Justice STEVENS delivered the opinion of the Court (Parts I, II, III and IV-C) and an opinion in which THE CHIEF JUSTICE and Justice REHNQUIST joined (Parts IV-A and IV-B).

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled “Filthy Words” before a live audience in a California theater. He began by referring to his thoughts about “the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever.” He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording . . . indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica Foundation, broadcast the “Filthy Words” monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the “record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control.”

Advancing several reasons for treating broadcast speech differently from other forms of expression, the Commission found a power to regulate indecent broadcasting in two statutes: 18 U.S.C. § 1464 (1976 ed.), which forbids the use of “any obscene, indecent, or profane language by means of radio communications,” and 47 U.S.C. § 303(g), which requires the Commission to “encourage the larger and more effective use of radio in the public interest.”

The Commission characterized the language used in the Carlin monologue as “patently offensive,” though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the “law generally speaks to channeling behavior more than actually prohibiting it. . . . [T]he concept ‘indecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs at times of the day when there is a reasonable risk that children may be in the audience.” 56 F.C.C.2d, at 98.

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they “were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon),” and that the prerecorded language, with these offensive words “repeated over and over,” was “deliberately broadcast.” Id., at 99. In summary, the Commission stated: “We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. [§] 1464.” Ibid.

IV

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the “Filthy Words” monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

A

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was “issued in a specific factual context.” 59 F.C.C.2d, at 893. That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context – it cannot be adequately judged in the abstract.
The approach is also consistent with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367. In that case the Court rejected an argument that the Commission's regulations defining the fairness doctrine were so vague that they would inevitably abridge the broadcasters' freedom of speech. The Court of Appeals had invalidated the regulations because their vagueness might lead to self-censorship of controversial program content. Radio Television News Directors Assn. v. United States, 400 F.2d 1002, 1016 (CA7 1968). This Court reversed. After noting that the Commission had indicated, as it has in this case, that it would not impose sanctions without warning in cases in which the applicability of the law was unclear, the Court stated: “We need not approve every aspect of the fairness doctrine to decide these cases, and we will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, United States v. Sullivan, 332 U.S. 689, 694 (1948), but will deal with those problems if and when they arise.” 395 U.S., at 396.

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. Cf. Bates v. State Bar of Arizona, 433 U.S. 350, 380-381. Young v. American Mini Theatres, Inc., 427 U.S. 50, 61. The danger dismissed so summarily in *Red Lion*, in contrast, was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is “strong medicine” to be applied “sparingly and only as a last resort.” Broadrick v. Oklahoma, 413 U.S. 601, 613. We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. Roth v. United States, 354 U.S. 476. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content – or even to the fact that it satirized contemporary attitudes about four-letter words – First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends.

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. . . . Indeed, we may assume, arguendo, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its “social value,” to use Justice Murphy's term, vary with the circumstances. Words that are
commonplace in one setting are shocking in another. To paraphrase Justice Harlan, one occasion's lyric is another's vulgarity. Cf. Cohen v. California, 403 U.S. 15, 25.

In this case it is undisputed that the content of Pacifica's broadcast was “vulgar,” “offensive,” and “shocking.” Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.

C

We have long recognized that each medium of expression presents special First Amendment problems. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-503. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve “the public interest, convenience, and necessity.” Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367.

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Rowan v. Post Office Dept., 397 U.S. 728. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in Ginsberg v. New York, 390 U.S. 629, that the government's interest in the “well-being of its youth” and in supporting “parents' claim to authority in their own household” justified the regulation of otherwise protected expression. Id., at 640 and 639. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.

Page 446
It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Justice Sutherland wrote a “nuisance may be merely a right thing in the wrong place, – like a pig in the parlor instead of the barnyard.” Euclid v. Ambler Realty Co., 272 U.S. 365, 388. We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

APPENDIX TO OPINION OF THE COURT

The following is a verbatim transcript of “Filthy Words” prepared by the FCC.

Aruba-du, ruba-tu, ruba-tu. I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, [']cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington, knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay, I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever, [']cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter). [Ed.: Remainder of the transcript not included here.]

Justice POWELL, with whom Justice BLACKMUN joins, concurring in part and concurring in the judgment.

I join Parts I, II, III, and IV-C of Justice Stevens' opinion. The Court today reviews only the Commission's holding that Carlin's monologue was indecent “as broadcast” at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion. Ante, at 3032-3033. In addition to being consistent with our settled practice of not deciding constitutional issues unnecessarily, see ante, at 3032; Ashwander v. TVA, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring), this narrow focus also is conducive to the orderly development of this relatively new and difficult area of law, in the first instance by the Commission, and then by the reviewing courts. See 181 U.S. App. D.C. 132, 158-160 (1977) (Leventhal, J., dissenting).

Page 447
I also agree with much that is said in Part IV of Mr. Justice Stevens' opinion, and with its conclusion that the Commission's holding in this case does not violate the First Amendment. Because I do not subscribe to all that is said in Part IV, however, I state my views separately.

The Commission properly held that the speech from which society may attempt to shield its children is not limited to that which appeals to the youthful prurient interest. The language involved in this case is as potentially degrading and harmful to children as representations of many erotic acts.

In most instances, the dissemination of this kind of speech to children may be limited without also limiting willing adults' access to it. Sellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children, but such a requirement has no effect on adults' access. See id., at 634-635. The difficulty is that such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children. This, as the Court emphasizes, is one of the distinctions between the broadcast and other media to which we often have adverted as justifying a different treatment of the broadcast media for First Amendment purposes. See Bates v. State Bar of Arizona, 433 U.S. 350, 384 (1977); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 101 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386-387 (1969). In my view, the Commission was entitled to give substantial weight to this difference in reaching its decision in this case.

A second difference, not without relevance, is that broadcasting – unlike most other forms of communication – comes directly into the home, the one place where people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds. Erznoznik v. Jacksonville, supra, 422 U.S., at 209; Cohen v. California, 403 U.S., at 21; Rowan v. Post Office Dept., 397 U.S. 728 (1970). Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, see, e.g., Erznoznik, supra, 422 U.S., at 210-211; but cf. Rosenfeld v. New Jersey, 408 U.S. 901, 903-909 (1972) (Powell, J., dissenting), a different order of values obtains in the home. “That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.” Rowan v. Post Office Dept., 397 U.S., at 738. The Commission also was entitled to give this factor appropriate weight in the circumstances of the instant case.

It is argued that despite society's right to protect its children from this kind of speech, and despite everyone's interest in not being assaulted by offensive speech in the home, the Commission's holding in this case is impermissible because it prevents willing adults from listening to Carlin's monologue over the radio in the early afternoon hours. It is said that this ruling will have the effect of “reduc[ing] the adult population . . . to [hearing] only what is fit for children.” Butler v. Michigan, 352 U.S. 380, 383 (1957). This argument is not without force. The Commission certainly should consider it as it develops standards in this area. But it is not sufficiently strong to leave the Commission powerless to act in circumstances such as those in this case.
The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion. On its face, it does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience [Ed.: under current law, between 10 p.m. - 6 a.m. in the Eastern time zone, which also applies to the Pacific time zone, and 9 p.m. - 5 a.m. in the Central time zone], nor from broadcasting discussions of the contemporary use of language at any time during the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here. . . .

As the foregoing demonstrates, my views are generally in accord with what is said in Part IV-C of Justice Stevens' opinion. See ante, at 3039-3041. I therefore join that portion of his opinion. I do not join Part IV-B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most “valuable” and hence deserving of the most protection, and which is less “valuable” and hence deserving of less protection. Compare ante, at 3037-3040; Young v. American Mini Theatres, Inc., 427 U.S. 50, 63-73 (1976) (opinion of Stevens, J.), with id., at 73 n.1 (Powell, J., concurring). In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less “value” than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.

The result turns instead on the unique characteristics of the broadcast media, combined with society's right to protect its children from speech generally agreed to be inappropriate for their years, and with the interest of unwilling adults in not being assaulted by such offensive speech in their homes. Moreover, I doubt whether today's decision will prevent any adult who wishes to receive Carlin's message in Carlin's own words from doing so, and from making for himself a value judgment as to the merit of the message and words. Cf. Id., at 77-79 (Powell, J., concurring). These are the grounds upon which I join the judgment of the Court as to Part IV.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

I agree with Justice Stewart that, under Hamling v. United States, 418 U.S. 87 (1974), and United States v. 12 200-ft. Reels of Film, 413 U.S. 123 (1973), the word “indecent” in 18 U.S.C. § 1464 (1976 ed.) must be construed to prohibit only obscene speech. I would, therefore, normally refrain from expressing my views on any constitutional issues implicated in this case. However, I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. Although the government unquestionably has a special interest in the
well-being of children and consequently “can adopt more stringent controls on communicative materials available to youths than on those available to adults,” Erznoznik v. Jacksonville, 422 U.S. 205, 212 (1975); see Paris Adult Theatre I v. Slaton, 413 U.S. 49, 106-107 (1973) (Brennan, J., dissenting), the Court has accounted for this societal interest by adopting a “variable obscenity” standard that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors. Ginsberg v. New York, 390 U.S. 629 (1968). It is true that the obscenity standard the Ginsberg Court adopted for such materials was based on the then-applicable obscenity standard of Roth v. United States, 354 U.S. 476 (1957), and Memoirs v. Massachusetts, 383 U.S. 413 (1966), and that “[w]e have not had occasion to decide what effect Miller [v. California, 413 U.S. 15 (1973)] will have on the Ginsberg formulation.” Erznoznik v. Jacksonville, supra, 422 U.S., at 213 n.10. Nevertheless, we have made it abundantly clear that “under any test of obscenity as to minors . . . to be obscene ‘such expression must be, in some significant way, erotic.’” 422 U.S., at 213 n.10, quoting Cohen v. California, 403 U.S., at 20.

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. It thus ignores our recent admonition that “[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” 422 U.S., at 213-214. The Court's refusal to follow its own pronouncements is especially lamentable since it has the anomalous subsidiary effect, at least in the radio context at issue here, of making completely unavailable to adults material which may not constitutionally be kept even from children. This result violates in spades the principle of Butler v. Michigan, supra. Butler involved a challenge to a Michigan statute that forbade the publication, sale, or distribution of printed material “tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.” 352 U.S., at 381. Although Roth v. United States had not yet been decided, it is at least arguable that the material the statute in Butler was designed to suppress could have been constitutionally denied to children. Nevertheless, this Court found the statute unconstitutional. Speaking for the Court, Mr. Justice Frankfurter reasoned: “The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society.” 352 U.S., at 383-384.

In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother Powell, and my Brother Stevens, both stress the time-honored right of a parent to raise his child as he sees fit – a right this Court has consistently been vigilant to protect. See Wisconsin v. Yoder, 406 U.S. 205 (1972). Yet this principle supports a result directly contrary to that reached by the Court. Yoder and Pierce hold that parents, not the government, have the right to make certain decisions regarding the upbringing of their children. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven “dirty words” healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the
American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature . . . . Only the Court's regrettable decision does that.

Justice STEWART, with whom Justice BRENNAN, Justice WHITE, and Justice MARSHALL join, dissenting.

The statute pursuant to which the Commission acted, 18 U.S.C. § 1464 (1976 ed.), makes it a federal offense to utter “any obscene, indecent, or profane language by means of radio communication.” The Commission held, and the Court today agrees, that “indecent” is a broader concept than “obscene” as the latter term was defined in Miller v. California, 413 U.S. 15, because language can be “indecent” although it has social, political, or artistic value and lacks prurient appeal. 56 F.C.C.2d 94, 97. But this construction of § 1464, while perhaps plausible, is by no means compelled. To the contrary, I think that “indecent” should properly be read as meaning no more than “obscene.” Since the Carlin monologue conceded was not “obscene,” I believe that the Commission lacked statutory authority to ban it. Under this construction of the statute, it is unnecessary to address the difficult and important issue of the Commission's constitutional power to prohibit speech that would be constitutionally protected outside the context of electronic broadcasting.

This Court has recently decided the meaning of the term “indecent” in a closely related statutory context. In Hamling v. United States, 418 U.S. 87, the petitioner was convicted of violating 18 U.S.C. § 1461, which prohibits the mailing of “[e]very obscene, lewd, lascivious, indecent, filthy or vile article.” The Court “construe[d] the generic terms in [§ 1461] to be limited to the sort of ‘patently offensive representations or descriptions of that specific “hard core” sexual conduct given as examples in Miller v. California.’” 418 U.S., at 114, quoting United States v. 12 200-ft. Reels of Film, 413 U.S. 123, 130 n.7. Thus, the clear holding of Hamling is that “indecent” as used in § 1461 has the same meaning as “obscene” as that term was defined in the Miller case. See also Marks v. United States, 430 U.S. 188, 190 (18 U.S.C. § 1465).

Nothing requires the conclusion that the word “indecent” has any meaning in § 1464 other than that ascribed to the same word in § 1461. Indeed, although the legislative history is largely silent, such indications as there are support the view that §§ 1461 and 1464 should be construed similarly. . . . A]lthough §§ 1461 and 1464 were originally enacted separately, they were codified together in the Criminal Code of 1948 as part of a chapter entitled “Obscenity.” There is nothing in the legislative history to suggest that Congress intended that the same word in two closely related sections should have different meanings. See H.R.Rep.No.304, 80th Cong., 1st Sess., A104-A106 (1947).

In FCC v. Fox Television Stations, Inc. (Fox 1), a 5-4 Court held that the FCC had appropriately exercised its power to change its interpretation of its authorizing statute to punish the broadcasting

---

4 129 S. Ct. 1800, 1810-12 (2009); id. at 1819-22 (Thomas, J., concurring); id. at 1822, 1824 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Justice Breyer’s dissent in the case); id. at 1829 (Breyer, J., joined by Stevens, Souter & Ginsburg, J.J., dissenting);
of indecent expletives even when the offensive words were not repeated, as they had been in *Pacifica*, excerpted above. The Court said an agency’s change in interpretation would not be given more searching review than an initial interpretation, and all that was required was that there are good reasons for it, and that the agency believes it to be better. Justice Thomas, concurring, used the case to suggest the Court should reexamine the lesser standard of review given to content-based regulation of the broadcast media, as occurs in *Red Lion* and other similar cases. In a dissent joined by Justices Stevens, Souter, and Ginsburg, Justice Breyer stated that the FCC’s reasons for changing its interpretation were not adequately explained and thus should be regarded as arbitrary and an abuse of discretion. Justice Kennedy remarked that he agreed that an agency “must explain why ‘it now reject[s] the considerations that led it to adopt that initial policy.’” In this case, he concluded the agency could meet this test. In *FCC v. Fox Television Stations, Inc. (Fox 2)*, a unanimous Court held the FCC did not give television networks fair notice in advance of a change in policy whereby a fleeting expletive or brief shot of nudity could be actionably indecent, and thus their new policy was unconstitutionally vague as applied to the charges filed in the case.

§ 9.2 Intermediate Review with Bite: Commercial Speech Regulation Under *Central Hudson Gas: 1976-1986*

Commercial speech relates to economic transactions, including promotional advertisements as well as offers.6 It is not converted into noncommercial speech by occurring in educational, political, or religious contexts (e.g., an ad for a church). Until 1975, commercial speech received no First Amendment protection. Thus, under Equal Protection and Due Process Clause analysis, only minimum rationality review was given to such economic regulation of advertisements, as in 1942 in *Valentine v. Chrestensen*.7 Similar treatment was given to offers made by door-to-door magazine sellers, and a ban on ads for optical appliances.8 The result was that barriers to commercial speech were easily erected.

At first, the change in perspective came in small increments. In 1972, health concerns allowed a ban on the broadcast of cigarette ads in *Capital Broadcasting Co. v. Acting Attorney General*.9 In 1973,

---


9 405 U.S. 1000 (1972) (holding that Congress may ban cigarette ads in any medium because of its power to regulate commerce).
in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, a state was allowed to ban gender discrimination in help-wanted newspapers ads based on *Valentine v. Chrestensen*, but four Justices dissented from that result. However, the cases indicated some First Amendment concerns might be applicable. The transitional case was *Bigelow v. Virginia*, decided in 1975. The Court said *Chrestensen* did not hold that all ads are unprotected *per se*. Justice Blackmun wrote that even commercial ads deserve some First Amendment protection when, unlike the ads in *Chrestensen* and *Pittsburgh Press*, they contain factual information with a clear public interest. Only Justices White and Rehnquist, two deference-to-government Holmesians, were in dissent.

The decisive case was *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, decided in 1976. There the Court held that a state cannot bar licensed pharmacists from publishing truthful information on drug prices. Justice Blackmun said there is a public interest in the flow of truthful information concerning lawful activities, including speech that merely proposes a commercial transaction. If information is not in itself harmful, the best means for persons to perceive their own best interests is to open the channels of communication. Less than strict review can be applied to commercial speech, however, because truth may be more easily verified by the disseminator and there is little likelihood of chill because ads lead to commercial profits. Thus, under *Virginia State Board*, content regulation of commercial speech that is not misleading or related to unlawful activity must directly advance a substantial governmental interest and not be more extensive than necessary. Only Justice Rehnquist dissented.

*Virginia State Board* was soon extended to permit price advertising for routine legal services in *Bates v. State Bar of Arizona*, and a letter from a civil rights group to potential class action plaintiffs in *In re Primus*, although in-person solicitation by a lawyer at a hospital bedside could still be sanctioned in *Ohralik v. Ohio State Bar Association*. In other decisions on commercial speech by lawyers, the Court held in *In re R.M.J.* that it was an invalid time, place, and manner restraint to bar attorneys from advertising their areas of practice in unapproved words, or to bar mailing cards to others than lawyers, clients, former clients, personal friends, and relatives. The Court said that

---

10 413 U.S. 376, 383-91 (1973) (such an ad created a threat of unlawful employment discrimination); id. at 393 (Burger, C.J., dissenting); id. at 400 (Stewart, J., joined by Douglas, J., dissenting); id. at 404 (Blackmun, J., dissenting).

11 421 U.S. 809, 818-26 (1975); id. at 831-36 (Rehnquist, J., joined by White, J., dissenting).


the law at issue in the case was a more extensive restriction on commercial speech than reasonably necessary to further a substantial governmental interest in preventing deception. In 1977, *Virginia State Board* was extended to real estate sales; however, this did not bar a state from preventing misleading commercial speech.16

More important, perhaps, than such results was the creation of an analytical methodology for dealing with regulation of commercial speech. That approach was summarized in 1980 by Justice Powell in *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, when he wrote: “In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”17

*Central Hudson Gas & Electric Corp. v. Public Service Comm’n*

447 U.S. 557 (1980)

Justice POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

In December 1973, the Commission, appellee here, ordered electric utilities in New York State to cease all advertising that “promot[es] the use of electricity.” App. to Juris. Statement 31a. The order was based on the Commission's finding that “the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter.” Id., at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

16 Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (states cannot bar "For Sale" or "Sold" signs on real estate to reduce panic selling by white owners in a racially integrated neighborhood because the state cannot suppress facts to keep people from acting in ways the government thinks irrational); Friedman v. Rogers, 440 U.S. 1 (1979) (upholding a state ban on the use of trade names by optometrists).

The Policy Statement divided advertising expenses “into two broad categories: promotional advertising intended to stimulate the purchase of utility services, and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales.” App. to Juris. Statement 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in “off-peak” consumption, the ban limits the “beneficial side effects” of such growth in terms of more efficient use of existing power-plants. Id., at 37a. And since oil dealers are not under the Commission's jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only “piecemeal conservationism.” Still, the Commission adopted the restriction because it was deemed likely to “result in some dampening of unnecessary growth” in energy consumption. Ibid.

The Commission's order explicitly permitted “informational” advertising designed to encourage “shifts of consumption” from peak demand times to periods of low electricity demand. Ibid. (emphasis in original). Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review “specific proposals by the companies for specifically described [advertising] programs that meet these criteria.” Id., at 38a.

When it rejected requests for rehearing on the Policy Statement, the Commission supplemented its rationale for the advertising ban. The agency observed that additional electricity probably would be more expensive to produce than existing output. Because electricity rates in New York were not then based on marginal cost, the Commission feared that additional power would be priced below the actual cost of generation. This additional electricity would be subsidized by all consumers through generally higher rates. Id., at 57a-58a. The state agency also thought that promotional advertising would give “misleading signals” to the public by appearing to encourage energy consumption at a time when conservation is needed. Id., at 59a.

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976); Bates v. State Bar of Arizona, 433 U.S. 350, 363-364 (1977); Friedman v. Rogers, 440 U.S. 1, 11 (1979). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. Virginia Pharmacy Board, 425 U.S., at 761-762. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the “highly paternalistic” view that government has complete power to suppress or regulate commercial speech. “[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them. . . .” Id., at 770, see Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 92 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. Bates v. State Bar of Arizona, supra, at 374.

The First Amendment's concern for commercial speech is based on the informational function of advertising. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, Friedman v. Rogers, supra, at 13, 15-16; Ohralik v. Ohio State Bar Assn., supra, at 464-465, or commercial speech related to illegal activity, Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 388 (1973).

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both Bates and Virginia Pharmacy Board, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in Virginia Pharmacy Board that “[t]he advertising ban does not directly affect professional standards one way or the other.” 425 U.S., at 769. In Bates, the Court overturned an advertising prohibition that was designed to protect the “quality” of a lawyer's work. “Restraints on advertising . . . are an ineffective way of deterring shoddy work.” 433 U.S., at 378.

The second criterion recognizes that the First Amendment mandates that speech restrictions be “narrowly drawn.” In re Primus, 436 U.S. 412, 438 (1978). The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, see First National Bank of Boston v. Bellotti, supra, at 794-795, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well. For example, in Bates the Court explicitly did not “foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required” in promotional materials. 433 U.S., at 384. And in Carey v. Population Services International, 431 U.S. 678, 701-702 (1977), we held that the State's “arguments . . . do not justify the total suppression of advertising concerning contraceptives.” This holding left open the possibility that the State could
implement more carefully drawn restrictions. See id., at 712 (Powell, J., concurring in part and in judgment); id., at 716-717 (Stevens, J., concurring in part and in judgment).

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising. The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a “noncompetitive market” could not improve the decisionmaking of consumers. 47 N.Y.2d, at 110, 417 N.Y.S.2d, at 39, 390 N.E.2d, at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

This reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago, see West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63, 72 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

Even in monopoly markets, the suppression of advertising reduces the information available for consumer decisions and thereby defeats the purpose of the First Amendment. The New York court's argument appears to assume that the providers of a monopoly service or product are willing to pay for wholly ineffective advertising. Most businesses – even regulated monopolies – are unlikely to underwrite promotional advertising that is of no interest or use to consumers. Indeed, a monopoly enterprise legitimately may wish to inform the public that it has developed new services or terms of doing business. A consumer may need information to aid his decision whether or not to use the monopoly service at all, or how much of the service he should purchase. In the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising.

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity – during peak or off-peak periods – means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression
of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utilities' rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. . . . The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "backup" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying rehearing made findings on
this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated.

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. [T]he Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. Cf. Banzhaf v. FCC, 405 F.2d 1082 (1968), cert. denied sub nom. Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969). In the absence of a showing that more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

Justice BRENNAN, concurring in the judgment.

I find it impossible to determine on the present record whether the Commission's ban on all “promotional” advertising, in contrast to “institutional and informational” advertising, is intended to encompass more than “commercial speech.” I am inclined to think that Justice Stevens is correct that the Commission's order prohibits more than mere proposals to engage in . . . commercial transactions, and therefore I agree with his conclusion that the ban surely violates the First and Fourteenth Amendments. But even on the assumption that the Court is correct that the Commission's order reaches only commercial speech, I agree with Justice Blackmun that “[n]o differences between commercial speech and other protected speech justify suppression of commercial speech in order to influence public conduct through manipulation of the availability of information.”

Justice BLACKMUN, with whom Justice BRENNAN joins, concurring in the judgment.

I agree with the Court that the Public Service Commission's ban on promotional advertising of electricity by public utilities is inconsistent with the First and Fourteenth Amendments. I concur only in the Court's judgment, however, because I believe the test now evolved and applied by the Court is not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech.

The Court asserts that “a four-part analysis has developed” from our decisions concerning commercial speech. Under this four-part test a restraint on commercial “communication [that] is neither misleading nor related to unlawful activity” is subject to an intermediate level of scrutiny, and suppression is permitted whenever it “directly advances” a “substantial” governmental interest and is “not more extensive than is necessary to serve that interest.” I agree with the Court that this
level of intermediate scrutiny is appropriate for a restraint on commercial speech designed to protect consumers from misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech. I do not agree, however, that the Court's four-part test is the proper one to be applied when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.

Since the Court, without citing empirical data or other authority, finds a “direct link” between advertising and energy consumption, it leaves open the possibility that the State may suppress advertising of electricity in order to lessen demand for electricity. I, of course, agree with the Court that, in today's world, energy conservation is a goal of paramount national and local importance. I disagree with the Court, however, when it says that suppression of speech may be a permissible means to achieve that goal. Justice Stevens appropriately notes: “The justification for the regulation is nothing more than the expressed fear that the audience may find the utility's message persuasive. Without the aid of any coercion, deception, or misinformation, truthful communication may persuade some citizens to consume more electricity than they otherwise would.”

I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to “dampen” demand for or use of the product. As the Court recognizes, the State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them. Ante, at 2351, n.9 (“We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy”). See Rotunda, The Commercial Speech Doctrine in the Supreme Court, 1976 U. Ill. Law Forum 1080, 1080-1083.

Justice STEVENS, with whom Justice BRENNAN joins, concurring in the judgment.

Because “commercial speech” is afforded less constitutional protection than other forms of speech, it is important that the commercial speech concept not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed. The issue in this case is whether New York's prohibition on the promotion of the use of electricity through advertising is a ban on nothing but commercial speech.

The Court first describes commercial speech as “expression related solely to the economic interests of the speaker and its audience.” Ante, at 2349. Although it is not entirely clear whether this definition uses the subject matter of the speech or the motivation of the speaker as the limiting factor, it seems clear to me that it encompasses speech that is entitled to the maximum protection afforded by the First Amendment. Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of a speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward. Thus, the Court's first definition of commercial speech is unquestionably too broad.
The Court's second definition refers to “‘speech proposing a commercial transaction.’” Ante, at 2349. A salesman's solicitation, a broker's offer, and a manufacturer's publication of a price list or the terms of his standard warranty would unquestionably fit within this concept. Presumably, the definition is intended to encompass advertising that advises possible buyers of the availability of specific products at specific prices and describes the advantages of purchasing such items. Perhaps it also extends to other communications that do little more than make the name of a product or a service more familiar to the general public. Whatever the precise contours of the concept, and perhaps it is too early to enunciate an exact formulation, I am persuaded that it should not include the entire range of communication that is embraced within the term “promotional advertising.”

This case involves a governmental regulation that completely bans promotional advertising by an electric utility. This ban encompasses a great deal more than mere proposals to engage in certain kinds of commercial transactions. It prohibits all advocacy of the immediate or future use of electricity. It curtails expression by an informed and interested group of persons of their point of view on questions relating to the production and consumption of electrical energy—questions frequently discussed and debated by our political leaders. For example, an electric company's advocacy of the use of electric heat for environmental reasons, as opposed to wood-burning stoves, would seem to fall squarely within New York's promotional advertising ban and also within the bounds of maximum First Amendment protection. The breadth of the ban thus exceeds the boundaries of the commercial speech concept, however that concept may be defined.

Justice REHNQUIST, dissenting.

The Court today invalidates an order issued by the New York Public Service Commission designed to promote a policy that has been declared to be of critical national concern. The order was issued by the Commission in 1973 in response to the Mideastern oil embargo crisis. It prohibits electric corporations “from promoting the use of electricity through the use of advertising, subsidy payments . . ., or employee incentives.” State of New York Public Service Commission, Case No. 26532 (Dec. 5, 1973), App. to Juris. Statement 31a (emphasis added). Although the immediate crisis created by the oil embargo has subsided, the ban on promotional advertising remains in effect. The regulation was re-examined by the New York Public Service Commission in 1977. Its constitutionality was subsequently upheld by the New York Court of Appeals, which concluded that the paramount national interest in energy conservation justified its retention.

The Court's asserted justification for invalidating the New York law is the public interest discerned by the Court to underlie the First Amendment in the free flow of commercial information. Prior to this Court's recent decision in Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), however, commercial speech was afforded no protection under the First Amendment whatsoever. See, e.g., Breard v. Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942). Given what seems to me full recognition of the holding of Virginia Pharmacy Board that commercial speech is entitled to some degree of First Amendment protection, I think the Court is nonetheless incorrect in invalidating the carefully considered state ban on promotional advertising in light of pressing national and state energy needs.
The Court's analysis in my view is wrong in several respects. Initially, I disagree with the Court's conclusion that the speech of a state-created monopoly, which is the subject of a comprehensive regulatory scheme, is entitled to protection under the First Amendment. I also think that the Court errs here in failing to recognize that the state law is most accurately viewed as an economic regulation and that the speech involved (if it falls within the scope of the First Amendment at all) occupies a significantly more subordinate position in the hierarchy of First Amendment values than the Court gives it today. Finally, the Court in reaching its decision improperly substitutes its own judgment for that of the State . . . . [T]he Court adopts . . . a “no more extensive than necessary” analysis that will unduly impair a state legislature's ability to adopt legislation reasonably designed to promote interests that have always been rightly thought to be of great importance to the State.

Four aspects of the Central Hudson test are important. First, the Central Hudson test is more stringent than regular intermediate scrutiny, since the test requires that the regulation directly advance the government’s interest, rather than merely substantially advance the interest. This increase in review is what makes the Central Hudson test an example of intermediate review with bite as described in the “base plus six” model of review, discussed at § 1.4.2 n.87. Second, commercial speech cases do involve a less rigorous form of scrutiny than traditional First Amendment doctrine for content-based regulations of speech, which ordinarily trigger strict scrutiny. The Court made clear in Board of Trustees of the State University of New York v. Fox that the fourth prong of the Central Hudson test does not involve the “least restrictive alternative” aspect of strict scrutiny, but only that “the regulation not ‘burden substantially more speech than is necessary.’” This tracks an intermediate standard of scrutiny, just as the requirement of only a “substantial government interest” in Central Hudson, and not a compelling government interest, tracks intermediate review. Third, the Central Hudson test lowers First Amendment protection only for content-based regulations of commercial speech. Content-neutral time, place, and manner restrictions of commercial speech, like content-neutral regulations of fully protected speech, are still tested under basic intermediate review. Fourth, under this approach, minimum rational review would be given to regulations of “unlawful” or “misleading” ads, since, without any special First Amendment protection, they would be viewed as standard economic regulations subject to minimum rationality review under the Equal Protection and Due Process Clauses.

Subsequent to Central Hudson, the Court decided in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985), that where the government could show the “possibility of consumer confusion or deception,” even though the commercial speech could not be proven to be unlawful, false, or misleading, then the government could require “uncontroversial, factual disclosures” as long as they were “reasonably related to the state’s interest in preventing deception of consumers” because “disclosure requirements trench much more narrowly on an advertizer’s interest than do flat prohibitions on speech.” As phrased in Zauderer, this was an
example of a 2nd-order reasonableness balancing test, as the Court phrase the issue as whether the challenger could show the government regulation was unreasonable. *Id.* at 651 n.15. In contrast, in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (California law requiring unlicensed “pregnancy-related clinics” to post notices they are not state-licensed, at clinics and on ads, including billboards, in English, Spanish, or any other language spoken by a named percentage of residents in the county (for Los Angeles County, 13 languages), unreasonably overbroad), the Court placed the burden on the government not only to show the “possibility of consumer confusion” to trigger the *Zauderer* test, but also to prove the disclosure requirement was “reasonable.” *Cf.* CTIA-The Wireless Association *v.* City of Berkeley, Cal., 854 F.3d 1105, 1117-19 (9th Cir. 2017) (also placing burden on the government). In *Becerra*, the Court did not acknowledge this shift in burden from *Zauderer*, and cited *Ibanez v. Florida Dep’t of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 146 (1994), which cited *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), to support placing the burden on the government, despite both *Ibanez* and *Edenfield* being cases of regular *Central Hudson* review where the burden is properly on the government, as is usual under intermediate review. However, this *Becerra* 3rd-order reasonableness balancing test may well reflect the Court’s current view, and is consistent with the Court’s increased commercial speech scrutiny, as discussed at § 9.4.

In applying *Central Hudson*, care must be taken to distinguish commercial from non-commercial speech. For example, it was held in *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 537-40 (1980) that a state may not bar a utility from including a political message with its bills. Justice Powell distinguished *Central Hudson* because the speech here involved a political message, rather than commercial speech, and thus the content-based restriction triggered strict scrutiny. In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482-86 (1989); *id.* at 487-88 (Blackmun, J., joined by Brennan & Marshall, JJ., dissenting). the Court concluded that those aspects of university regulations that banned corporations from doing product demonstrations in campus dormitory rooms, such as “tupperware parties,” were targeting commercial speech. Both the majority and the dissent noted, however, that to the extent the regulation also prohibited a wide range of fully protected speech, *e.g.*, speech in a dormitory room, such as consultation with a lawyer or doctor, even though it was speech for which the speaker received a profit, standard First Amendment doctrine would apply to that part of the regulation. The majority remanded the case for determination of whether the statute could be held constitutional as applied to non-commercial speech, while the dissent concluded that the statute was unconstitutional on that ground.

Unlike use of the “substantial overbreadth” doctrine in other areas of First Amendment law, discussed at § 5.3.2, a statute whose overbreadth consists of unlawful restriction of commercial speech will not be facially invalidated on that ground. As the Court noted in *Bates v. State Bar of Arizona*, 433 U.S. 350, 380-81 (1977).
insofar as it might apply to noncommercial speech in which that person is also engaged. But an individual cannot use the overbreadth doctrine to challenge overbreadth as to other individuals engaging in other kinds of speech. The Court explained that because commercial speech is “hardy,” since individuals have an economic incentive to engage in such speech, the overbreadth doctrine is not needed to ensure such speech is not chilled.

With respect to professionals, a state cannot ban all certification claims. However, as in *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, a state may ban a letterhead as misleading, such as "Certified specialist by National Board of Trial Advocacy." Although a ban on in-person solicitation by attorneys can be valid, as in *Ohralik v. Ohio State Bar Association*, a ban on in-person solicitation by accountants was declared unconstitutional in *Edenfield v. Fane*. The Court distinguished *Ohralik* on the ground that lawyers are trained in persuasion so there is a danger of overreaching, whereas the typical client of an accountant is a person experienced in business and so solicitation by a CPA is not inherently conducive to overreaching. In another case dealing with lawyer advertising, *Florida Bar v. Went For It, Inc.*, Justice O'Connor wrote for a 5-4 Court that a rule forbidding solicitation of accident victims during a 30-day period after the accident was valid under the *Central Hudson* test. Justice Kennedy's dissent, with Justices Stevens, Souter, and Ginsburg, said the rule prejudiced victims to vindicate a desire for more dignity in the legal profession. Distinguishing *Florida Bar* on grounds that the need for immediate counsel is more pressing for criminal defendants than for accident victims, courts have ruled that a 30-day ban on direct-mail solicitation of criminal defendants is unconstitutional.


*Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*

*478 U.S. 328 (1986)*

Justice REHNQUIST delivered the opinion of the Court.

In this case we address the facial constitutionality of a Puerto Rico statute and regulations restricting advertising of casino gambling aimed at the residents of Puerto Rico. Appellant Posadas de Puerto Rico states that the regulations are facially invalid because they do not serve a substantial government interest and are not narrowly tailored to achieve that end.

---


24 507 U.S. 761, 768-77 (1993). *See also* Speaks v. Kruse, 445 F.3d 396, 400-02 (5th Cir. 2006) (statute barring direct mail or phone solicitation by health care providers to potential patients who are “vulnerable to undue influence” unconstitutional as not sufficiently narrowly tailored).


26 *See, e.g.*, Ficker v. Curran, 119 F.3d 1150, 1151-56 (4th Cir. 1997).
Rico Associates, doing business in Puerto Rico as Condado Holiday Inn Hotel and Sands Casino, filed suit against appellee Tourism Company of Puerto Rico in the Superior Court of Puerto Rico, San Juan Section. Appellant sought a declaratory judgment that the statute and regulations, both facially and as applied by the Tourism Company, impermissibly suppressed commercial speech in violation of the First Amendment and the equal protection and due process guarantees of the United States Constitution. The Superior Court held that the advertising restrictions had been unconstitutionally applied to appellant's past conduct. But the court adopted a narrowing construction of the statute and regulations and held that, based on such a construction, both were facially constitutional. The Supreme Court of Puerto Rico dismissed an appeal on the ground that it “did not present a substantial constitutional question.” We postponed consideration of the question of jurisdiction until the hearing on the merits. 474 U.S. 917 (1985). We now hold that we have jurisdiction to hear the appeal, and we affirm the decision of the Supreme Court of Puerto Rico with respect to the facial constitutionality of the advertising restrictions.

In 1948, the Puerto Rico Legislature legalized certain forms of casino gambling. The Games of Chance Act of 1948, Act No. 221 of May 15, 1948 (Act), authorized the playing of roulette, dice, and card games in licensed “gambling rooms.” § 2, codified, as amended, at P.R. Laws Ann., Tit. 15, § 71 (1972). Bingo and slot machines were later added to the list of authorized games of chance under the Act. See Act of June 7, 1948, No. 21, § 1 (bingo); Act of July 30, 1974, No. 2, pt. 2, § 2 (slot machines). The legislature's intent was set forth in the Act's Statement of Motives: “The purpose of this Act is to contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world, and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income.” Games of Chance Act of 1948, Act No. 221 of May 15, 1948, § 1. The Act also provided that “[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico.” § 8, codified, as amended, at P.R. Laws Ann., Tit. 15, § 77 (1972).

The Act authorized the Economic Development Administration of Puerto Rico to issue and enforce regulations implementing the various provisions of the Act. See § 7(a), codified, as amended, at P.R. Laws Ann., Tit. 15, § 76a (1972). . . . Regulation 76a-1(7), as amended in 1971, provides in pertinent part: “No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company.” 15 R. & R.P.R. § 76a-1(7) (1972).

In 1975, appellant Posadas de Puerto Rico Associates, a partnership organized under the laws of Texas, obtained a franchise to operate a gambling casino and began doing business under the name Condado Holiday Inn Hotel and Sands Casino. In 1978, appellant was twice fined by the Tourism Company for violating the advertising restrictions in the Act and implementing regulations. Appellant protested the fines in a series of letters to the Tourism Company. On February 16, 1979, the Tourism Company issued to all casino franchise holders a memorandum setting forth the
following interpretation of the advertising restrictions: “This prohibition includes the use of the word ‘casino’ in matchbooks, lighters, envelopes, inter-office and/or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, plates, lobbies, banners, flyers, paper holders, pencils, telephone books, directories, bulletin boards or in any hotel dependency or object which may be accessible to the public in Puerto Rico.” App. 7a.

Pursuant to this administrative interpretation, the Tourism Company assessed additional fines against appellant. The Tourism Company ordered appellant to pay the outstanding total of $1,500 in fines by March 18, 1979, or its gambling franchise would not be renewed. Appellant continued to protest the fines, but ultimately paid them without seeking judicial review of the decision of the Tourism Company. In July 1981, appellant was again fined for violating the advertising restrictions. Faced with another threatened nonrenewal of its gambling franchise, appellant paid the $500 fine under protest.

Appellant then filed a declaratory judgment action against the Tourism Company in the Superior Court of Puerto Rico, San Juan Section, seeking a declaration that the Act and implementing regulations, both facially and as applied by the Tourism Company, violated appellant's commercial speech rights under the United States Constitution.

The court reviewed the history of casino gambling in Puerto Rico and concluded: “. . . We assume that the legislator was worried about the participation of the residents of Puerto Rico on what on that date constituted an experiment. . . . Therefore, he prohibited the gaming rooms from announcing themselves or offering themselves to the public – which we reasonably infer are the bona fide residents of Puerto Rico. . . . [W]hat the legislator foresaw and prohibited was the invitation to play at the casinos through publicity campaigns or advertising in Puerto Rico addressed to the resident of Puerto Rico. He wanted to protect him.” Id., at 32b.

[T]he court issued a narrowing construction of the statute, declaring that “the only advertisement prohibited by the law originally is that which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo tables.” Id., at 33b-34b. The court also issued the following narrowing construction of Regulation 76a 1(7): “. . . Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos. We hereby allow, within the jurisdiction of Puerto Rico, advertising by the casinos addressed to tourists, provided they do not invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident. . . . For example: an advertisement in the New York Times, an advertisement in CBS which reaches us through Cable TV, whose main objective is to reach the potential tourist. We hereby authorize advertising in the mass communication media of the country, where the trade name of the hotel is used even though it may contain a reference to the casino provided that the word casino is never used alone nor specified. . . . The direct promotion of the casinos within the premises of the hotels is allowed. In-house guests and clients may receive any type of information and promotion regarding the location of the casino, its schedule and the procedure of the games as well as magazines, souvenirs, stirrers, matchboxes, cards, dice, chips, T-shirts, hats, photographs, postcards and similar items used by the tourism centers of the world.”
Although we have not heretofore squarely addressed the issue in the context of a case originating in Puerto Rico, we think it obvious that, in reviewing the facial constitutionality of the challenged statute and regulations, we must abide by the narrowing constructions announced by the Superior Court and approved sub silentio by the Supreme Court of Puerto Rico. This would certainly be the rule in a case originating in one of the 50 States. See New York v. Ferber, 458 U.S. 747, 769, n.24 (1982); Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959). And we believe that Puerto Rico's status as a Commonwealth dictates application of the same rule. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 672-673 (1974) (noting with approval decisions of lower federal courts holding that Puerto Rico is to be deemed “sovereign over matters not ruled by the Constitution”); Wackenhut Corp. v. Aponte, 266 F. Supp. 401, 405 (PR 1966) (Puerto Rico “should have the primary opportunity through its courts to determine the intended scope of its own legislation”), aff'd, 386 U.S. 268 (1967).

Because this case involves the restriction of pure commercial speech which does “no more than propose a commercial transaction,” Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976), our First Amendment analysis is guided by the general principles identified in Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980). See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 637-638 (1985). Under Central Hudson, commercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent. Once it is determined that the First Amendment applies to the particular kind of commercial speech at issue, then the speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest. 447 U.S., at 566.

The particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not misleading or fraudulent, at least in the abstract. We must therefore proceed to the three remaining steps of the Central Hudson analysis in order to determine whether Puerto Rico's advertising restrictions run afoul of the First Amendment. The first of these three steps involves an assessment of the strength of the government's interest in restricting the speech. The interest at stake in this case, as determined by the Superior Court, is the reduction of demand for casino gambling by the residents of Puerto Rico. Appellant acknowledged the existence of this interest in its February 24, 1982, letter to the Tourism Company. See App. to Juris. Statement 2h (“The legislators wanted the tourists to flock to the casinos to gamble, but not our own people”). The Tourism Company's brief before this Court explains the legislature's belief that “[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.” Brief for Appellees 37. These are some of the very same concerns, of course, that have motivated the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a “substantial” governmental interest. Cf. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986) (city has substantial interest in “preserving the quality of life in the community at large”).
The last two steps of the *Central Hudson* analysis basically involve a consideration of the “fit” between the legislature's ends and the means chosen to accomplish those ends. Step three asks the question whether the challenged restrictions on commercial speech “directly advance” the government's asserted interest. In the instant case, the answer to this question is clearly “yes.” The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view. See *Central Hudson*, supra, 447 U.S., at 569 (“There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales”).

Appellant argues, however, that the challenged advertising restrictions are underinclusive because other kinds of gambling such as horse racing, cockfighting, and the lottery may be advertised to the residents of Puerto Rico. Appellant's argument is misplaced for two reasons. First, whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling “directly advance” the legislature's interest in reducing demand for games of chance. See *id.*, at 511 (plurality opinion of White, J.) (“[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising”). Second, the legislature's interest, as previously identified, is not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling. According to the Superior Court, horse racing, cockfighting, “picas,” or small games of chance at fiestas, and the lottery “have been traditionally part of the Puerto Rican's roots,” so that “the legislator could have been more flexible than in authorizing more sophisticated games which are not so widely sponsored by the people.” App. to Juris. Statement 35b. In other words, the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico.

We also think it clear beyond peradventure that the challenged statute and regulations satisfy the fourth and last step of the *Central Hudson* analysis, namely, whether the restrictions on commercial speech are no more extensive than necessary to serve the government's interest. The narrowing constructions of the advertising restrictions announced by the Superior Court ensure that the restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico. Appellant contends, however, that the First Amendment requires the Puerto Rico Legislature to reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it. We reject this contention. We think it is up to the legislature to decide whether or not such a “counterspeech” policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct. Cf. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 585 (DC 1971) (three-judge court) (“Congress had convincing evidence that the
Labeling Act of 1965 had not materially reduced the incidence of smoking”), summarily aff’d sub nom. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972); Dunagin v. City of Oxford, Miss., 718 F.2d 738, 751 (CA5 1983) (en banc) (“We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers”), cert. denied, 467 U.S. 1259 (1984).

Appellant also makes the related argument that, having chosen to legalize casino gambling for residents of Puerto Rico, the legislature is prohibited by the First Amendment from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. We disagree. In our view, appellant has the argument backwards. As we noted in the preceding paragraph, it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, see, e.g., Cal. Penal Code Ann. § 647(b) (West Supp.1986) (prohibiting soliciting or engaging in act of prostitution), to legalization of the product or activity with restrictions on stimulation of its demand on the other hand, see, e.g., Nev. Rev. Stat. §§ 244.345(1), (8) (1986) (authorizing licensing of houses of prostitution except in counties with more than 250,000 population), §§ 201.430, 201.440 (prohibiting advertising of houses of prostitution “[i]n any public theater, on the public streets of any city or town, or on any public highway,” or “[a] place of business”). To rule out the latter, intermediate kind of response would require more than we find in the First Amendment.

Appellant's final argument in opposition to the advertising restrictions is that they are unconstitutionally vague. In particular, appellant argues that the statutory language, “to advertise or otherwise offer their facilities,” and “the public of Puerto Rico,” are not sufficiently defined to satisfy the requirements of due process. Appellant also claims that the term “anunciarse,” which appears in the controlling Spanish version of the statute, is actually broader than the English term “to advertise,” and could be construed to mean simply “to make known.” Even assuming that appellant's argument has merit with respect to the bare statutory language, however, we have already noted that we are bound by the Superior Court's narrowing construction of the statute. Viewed in light of that construction, and particularly with the interpretive assistance of the implementing regulations as modified by the Superior Court, we do not find the statute unconstitutionally vague.

Page 469
Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

Because neither the language of § 8 nor the applicable regulations define what constitutes “advert[is]ing or otherwise offer[ing gambling] facilities to the public of Puerto Rico,” appellee Tourism Company was found to have applied the Act in an arbitrary and confusing manner. To ameliorate this problem, the Puerto Rico Superior Court, to avoid a declaration of the unconstitutionality of § 8, construed it to ban only advertisements or offerings directed to the residents of Puerto Rico, and listed examples of the kinds of advertisements that the court considered permissible under the Act. I doubt that this interpretation will assure that arbitrary and unreasonable applications of § 8 will no longer occur. However, even assuming that appellee will now enforce § 8 in a nonarbitrary manner, I do not believe that Puerto Rico constitutionally may suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity.

“Even though ‘commercial’ speech is involved, [this kind of restriction] strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. . . . [T]he State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them.” Central Hudson, supra, 447 U.S., at 574-575 (Blackmun, J., concurring in judgment). See also Note, Constitutional Protection of Commercial Speech, 82 Colum. L. Rev. 720, 750 (1982) (“Regulation of commercial speech designed to influence behavior by depriving citizens of information . . . violates basic [First Amendment] principles of viewpoint- and public-agenda-neutrality”). Accordingly, I believe that where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny.

The Court, rather than applying strict scrutiny, evaluates Puerto Rico's advertising ban under the relaxed standards normally used to test government regulation of commercial speech. Even under these standards, however, I do not believe that Puerto Rico constitutionally may suppress all casino advertising directed to its residents. The Court correctly recognizes that “[t]he particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not misleading or fraudulent.” Under our commercial speech precedents, Puerto Rico constitutionally may restrict truthful speech concerning lawful activity only if its interest in doing so is substantial, if the restrictions directly advance the Commonwealth's asserted interest, and if the restrictions are no more extensive than necessary to advance that interest. See Central Hudson, supra, 447 U.S., at 564. While tipping its hat to these standards, the Court does little more than defer to what it perceives to be the determination by Puerto Rico's Legislature that a ban on casino advertising aimed at residents is reasonable.

The Court . . . sustains Puerto Rico's advertising ban because the legislature could have determined that casino gambling would seriously harm the health, safety, and welfare of the Puerto Rican citizens. This reasoning is contrary to this Court's long-established First Amendment jurisprudence. When the government seeks to place restrictions upon commercial speech, a court may not, as the
Court implies today, simply speculate about valid reasons that the government might have for enacting such restrictions. Rather, the government ultimately bears the burden of justifying the challenged regulation, and it is incumbent upon the government to prove that the interests it seeks to further are real and substantial. See Zauderer, 471 U.S., at 641. In this case, appellee has not shown that “serious harmful effects” will result if Puerto Rico residents gamble in casinos, and the legislature's decision to legalize such activity suggests that it believed the opposite to be true.

Appellee must still demonstrate that the challenged advertising ban directly advances Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling. Central Hudson, 447 U.S., at 564. The Court proclaims that Puerto Rico's legislature “obviously believed . . . that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised.” However, even assuming that an advertising ban would effectively reduce residents' patronage of gambling casinos, it is not clear how it would directly advance Puerto Rico's interest in controlling the “serious harmful effects” the Court associates with casino gambling. In particular, it is unclear whether banning casino advertising aimed at residents would affect local crime, prostitution, the development of corruption, or the infiltration of organized crime. Because Puerto Rico actively promotes its casinos to tourists, these problems are likely to persist whether or not residents are also encouraged to gamble.

Finally, appellees have failed to show that Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling “cannot be protected adequately by more limited regulation of appellant's commercial expression.” Central Hudson, supra, at 570. Rather than suppressing constitutionally protected expression, Puerto Rico could seek directly to address the specific harms thought to be associated with casino gambling. Thus, Puerto Rico could continue carefully to monitor casino operations to guard against “the development of corruption, and the infiltration of organized crime.” It could vigorously enforce its criminal statutes to combat “the increase in local crime [and] the fostering of prostitution.” Ibid. It could establish limits on the level of permissible betting, or promulgate additional speech designed to discourage casino gambling among residents, in order to avoid the “disruption of moral and cultural patterns,” ibid., that might result if residents were to engage in excessive casino gambling. Such measures would directly address the problems appellee associates with casino gambling, while avoiding the First Amendment problems raised where the government seeks to ban constitutionally protected speech.

The Court fails even to acknowledge the wide range of effective alternatives available to Puerto Rico, and addresses only appellant's claim that Puerto Rico's legislature might choose to reduce the demand for casino gambling among residents by “promulgating additional speech designed to discourage it.” The Court rejects this alternative, asserting that “it is up to the legislature to decide whether or not such a ‘counterspeech’ policy would be as effective in reducing the demand for casino gambling as a restriction on advertising.” Ibid. This reasoning ignores the commands of the First Amendment. Where the government seeks to restrict speech in order to advance an important interest, it is not, contrary to what the Court has stated, “up to the legislature” to decide whether or not the government's interest might be protected adequately by less intrusive measures. Rather, it is incumbent upon the government to prove that more limited means are not sufficient to protect its interests, and for a court to decide whether or not the government has sustained this burden. See In
re R.M.J., supra, 455 U.S., at 206; Central Hudson, supra, 447 U.S., at 571. In this case, nothing suggests that the Puerto Rico Legislature ever considered the efficacy of measures other than suppressing protected expression. More importantly, there has been no showing that alternative measures would inadequately safeguard the Commonwealth's interest in controlling the harmful effects allegedly associated with casino gambling.

Justice STEVENS, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

The Court concludes that “the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.” Ante, at 2977. Whether a State may ban all advertising of an activity that it permits but could prohibit – such as gambling, prostitution, or the consumption of marijuana or liquor – is an elegant question of constitutional law. It is not, however, appropriate to address that question in this case because Puerto Rico's rather bizarre restraints on speech are so plainly forbidden by the First Amendment.

Puerto Rico does not simply “ban advertising of casino gambling.” Rather, Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed. Moreover, the prohibitions, as now construed by the Puerto Rico courts, establish a regime of prior restraint and articulate a standard that is hopelessly vague and unpredictable.

[I]n stark, unabashed language, the Superior Court's construction favors certain identifiable publications and disfavors others. If the publication (or medium) is from outside Puerto Rico, it is very favored indeed. . . . If the publication is native to Puerto Rico, however – the San Juan Star, for instance – it is subject to a far more rigid system of restraints and controls regarding the manner in which a certain form of speech (casino ads) may be carried in its pages. Unless the Court is prepared to uphold an Illinois regulation of speech that subjects the New York Times to one standard and the Chicago Tribune to another, I do not understand why it is willing to uphold a Puerto Rico regulation that applies one standard to the New York Times and another to the San Juan Star.

With respect to the audience, the newly construed regulations plainly discriminate in terms of the intended listener or reader. Casino advertising must be “addressed to tourists.” Id., at 38b. It must not “invite the residents of Puerto Rico to visit the casino.” Ibid. The regulation thus poses what might be viewed as a reverse privileges and immunities problem: Puerto Rico's residents are singled out for disfavored treatment in comparison to all other Americans. . . . I cannot imagine that this Court would uphold an Illinois regulation that forbade advertising “addressed” to Illinois residents while allowing the same advertiser to communicate his message to visitors and commuters; we should be no more willing to uphold a Puerto Rico regulation that forbids advertising “addressed” to Puerto Rico residents.

With respect to prior restraint, the Superior Court's opinion establishes a regime of censorship. In a section of the opinion that the majority fails to include, ante, at 2973, the court explained: “We hereby authorize the publicity of the casinos in newspapers, magazines, radio, television or any other publicity media, of our games of [chance] in the exterior with the previous approval of the Tourism Company regarding the text of said ad, which must be submitted in draft to the Company. Provided,
however, that no photographs, or pictures may be approval of the Company.” App. to Juris. Statement 38b (emphasis added). A more obvious form of prior restraint is difficult to imagine.

With respect to vagueness, the Superior Court's construction yields no certain or predictable standards for Puerto Rico's suppression of particular kinds of speech. . . . And in a passage that should chill, not only would-be speakers, but reviewing courts as well, the Superior Court expressly noted that there was nothing immutable about its supposedly limiting and saving construction of the restraints on speech: “These guide-regulations may be amended in the future by the enforcing agency pursuant to the dictates of the changing needs and in accordance with the law and what is resolved herein.” Id., at 42b.

One year after *Posadas*, in 1987 in *San Francisco Arts & Athletics v. Olympic Committee,* the Court upheld a congressional grant to the United States Olympic Committee of the right to prohibit commercial and promotional uses of the word "Olympic" because the commercial value of the word was the product of the Committee's talents and energy. Justice Brennan, in dissent, said the statute was overbroad in creating exclusive rights that limited non-commercial speech, such as using the term to promote non-profit events. Note that even absent a congressional grant, trademark law might protect word use from a First Amendment challenge, such as the National Football League’s use of the word “SuperBowl,” and non-NFL advertisers have to use alternative descriptions, such as “Big Game,” to refer to it.

In *United States v. Edge Broadcasting Co.*, the Court sustained a congressional ban on the broadcast of lottery advertisements, except as to ads for their own state's lottery, as applied to a station in North Carolina, which had no lottery, but over 90% of whose listening audience was located in Virginia, which did have a lottery. Justice Stevens, dissenting with Justice Blackmun, said that the change in public attitudes toward state-run lotteries undermined any claim that the state's interest in discouraging citizen participation outweighed the station's First Amendment right to play the advertisement, and the public’s right to receive truthful, non-misleading information about a perfectly legal activity conducted in a neighboring state.

In 1993, however, the Court began a string of cases in which it struck down regulations of commercial speech. In *City of Cincinnati v. Discovery Network*, the Court held that a city violated the First Amendment when it refused for reasons of safety and aesthetics to allow the distribution

---

29 507 U.S. 410, 418-31 (1993); *id.* at 431-38 (Blackmun, J., concurring); *id.* at 438-46 (Rehnquist, C.J., joined by White & Thomas, J.J., dissenting).
of commercial publications through free-standing newsracks on public property, although it allowed newspapers to be distributed in that manner. Applying *Central Hudson*, Justice Stevens wrote that the distinction between commercial and non-commercial speech bears no relationship whatsoever to the particular interests of the city. Nor can the regulation be upheld as a content-neutral time, place, or manner restriction because the basis for the regulation was the difference in content between ordinary newspapers and commercial speech. Justice Blackmun, concurring, would have given full First Amendment protection to commercial speech. Chief Justice Rehnquist, dissenting with Justices White and Thomas, said that a city may stop short of fully accomplishing its objectives in relation to commercial speech, and this law directly advanced the city's interests because it would decrease the number of newsracks on city corners.

In 1995, the Court held in *Rubin v. Coors Brewing Co.* that the federal government's ban on beer labels that display alcohol content violated the First Amendment because the government failed to meet its burden of showing under *Central Hudson* that the ban advanced the government's interest in a direct way. The government's interest was in preventing strength wars. However, the ban was limited so that brewers remained free to disclose alcohol content in ads, just not on the label, and brewers could signal high alcohol content by using the term "malt liquor." Thus, there was little chance that the ban could directly and materially advance its aim. Justice Stevens, concurring, said the First Amendment bars the government from restricting the flow of accurate information because of a perceived danger of that knowledge. Congress could directly limit the alcoholic content of malt beverages, but Congress may not accomplish that purpose through a policy of consumer ignorance, at the expense of the free-speech rights of both sellers and purchasers.

### § 9.4 Commercial Speech Cases Rejecting Posadas: 1996-Today

Under standard doctrine, even if the government can completely ban some conduct, if the means chosen to regulate the conduct violate free speech, equal protection, or other constitutional prohibitions, the government action is unconstitutional. For example, in *Craig v. Boren*, excerpted at § 22.2 of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2 (2018 ORIG. ED. 2014) (http://libguides.stel.edu/kelsomaterials), the government could engage in the “greater power” of banning all persons less than 21 years old from buying alcohol, but could not engage in the “lesser power” of banning only males below 21 from buying alcohol, but permit women 18-21 years old to buy low-alcohol beer, as that constituted gender discrimination. Following *Posadas*, commentators almost uniformly criticized the “greater power includes the lesser power” aspect of the decision. The Supreme Court followed suit, rejecting this aspect of *Posadas* ten years later in *44 Liquormart, Inc. v. Rhode Island*.

---

30 514 U.S. 476, 483-91 (1995); id. at 491-92 (Stevens, J., concurring in the judgment).

31 429 U.S. 190, 197, 201-04 (1976).


Page 474
In 1956, the Rhode Island Legislature enacted two separate prohibitions against advertising the retail price of alcoholic beverages. The first applies to vendors licensed in Rhode Island as well as to out-of-state manufacturers, wholesalers, and shippers. It prohibits them from “advertising in any manner whatsoever” the price of any alcoholic beverage offered for sale in the State; the only exception is for price tags or signs displayed with the merchandise within licensed premises and not visible from the street. The second statute applies to the Rhode Island news media. It contains a categorical prohibition against the publication or broadcast of any advertisements – even those referring to sales in other States – that “make reference to the price of any alcoholic beverages.”

Complaints from competitors about an advertisement placed by 44 Liquormart in a Rhode Island newspaper in 1991 generated enforcement proceedings that in turn led to the initiation of this litigation. The advertisement did not state the price of any alcoholic beverages. Indeed, it noted that “State law prohibits advertising liquor prices.” The ad did, however, state the low prices at which peanuts, potato chips, and Schweppes mixers were being offered, identify various brands of packaged liquor, and include the word “WOW” in large letters next to pictures of vodka and rum bottles. Based on the conclusion that the implied reference to bargain prices for liquor violated the statutory ban on price advertising, the Rhode Island Liquor Control Administrator assessed a $400 fine. After paying the fine, 44 Liquormart . . . filed this action against the administrator in the Federal District Court seeking a declaratory judgment that the two statutes and the administrator's implementing regulations violate the First Amendment.

In Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980), we took stock of our developing commercial speech jurisprudence. In that case, we considered a regulation “completely” banning all promotional advertising by electric utilities. Our decision acknowledged the special features of commercial speech but identified the serious First Amendment concerns that attend blanket advertising prohibitions that do not protect consumers from commercial harms.

In reaching its conclusion, the majority explained that although the special nature of commercial speech may require less than strict review of its regulation, special concerns arise from “regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy.” Id., at 566, n.9. In those circumstances, “a ban on speech could screen from public view the underlying governmental policy.” Ibid. As a result, the Court concluded that “special care” should attend the
review of such blanket bans, and it pointedly remarked that “in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.” Ibid.

IV

As our review of the case law reveals, Rhode Island errs in concluding that all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them. See Rubin v. Coors Brewing Co., 514 U.S., at 491-492 (Stevens, J., concurring in judgment).

When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. However, when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

Our commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression. For example, in Linmark, 431 U.S., at 92-94, we concluded that a ban on “For Sale” signs was “content based” and failed to leave open “satisfactory” alternative channels of communication. Moreover, last Term we upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers. Florida Bar v. Went For It, Inc., 515 U.S. 618, 633-634 (1995).

The special dangers that attend complete bans on truthful, nonmisleading commercial speech cannot be explained away by appeals to the “commonsense distinctions” that exist between commercial and noncommercial speech. Virginia Bd. of Pharmacy, 425 U.S., at 771, n.24. Regulations that suppress the truth are no less troubling because they target objectively verifiable information, nor are they less effective because they aim at durable messages. As a result, neither the “greater objectivity” nor the “greater hardiness” of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference. Ibid.

It is the State's interest in protecting consumers from “commercial harms” that provides “the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.” Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993). Yet bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an “underlying governmental policy” that could be implemented without regulating speech. Central Hudson, 447 U.S., at 566, n.9. In this way, these commercial speech bans not only hinder consumer choice, but also impede debate over central issues of public policy. See id., at 575 (Blackmun, J., concurring in judgment).
Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond “irrationally” to the truth. Linmark, 431 U.S., at 96. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products: “The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment. See Virginia State Bd. of Pharmacy, supra, at 762.” Edenfield v. Fane, 507 U.S. 761, 767 (1993).

V

In this case, there is no question that Rhode Island's price advertising ban constitutes a blanket prohibition against truthful, nonmisleading speech about a lawful product. There is also no question that the ban serves an end unrelated to consumer protection. Accordingly, we must review the price advertising ban with “special care,” Central Hudson, 447 U.S., at 566, n 9, mindful that speech prohibitions of this type rarely survive constitutional review, ibid.

The State argues that the price advertising prohibition should nevertheless be upheld because it directly advances the State's substantial interest in promoting temperance, and because it is no more extensive than necessary. Cf. id., at 566. Although there is some confusion as to what Rhode Island means by temperance, we assume that the State asserts an interest in reducing alcohol consumption. In evaluating the ban's effectiveness in advancing the State's interest, we note that a commercial speech regulation “may not be sustained if it provides only ineffective or remote support for the government's purpose.” Id., at 564. For that reason, the State bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so “to a material degree.” Edenfield, 507 U.S., at 771; see also Rubin v. Coors Brewing Co., 514 U.S., at 486-488. The need for the State to make such a showing is particularly great given the drastic nature of its chosen means – the wholesale suppression of truthful, nonmisleading information. Accordingly, we must determine whether the State has shown that the price advertising ban will significantly reduce alcohol consumption.

We can agree that common sense supports the conclusion that a prohibition against price advertising, like a collusive agreement among competitors to refrain from such advertising, will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market. Despite the absence of proof on the point, we can even agree with the State's contention that it is reasonable to assume that demand, and hence consumption throughout the market, is somewhat lower whenever a higher, noncompetitive price level prevails. However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance.
Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, 829 F. Supp., at 546, the State has presented no evidence to suggest that its speech prohibition will significantly reduce marketwide consumption. Indeed, the District Court's considered and uncontradicted finding on this point is directly to the contrary. Id., at 549. Moreover, the evidence suggests that the abusive drinker will probably not be deterred by a marginal price increase, and that the true alcoholic may simply reduce his purchases of other necessities.

In addition, as the District Court noted, the State has not identified what price level would lead to a significant reduction in alcohol consumption, nor has it identified the amount that it believes prices would decrease without the ban. Ibid. Thus, the State's own showing reveals that any connection between the ban and a significant change in alcohol consumption would be purely fortuitous.

As is evident, any conclusion that elimination of the ban would significantly increase alcohol consumption would require us to engage in the sort of “speculation or conjecture” that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Edenfield, 507 U.S., at 770. Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends.

The State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation. 829 F. Supp., at 549. Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.

As a result, even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a “reasonable fit” between its abridgment of speech and its temperance goal. Board of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989); see also Rubin v. Coors Brewing Co., 514 U.S., at 491 (explaining that defects in a federal ban on alcohol advertising are “further highlighted by the availability of alternatives that would prove less intrusive to the First Amendment's protections for commercial speech’’); Linmark, 431 U.S., at 97 (suggesting that the State use financial incentives or counter-speech, rather than speech restrictions, to advance its interests). It necessarily follows that the price advertising ban cannot survive the more stringent constitutional review that Central Hudson itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech. 447 U.S., at 566, n.9.

VI

argues that, because expert opinions as to the effectiveness of the price advertising ban “go both ways,” the Court of Appeals correctly concluded that the ban constituted a “reasonable choice” by the legislature. 39 F.3d, at 7. The State next contends that precedent requires us to give particular deference to that legislative choice because the State could, if it chose, ban the sale of alcoholic beverages outright. See Posadas, 478 U.S., at 345-346. Finally, the State argues that deference is appropriate because alcoholic beverages are so-called “vice” products. See Edge, 509 U.S., at 426; Posadas, 478 U.S., at 346-347.

In *Edge*, we upheld a federal statute that permitted only those broadcasters located in States that had legalized lotteries to air lottery advertising. The statute was designed to regulate advertising about an activity that had been deemed illegal in the jurisdiction in which the broadcaster was located. 509 U.S., at 433-434. Here, by contrast, the commercial speech ban targets information about entirely lawful behavior.

*Posadas* is more directly relevant. . . . The reasoning in *Posadas* does support the State's argument, but, on reflection, we are now persuaded that *Posadas* erroneously performed the First Amendment analysis. The casino advertising ban was designed to keep truthful, nonmisleading speech from members of the public for fear that they would be more likely to gamble if they received it. As a result, the advertising ban served to shield the State's antigambling policy from the public scrutiny that more direct, nonspeech regulation would draw. See *Posadas*, id., at 351 (Brennan, J., dissenting).

Given our longstanding hostility to commercial speech regulation of this type, *Posadas* clearly erred in concluding that it was “up to the legislature” to choose suppression over a less speech-restrictive policy. The *Posadas* majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, nonmisleading advertising when non-speech-related alternatives were available. See id., at 350 (Brennan, J., dissenting) (listing cases); Kurland, Posadas de Puerto Rico v. Tourism Company: “‘Twas Strange, ‘Twas Passing Strange; ‘Twas Pitiful, ‘Twas Wondrous Pitiful,” 1986 S. Ct. Rev. 1, 12-15.

Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach.

We also cannot accept the State's second contention, which is premised entirely on the “greater-includes-the-lesser” reasoning endorsed toward the end of the majority's opinion in *Posadas*. . . . In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the United States advanced a similar argument as a basis for supporting a statutory prohibition against revealing the alcoholic content of malt beverages on product labels. We rejected the argument, noting that the statement in the *Posadas* opinion was made only after the majority had concluded that the Puerto Rican regulation “survived the *Central Hudson* test.” 514 U.S., at 483, n.2. Further consideration persuades us that the “greater-includes-the-lesser” argument should be rejected for the additional and more important reason that it is inconsistent with both logic and well-settled doctrine.
As a matter of First Amendment doctrine, the Posadas syllogism is even less defensible. The text of the First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.

As the entire Court apparently now agrees, the statements in the Posadas opinion on which Rhode Island relies are no longer persuasive.

Justice SCALIA, concurring in part and concurring in the judgment.

I share Justice Thomas's discomfort with the Central Hudson test, which seems to me to have nothing more than policy intuition to support it. I also share Justice Stevens's aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them. On the other hand, it would also be paternalism for us to prevent the people of the States from enacting laws that we consider paternalistic, unless we have good reason to believe that the Constitution itself forbids them. I will take my guidance as to what the Constitution forbids, with regard to a text as indeterminate as the First Amendment's preservation of “the freedom of speech,” and where the core offense of suppressing particular political ideas is not at issue, from the long accepted practices of the American people. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).

The briefs and arguments of the parties in the present case provide no illumination on that point; understandably so, since both sides accepted Central Hudson. The amicus brief on behalf of the American Advertising Federation et al. did examine various expressions of view at the time the First Amendment was adopted; they are consistent with First Amendment protection for commercial speech, but certainly not dispositive. I consider more relevant the state legislative practices prevalent at the time the First Amendment was adopted, since almost all of the States had free speech constitutional guarantees of their own, whose meaning was not likely to have been different from the federal constitutional provision derived from them. Perhaps more relevant still are the state legislative practices at the time the Fourteenth Amendment was adopted, since it is most improbable that that adoption was meant to overturn any existing national consensus regarding free speech. Indeed, it is rare that any nationwide practice would develop contrary to a proper understanding of the First Amendment itself – for which reason I think also relevant any national consensus that had formed regarding state regulation of advertising after the Fourteenth Amendment, and before this Court's entry into the field. The parties and their amici provide no evidence on these points.

Since I do not believe we have before us the wherewithal to declare Central Hudson wrong – or at least the wherewithal to say what ought to replace it – I must resolve this case in accord with our existing jurisprudence, which all except Justice Thomas agree would prohibit the challenged regulation. I am not disposed to develop new law, or reinforce old, on this issue, and accordingly I merely concur in the judgment of the Court.
Justice THOMAS, concurring in part, and concurring in the judgment.

In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), should not be applied, in my view. Rather, such an “interest” is *per se* illegitimate and can no more justify regulation of “commercial” speech than it can justify regulation of “noncommercial” speech.

Justice O'CONNOR, with whom THE CHIEF JUSTICE, Justice SOUTER, and Justice BREYER join, concurring in the judgment.

Rhode Island prohibits advertisement of the retail price of alcoholic beverages, except at the place of sale. The State's only asserted justification for this ban is that it promotes temperance by increasing the cost of alcoholic beverages. Brief for Respondent State of Rhode Island 22. I agree with the Court that Rhode Island's price-advertising ban is invalid. I would resolve this case more narrowly, however, by applying our established *Central Hudson* test to determine whether this commercial speech regulation survives First Amendment scrutiny.

[The first two prongs of the *Central Hudson* test are met. Even if we assume, *arguendo*, that Rhode Island's regulation satisfies the third prong of direct advancement, it fails the final prong.]

As we have explained, in order for a speech restriction to pass muster under the final prong, there must be a fit between the legislature's goal and method, “a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.” *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (internal quotation marks omitted). While the State need not employ the least restrictive means to accomplish its goal, the fit between means and ends must be “narrowly tailored.” Ibid. The scope of the restriction on speech must be reasonably, though it need not be perfectly, targeted to address the harm intended to be regulated. See *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632-634 (1995). The State's regulation must indicate a “careful[1] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition.” *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (internal quotation marks omitted). The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-487 (1995); *Cincinnati*, supra, at 417, n.13. If alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable. See *Florida Bar*, supra, at 632-634.

Rhode Island offers one, and only one, justification for its ban on price advertising. Rhode Island says that the ban is intended to keep alcohol prices high as a way to keep consumption low. By preventing sellers from informing customers of prices, the regulation prevents competition from driving prices down and requires consumers to spend more time to find the best price for alcohol. Brief for Respondent State of Rhode Island 22. The higher cost of obtaining alcohol, Rhode Island argues, will lead to reduced consumption.
The fit between Rhode Island's method and this particular goal is not reasonable. If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. The State has other methods at its disposal — methods that would more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers. Indeed, Rhode Island's own expert conceded that “the objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages.” 39 F.3d 5, 7 (C.A.1 1994). A tax, for example, is not normally very difficult to administer and would have a far more certain and direct effect on prices, without any restriction on speech. The principal opinion suggests further alternatives, such as limiting per capita purchases or conducting an educational campaign about the dangers of alcohol consumption.

Respondents point for support to Posadas de Puerto Rico Associates v. Tourism Co. of P.R., 478 U.S. 328 (1986), where, applying the Central Hudson test, we upheld the constitutionality of a Puerto Rico law that prohibited the advertising of casino gambling aimed at residents of Puerto Rico, but permitted such advertising aimed at tourists.

The Court there accepted as reasonable the legislature's belief that the regulation would be effective, and concluded that, because the restriction affected only advertising of casino gambling aimed at residents of Puerto Rico, not that aimed at tourists, the restriction was narrowly tailored to serve Puerto Rico's interest. 478 U.S., at 341-344. The Court accepted without question Puerto Rico's account of the effectiveness and reasonableness of its speech restriction. Respondents ask us to make a similar presumption here to uphold the validity of Rhode Island's law.

It is true that Posadas accepted as reasonable, without further inquiry, Puerto Rico's assertions that the regulations furthered the government's interest and were no more extensive than necessary to serve that interest. Since Posadas, however, this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny. See, e.g., Florida Bar v. Went For It, Inc., supra; Rubin v. Coors Brewing Co., supra; Edenfield v. Fane, 507 U.S. 761 (1993); Cincinnati v. Discovery Network, Inc., supra. In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since Posadas comports better with the purpose of the analysis set out in Central Hudson, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored. Under such a closer look, Rhode Island's price-advertising ban clearly fails to pass muster.

This “closer look” since Posadas was reflected in Greater New Orleans Broadcasting Association, Inc. v. United States,33 where the Court held Congress could not bar the broadcast advertising of

lotteries and casino gambling in Louisiana where such gambling is legal. Justice Stevens wrote for the Court that the federal law contained so many exceptions, such as for gambling by Indian casinos, lotteries run by government or non-profit organizations, and "occasional and ancillary" commercial casinos, that the law was not shown directly and materially to advance the government's interest in reducing the social cost of gambling or assist states in restricting gambling within their borders.

In *Thompson v. Western States Medical Center*, a 5-4 Court held unconstitutional a ban on advertising or promoting particular compounded drugs (drugs tailored to the needs of an individual patient). The government said it was trying to prevent large-scale manufacturing of compound drugs and that advertising was serving as a proxy. The Court replied that there were non-speech-related means of drawing that line, including a ban on commercial scale manufacturing, capping the amount of compounded drugs druggists may sell in a given period of time, barring offering the drugs at wholesale, or requiring a prescription or a history of receiving a prescription. The dissent concluded that the government had met their burden, and was composed of deference-to-government Holmsian Chief Justice Rehnquist, and Justices Stevens, Ginsburg, and Breyer, liberal instrumentalists who might support on policy grounds this kind of government drug regulation.

Consistent with the recent trend of courts being vigorous in applying the *Central Hudson* test, in *IMS Health, Inc. v. Ayotte*, 490 F. Supp. 2d 163 (D.N.H. 2007), a federal district court struck down New Hampshire’s first-in-the-nation law banning the sale of data on individual doctors’ drug prescribing habits. The court indicated that the law was not narrowly tailored, in that the state could deal with its concern that distributing such information might be improperly used by pharmaceutical companies in their marketing plans to individual doctors, by regulating improper inducements to influence prescribing practices, issuing best practice guidelines, or requiring continuing education about prescriptions. The Supreme Court similarly ruled in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2658-59 (2011), that a Vermont law that restricted the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of doctors was unconstitutional. Three Justices dissented. *Id.* at 2673 (Breyer, J., joined by Ginsburg & Kagan, JJ., dissenting). Justice Sotomayor has indicated a change of heart and would vote with the dissent today, as noted in *Janus v. American Fed. of State, Cty., and Mun. Employees, Council 31*, 138 S. Ct. 2448, 2487 (2018) (Sotomayor, J., dissenting). See also *Heffner v. Murphy*, 745 F.3d 56 (3rd Cir. 2014) (ban on use of trade names by funeral parlors unconstitutional); *Dwyer v. Cappell*, 762 F.3d 275 (3rd Cir. 2014) (requiring attorneys to post entire judicial opinion on website to use judicial compliment in opinion overbroad).

In contrast, in *Coyote Pub. Co. v. Miller*, 598 F.3d 592 (9th Cir. 2010), the Ninth Circuit upheld a Nevada statute that prohibited brothels from advertising in “any public theater, on the public streets, or on any public highway” in the 11 rural counties in Nevada where licensed prostitution is legal. The Ninth Circuit concluded that the restrictions were narrowly drawn and left open ample alternative channels of communication because they only banned advertising in public places where “it would reach residents who do not seek it out,” but permitted “other forms of advertising likely

---

to reach those already interested in patronizing the brothels.” In *Educational Media Company at Virginia Tech, Inc. v. Swecker*, 602 F.3d 583 (4th Cir. 2014), the Fourth Circuit upheld regulations restricting advertising for alcohol in college newspapers as being directly related to the state’s interest in enforcing laws restricting alcohol use to persons under 21. See also *Contest Promotions, LLC v. City and County of San Francisco*, 874 F.3d 597 (9th Cir. 2017) (regulation banning any new commercial signs not for onsite business, but permitting offsite non-commercial signs triggers *Central Hudson* commercial speech test, not strict scrutiny under *Reed*, discussed at § 2.4.

In *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017), the Supreme Court held that New York’s “no-surcharge” law, which permits retailers to give discounts for cash purchases, but prevents surcharges for credit card purchases, regulates how merchants may communicate their prices, and thus triggers *Central Hudson*’s heightened review, rather than minimum rational review applicable to economic regulations. The Court remanded the case for the lower courts to decide whether the New York law could meet the *Central Hudson* standard of review. In *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165 (9th Cir. 2018), the 9th Circuit held that such a law did violate the *Central Hudson* standard of review.

**R.J. Reynolds Tobacco Co. v. Food & Drug Administration***

696 F.3d 1205 (D.C. Cir. 2012)

BROWN, Circuit Judge:

The Family Smoking Prevention and Tobacco Control Act (“the Act”), Pub. L. No. 111–31, 123 Stat. 1776 (2009), directed the Secretary of the U.S. Department of Health and Human Services to issue regulations requiring all cigarette packages manufactured or sold in the United States to bear one of nine new textual warnings, as well as “color graphics depicting the negative health consequences of smoking.” See id. § 201(a). Pursuant to this authority, the Food and Drug Administration (“FDA”) initiated a rulemaking proceeding through which it selected the nine images that would accompany the statutorily-prescribed warnings. Five tobacco companies (“the Companies”) challenged the rule, alleging that FDA's proposed graphic warnings violated the First Amendment. See Compl. at 35-36. The district court granted the Companies' motion for summary judgment on February 29, 2012. FDA appeals, and we affirm.

The Act gives FDA the authority to regulate the manufacture and sale of tobacco products, including cigarettes. In addition to requiring cigarette packages and advertisements to bear one of nine new warning statements, the Act mandates that the new warning labels comprise the top 50 percent of the front and rear panels of cigarette packages and 20 percent of the area of each cigarette advertisement. Act § 201(a), 123 Stat. at 1842-45. The Act directs the Secretary to issue final regulations identifying the graphic component of the warnings by June 22, 2011, and provides that the revised health warnings will take effect by September 22, 2012. See 15 U.S.C. § 1333 note.

Pursuant to the statutory directive, FDA issued a Proposed Rule seeking comment on thirty-six potential images for the new graphic warning labels. Required Warnings for Cigarette Packages and Advertisements, 75 Fed.Reg. 69,524, 69,534 (Nov. 12, 2010) (hereinafter Proposed Rule). At the
outset of the Proposed Rule, FDA asserted the government's “substantial interest in reducing the number of Americans, particularly children and adolescents, who use cigarettes and other tobacco products in order to prevent the life-threatening health consequences associated with tobacco use.” Id. at 69,525. In accordance with the requirements of the Act, FDA proposed a dramatic expansion of the existing health warnings, which it justified based on scientific literature and a “strong worldwide consensus” regarding the relative effectiveness of graphic warnings compared to the text-only warnings the United States currently requires. Id. The agency explained that by “clearly and effectively convey[ing] the negative health consequences of smoking,” the new warnings would discourage nonsmokers, particularly minors, from “initiating cigarette use,” and encourage current smokers to quit. Id. at 69,526.

FDA promulgated the final set of nine images – one for each warning statement – by regulations issued on June 22, 2011. See Required Warnings for Cigarette Packages and Advertisements, 76 Fed.Reg. 36,628 (June 22, 2011) (hereinafter Final Rule). FDA also required each graphic image to bear the phone number of the National Cancer Institute's “Network of Tobacco Cessation Quitlines,” which uses the telephone portal “1-800-QUIT-NOW.” Id. at 36,681.

FDA based its selection of the final images on an 18,000-person internet-based consumer study it commissioned. The study divided respondents into two groups: a control group that was shown the new text in the format of the current warnings (located on the side of cigarette packages), and a separate treatment group that was shown the proposed graphic warnings, which included the new text, the accompanying graphic image, and the 1-800-QUIT-NOW number. Id. at 36,638. Each group then answered questions designed to assess, among other things, whether the graphic warnings, relative to the text-only control, (1) increased viewers' intention to quit or refrain from smoking; (2) increased viewers' knowledge of the health risks of smoking or secondhand smoke; and (3) were “salient,” which FDA defined in part as causing viewers to feel “depressed,” “discouraged,” or “afraid.” Id.

In selecting these nine images, FDA reviewed and responded to over a thousand public comments, including joint comments submitted by plaintiffs-appellees RJ Reynolds, Lorillard, and Commonwealth Brands. See id. at 36,629. Several comments – including comments from cancer researchers, nonprofits, and academics – criticized the single exposure study design, noting it prevented the government from assessing the long-term or actual effects of the proposed warnings. Two of these comments recommended FDA conduct longitudinal research or post-market surveillance to assess actual long-term effects. Id. at 36,639. FDA conceded the study did not permit it to reach “firm” conclusions about the “long-term, real-world effects” of the proposed warnings, but claimed the existing scientific literature “provides a substantial basis for our conclusion that the required warnings will effectively communicate the health risks of smoking, thereby encouraging smoking cessation and discouraging smoking initiation.” Id.

After FDA finalized the Rule, the Companies filed suit in the district court, claiming the cigarette warnings required under the Act and FDA's implementing regulations violated the First Amendment. The district court granted the Companies' motion for a preliminary injunction on November 7, 2011, and subsequently granted their motion for summary judgment. FDA appeals, and we review de novo
the district court's decision to grant summary judgment. Davis v. Pension Benefit Guar. Corp., 571 F.3d 1288, 1291 (D.C. Cir. 2009).

Courts have recognized a handful of “narrow and well-understood exceptions” to the general rule that content-based speech regulations – including compelled speech – are subject to strict scrutiny. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994). There are two primary exceptions in the commercial speech context. First, “purely factual and uncontroversial” disclosures are permissible if they are “reasonably related to the State's interest in preventing deception of consumers,” provided the requirements are not “unjustified or unduly burdensome.” Zauderer [v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985)]. Second, restrictions on commercial speech are subject to less stringent review than restrictions on other types of speech. For a statute burdening commercial speech to survive, the government must affirmatively prove that (1) its asserted interest is substantial, (2) the restriction directly and materially advances that interest, and (3) the restriction is narrowly tailored. See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). While this test is not quite as demanding as strict scrutiny, it is significantly more stringent than Zauderer's standard, which is akin to rational-basis review.

The Supreme Court has never applied Zauderer to disclosure requirements not designed to correct misleading commercial speech. FDA argues that Zauderer's lenient standard of scrutiny applies to regulations that serve a different governmental interest: disclosure of the health and safety risks associated with commercial products. See Appellant's Br. at 26. But by its own terms, Zauderer's holding is limited to cases in which disclosure requirements are “reasonably related to the State's interest in preventing deception of consumers.” 471 U.S. at 651. Zauderer “carries no authority for a mandate unrelated to the interest in avoiding misleading or incomplete commercial messages.” Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 491 (1997) (Souter, J., dissenting, joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

In fact, the Court's only recent application of the Zauderer standard involved a disclosure requirement that “share[d] the essential features of the rule at issue in Zauderer.” Milavetz, 130 S.Ct. at 1340. In Milavetz, a law firm challenged a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") that required professionals qualifying as debt relief agencies to “clearly and conspicuously disclose in any advertisement of bankruptcy assistance services . . . that the services or benefits are with respect to bankruptcy relief under this title.” 11 U.S.C. § 528(a)(3). BAPCPA also required qualifying professionals to state that “[w]e are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.” Id. § 528(a)(4). The Court upheld the statute's disclosure requirement because, as in Zauderer, the law firm's advertisements were “inherently misleading” – in this case, because they “promis[ed] . . . debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs.” Milavetz, 130 S. Ct. at 1340. One Justice even cautioned against interpreting the Court's holding as a “presumptive[,] endorse[ment of] laws requiring the use of government-scripted disclaimers in commercial advertising,” noting that Zauderer does not stand for the proposition that government “can constitutionally compel the use of a scripted disclaimer in any circumstance in which its interest in preventing consumer deception might plausibly be at stake.” Id. at 1343-44 (Thomas, J., concurring in part and concurring in the judgment).
Under *Central Hudson*, the government must first show that its asserted interest is “substantial.” 447 U.S. at 566. If so, the Court must determine “whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” Id. The party seeking to uphold a restriction on commercial speech bears the burden of justifying it. Edenfield v. Fane, 507 U.S. 761, 770-71 (1993). Because this case involves a challenge to final agency action, the Administrative Procedure Act governs our review of the record. See 5 U.S.C. § 706(2)(B) (providing that the APA applies to allegations that agency action is “contrary to constitutional right, power, privilege, or immunity”). The APA requires us to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence.” 5 U.S.C. § 706(2).

A review of the statute and the administrative record makes clear that the graphic warnings are intended to encourage current smokers to quit and dissuade other consumers from ever buying cigarettes. One of the Act's many stated purposes is “promot[ing] cessation to reduce disease risk and the social costs associated with tobacco-related diseases.” Act § 3.9. The only explicitly asserted interest in either the Proposed or Final Rule is an interest in reducing smoking rates. The Proposed Rule states in its preamble that the government has a “substantial interest in reducing the number of Americans, particularly children and adolescents, who use cigarettes and other tobacco products.” Proposed Rule at 69,525. And the preamble to the Final Rule reiterates the same interest. Final Rule at 36,629. Although counsel attempted to disclaim this interest at oral argument, the administrative record shows otherwise: the primary objective of the Rule was “both to discourage nonsmokers from initiating cigarette use and to encourage current smokers to consider quitting.” Id. at 36,630.

Assuming FDA's interest in reducing smoking rates is substantial, we next evaluate whether FDA has offered substantial evidence showing that the graphic warning requirements “directly advance[ ] the governmental interest asserted,” Cent. Hudson, 447 U.S. at 566, to a “material degree,” Fl. Bar v. Went For It, Inc., 515 U.S. 618, 626 (1995). The government bears the burden of justifying its attempt to restrict commercial speech, Edenfield, 507 U.S. at 770, and its burden is not light. A restriction that “provides only ineffective or remote support for the government's purposes,” id. at 770, is not sufficient, and the government cannot satisfy its burden “by mere speculation or conjecture.” Rubin v. Coors Brewing Co., 514 U.S. 476, 487 (1995). The requirement that a restriction directly advance the asserted interest is “critical,” because without it, the government “could [interfere with] commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.” Id.

FDA has not provided a shred of evidence – much less the “substantial evidence” required by the APA – showing that the graphic warnings will “directly advance” its interest in reducing the number of Americans who smoke. FDA makes much of the “international consensus” surrounding the effectiveness of large graphic warnings, but offers no evidence showing that such warnings have *directly caused* a material decrease in smoking rates in any of the countries that now require them. While studies of Canadian and Australian youth smokers showed that the warnings on cigarette packs caused a substantial number of survey participants to think – or think more – about quitting smoking, Proposed Rule at 69,532, and FDA might be correct that intentions are a “necessary precursor” to behavior change, Final Rule at 36,642, it is mere speculation to suggest that
respondents who report increased thoughts about quitting smoking will actually follow through on their intentions. And at no point did these studies attempt to evaluate whether the increased thoughts about smoking cessation led participants to actually quit. Another Australian study reported increased quit attempts by survey participants after that country enacted large graphic warnings, but found “no association with short-term quit success.” Proposed Rule at 69,532. Some Canadian and Australian studies indicated that large graphic warnings might induce individual smokers to reduce consumption, or to help persons who have already quit smoking remain abstinent. See id. But again, the study did not purport to show that the implementation of large graphic warnings has actually led to a reduction in smoking rates.

FDA's reliance on this questionable social science is unsurprising when we consider the raw data regarding smoking rates in countries that have enacted graphic warnings. FDA claims that Canadian national survey data suggest that graphic warnings may reduce smoking rates. But the strength of the evidence is underwhelming, making FDA's claim somewhat misleading. In the year prior to the introduction of graphic warnings, the Canadian national survey showed that 24 percent of Canadians aged 15 or older smoked cigarettes. In 2001, the year the warnings were introduced, the national smoking rate dropped to 22 percent, and it further dropped to 21 percent in 2002. Id. at 69,532. But the raw numbers don't tell the whole tale. FDA concedes it cannot directly attribute any decrease in the Canadian smoking rate to the graphic warnings because the Canadian government implemented other smoking control initiatives, including an increase in the cigarette tax and new restrictions on public smoking, during the same period. Id. Although FDA maintains the data “are suggestive” that large graphic warnings “may” reduce smoking consumption, id., it cannot satisfy its First Amendment burden with “mere speculation and conjecture.” Rubin, 514 U.S. at 487.

FDA has . . . presented us with only two studies that directly evaluate the impact of graphic warnings on actual smoking rates, and neither set of data shows that the graphic warnings will “directly” advance its interest in reducing smoking rates “to a material degree.” Rubin, 514 U.S. at 487. And one of the principal researchers on whom FDA relies recently surveyed the relevant literature and conceded that “[t]here is no way to attribute . . . declines [in smoking] to the new health warnings.” David Hammond, Health Warnings Messages on Tobacco Products: A Review, 20 Tobacco Control 327, 331 (2011), available at http://tobaccocontrol.bmj.com/content/20/5/327.full.pdf. In light of the number of foreign jurisdictions that have enacted large graphic warning labels, the dearth of data reflecting decreased smoking rates in these countries is somewhat surprising, and strongly implies that such warnings are not very effective at promoting cessation and discouraging initiation. While APA review of final agency action is deferential, it surely does not require us to accept a flawed interpretation of Canadian survey data or the agency's own projected 0.088% decrease in the U.S. smoking rate as “substantial evidence” that its warnings will advance its stated interest.

Alternatively, FDA asserts an interest in “effectively communicating health information” regarding the negative effects of cigarettes. Appellant's Br. at 28. But as FDA concedes, this purported “interest” describes only the means by which FDA is attempting to reduce smoking rates: “[t]he goal of effectively communicating the risks of cigarette smoking is, of course, related to the viewer's decision to quit, or never to start, smoking.” Id. at 47. The government's attempt to reformulate its interest as purely informational is unconvincing, as an interest in “effective” communication is too
vague to stand on its own. Indeed, the government's chosen buzzwords, which it reiterates through the rulemaking, prompt an obvious question: “effective” in what sense? Allowing FDA to define “effectiveness” however it sees fit would not only render Central Hudson's “substantial interest” requirement a complete nullity, but it would also eviscerate the requirement that any restriction “directly advance” that interest. See 447 U.S. at 566. In this case, both the statute and the Rule offer a barometer for assessing the effectiveness of the graphic warnings – the degree to which they encourage current smokers to quit and dissuade would-be smokers from taking up the habit. See Final Rule at 36,630, 36,707-08. As such, FDA's interest in “effectively communicating” the health risks of smoking is merely a description of the means by which it plans to accomplish its goal of reducing smoking rates, and not an independent interest capable of sustaining the Rule.

In the Proposed Rule, FDA lamented that their previous efforts to combat the tobacco companies' advertising campaigns have been like bringing a butter knife to a gun fight. According to the FTC, tobacco companies spent approximately $12.49 billion on advertising and promotion in 2006 alone, employing marketing and advertising experts to incorporate current trends and target their messages toward certain demographics. Proposed Rule at 69,531. The graphic warnings represent FDA's attempt to level the playing field, not only by limiting the Companies' ability to advertise, but also by forcing the Companies to bear the cost of disseminating an anti-smoking message. But as the Supreme Court recently reminded us, “[t]hat the [government] finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.” Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011).

ROGERS, Circuit Judge, dissenting.

Because the warning labels present factually accurate information and address misleading commercial speech, as defined in Supreme Court precedent, Zauderer scrutiny applies, and the government need show only that the warning label requirement is reasonably related to its stated and substantial interest in effectively conveying this information to consumers. See Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010); Zauderer, 471 U.S. at 650-51; Spirit Airlines, Inc. v. U.S. Dept of Transp., 687 F.3d 403, 412 (D.C. Cir. 2012). Even treating Zauderer's “less exacting scrutiny” as limited to disclosure requirements serving a governmental interest in preventing consumer deception, the voluminous findings of our own courts, cited and supplemented by Congress in the Family Smoking Prevention and Tobacco Control Act (“Tobacco Control Act” or “Act”), Pub.L. No. 111-31, 123 Stat. 1776 (2009), and the Federal Drug Administration (“FDA”) in the Final Rule, are more than adequate to substantiate that interest.

Regardless of which level of scrutiny applies, the court errs in failing to examine both of the government's stated interests. In the rulemaking, the FDA articulated complementary, but distinct, interests in effectively conveying information about the negative health consequences of smoking to consumers and in decreasing smoking rates. See, e.g., Final Rule, 76 Fed. Reg. at 36,633. The court dismisses the former interest as “too vague,” Maj. Op. at 1221, thereby sidestepping much of the substantial evidence supporting the warning label requirement. Yet this court has “recognize[d] that the government's interest in preventing consumer fraud/confusion may well take on added importance in the context of a product . . . that can affect the public's health.” Pearson v. Shalala,
164 F.3d 650, 656 (D.C. Cir. 1999). Tobacco products necessarily affect the public health, and to a significant degree. Unlike other consumer products, “tobacco products are ‘dangerous to health’ when used in the manner prescribed.” FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 135 (2000). They are also highly addictive. Consequently, “tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.” Id. at 161. . . .

As the Supreme Court explained in Milavetz, where the challenged requirements are “directed at misleading commercial speech,” and where they “impose a disclosure requirement rather than an affirmative limitation on speech, . . . the less exacting scrutiny described in Zauderer governs [a court's] review.” 130 S. Ct. at 1339; see Spirit Airlines, 687 F.3d at 412. The warning label requirement meets both of these criteria.

First, the government need show only that the targeted commercial speech presents the “possibility of deception” or a “tendency to mislead.” Milavetz, 130 S. Ct. at 1340 (citation and internal quotation marks omitted). In Milavetz, the Supreme Court concluded that a law firm's advertisements were “inherently misleading” because they “promise[d] . . . debt relief without any reference to the possibility of filing for bankruptcy, which has inherent costs.” [Id.] Thus, . . . the Court considered the omission of a reference to a possible outcome with “inherent costs” to be sufficiently misleading as to warrant review under Zauderer. Even advertisements that display all the costs of a service may remain misleading. In Spirit Airlines, this court addressed a Department of Transportation (“DOT”) rule requiring that the most prominent number displayed in airfare advertisements be the total price, inclusive of taxes. Spirit Airlines, 687 F.3d at 408-09. Notwithstanding the airlines' compliance with preexisting regulations requiring advertisements to display the entire ticket cost as well as the amount of any tax, the court accepted DOT's determination, based on common sense and experience, “that it was deceitful and misleading when the most prominent price listed by an airline is anything other than the total, final price of air travel.” Id. at 413.

Furthermore, even if (contrary to Supreme Court and this court's precedent) these findings were inadequate to establish a “tendency to mislead,” this court has recognized that certain advertisements, “although not misleading if taken alone,” can “become[ ] misleading” when “considered in light of past advertisements.” Warner-Lambert Co. v. FTC, 562 F.2d 749, 760 (D.C. Cir. 1977); see id. at n.57. In other words, a “tendency to mislead” may arise through efforts to “capitalize on . . . prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions.” Philip Morris, 566 F.3d at 1144-45 (citing Warner-Lambert, 562 F.2d at 769). This court has already acknowledged the tendency of cigarette marketing to mislead consumers based on the companies' decades of deception regarding each of the risks identified in the warning labels. See Philip Morris, 566 F.3d at 1144; supra Part I. Consistent with that decision, Congress found that “[t]obacco product advertising often misleadingly portrays the use of tobacco as socially acceptable and healthful to minors.” Tobacco Control Act § 2(17), 21 U.S.C. § 387 Note. These findings are more than “adequate to establish that the likelihood of deception in this case ‘is hardly a speculative one.’” Milavetz, 130 S. Ct. at 1340; see Discount Tobacco, 674 F.3d at 562.
Unlike the graphic images envisioned in Section 201, however, the additional inclusion of the telephone number “1-800-QUIT-NOW” on each warning label does not directly disclose factual information about the health consequences of smoking. . . . To the extent the purpose is directed toward reducing smoking rates, the constitutionality of the number's mandatory inclusion in the warning labels requires examination under a different standard than Zauderer, to which I now turn.

The government's informational interest in effectively conveying the negative health consequences of smoking clearly qualifies as “substantial” under the second prong of Central Hudson. “The Supreme Court has said ‘there is no question that [the government's] interest in ensuring the accuracy of commercial information in the marketplace is substantial,’” Pearson, 164 F.3d at 656 (quoting Edenfield v. Fane, 507 U.S. 761, 769 (1993)), “and that the government has a substantial interest in ‘promoting the health, safety, and welfare of its citizens,’” id. (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 485 (1995)). This court has previously “recognize[d] that the government's interest in preventing consumer fraud/confusion may well take on added importance in the context of a product . . . that can affect the public's health.” Id. And “tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States.” Brown & Williamson, 529 U.S. at 161. The government interest in effectively conveying the negative health consequences of smoking takes on even greater importance in view of the highly addictive nature of tobacco and the fact that “the most serious harmful consequences of smoking are cumulative, and occur in the distant future.” Philip Morris, 449 F. Supp. 2d at 577.

The warning label requirement appears to meet the third and fourth prongs of Central Hudson as well. The rulemaking record includes substantial evidence from international experience, see Proposed Rule, 75 Fed. Reg. at 69,531-32, and the FDA Study, see Final Rule, 76 Fed. Reg. at 36,637-42, supporting the government's reasoned determination that the warnings would “directly advance” its informational interest, not least by “ensur[ing] that the health risk message[s] [are] actually seen by consumers in the first instance.” Commonwealth Brands, Inc. v. United States, 678 F. Supp. 2d 512, 530 (W.D.Ky.2010), aff'd in relevant part, Discount Tobacco, 674 F.3d at 569. “The harms [the government] recites are real” – caused in part by the “often misleading” advertising that smoking is part of a healthy lifestyle without consequences – and there is substantial evidence to support the government's conclusion that the warning label requirement “will in fact alleviate [those harms] to a material degree.” Lorillard, 533 U.S. at 555. “[H]istory, consensus, and ‘simple common sense,’” id. (quoting Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 (1995)), demonstrate as well that warning label requirement meets the fourth prong of the Central Hudson test. The failures of previous government efforts to convey the relevant information through small, textual warnings on the side of cigarette packages, see Final Rule, 76 Fed. Reg. at 36,631-32; Proposed Rule, 75 Fed. Reg. at 69,530-31, . . . are sufficient to show that the warning labels, with graphic images, are “not more extensive than necessary to serve” the government's substantial interest in effectively conveying that information to consumers.

The one exception is the “1-800-QUIT-NOW” telephone number. . . . Under Central Hudson intermediate scrutiny, the government's interest in reducing smoking rates is doubtless substantial. See, e.g., Lorillard, 533 U.S. at 564. There also is substantial evidence to support the FDA's determination that the display of the “1-800-QUIT-NOW” number will directly advance this interest.
The biological and psychological effects of nicotine “can make smoking cessation extremely difficult,” PCP Report at 62; “about 40 percent of smokers try to quit” each year, but “95 percent of those who try to quit on their own relapse,” Final Rule, 76 Fed. Reg. at 36,681. In comparison to minimal or no counseling interventions, quitlines have been found to “significantly increase abstinence rates.” Id. at 36,687 (citing U.S. Dep't Health & Human Servs., Public Health Serv., Treating Tobacco Use and Dependence: 2008 Update 91 (May 2008)); see also IOM Report at C-7. International experience referenced in the rulemaking, see Final Rule, 76 Fed. Reg. at 36,682, further supports the common sense proposition that informing smokers of cessation resources is likely to increase rates of successful quit attempts.

But the additional inclusion of the “1-800-QUIT-NOW” number on the warning labels does not meet the fourth prong of Central Hudson. The number is prominently presented in imperative terms, directing consumers to “QUIT NOW.” That command directly contradicts the tobacco companies' desired message at the point of sale, thereby imposing a significant burden on their protected commercial speech. “In previous cases addressing [the] final prong of the Central Hudson test,” the Supreme Court has “made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.” Thompson, 535 U.S. at 371. [T]he inclusion of the “1-800-QUIT-NOW” number follows upon no apparent consideration of the effectiveness of alternative means of connecting smokers to cessation resources, such as a package insert. Absent an explanation why such alternatives would be inadequate, the government has failed to show the requisite “reasonable fit,” Lorillard, 533 U.S. at 561.

On when to apply Zauderer, see American Meat Institute v. United States Dept. of Agriculture, 760 F.3d 18 (D.C. Cir. 2014) (required disclosure of purely factual information, like regulations to prevent consumer deception, trigger rational review test of Zauderer); CTIA-The Wireless Association v. City of Berkeley, Cal., 854 F.3d 1105, 1116-17 (9th Cir. 2017) (joining First, Second, Sixth Circuits in holding that Zauderer applies to any factual disclosure requirement, including information or health, safety, and welfare concerns, and is not limited to preventing consumer deception, as held in R.J. Reynolds above). The Supreme Court did not address this issue directly in National Institute of Family and Life Advocates (NIFLA) v. Becerra, 138 S. Ct. 2361, 2372 (2018), but did phrase the Zauderer test in terms of any “factual, noncontroversial information.” Cf. POM Wonderful, LLC v. FTC, 777 F.3d 478 (D.C. Cir. 2015) (adopting “substantial evidence” standard, not de novo review, to review FTC’s finding statements are “deceptive and misleading”).

See generally IMDb.com, Inc. v. Becerra, 2018 WL 979031 (N.D. Cal. 2018) (California law forbidding IMDb from publishing truthful age-related information upon request by a subscriber, which was passed in part to make age discrimination more difficult, regulates non-commercial speech and is unconstitutional under strict scrutiny, particularly because the state explored no less-speech-restrictive alternatives); King v. Governor of New Jersey, 767 3d. 216, 222-35 (3rd Cir. 2014) (“commercial speech” analysis applies to “professional speech” regulations of persons subject to licensing, while acknowledging a lower court split on the issue). In NIFLA, cited above, the Supreme Court rejected this exception for “professional speech” and strongly indicated such content-based regulations should trigger traditional strict scrutiny. 138 C. Ct. at 2371-76.
CHAPTER 10: CONTENT-BASED REGULATIONS OF SPEECH TRIGGERING THEIR OWN VERSIONS OF STRICT SCRUTINY

§ 10.1 Loose Strict Scrutiny: Cable/Satellite Television and Radio Regulation ............. 493

§ 10.2 Not Completely Strict Scrutiny: Campaign Finance Regulation

in 1976 in *Buckley v. Valeo* ................................................................. 507

§ 10.3 Campaign Finance Regulation From *Buckley* Through *Citizens United* ........ 517

§ 10.4 Regulation of Political Speech by Judges .............................................. 542

---

§ 10.1 Loose Strict Scrutiny: Cable/Satellite Television and Radio Regulation

Cases involving regulation of cable television have posed difficult problems for the Court in determining whether standard First Amendment doctrine or *Red Lion* doctrine should apply. The arguments regarding scarcity and distribution through the public airways, which justified the lower standard of review in *Red Lion* and *League of Women Voters*, discussed at § 9.1, do not apply in any meaningful way to cable or satellite television or radio as they have evolved. Arguments regarding the ability of cable or satellite television or radio to intrude into the privacy of one’s home, like radio and television intruding as in *FCC v. Pacifica*, excerpted at § 9.1, can be dealt with under standard First Amendment doctrine viewing the privacy rationale as a content-neutral justification for regulation, triggering the intermediate scrutiny standard of *Pacifica*.

In *Turner Broadcasting System, Inc. v. FCC (Turner I)*, the Court considered the constitutional validity of a federal statute that required cable systems with more than 12 active channels to set aside up to one-third of their channels for commercial broadcast stations that request carriage. For the Court, Justice Kennedy said that the radio and television cases do not apply because cable does not have the limits of the broadcast medium. On the other hand, a cable operator can silence the voice of competing speakers with a flick of the switch, raising some access concerns. Nevertheless, some degree of heightened scrutiny is required, although strict scrutiny need not apply because the must-carry provisions do not impose burdens or benefits with reference to the content of speech. Instead, they are based on the manner in which the speakers transmit their messages, and the purpose was to preserve access to free television programming for the 40 percent of Americans without cable. Thus, even under standard First Amendment doctrine, a content-neutral regulation would only trigger intermediate scrutiny. Applying intermediate scrutiny, Justice Kennedy noted the lack of evidence that local stations had fallen into bankruptcy, turned in licenses, curtailed broadcasting, or suffered a reduction in operating revenues. Nor was there evidence on the availability of less restrictive means. Thus, there were factual issues to be resolved and it was error to enter summary judgment for the defendant FCC.

---

In *Turner Broadcasting System, Inc. v. FCC (Turner II)*, the Court again rejected the comparison of a cable television company with a newspaper and, applying intermediate review, upheld requiring cable broadcasters to set aside up to one-third of their channels for use by local, over-the-air commercial broadcasters. By a similar 5-4 vote as in *Turner I*, with Justice Breyer, who had replaced Justice Blackmun on the Court, taking Blackmun’s place in the 5-Justice majority, the Court held the record showed the government had an important interest unrelated to the suppression of free speech – the preservation of free, over-the-air broadcasting. The majority said that Congress' judgment was supported by substantial evidence in the record before Congress. Justice O’Connor’s dissent concluded that even under intermediate scrutiny the regulations should fail. Her dissent underscored the fact that, unlike the substantial deference given to government at minimum rational review, at intermediate scrutiny the Court has “an independent duty to identify with care the Government’s interests supporting the scheme, to inquire into the reasonableness of congressional findings regarding its necessity, and to examine the fit between its goals and its consequences.”

**Denver Area Educational Telecommunications Consortium v. FCC**  
518 U.S. 727 (1996)

Justice BREYER announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, an opinion with respect to Parts I, II, and V, in which Justice STEVENS, Justice O’CONNOR, and Justice SOUTER join, and an opinion with respect to Parts IV and VI, in which Justice STEVENS and Justice SOUTER join.

These cases present First Amendment challenges to three statutory provisions that seek to regulate the broadcasting of “patently offensive” sex-related material on cable television. Cable Television Consumer Protection and Competition Act of 1992 (1992 Act or Act), 106 Stat. 1486, §§ 10(a), 10(b), and 10(c), 47 U.S.C. §§ 532(h), 532(j), and note following § 531. The provisions apply to programs broadcast over cable on what are known as “leased access channels” and “public, educational, or governmental channels.” Two of the provisions essentially permit a cable system operator to prohibit the broadcasting of “programming” that the “operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner.” 1992 Act, § 10(a); see § 10(c). See also In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 FCC Rcd 998 (1993) (First Report and Order); 8 FCC Rcd 2638 (1993) (Second Report and Order). The remaining provision requires cable system operators to segregate certain “patently offensive” programming, to place it on a single channel, and to block that channel from viewer access unless the viewer requests access in advance and in writing. 1992 Act, § 10(b); 47 CFR § 76.701(g) (1995).

We conclude that the first provision – which permits the operator to decide whether or not to broadcast such programs on leased access channels – is consistent with the First Amendment. The

---


3 *Id.* at 229 (O’Connor, J., joined by Scalia, Thomas & Ginsburg, JJ., dissenting).
second provision, which requires leased channel operators to segregate and to block that programming, and the third provision, applicable to public, educational, and governmental channels, violate the First Amendment, for they are not appropriately tailored to achieve the basic, legitimate objective of protecting children from exposure to “patently offensive” material.

Like petitioners, Justices Kennedy and Thomas would have us decide these cases simply by transferring and applying literally categorical standards this Court has developed in other contexts. For Justice Kennedy, leased access channels are like a common carrier, cablecast is a protected medium, strict scrutiny applies, § 10(a) fails this test, and, therefore, § 10(a) is invalid. For Justice Thomas, the case is simple because the cable operator who owns the system over which access channels are broadcast, like a bookstore owner with respect to what it displays on the shelves, has a predominant First Amendment interest. Both categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.

The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required. See, e.g., Schenck v. United States, 249 U.S. 47, 51-52 (1919); Abrams v. United States, 250 U.S. 616, 627-628 (1919) (Holmes, J., dissenting); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 639 (1943); Texas v. Johnson, 491 U.S. 397, 418-420 (1989). At the same time, our cases have not left Congress or the States powerless to address the most serious problems. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (allowing criticism of public officials to be regulated by civil libel only if the plaintiff shows actual malice); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (allowing greater regulation of speech harming individuals who are not public officials, but still requiring a negligence standard); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (employing highly flexible standard in response to the scarcity problem unique to over-the-air broadcast); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231-232 (1987) (requiring “compelling state interest” and a “narrowly drawn” means in context of differential taxation of media); Sable [Communications of California, Inc. v. FCC, 492 U.S. 115,] 126, 131 [(1989)] (applying “compelling interest,” “least restrictive means,” and “narrowly tailored” requirements to indecent telephone communications); Turner, 512 U.S., at 641 (using “heightened scrutiny” to address content-neutral regulations of cable system broadcasts); Central Hudson Gas & Elec. Corp., 447 U.S., at 566 (restriction on commercial speech cannot be “more extensive than is necessary” to serve a “substantial” government interest).
This tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems. This Court, in different contexts, has consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech. Justices Kennedy and Thomas would have us further declare which, among the many applications of the general approach that this Court has developed over the years, we are applying here. But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard – they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, see, e.g., Telecommunications Act of 1996, 110 Stat. 56; S. Rep. No. 104-23 (1995); H.R. Rep. No. 104-204 (1995), we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now. See Columbia Broadcasting, 412 U.S., at 102 (“The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence’’); Pacifica, supra, at 748 (“We have long recognized that each medium of expression presents special First Amendment problems”). We therefore think it premature to answer the broad questions that Justices Kennedy and Thomas raise in their efforts to find a definitive analog, deciding, for example, the extent to which private property can be designated a public forum, compare post, at 2409-2410 (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part), with post, at 2426-2427 (Thomas, J., concurring in judgment in part and dissenting in part); whether public access channels are a public forum, post, at 2409 (opinion of Kennedy, J.); whether the Government's viewpoint neutral decision to limit a public forum is subject to the same scrutiny as a selective exclusion from a pre-existing public forum, post, at 2413-2415 (opinion of Kennedy, J.); whether exclusion from common carriage must for all purposes be treated like exclusion from a public forum, post, at 2412 (opinion of Kennedy, J.); and whether the interests of the owners of communications media always subordinate the interests of all other users of a medium, post, at 2421-2422 (opinion of Thomas, J.).

Rather than decide these issues, we can decide these cases more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech. The importance of the interest at stake here – protecting children from exposure to patently offensive depictions of sex; the accommodation of the interests of programmers in maintaining access channels and of cable operators in editing the contents of their channels; the similarity of the problem and its solution to those at issue in Pacifica; and the flexibility inherent in an approach that permits private cable operators to make editorial decisions, lead us to conclude that § 10(a) is a sufficiently tailored response to an extraordinarily important problem.
Third, the problem Congress addressed here is remarkably similar to the problem addressed by the FCC in *Pacifica*, and the balance Congress struck is commensurate with the balance we approved there. In *Pacifica* this Court considered a governmental ban of a radio broadcast of “indecent” materials, defined in part, like the provisions before us, to include “‘language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.’” 438 U.S., at 732 (quoting 56 F.C.C.2d 94, 98 (1975)).

The Court found this ban constitutionally permissible primarily because “broadcasting is uniquely accessible to children” and children were likely listeners to the program there at issue – an afternoon radio broadcast. 438 U.S., at 749-750. In addition, the Court wrote, “the broadcast media have established a uniquely pervasive presence in the lives of all Americans,” id., at 748, “[p]atently offensive, indecent material . . . confronts the citizen, not only in public, but also in the privacy of the home,” generally without sufficient prior warning to allow the recipient to avert his or her eyes or ears, ibid.; and “[a]dults who feel the need may purchase tapes and records or go to theaters and nightclubs” to hear similar performances, id., at 750, n.28.

All these factors are present here. Cable television broadcasting, including access channel broadcasting, is as “accessible to children” as over-the-air broadcasting, if not more so. See Heeter, Greenberg, Baldwin, Paugh, Srigley, & Atkin, Parental Influences on Viewing Style, in Cableviewing 140 (C. Heeter & B. Greenberg eds.1988) (children spend more time watching television and view more channels than do their parents, whether their household subscribes to cable or receives television over the air). Cable television systems, including access channels, “have established a uniquely pervasive presence in the lives of all Americans.” *Pacifica*, supra, at 748. See Jost, The Future of Television, 4 The CQ Researcher 1131, 1146 (Dec. 23, 1994) (63% of American homes subscribe to cable); Greenberg, Heeter, D'Alessio, & Sipes, Cable and Noncable Viewing Style Comparisons, in Cableviewing, *supra*, at 207 (cable households spend more of their day, on average, watching television, and will watch more channels, than households without cable service).

“Patently offensive” material from these stations can “confront[] the citizen” in the “privacy of the home,” *Pacifica*, *supra*, at 748, with little or no prior warning. Cableviewing, *supra*, at 217–218 (while cable subscribers tend to use guides more than do broadcast viewers, there was no difference among these groups in the amount of viewing that was planned, and, in fact, cable subscribers tended to sample more channels before settling on a program, thereby making them more, not less, susceptible to random exposure to unwanted materials). There is nothing to stop “adults who feel the need” from finding similar programming elsewhere, say, on tape or in theaters. In fact, the power of cable systems to control home program viewing is not absolute. Over-the-air broadcasting and direct broadcast satellites already provide alternative ways for programmers to reach the home and are likely to do so to a greater extent in the near future. See generally Telecommunications Act of 1996, § 201, 110 Stat. 107 (advanced television services), § 205 (direct broadcast satellite), § 302 (video programming by telephone companies), and § 304 (availability of navigation devices to enhance multichannel programming); L. Johnson, Toward Competition in Cable Television (1994).

Fourth, the permissive nature of § 10(a) means that it likely restricts speech less than, not more than, the ban at issue in *Pacifica*. The provision removes a restriction as to some speakers – namely, cable
operators. Moreover, although the provision does create a risk that a program will not appear, that risk is not the same as the certainty that accompanies a governmental ban. In fact, a glance at the programming that cable operators allow on their own (nonaccess) channels suggests that this distinction is not theoretical, but real. See App. 393 (regular channel broadcast of Playboy and “Real Sex” programming). Finally, the provision's permissive nature brings with it a flexibility that allows cable operators, for example, not to ban broadcasts, but, say, to rearrange broadcast times, better to fit the desires of adult audiences while lessening the risks of harm to children. See First Report and Order ¶ 31, at 1003 (interpreting the Act's provisions to allow cable operators broad discretion over what to do with offensive materials). In all these respects, the permissive nature of the approach taken by Congress renders this measure appropriate as a means of achieving the underlying purpose of protecting children.

The statute's second provision significantly differs from the first, for it does not simply permit, but rather requires, cable system operators to restrict speech – by segregating and blocking “patently offensive” sex-related material appearing on leased channels (but not on other channels). 1992 Act, § 10(b). In particular, as previously mentioned, this provision and its implementing regulations require cable system operators to place “patently offensive” leased channel programming on a separate channel; to block that channel; to unblock the channel within 30 days of a subscriber's written request for access; and to reblock the channel within 30 days of a subscriber's request for reblocking. 1992 Act, § 10(b); 47 CFR §§ 76.701(b), (c), (g) (1995). Also, leased channel programmers must notify cable operators of an intended “patently offensive” broadcast up to 30 days before its scheduled broadcast date. §§ 76.701(d), (g).

We agree with the Government that protection of children is a “compelling interest.” But we do not agree that the “segregate and block” requirements properly accommodate the speech restrictions they impose and the legitimate objective they seek to attain. Nor need we here determine whether, or the extent to which, Pacifica does, or does not, impose some lesser standard of review where indecent speech is at issue, compare 438 U.S., at 745-748 (opinion of Stevens, J.) (indecent materials enjoy lesser First Amendment protection), with id., at 761-762 (Powell, J., concurring in part and concurring in judgment) (refusing to accept a lesser standard for nonobscene, indecent material). That is because once one examines this governmental restriction, it becomes apparent that, not only is it not a “least restrictive alternative” and is not “narrowly tailored” to meet its legitimate objective, it also seems considerably “more extensive than necessary.” That is to say, it fails to satisfy this Court's formulations of the First Amendment's "strictest," as well as its somewhat less "strict," requirements. See, e.g., Sable, 492 U.S., at 126 (“compelling interest” and “least restrictive means” requirements applied to indecent telephone communications); id., at 131 (requiring “narrowly tailored” law); Turner, 512 U.S., at 641 (using “heightened scrutiny” to address content-neutral structural regulations of cable systems); id., at 662 (quoting "‘no greater than . . . essential’” language from United States v. O'Brien, 391 U.S. 367, 377 (1968), as an example of “heightened,” less-than-strictest, First Amendment scrutiny); Central Hudson, 447 U.S., at 566 (restriction on commercial speech cannot be “more extensive than is necessary”); Florida Bar v. Went For It, Inc., 515 U.S. 618, 624 (1995) (restriction must be “narrowly drawn”); id., at 632 (there must be a “reasonable” “fit” with the objective that legitimates speech restriction). The provision before us does not reveal the caution and care that the standards underlying these various verbal formulas
impose upon laws that seek to reconcile the critically important interest in protecting free speech with very important, or even compelling, interests that sometimes warrant restrictions.

Several circumstances lead us to this conclusion. For one thing, the law, as recently amended, uses other means to protect children from similar “patently offensive” material broadcast on unleased cable channels, i.e., broadcast over any of a system's numerous ordinary, or public access, channels. The law, as recently amended, requires cable operators to “scramble or . . . block” such programming on any (unleased) channel “primarily dedicated to sexually-oriented programming.” Telecommunications Act of 1996, § 505, 110 Stat. 136 (emphasis added). In addition, cable operators must honor a subscriber's request to block any, or all, programs on any channel to which he or she does not wish to subscribe. § 504, ibid. And manufacturers, in the future, will have to make television sets with a so-called “V-chip” – a device that will be able automatically to identify and block sexually explicit or violent programs. § 551, id., at 139-142.

Although we cannot, and do not, decide whether the new provisions are themselves lawful (a matter not before us), we note that they are significantly less restrictive than the provision here at issue. They do not force the viewer to receive (for days or weeks at a time) all “patently offensive” programming or none; they will not lead the viewer automatically to judge the few by the reputation of the many; and they will not automatically place the occasional viewer's name on a special list. They therefore inevitably lead us to ask why, if they adequately protect children from “patently offensive” material broadcast on ordinary channels, they would not offer adequate protection from similar leased channel broadcasts as well? Alternatively, if these provisions do not adequately protect children from “patently offensive” material broadcast on ordinary channels, how could one justify more severe leased channel restrictions when (given ordinary channel programming) they would yield so little additional protection for children?

The record does not answer these questions. It does not explain why, under the new Act, blocking alone – without written access requests – adequately protects children from exposure to regular sex-dedicated channels, but cannot adequately protect those children from programming on similarly sex-dedicated channels that are leased. It does not explain why a simple subscriber blocking request system, perhaps a phone-call-based system, would adequately protect children from “patently offensive” material broadcast on ordinary non-sex-dedicated channels (i.e., almost all channels) but a far more restrictive segregate/block/written-access system is needed to protect children from similar broadcasts on what (in the absence of the segregation requirement) would be non-sex-dedicated channels that are leased. Nor is there any indication Congress thought the new ordinary channel protections less than adequate.

The statute's third provision, as implemented by FCC regulation, is similar to its first provision, in that it too permits a cable operator to prevent transmission of “patently offensive” programming, in this case on public access channels. 1992 Act, § 10(c); 47 CFR § 76.702 (1995)

Finally, our examination of the legislative history and the record before us is consistent with what common sense suggests, namely, that the public/nonprofit programming control systems now in place would normally avoid, minimize, or eliminate any child-related problems concerning “patently
offensive” programming. We have found anecdotal references to what seem isolated instances of potentially indecent programming, some of which may well have occurred on leased, not public access, channels. See 138 Cong. Rec. 984, 990 (1992) (statement of Sen. Wirth) (mentioning “abuses” on Time Warner's New York City channel); but see Comments of Manhattan Neighborhood Network, App. 235, 238 (New York access manager noting that leased, not public access, channels regularly carry sexually explicit programming in New York, and that no commercial programs or advertising are allowed on public access channels); Brief for Time Warner Cable as Amicus Curiae 2-3 (indicating that relevant “abuses” likely occurred on leased channels). See also 138 Cong. Rec., at 989 (statement of Sen. Fowler) (describing solicitation of prostitution); id., at 985 (statement of Sen. Helms) (identifying newspaper headline referring to mayor's protest of a “strip act”); 56 F.3d, at 117-118 (recounting comments submitted to the FCC describing three complaints of offensive programming).

But these few examples do not necessarily indicate a significant nationwide pattern. See 56 F.3d, at 127-128 (public access channels “did not pose dangers on the order of magnitude of those identified on leased access channels,” and “local franchising authorities could respond” to such problems “by issuing ‘rules and procedures' or other ‘requirements' ”). The Commission itself did not report any examples of “indecent” programs on public access channels.

The upshot, in respect to the public access channels, is a law that could radically change present programming-related relationships among local community and nonprofit supervising boards and access managers, which relationships are established through municipal law, regulation, and contract. In doing so, it would not significantly restore editorial rights of cable operators, but would greatly increase the risk that certain categories of programming (say, borderline offensive programs) will not appear. At the same time, given present supervisory mechanisms, the need for this particular provision, aimed directly at public access channels, is not obvious. Having carefully reviewed the legislative history of the Act, the proceedings before the FCC, the record below, and the submissions of the parties and amici here, we conclude that the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end. See, e.g., Columbia Broadcasting, 412 U.S., at 127; League of Women Voters, 468 U.S., at 398-399. Consequently, we find that this third provision violates the First Amendment.

Finally, we must ask whether § 10(a) is severable from the two other provisions. The question is one of legislative intent: Would Congress still “have passed” § 10(a) “had it known” that the remaining “provision[s were] invalid”? Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985). If so, we need not invalidate all three provisions. New York v. Ferber, 458 U.S., at 769, n.24 (citing United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971)).

Although the 1992 Act contains no express “severability clause,” we can find the Act's “severability” intention in its structure and purpose. It seems fairly obvious Congress would have intended its permissive “leased access” channels provision, § 10(a), to stand irrespective of § 10(c)'s legal fate. That is because the latter provision concerns only public, educational, and governmental channels. Its presence had little, if any, effect upon “leased access” channels; hence its absence in respect to those channels could not make a significant difference.
The “segregate and block” requirement’s invalidity does make a difference, however, to the effectiveness of the permissive “leased access” provision, § 10(a). Together they told the cable system operator: “Either ban a ‘patently offensive’ program or ‘segregate and block’ it.” Without the “segregate and block” provision, cable operators are afforded broad discretion over what to do with a patently offensive program, and because they will no longer bear the costs of segregation and blocking if they refuse to ban such programs, cable operators may choose to ban fewer programs.

Nonetheless, this difference does not make the two provisions unseverable. Without the “segregate and block” provision, the law simply treats leased channels (in respect to patently offensive programming) just as it treats all other channels. And judging by the absence of similar segregate and block provisions in the context of these other channels, Congress would probably have thought that § 10(a), standing alone, was an effective (though, perhaps, not the most effective) means of pursuing its objective. Moreover, we can find no reason why, in light of Congress' basic objective (the protection of children), Congress would have preferred no provisions at all to the permissive provision standing by itself. That provision, capable of functioning on its own, still helps to achieve that basic objective. Consequently, we believe the valid provision is severable from the others.

Justice O'CONNOR, concurring in part and dissenting in part.

I agree that § 10(a) is constitutional and that § 10(b) is unconstitutional. I am not persuaded, however, that the asserted “important differences” between §§ 10(a) and 10(c) are sufficient to justify striking down § 10(c). I find the features shared by § 10(a), which covers leased access channels, and § 10(c), which covers public access channels, to be more significant than the differences. For that reason, I would find that § 10(c) also withstands constitutional scrutiny.

Both §§ 10(a) and 10(c) serve an important governmental interest: the well-established compelling interest of protecting children from exposure to indecent material. See Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). Cable television, like broadcast television, is a medium that is uniquely accessible to children, and, of course, children have equally easy access to public access channels as to leased access channels. By permitting a cable operator to prevent transmission of patently offensive sex-related programming, §§ 10(a) and 10(c) further the interest of protecting children.

Furthermore, both provisions are permissive. Neither presents an outright ban on a category of speech, such as we struck down in Sable Communications. Sections 10(a) and 10(c) leave to the cable operator the decision whether to broadcast indecent programming, and, therefore, are less restrictive than an absolute governmental ban. Certainly § 10(c) is not more restrictive than § 10(a). It is also significant that neither § 10(a) nor § 10(c) is more restrictive than the governmental speech restriction we upheld in FCC v. Pacifica Foundation, 438 U.S. 726 (1978). I agree with Justice Breyer that we should not yet undertake fully to adapt our First Amendment doctrine to the new context we confront here. Because we refrain from doing so, the precedent established by Pacifica offers an important guide. Section 10(c), no less than § 10(a), is within the range of acceptability set by Pacifica.
Justice KENNEDY, with whom Justice GINSBURG joins, concurring in part, concurring in the judgment in part, and dissenting in part.

The plurality opinion, insofar as it upholds § 10(a) of the 1992 Cable Act, is adrift. The opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine.

Section 10(c) involves public, educational, and governmental access channels (or PEG access channels, as they are known). These are channels set aside for use by members of the public, governmental authorities, and local school systems. As interpreted by the Federal Communications Commission (FCC), § 10(c) requires the agency to make regulations enabling cable operators to prohibit indecent programming on PEG access channels.

Though the two provisions differ in significant respects, they have common flaws. In both instances, Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted. The plurality at least recognizes this as state action, avoiding the mistake made by the Court of Appeals, Alliance for Community Media v. FCC, 56 F.3d 105, 112-121 (C.A.D.C.1995). State action lies in the enactment of a statute altering legal relations between persons, including the selective withdrawal from one group of legal protections against private acts, regardless of whether the private acts are attributable to the State. Cf. Hunter v. Erickson, 393 U.S. 385, 389-390 (1969) (state action under the Fourteenth Amendment).

The plurality balks at taking the next step, however, which is to advise us what standard it applies to determine whether the state action conforms to the First Amendment. Sections 10(a) and (c) disadvantage nonobscene, indecent programming, a protected category of expression, Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989), on the basis of its content. The Constitution in general does not tolerate content-based restriction of, or discrimination against, speech. R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid”); Carey v. Brown, 447 U.S. 455, 461-463 (1980). In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes “governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity.” Cohen v. California, 403 U.S. 15, 24 (1971). “[E]ach person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.” Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 641 (1994). We therefore have given “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.” Id., at 642.

Sections 10(a) and (c) are unusual. They do not require direct action against speech, but do authorize a cable operator to deny the use of its property to certain forms of speech. As a general matter, a private person may exclude certain speakers from his or her property without violating the First Amendment, Hudgens v. NLRB, 424 U.S. 507 (1976), and if §§ 10(a) and (c) were no more than
affirmations of this principle they might be unremarkable. Access channels, however, are property of the cable operator, dedicated or otherwise reserved for programming of other speakers or the government. A public access channel is a public forum, and laws requiring leased access channels create common-carrier obligations. When the government identifies certain speech on the basis of its content as vulnerable to exclusion from a common carrier or public forum, strict scrutiny applies. These laws cannot survive this exacting review. However compelling Congress' interest in shielding children from indecent programming, the provisions in these cases are not drawn with enough care to withstand scrutiny under our precedents.

Congress does have, however, a compelling interest in protecting children from indecent speech. Sable Communications, 492 U.S., at 126; Ginsberg v. New York, 390 U.S. 629, 639-640 (1968). See also Pacifica, 438 U.S., at 749-750 (same). So long as society gives proper respect to parental choices, it may, under an appropriate standard, intervene to spare children exposure to material not suitable for minors. This interest is substantial enough to justify some regulation of indecent speech even under, I will assume, the indecency standard used here.

Sections 10(a) and (c) nonetheless are not narrowly tailored to protect children from indecent programs on access channels. First, to the extent some operators may allow indecent programming, children in localities those operators serve will be left unprotected. Partial service of a compelling interest is not narrow tailoring. FCC v. League of Women Voters of Cal., 468 U.S. 364, 396 (1984) (asserted interest in keeping noncommercial stations free from controversial or partisan opinions not served by ban on station editorials, if such opinions could be aired through other programming); Florida Star v. B.J.F., 491 U.S. 524, 540-541 (1989) (selective ban on publication of rape victim's name in some media but not others not narrowly tailored). Cf. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73 (1983) (restriction that "provides only the most limited incremental support for the interest asserted" cannot pass muster under commercial-speech standards). Put another way, the interest in protecting children from indecency only at the caprice of the cable operator is not compelling. Perhaps Congress drafted the law this way to avoid the clear constitutional difficulties of banning indecent speech from access channels, but the First Amendment does not permit this sort of ill fit between a law restricting speech and the interest it is said to serve.

Second, to the extent cable operators prohibit indecent programming on access channels, not only children but adults will be deprived of it. The Government may not "reduce the adult population . . . to [viewing] only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383 (1957). It matters not that indecent programming might be available on the operator's other channels. The Government has no legitimate interest in making access channels pristine. A block-and-segregate requirement similar to § 10(b), but without its constitutional infirmity of requiring persons to place themselves on a list to receive programming, protects children with far less intrusion on the liberties of programmers and adult viewers than allowing cable operators to ban indecent programming from access channels altogether. When applying strict scrutiny, we will not assume plausible alternatives will fail to protect compelling interests; there must be some basis in the record, in legislative findings or otherwise, establishing the law enacted as the least restrictive means. Sable Communications, supra, at 128-130. There is none here.
Sections 10(a) and (c) present a classic case of discrimination against speech based on its content. There are legitimate reasons why the Government might wish to regulate or even restrict the speech at issue here, but §§ 10(a) and (c) are not drawn to address those reasons with the precision the First Amendment requires.

Justice THOMAS, joined by THE CHIEF JUSTICE and Justice SCALIA, concurring in the judgment in part and dissenting in part.

I agree with the principal opinion's conclusion that § 10(a) is constitutionally permissible, but I disagree with its conclusion that §§ 10(b) and (c) violate the First Amendment. For many years, we have failed to articulate how, and to what extent, the First Amendment protects cable operators, programmers, and viewers from state and federal regulation. I think it is time we did so, and I cannot go along with Justice Breyer's assiduous attempts to avoid addressing that issue openly.

[Ed.: Since § 10(a) and § 10(c) merely restore the editorial discretion an operator of a cable station, like a publisher of a newspaper or book, would have absent government regulation, these sections do not burden their First Amendment rights, and viewers or listeners have no First Amendment rights to complain about the content of someone else’s publication, since, contrary to the opinions of the other Justices in this case, cable stations are not “government-owned” forums, which would therefore involve “state action,” to which listeners and viewers would have First Amendment rights.]

Unlike §§ 10(a) and (c), § 10(b) clearly implicates petitioners' free speech rights. Though § 10(b) by no means bans indecent speech, it clearly places content-based restrictions on the transmission of private speech by requiring cable operators to block and segregate indecent programming that the operator has agreed to carry. Consequently, § 10(b) must be subjected to strict scrutiny and can be upheld only if it furthers a compelling governmental interest by the least restrictive means available. See Sable, 492 U.S., at 126. The parties agree that Congress has a “compelling interest in protecting the physical and psychological well-being of minors” and that its interest “extends to shielding minors from the influence of [indecent speech] that is not obscene by adult standards.” Ibid. See Ginsberg v. New York, 390 U.S. 629, 639 (1968) (persons “who have th[e] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility”). Because § 10(b) is narrowly tailored to achieve that well-established compelling interest, I would uphold it. I therefore dissent from the Court's decision to the contrary.

Our precedents establish that government may support parental authority to direct the moral upbringing of their children by imposing a blocking requirement as a default position. [I]n Ginsberg, in which we upheld a State's ability to prohibit the sale of indecent literature to minors, we pointed out that the State had simply imposed its own default choice by noting that “the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.” Ibid. Likewise, in Sable we set aside a complete ban on indecent dial-a-porn messages in part because the FCC had previously imposed certain default rules intended to prevent access by minors, and there was no evidence that those rules were ineffective. 492 U.S., at 128-130.
The Court strikes down § 10(b) by pointing to alternatives, such as reverse blocking and lockboxes, that it says are less restrictive than segregation and blocking. Though these methods attempt to place in parents' hands the ability to permit their children to watch as little, or as much, indecent programming as the parents think proper, they do not effectively support parents' authority to direct the moral upbringing of their children. See First Report and Order, 8 FCC Rcd, at 1000-1001. The FCC recognized that leased access programming comes “from a wide variety of independent sources, with no single editor controlling [its] selection and presentation.” Id., at 1000. Thus, indecent programming on leased access channels is “especially likely to be shown randomly or intermittently between non-indecent programs.” Ibid. Rather than being able to simply block out certain channels at certain times, a subscriber armed with only a lockbox must carefully monitor all leased access programming and constantly reprogram the lockbox to keep out undesired programming. Thus, even assuming that cable subscribers generally have the technical proficiency to properly operate a lockbox, by no means a given, this distinguishing characteristic of leased access channels makes lockboxes and reverse blocking largely ineffective.

Petitioners argue that § 10(b)'s segregation and blocking scheme is not sufficiently narrowly tailored because it requires the viewer's “written consent,” 47 CFR § 76.701(b) (1995); it permits the cable operator 30 days to respond to the written request for access, § 76.701(c). . . . Though making an oral request for access, perhaps by telephone, is slightly less bothersome than making a written request, it is also true that a written request is less subject to fraud “by a determined child.” Ante, at 2393. Consequently, despite the fact that an oral request is slightly less restrictive in absolute terms, it is also less effective in supporting parents' interest in denying enterprising, but parentally unauthorized, minors access to blocked programming.

The segregation and blocking requirement was not intended to be a replacement for lockboxes, V-chips, reverse blocking, or other subscriber-initiated measures. Rather, Congress enacted in § 10(b) a default setting under which a subscriber receives no blocked programming without a written request. Thus, subscribers who do not want the blocked programming are protected, and subscribers who do want it may request access. Once a subscriber requests access to blocked programming, however, the subscriber remains free to use other methods, such as lockboxes, to regulate the kind of programming shown on those channels in that home. Thus, petitioners are wrong to portray § 10(b) as a highly ineffective method of screening individual programs, see Brief for Petitioners in No. 95-124, at 43, and the majority is similarly wrong to suggest that a person cannot “watch a single program . . . without letting the ‘patently offensive’ channel in its entirety invade his household for days, perhaps weeks, at a time,” ante, at 2391; see ante, at 2392. Given the limited scope of § 10(b) as a default setting, I see nothing constitutionally infirm about Congress' decision to permit the cable operator 30 days to unblock or reblock the segregated channel.

Despite the argument that higher than intermediate review should apply to content-based regulations of cable televisions, the Court’s recent cases have failed to produce any clear standard of review, as indicated by Denver Area Educational Telecommunications. Some members of the Court perhaps
think that strict scrutiny review, applicable to newspapers and books, is too rigorous, while other members of the Court understandably feel that intermediate review, applicable to over-the-air radio and television, is simply not rigorous enough.

As discussed at § 1.4.2 n.88, there is a version of strict scrutiny that adopts the strict scrutiny requirement of a compelling government interest and a direct relationship between means and ends, but adopts the intermediate review requirement of the regulation only having to be not substantially more burdensome than necessary. Because this level adopts two of the three levels of strict scrutiny, but waters down element three to an intermediate level of inquiry, this additional level can be called "loose" strict scrutiny. As discussed at § 21.4 of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2 (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials), the Supreme Court used this standard of review in the Equal Protection case of Bush v. Vera. In that case, although generally applying a strict scrutiny compelling governmental interest analysis, the majority, per Justice O’Connor, “reject[ed], as impossibly stringent, the District Court’s view of the narrow tailoring requirement, that ‘a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria.’” Instead, the Court adopted the intermediate requirement that racial redistricting not be “substantially more [burdensome] than is ‘reasonably necessary.’” As discussed id. at § 21.3 n.72, it has also been used in dissent by instrumentalist Justices in some race-based affirmative action cases, such as Parents Involved in Comm. Schools v. Seattle School District No. 1.

Perhaps a majority of five Justices might be able to reach a compromise to command a majority for loose strict scrutiny review. Or perhaps there are now five votes on the Court for traditional strict scrutiny for content-based regulations of cable or satellite television and radio. Some more clear standard of review would be helpful.

_________________________________________


5 See Denver Area, 518 U.S. 727, 739-41 (1996) (Breyer, J., joined by Stevens, J., O’Connor, J., & Souter, J., plurality opinion); id. at 777-78 (Souter, J., concurring).


7 See Denver Area, 518 U.S. at 820-23 (1996) (Thomas, J., joined by Rehnquist, C.J., & Scalia, J., concurring in the judgment in part and dissenting in part) (criticizing adoption of an intermediate standard of review for cable television regulation, rather than strict scrutiny.); id. at 784-87 (Kennedy, J., joined by Ginsburg, J., concurring in part and dissenting in part) (strict scrutiny is the proper standard to use for content-based regulations of public forum public access channels).


In some cases, the Court has made it relatively easy for a state to create a communications forum that will be characterized as a nonpublic forum, in which case non-viewpoint discriminatory regulations will be given only rational basis review. For example, in *Arkansas Educational Television Commission v. Forbes*, the Court held that a state agency that operated TV stations had opened a nonpublic forum rather than a designated public forum when it sponsored a political debate among candidates for Congress. Justice Kennedy said that the public forum doctrine should not be extended in a mechanical way to the very different context of public television. He added that the government does not create a designated public forum when it does no more than reserve eligibility for access to a particular class of speakers, whose members must then, as individuals, obtain permission. Accordingly, it was valid to exclude candidate Forbes for lack of public interest because this was not based on the speaker's viewpoint and was otherwise reasonable in light of the purpose to which the property was being put. Justice Stevens, dissenting with Justices Souter and Ginsburg, said that the importance of avoiding viewpoint-based decisions relating to political debates indicates that the state agency should be required to use and adhere to pre-established, objective criteria for determining who among qualified candidates may participate. Cf. *Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300 (2nd Cir. 2018) (acknowledging split among lower federal courts, holding that generic public access channels are public forums, based on Justices Kennedy and Ginsburg's concurrence in *Denver Area*, excerpted above).

§ 10.2 Not Completely Strict Scrutiny: Campaign Finance Regulation in 1976 in *Buckley v. Valeo*

In the realm of speech regarding elections, the Court has focused on four situations: regulations of contributions, regulation of expenditures, disclosure requirements, and regulating the process of nominating and electing candidates. Fundamental First Amendment interests are implicated in each area, and the government thus has the burden of justifying its restrictions, which typically are reviewed by applying strict scrutiny. These cases have their own special “feel,” however, and, beginning with the foundational modern case in 1976 of *Buckley v. Valeo*, excerpted below at § 10.2, resort to explicit strict scrutiny language has not been a priority in the Court’s opinions. Further, as the cases have developed, the Court has drawn a distinction between limitations on expenditures versus limitations on contributions in terms of the level of scrutiny to be applied. As discussed at § 10.3.2 nn.44-48, this development reached a climax in 2003, with a 5-Justice majority of the Court in *McConnell v. Federal Election Commission* clearly holding that a lower level of scrutiny, some version of intermediate scrutiny, should be used for limitations on contributions, while strict scrutiny was still appropriate for limitations on expenditures. As discussed at § 10.3.3, while the Court has not yet overruled *McConnell*, since 2006 it has substantially limited *McConnell* to its facts, and applied a more vigorous version of intermediate review to contribution limits.

---

10 523 U.S. 666, 677-83 (1998); *id.* at 983-84 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting).


Cases involving disclosure requirements were dealt with in *Buckley* under a strict scrutiny, direct relationship, least restrictive alternative approach. Even under this standard, however, the disclosure requirements were viewed as constitutional. Thus, the level of review for disclosure requirements has not been a matter of much debate, as disclosure requirements involving campaign financing tend to survive strict scrutiny anyway. Under the reasoning of the 5-Justice majority in *McConnell*, however, discussed at § 10.3.3 nn.44-48, since disclosure requirements are typically not substantial burdens on free speech rights, an argument can be made that they should trigger the intermediate scrutiny used for contribution limitations. This is the standard seemingly adopted by the Court in 2010 in *John Doe No. 1 v. Roe*, excerpted at § 10.3.4.

As the cases have been decided, there have been substantial differences among the Justices in terms of what they think is going on in the political process. Overall, liberal Justices have more easily found that regulations in these areas are narrowly tailored to advance compelling interests, such as preventing fraud and corruption. Further, the more liberal Justices have been the ones more willing to apply intermediate review to certain regulations in this area. More conservative Justices have typically ruled in favor of free speech interests held by the people, candidates, political parties, and other political groups. Usually they have identified less speech-infringing ways for dealing with the concerns that have led to the government restrictions. For example, while *Buckley v. Valeo* upheld limits on contributions to candidates, a call for overruling that case was made in 2000 by Justices Scalia, Kennedy, and Thomas in *Nixon v. Shrink Missouri Government PAC*.\(^{13}\) In 2003, in *McConnell v. Federal Election Commission*,\(^{14}\) Chief Justice Rehnquist joined Justice Kennedy’s dissent, joined also in part by Justices Scalia and Thomas, again rejecting the *Buckley* framework.

**Buckley v. Valeo**  
424 U.S. 1 (1976)

PER CURIAM.


The Court of Appeals, in sustaining the legislation in large part against various constitutional challenges, viewed it as “by far the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress.” 519 F.2d 821, 831 (1975). The statutes at issue summarized in broad terms, contain the following provisions: (a) individual political contributions are limited to $1,000 to any single candidate per

---

\(^{13}\) 528 U.S. 377, 410 (2000) (Thomas, J., joined by Scalia, J., dissenting); *id.* at 407-08 (Kennedy, J., dissenting).

election, with an overall annual limitation of $25,000 by any contributor; independent expenditures by individuals and groups “relative to a clearly identified candidate” are limited to $1,000 a year; campaign spending by candidates for various federal offices and spending for national conventions by political parties are subject to prescribed limits; (b) contributions and expenditures above certain threshold levels must be reported and publicly disclosed; (c) a system for public funding of Presidential campaign activities is established by Subtitle H of the Internal Revenue Code; and (d) a Federal Election Commission is established to administer and enforce the legislation.

[T]he primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association. The Court's decisions involving associational freedoms establish that the right of association is a “basic constitutional freedom,” Kusper v. Pontikes, 414 U.S., at 57, that is “closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.” Shelton v. Tucker, 364 U.S. 479, 486. In view of the fundamental nature of the right to associate, governmental “action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” NAACP v. Alabama, supra, 357 U.S., at 460-461. Yet, it is clear that “[n]either the right to associate nor the right to participate in political activities is absolute.” CSC v. Letter Carriers, 413 U.S. 548, 567 (1973). Even a “significant interference” with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. Cousins v. Wigoda, supra, 419 U.S., at 488; NAACP v. Button, supra, 371 U.S., at 438; Shelton v. Tucker, supra, 364 U.S., at 488.

Appellees argue that the Act's restrictions on large campaign contributions are justified by three governmental interests. [T]he primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office. Two “ancillary” interests underlying the Act are also allegedly furthered by the $1,000 limits on contributions. First, the limits serve to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections. Second, it is argued, the ceilings may to some extent act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money.

It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification for the $1,000 contribution limitation. Under a system of private financing of elections, a candidate lacking immense personal or family wealth must depend on financial contributions from others to provide the resources necessary to conduct a successful campaign. The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy. To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. [T]he deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.
Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. In *CSC v. Letter Carriers*, [413 U.S. 548 (1973)], the Court found that the danger to “fair and effective government” posed by partisan political conduct on the part of federal employees charged with administering the law was a sufficiently important concern to justify broad restrictions on the employees' right of partisan political association. Here, as there, Congress could legitimately conclude that the avoidance of the appearance of improper influence “is also critical... if confidence in the system of representative Government is not to be eroded to a disastrous extent.” 413 U.S., at 565.

Appellants contend that the contribution limitations must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with “proven and suspected quid pro quo arrangements.” But laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.

The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions the narrow aspect of political association where the actuality and potential for corruption have been identified while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.

The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political speech. The most drastic of the limitations restricts individuals and groups, including political parties that fail to place a candidate on the ballot, to an expenditure of $1,000 “relative to a clearly identified candidate during a calendar year.” § 608(e)(1). Other expenditure ceilings limit spending by candidates, § 608(a), their campaigns, § 608(c), and political parties in connection with election campaigns, § 608(f). It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression “at the core of our electoral process and of the First Amendment freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).
We find that the governmental interest in preventing corruption and the appearance of corruption is inadequate to justify § 608(e)(1)'s ceiling on independent expenditures. First, assuming, arguendo, that large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions, § 608(e)(1) does not provide an answer that sufficiently relates to the elimination of those dangers. Unlike the contribution limitations' total ban on the giving of large amounts of money to candidates, § 608(e)(1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views. The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder. It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign. Yet no substantial societal interest would be served by a loophole-closing provision designed to check corruption that permitted unscrupulous persons and organizations to expend unlimited sums of money in order to obtain improper influence over candidates for elective office. Cf. Mills v. Alabama, 384 U.S., at 220.

Second, quite apart from the shortcomings of § 608(e)(1) in preventing any abuses generated by large independent expenditures, the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. The parties defending § 608(e)(1) contend that it is necessary to prevent would-be contributors from avoiding the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities. They argue that expenditures controlled by or coordinated with the candidate and his campaign might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse. Yet such controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act. Section 608(b)'s contribution ceilings rather than § 608(e)(1)'s independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions. By contrast, § 608(e)(1) limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign. Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

While the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression. For the First Amendment right to “‘speak one's mind . . . on all public institutions’’ includes the right to engage in “‘vigorous advocacy’ no less than ‘abstract
It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)’s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’ ” and “to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” New York Times Co. v. Sullivan, supra, 376 U.S., at 266, quoting Associated Press v. United States, 326 U.S. 1, 20 (1945), and Roth v. United States, 354 U.S., at 484. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. Cf. Eastern R. Conf. v. Noerr Motors, 365 U.S. 127, 139 (1961).

The Court's decisions in Mills v. Alabama, 384 U.S. 214 (1966), and Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), held that legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment. In Mills, the Court addressed the question whether “a State, consistently with the United States Constitution, can make it a crime for the editor of a daily newspaper to write and publish an editorial on election day urging people to vote a certain way on issues submitted to them.” 384 U.S., at 215 (emphasis in original). We held that “no test of reasonableness can save (such) a state law from invalidation as a violation of the First Amendment.” Id., at 220. Yet the prohibition of election day-editorials invalidated in Mills is clearly a lesser intrusion on constitutional freedom than a $1,000 limitation on the amount of money any person or association can spend during an entire election year in advocating the election or defeat of a candidate for public office. More recently in Tornillo, the Court held that Florida could not constitutionally require a newspaper to make space available for a political candidate to reply to its criticism. Yet under the Florida statute, every newspaper was free to criticize any candidate as much as it pleased so long as it undertook the modest burden of printing his reply. See 418 U.S., at 256-257. The legislative restraint involved in Tornillo thus also pales in comparison to the limitations imposed by § 608(e)(1).

Section 608(c) places limitations on overall campaign expenditures by candidates seeking nomination for election and election to federal office. Presidential candidates may spend $10,000,000 in seeking nomination for office and an additional $20,000,000 in the general election campaign. ss 608(c)(1)(A), (B). The ceiling on senatorial campaigns is pegged to the size of the voting-age population of the State with minimum dollar amounts applicable to campaigns in States with small populations. In senatorial primary elections, the limit is the greater of eight cents multiplied by the voting-age population or $100,000, and in the general election the limit is increased to 12 cents multiplied by the voting-age population or $150,000. §§ 608(c)(1)(C), (D). The Act imposes blanket $70,000 limitations on both primary campaigns and general election campaigns.
for the House of Representatives with the exception that the senatorial ceiling applies to campaigns in States entitled to only one Representative. §§ 608(c)(1)(C)-(E). These ceilings are to be adjusted upwards at the beginning of each calendar year by the average percentage rise in the consumer price index for the 12 preceding months. § 608(d).

No governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608(c)'s campaign expenditure limitations. The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions. The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by § 608(c)'s campaign expenditure ceilings. The Court of Appeals' assertion that the expenditure restrictions are necessary to reduce the incentive to circumvent direct contribution limits is not persuasive. See 171 U.S. App. D.C., at 210, 519 F.2d, at 859. There is no indication that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions. Extensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns are designed to facilitate the detection of illegal contributions. Moreover, as the Court of Appeals noted, the Act permits an officeholder or successful candidate to retain contributions in excess of the expenditure ceiling and to use these funds for “any other lawful purpose.” 2 U.S.C. § 439a (1970 ed., Supp. IV). This provision undercuts whatever marginal role the expenditure limitations might otherwise play in enforcing the contribution ceilings.

The interest in equalizing the financial resources of candidates competing for federal office is no more convincing a justification for restricting the scope of federal election campaigns. Given the limitation on the size of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate. Moreover, the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.

The campaign expenditure ceilings appear to be designed primarily to serve the governmental interests in reducing the allegedly skyrocketing costs of political campaigns. Appellees and the Court of Appeals stressed statistics indicating that spending for federal election campaigns increased almost 300% between 1952 and 1972 in comparison with a 57.6% rise in the consumer price index during the same period. Appellants respond that during these years the rise in campaign spending lagged behind the percentage increase in total expenditures for commercial advertising and the size of the gross national product. In any event, the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political
committees who must retain control over the quantity and range of debate on public issues in a political campaign.

In sum, the provisions of the Act that impose a $1,000 limitation on contributions to a single candidate, § 608(b)(1), a $5,000 limitation on contributions by a political committee to a single candidate, § 608(b)(2), and a $25,000 limitation on total contributions by an individual during any calendar year, § 608(b)(3), are constitutionally valid. These limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion. By contrast, the First Amendment requires the invalidation of the Act's independent expenditure ceiling, § 608(e)(1), its limitation on a candidate's expenditures from his own personal funds, § 608(a), and its ceilings on overall campaign expenditures, § 608(c). These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.

Unlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities. But we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. E.g., Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since NAACP v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a “relevant correlation” or “substantial relation” between the governmental interest and the information required to be disclosed. See Pollard v. Roberts, 283 F. Supp. 248, 257 (ED Ark.) (three-judge court), aff’d, 393 U.S. 14 (1968) (per curiam). This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure. NAACP v. Alabama, supra, 357 U.S., at 461. Cf. Kusper v. Pontikes, 414 U.S., at 57-58.

Appellees argue that the disclosure requirements of the Act differ significantly from those at issue in NAACP v. Alabama and its progeny because the Act only requires disclosure of the names of contributors and does not compel political organizations to submit the names of their members.

As we have seen, group association is protected because it enhances “[e]ffective advocacy.” NAACP v. Alabama, supra, 357 U.S., at 460. The right to join together “for the advancement of beliefs and ideas,” ibid., is diluted if it does not include the right to pool money through contributions, for funds are often essential if “advocacy” is to be truly or optimally “effective.” Moreover, the invasion of

Page 514
privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for “[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.” California Bankers Ass'n v. Shultz, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably. In Bates, for example, we applied the principles of NAACP v. Alabama and reversed convictions for failure to comply with a city ordinance that required the disclosure of “dues, assessments, and contributions paid, by whom and when paid.” 361 U.S., at 518. See also United States v. Rumely, 345 U.S. 41 (1953) (setting aside a contempt conviction of an organization official who refused to disclose names of those who made bulk purchases of books sold by the organization).

The strict test established by NAACP v. Alabama is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But we have acknowledged that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the “free functioning of our national institutions” is involved. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97 (1961).

The governmental interests sought to be vindicated by the disclosure requirements are of this magnitude. They fall into three categories. First, disclosure provides the electorate with information “as to where political campaign money comes from and how it is spent by the candidate” in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return. And, as we recognized in Burroughs v. United States, 290 U.S., at 548, Congress could reasonably conclude that full disclosure during an election campaign tends “to prevent the corrupt use of money to affect elections.” In enacting these requirements it may have been mindful of Justice Brandeis' advice: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above. The disclosure requirements, as a general matter, directly serve substantial governmental interests. In determining whether these interests are sufficient to justify the requirements we must look to the extent of the burden that they place on individual rights.
It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by this legislation. In this process, we note and agree with appellants' concession that disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist. Appellants argue, however, that the balance tips against disclosure when it is required of contributors to certain parties and candidates.

Appellants contend that the Act's requirements are overbroad insofar as they apply to contributions to minor parties and independent candidates because the governmental interest in this information is minimal and the danger of significant infringement on First Amendment rights is greatly increased.

In *NAACP v. Alabama* the organization had “made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members (had) exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility,” 357 U.S., at 462, and the State was unable to show that the disclosure it sought had a “substantial bearing” on the issues it sought to clarify, id., at 464. Under those circumstances, the Court held that “whatever interest the State may have in (disclosure) has not been shown to be sufficient to overcome petitioner's constitutional objections.” Id., at 465.

The Court of Appeals rejected appellants' suggestion that this case fits into the *NAACP v. Alabama* mold. It concluded that substantial governmental interests in “informing the electorate and preventing the corruption of the political process” were furthered by requiring disclosure of minor parties and independent candidates, 519 F.2d, at 867, and therefore found no “tenable rationale for assuming that the public interest in minority party disclosure of contributions above a reasonable cut-off point is uniformly outweighed by potential contributors' associational rights,” id., at 868. The court left open the question of the application of the disclosure requirements to candidates (and parties) who could demonstrate injury of the sort at stake in *NAACP v. Alabama*.

We agree with the Court of Appeals' conclusion that *NAACP v. Alabama* is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative.

It is true that the governmental interest in disclosure is diminished when the contribution in question is made to a minor party with little chance of winning an election. As minor parties usually represent definite and publicized viewpoints, there may be less need to inform the voters of the interests that specific candidates represent. Major parties encompass candidates of greater diversity. In many situations the label “Republican” or “Democrat” tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum. It is less likely that a candidate of, say, the Socialist Labor Party will represent interests that cannot be discerned from the party's ideological position.
The Government's interest in deterring the “buying” of elections and the undue influence of large contributors on officeholders also may be reduced where contributions to a minor party or an independent candidate are concerned, for it is less likely that the candidate will be victorious. But a minor party sometimes can play a significant role in an election. Even when a minor-party candidate has little or no chance of winning, he may be encouraged by major-party interests in order to divert votes from other major-party contenders.

We are not unmindful that the damage done by disclosure to the associational interests of the minor parties and their members and to supporters of independents could be significant. These movements are less likely to have a sound financial base and thus are more vulnerable to falloffs in contributions. In some instances fears of reprisal may deter contributions to the point where the movement cannot survive. The public interest also suffers if that result comes to pass, for there is a consequent reduction in the free circulation of ideas both within and without the political arena.

There could well be a case, similar to those before the Court in *NAACP v. Alabama* and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied. But no appellant in this case has tendered record evidence of the sort proffered in *NAACP v. Alabama*. Instead, appellants primarily rely on “the clearly articulated fears of individuals, well experienced in the political process.” Brief for Appellants 173. At best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure. On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged.

§ 10.3  Its Own Version of Strict Scrutiny: Campaign Finance Regulation

From *Buckley v. Valeo* Through *Citizens’ United*

1. Strict Scrutiny for Campaign Financing Expenditures after *Buckley*

The Court’s *per curiam* opinion in *Buckley v. Valeo* noted: “[A] ‘significant interference’ with protected rights of political association’ may be sustained if the State demonstrates [1] a sufficiently important interest and [2] employs means closely drawn to avoid unnecessary abridgment of associational freedoms. *Cousins v. Wigoda*, [419 U.S. 477, 488 (1975)]; *NAACP v. Button*, [371 U.S. 415, 438 (1963)]; *Shelton v. Tucker* [364 U.S. 479, 488 (1960)].” This sentence has been the source of much confusion ever since. Each of the freedom of association cases cited by the Court as an example of the kind of scrutiny appropriate for a “significant interference” with protected rights is typically regarded as a strict scrutiny case. *Cousins* involved a burden on the freedom of association rights of the Democratic Party, with the Court stating that the “interest of the State must be compelling” to justify the regulation. *Button* involved a case burdening the freedom of

---


association of the NAACP, with the Court stating that the government must regulate with “narrow specificity” and “precision of regulation.”\textsuperscript{17} \textit{Shelton} involved the associational rights of teachers, with the Court applying a least restrictive alternative approach to hold the regulation unconstitutional because “the end can be more narrowly achieved.”\textsuperscript{18} Yet, because each case was decided before the Court’s more careful attention to precise language regarding the standards of review, which began in 1976 with adoption of the intermediate scrutiny standard for cases of gender discrimination in \textit{Craig v. Boren}, 429 U.S. 190 (1976), discussed at § 21.2 of CHARLES D. KELSO \& R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 \& 2 (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials), loose language in some opinions occasionally talked of “significant” government interests, not “compelling interests,” and of “closely drawn” statutes, not “narrow tailoring,” \textit{i.e.}, intermediate review language, not strict scrutiny.

Despite this imprecision of language in \textit{Buckley}, for expenditure limits the Court seemed to apply a regular strict scrutiny approach. Interpreting the Act to bar more than $1,000 spent annually for communications in express terms that advocate the election or defeat of a clearly identified candidate for federal office, the opinion concluded that the government’s compelling interests in preventing corruption and the appearance of corruption were not adequately advanced by the statute’s means. The Act was not narrowly tailored because there was no limit on persons and groups spending as much as they wished to promote a candidate and the candidate’s views, so long as they did not in express terms advocate his or her election. Further, the law limited expenditures for express advocacy of candidates made totally independent of the candidate’s campaign. This was a problem because, as the Court noted, “Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.”\textsuperscript{19}

The federal Act also sought to limit expenditures by a candidate from his or her own funds. The Court said that the government’s primary interest in the prevention of actual and apparent corruption of the political process did not support this limitation. Further, the Court rejected the proposition that the government may restrict the speech of some elements in our society in order to enhance the relative voice of others.\textsuperscript{20} Thus, general limits on campaign expenditures must also fall.

Strict scrutiny has continued to be applied for expenditure limits since \textit{Buckley}. For example, in \textit{First National Bank of Boston v. Bellotti},\textsuperscript{21} the Court struck down a Massachusetts statute that forbade banks and business corporations from making contributions or expenditures for the purpose

\begin{itemize}
  \item \textsuperscript{17} NAACP v. Button, 371 U.S. 415, 433 (1963).
  \item \textsuperscript{18} Shelton v. Tucker, 364 U.S. 479, 488-89 (1960).
  \item \textsuperscript{19} \textit{Buckley}, 424 U.S. at 48.
  \item \textsuperscript{20} \textit{Id.} at 48-49.
  \item \textsuperscript{21} 435 U.S. 765, 786-95 (1978).
\end{itemize}
of influencing the vote on any question submitted to the voters, other than one materially affecting
the property, business, or assets of the corporation. Applying strict scrutiny, Justice Powell noted
that there had been no showing that the voice of corporations had been overwhelming or even
significant in influencing referenda in Massachusetts. With respect to protecting shareholders from
the use of corporate resources with which they disagree, the law was underinclusive in reaching only
referenda and not legislation or expression of views, and it was overinclusive in prohibiting
expenditures even if the shareholders unanimously authorized the contribution or expenditure.22

The Court considered regulations that limited political action committees in Federal Election
held that Section 9012(f) of the Presidential Election Campaign Fund Act was invalid in barring
independent political action committees from spending more than $1,000 to further the election of
a candidate who decided to receive federal funding. Speaking for the Court, Justice Rehnquist said
that the present case involved limits on expenditures by PACs, and thus strict scrutiny clearly
applied. He said that in Buckley and Citizens Against Rent Control the only compelling interests
recognized by the Court were preventing corruption and the appearance of corruption. Here there
was no clear indication of what any “corruption” might consist. The fact that candidates and elected
officials may alter or reaffirm their own position on issues in response to political messages paid for
by PACs cannot be called corruption. Further, this law was overbroad in response to any evil
regarding corruption because it was not limited to large war chests; its terms applied equally to
informal discussion groups that solicit neighborhood contributions.24

22 Justice White dissented, with Justices Brennan and Marshall. He said the law substantially
advances an overriding interest in preventing corporate domination of the referendum process and
it helps assure that shareholders are not compelled to support and financially further beliefs with
which they disagree where the issue does not materially affect the business, property, or other affairs
of the corporation. Id. at 802-06, 812 (White, J., joined by Brennan & Marshall, JJ., dissenting).
Justice Rehnquist dissented on the grounds that corporations are not full “persons” and thus have only
limited Equal Protection, Due Process, First Amendment, and other such rights has not been adopted
by any other Justice on the Court in modern times, and is inconsistent with 100-year old doctrine.
See, e.g., Smyth v. Ames, 169 U.S. 466, 522 (1898); Gulf, Colorado & Santa Fe R. Co. v. Ellis, 165
U.S. 150, 154 (1897), and cases cited therein. However, it does reflect an aside made, as Justice
Rehnquist noted, in an old 1906 case. Belloti, 435 U.S. at 822-28 (Rehnquist, J., dissenting), citing


24 Justice White, dissented, saying it was pointless to limit contributions to a candidate without
also limiting the amounts that can be spent on behalf of the candidate. Id. at 507-12 (White, J.,
In 1986, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, the Court struck down a federal statute that required corporations to make independent political expenditures only through special segregated funds, as applied to a small nonprofit corporation that would face organizational and financial hurdles in establishing a segregated political fund.

In 1990, in *Austin v. Michigan Chamber of Commerce*, a 6-3 Court distinguished *Citizens for Life* and upheld a state bar on corporations using corporate treasury funds for independent expenditures in support of or in opposition to any candidate for election to state office. Justice Marshall said the state had a compelling interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.” The law was sufficiently narrowly tailored because it permitted corporations to make independent political expenditures through separate segregated funds. Justice Marshall explained, “Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors’ support for the corporation’s political views.” Justice Marshall distinguished *Citizens for Life* on the ground that there the organization was formed for the express purpose of promoting political ideas, it had no persons with a claim on its assets or earnings, and it was independent from the influence of business corporations. That is not true of the Chamber of Commerce because more than three-quarters of its members are business corporations. Justice Marshall continued that the law was not underinclusive for not regulating unions because they lack the significant state-conferred advantages of the corporate structure. Nor was the Equal Protection Clause violated by exempting media corporations because of their unique societal role.

Dissenting were Justices Scalia, O'Connor, and Kennedy. Justice Scalia said that *Buckley*, which was entirely correct on the point, held that independent expenditures to express the political views of individuals and associations do not raise a sufficient threat of corruption to justify prohibition. Further, the government cannot be trusted to establish restrictions on speech for the purpose of assuring fair political debate. Justice Scalia said, “The premise of our system is that there is no such thing as too much speech – that the people are not foolish but intelligent, and will separate the wheat from the chaff.” Justice Kennedy, dissenting with Justices O'Connor and Scalia, added that the majority’s attempt to distinguish *Citizens for Life* rested on the fallacy that the source of a speaker’s funds is somehow relevant to the speaker’s right of expression or society’s interest in hearing what dissenting). Justice Marshall, also dissenting, said that he now believed that it “simply belies reality to say that a campaign will not reward massive financial assistance [by] an independent expenditure into an area that a candidate will appreciate.” *Id.* at 519-20 (Marshall, J., dissenting).


27 *Id.* at 660-61, 666-69.

28 *Id.* at 679-80 (Scalia, J., dissenting).
the speaker has to say. The state’s interest in protecting members from the use of funds to support
candidates whom they may oppose is not here a compelling interest, just as it was not in *Buckley*.
Finally, the First Amendment provides no basis for excluding media corporations from the ban,
considering the tangled ownership links between media and nonmedia corporations.29

In *Citizens United v. Federal Election Commission*, the Court considered 2 U.S.C. § 441b, which
barred corporations from making independent expenditures that referred to a clearly identified
candidate within 30 days of a primary election or within 60 days of a general election for pubic
office. In his opinion for a 5-4 Court, Justice Kennedy held the law unconstitutional, overruling
*Austin v. Michigan Chamber of Commerce*.

**Citizens United v. Federal Election Commission**

130 S. Ct. 876 (2010)

Justice KENNEDY delivered the opinion of the Court.

Federal law prohibits corporations and unions from using their general treasury funds to make
independent expenditures for speech defined as an “electioneering communication” or for speech
expressly advocating the election or defeat of a candidate. 2 U.S.C. § 441b. Limits on electioneering
communications were upheld in *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 203-209
Chamber of Commerce*, 494 U.S. 652 (1990). *Austin* had held that political speech may be banned
based on the speaker’s corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that
“Austin was a significant departure from ancient First Amendment principles,” Federal Election
and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not
compel the continued acceptance of *Austin*. The Government may regulate corporate political speech
through disclaimer and disclosure requirements, but it may not suppress that speech altogether.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a
is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban,
§ 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a
corporation to speak – and it does not – the option to form PACs does not alleviate the First
Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to
administer and subject to extensive regulations. For example, every PAC must appoint a treasurer,
forward donations to the treasurer promptly, keep detailed records of the identities of the persons
making donations, preserve receipts for three years, and file an organization statement and report
changes to this information within 10 days. See id., at 330-332.

---

29 *Id.* at 695-96 (Kennedy, J., joined by Scalia & O’Connor, JJ., dissenting).
And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur.

PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. See Brief for Seven Former Chairmen of FEC et al. as Amici Curiae 11 (citing FEC, Summary of PAC Activity 1990-2006, online at http://www.fec.gov/press/press2007/20071009pac/sumhistory.pdf (as visited Jan. 18, 2010, and available in Clerk of Courts case file));IRS, Statistics of Income: 2006, Corporation Income Tax Returns 2 (2009) (hereinafter Statistics of Income) (5.8 million for-profit corporations filed 2006 tax returns). PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.


This protection has been extended by explicit holdings to the context of political speech. See, e.g., Button, 371 U.S., at 428-429; Grosjean v. American Press Co., 297 U.S. 233, 244 (1936). Under the rationale of these precedents, political speech does not lose First Amendment protection “simply because its source is a corporation.” Bellotti, supra, at 784; see Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1, 8 (1986) (plurality opinion) (“The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster” (quoting Bellotti, 435 U.S., at 783)). The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not “natural persons.” Id., at 776; see id., at 780, n.16. Cf. id., at 828 (Rehnquist, J., dissenting).

To bypass Buckley and Bellotti, the Austin Court identified a new governmental interest in limiting political speech: an antidistortion interest. Austin found a compelling governmental interest in preventing “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.” 494 U.S., at 660.

As for Austin's antidistortion rationale, the Government does little to defend it. See Tr. of Oral Arg. 45-48 (Sept. 9, 2009). And with good reason, for the rationale cannot support § 441b.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that Austin permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. Tr. of Oral Arg. 66 (Sept. 9, 2009); see also id., at 26-31 (Mar. 24, 2009). If Austin were
correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds “that the FEC has never applied this statute to a book,” and if it did, “there would be quite [a] good as-applied challenge.” Tr. of Oral Arg. 65 (Sept. 9, 2009). This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is “indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.” Bellotti, 435 U.S., at 777 (footnote omitted); see ibid. (the worth of speech “does not depend upon the identity of its source, whether corporation, association, union, or individual”); Buckley, 424 U.S., at 48-49 (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment”); Automobile Workers, 352 U.S., at 597 (Douglas, J., dissenting); CIO, 335 U.S., at 154-155 (Rutledge, J., concurring in result). This protection for speech is inconsistent with Austin's antidistortion rationale. Austin sought to defend the antidistortion rationale as a means to prevent corporations from obtaining “‘an unfair advantage in the political marketplace’” by using “‘resources amassed in the economic marketplace.’” 494 U.S., at 659 (quoting MCFL, supra, at 257). But Buckley rejected the premise that the Government has an interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections.” 424 U.S., at 48; see Bellotti, supra, at 791, n.30. Buckley was specific in stating that “the skyrocketing cost of political campaigns” could not sustain the governmental prohibition. 424 U.S., at 26. The First Amendment's protections do not depend on the speaker's “financial ability to engage in public discussion.” Id., at 49.

It is irrelevant for purposes of the First Amendment that corporate funds may “have little or no correlation to the public's support for the corporation's political ideas.” Id., at 660 (majority opinion). All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas. See id., at 707 (Kennedy, J., dissenting) (“Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary”).

Austin's antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. See McConnell, 540 U.S., at 283 (opinion of Thomas, J.) (“The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press”). Cf. Tornillo, 418 U.S., at 250 (alleging the existence of “vast accumulations of unreviewable power in the modern media empires”). Media corporations are now exempt from § 441b's ban on corporate expenditures. See 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have “immense aggregations of wealth,” and the views expressed by media corporations often “have little or no correlation to the public's support” for those views. Austin, 494 U.S., at 660. Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.
The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” Id., at 691 (Scalia, J., dissenting) (citing Bellotti, 435 U.S., at 782). With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.

In *Citizens United*, Justice Kennedy also said that independent expenditures do not give rise to corruption or the appearance of corruption; and that any concern with shareholder protection can be protected through the processes of corporation democracy. Justice Kennedy said that the Court was not reaching the question of whether the Government has a compelling interest in preventing foreign corporations from influencing our Nation’s political process. 130 S. Ct. at 903-11.

The statute also included in 2 U.S.C. § 441(d) a disclaimer requirement indicating who is responsible for the content of any advertisement, and in 2 U.S.C. § 444(f) a disclosure requirement for any person spending more than $10,000 on electioneering communications within a calendar year. Justice Kennedy found no constitutional impediment to the application of those requirements to a movie broadcast via video-on-demand, as there had been no showing that these requirements would impose a chill on speech or expression. 130 S. Ct. at 913-14, 917.

Justice Thomas joined all but the final part of Justice Kennedy’s opinion, where the Court upheld the disclaimer and disclosure requirements. Thomas pointed to a number of examples wherein persons whose names and addresses were disclosed, as required by law, were subjected to attacks and were left subject to retaliation from elected officials. He said that persons should have a right to anonymous speech. While Court majorities have been willing to consider those risks to freedom of association as grounds for not requiring disclosure in specific cases, as in *NAACP v. Alabama*, 357 U.S. 449 (1958), discussed at § 11.2, for Justice Thomas the possibility of bringing such an as-applied action would require litigation over an extended time during which there would be a risk of chilling speech. 130 S. Ct. at 982 (Thomas, J., concurring in part and dissenting in part).

Four Justices dissented in the case. The dissent claimed that *stare decisis* had been inappropriately departed from because *Austin* has long been relied upon by state legislatures, and the case had not been proved unworkable. 130 S. Ct. at 938-40 (Stevens, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting). Justice Stevens also insisted there was plenty of evidence supporting the reasonableness of Congress’s concern to deal with corruption, distortion, and shareholder protection. As to the danger of corruption from corporate participation in an election, Congress conducted much investigation and the Court should defer to its judgment. Stevens said the fact that corporations have no consciences, no beliefs, no feelings, and no thoughts or desires is a reminder that they themselves are not “We the People” by whom and for whom our Constitution was established. Id. at 960-79. He concluded that the majority view is contrary to the long recognition by the people of the need to prevent corporations from undermining self-government. Id. at 948-60. These four Justices did agree with Kennedy that the disclaimer and disclosure requirements were constitutional. Id. at 979.
Even before *Citizens United* was decided, reflecting increased skepticism toward campaign finance laws since Justice Alito replaced Justice O’Connor on the Court in 2006, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, Chief Justice Roberts and Justice Alito applied strict scrutiny to campaign expenditures by distinguishing *McConnell v. FCC*, discussed at § 10.3.2 nn.44-48. In *McConnell*, in 2003, the Court had upheld a ban on “express advocacy” by corporations within 60 days of a general election, or 30 days of a primary election, based on a compelling interest of regulating “express advocacy” by corporations whose economic power could otherwise distort the election process. In contrast, the ads at issue here were more properly viewed as “issue ads,” not “express advocacy” for a candidate, and thus were not controlled by *McConnell*. In adopting a test to distinguish “express advocacy” from “issue advocacy,” Chief Justice Roberts adopted a test by which most ads would be “issue ads,” since “our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” and any “tie is resolved in favor of protecting speech.” Justices Scalia, Kennedy, and Thomas continued their view that *McConnell* was wrongly decided and even “express advocacy” should be permitted by corporations throughout the election. Given Chief Justice Roberts’ test, where most ads will be viewed as “issue ads,” the result will be the same under either approach. Justices Stevens, Souter, Ginsburg, and Breyer continued their more accommodating approach, and would have upheld the regulations on the compelling interest concerned with distortion of the election process by corporations, which applies to both “express advocacy” ads and most “issue ads,” which should be viewed as the “functional equivalent” of express advocacy.  

For cases involving campaign finance requirements decided since *Citizens United*, see generally *American Tradition Partnership Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (*Citizens United* applies even if a state Supreme Court, here Montana, concludes the corrupting influence of corporate contributions is a compelling interest in their state); *id.* at 2491-92 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, JJ., dissenting) (*Citizens United* should not bar a state Supreme Court from making its own finding regarding corruption in their state); *Texans for Free Enterprise v. Texas Ethics Commission*, 732 F.3d 535 (5th Cir. 2013) (contributions to independent-expenditure political action committees cannot be limited under *Citizens United*); *Republican Party of New Mexico v. King*, 741 F.3d 1089 (10th Cir. 2013) (same); *Missourians for Fiscal Accountability v. Klahr*, 2018 WL 29249973 (8th Cir. 2018) (law requiring groups to support or oppose ballot measure to form at least 30 days before election unconstitutional under strict scrutiny as law bans expenditures before an election).

In *Buckley*, the contribution limit of $1,000 to any single candidate per election, which has since been amended to $2,000, and the various other limits, such as an overall annual limit of $25,000 by any contributor, were justified by the government’s compelling interest in limiting the actuality and appearance of corruption resulting from large individual financial contributions. Regarding the narrowly tailoring requirement, the Court decided that Congress was entitled to conclude that disclosure of contributions was only a partial measure and that contribution ceilings were a “necessary” concomitant, focused “precisely” on the problem of corruption, thus satisfying the strict scrutiny test of having no unnecessary overinclusiveness, and did not undermine to “any material degree” the ability for “robust” political debate. Thus, in *Buckley*, the contribution limits were upheld not because a lower standard of scrutiny was applied, but because the burdens on the rights of contributions could survive “the rigorous standard of review established by our prior decisions.”

In 1981, in *California Medical Association v. Federal Election Commission*, the Court upheld the federal Act’s $5000 limitation on contributions by a political committee, as applied to a contribution by the medical association to its multi-candidate political action committee. Four Justices said that the Act’s limitations on contributions were constitutional under *Buckley*. Justice Blackmun said the Act was constitutional applying a clear strict scrutiny approach. Four Justices dissented on grounds that under the Act Congress had not authorized plaintiffs to sue in a declaratory judgment action where such an action would delay or disrupt on-going enforcement proceedings.

In *Citizens Against Rent Control v. Berkeley*, the Court struck down an ordinance that limited to $250 the contribution that a person could make to a committee in support of, or in opposition to, a ballot measure. The Court said that placing this limit on individuals wishing to band together to advance their views on a ballot measure, while placing no limit on individuals acting alone, was a clear restraint on the right of association. It was not supported by the *Buckley* case because *Buckley* applied only to the perception of undue influence of large contributions to a candidate. There is no significant state or public interest in curtailing debate and discussion of a ballot measure.

In 1982, returning to election-related actions by corporations and labor unions, the Court held in *Federal Election Commission v. National Right to Work Committee*, that Congress could forbid corporations and labor unions from making contributions and expenditures in connection with

---

32 424 U.S. at 25-29.
33 453 U.S. 182, 193-201 (1981); id. at 201-04 (Blackmun, J., concurring in part and concurring in the judgment); id. at 208-09 (Stewart, J., joined by Burger, C.J., and Powell & Rehnquist, JJ., dissenting).
federal elections unless they established separate segregated funds for political purposes to which shareholders or labor union members could make contributions. Even regarding the limitation on contribution, the opinion referred to the standard of review as involving “the closest scrutiny.” In applying the test, however, the Court noted that the statute was “sufficient tailored” under Buckley to be constitutional, rather than clearly applying a strict scrutiny, narrowly tailored analysis. The opinion also spoke of deference given to Congress’ judgment regarding the need to regulate corporate and union activity. The Court noted this bar could be applied even to solicitation by corporations and labor unions that did not have great financial resources because the court would not second guess the legislative determination on a need for prophylactic measures where corruption is feared. This deference to the government is not consistent with strict scrutiny review.

In Colorado Republican Federal Campaign Committee v. Federal Election Commission (Colorado I),36 the Court struck down federal limits on expenditures by a political party that were made independently, without coordination with any candidate. Announcing the judgment of the Court, and joined by Justices O’Connor and Souter, Justice Breyer said that the independent expression of a political party’s views is “core” First Amendment activity no less than the independent expression of individuals, candidates, or other political committees. It is protected in the absence of record evidence or legislative findings suggesting a special corruption problem. Justice Thomas concurred in the judgment, but said that Buckley should be overruled because contribution limits infringe as directly and seriously upon free of political expression and association as do expenditure limits.37 Justice Kennedy, with Chief Justice Rehnquist and Justice Scalia, also concurred in the judgment, but went further to express the opinion that even coordinated spending should be protected because, as said in New York Times Co. v. Sullivan, the First Amendment embodies “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.”38 In dissent, Justice Stevens, joined by Justice Ginsburg, said that all money spent by a political party to secure the election of its candidate for Senator should be considered a “contribution” to his or her campaign. Justice Stevens pointed to three interests which he said provide a sufficient constitutional predicate for the federal spending limits: (1) such limits help avoid both the appearance and the reality of corrupt political process via abuse by the party’s influence over candidates, (2) the limits supplement other spending limitations, and (3) the government has an important interest in leveling the playing field by constraining the cost of federal campaigns.39


37 Id. at 631 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., as to Parts I and III, concurring in the judgment and dissenting in part).


39 Id. at 648-49 (Stevens, J., joined by Ginsburg, J, dissenting). This third interest was expressly rejected as a compelling government interest in Buckley, 424 U.S. 1, 48-49 (1976).
The case was remanded to the Court of Appeals, which held that even closely coordinated party expenditures could not be limited by Congress. The case reached the Court again in 2001 in Federal Election Commission v. Colorado Republican Federal Campaign Committee (Colorado II).\(^{40}\) A majority, comprised of Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer, reversed. Noting that the Act treats such coordinated expenditures as contributions, Justice Souter said that political parties are no different from other political speakers in this context, and thus have no claim to a higher standard of scrutiny be applied to limits on coordinated spending. Although the majority did not define with any precision what this lower level of scrutiny was, the Court noted that the different results between contributions and expenditures meant that a different standard of scrutiny was being applied to contribution cases. Since spending above the limits, even of independent amounts, was not permitted until the 1996 decision in Colorado I, political parties could not claim that coordinated spending beyond statutory limits was essential to their functions. Further, parties receive money from people who seek to produce obligated officeholders. Applying the scrutiny appropriate to contribution limits, the Court found a serious threat of abuse by candidates diverting contributions to the party in order to avoid the limits on individual contributions to candidates.

Justice Thomas dissented. He was joined by Justices Scalia and Kennedy and, in Part II, by Chief Justice Rehnquist. In Part I, Justice Thomas again called for overruling Buckley. In Part II, assuming that Buckley survived, Justice Thomas said that party expenditures are not the equal of contributions. But even if they were, a restriction on contributions by a party does not entail only the “marginal restriction” that is said to be suffered by individuals and political committees. The reason is that political parties and their candidates are inextricably intertwined in the conduct of an election. The restrictions have a stifling effect on the ability of the party to do what it exists to do. Breaking the connection between parties and their candidates inhibits the party’s message. Finally, even if the government had presented evidence of corruption, there are better tailored alternatives such as bribery law, disclosure laws, treating earmarked contributions as contributions to the candidate, and lowering the cap on total contributions that an individual can make to a party.\(^{41}\)

In another case, decided in 2000, a divided Court upheld in Nixon v. Shrink Missouri Government PAC\(^{42}\) a Missouri campaign contribution law which, like the federal law, included a per election contribution limit ($1,000). The Court held that a public perception of potential harm was sufficient to justify a contribution limit under Buckley, although the majority acknowledged that Buckley review was not as flexible as the O’Brien test or time, place, or manner tests of intermediate scrutiny. Justices Scalia, Kennedy, and Thomas dissented. They again urged that Buckley be overruled. Justice Kennedy was especially concerned that Buckley had led to the unintended consequence of “soft money” and “issue advocacy” campaigns that escape contribution limits.


\(^{41}\) Id. at 465-66 (Thomas, J., joined by Scalia & Kennedy, JJ., and as to Part II by Rehnquist, C.J., dissenting).

\(^{42}\) 528 U.S. 377, 386-89 (2000); id. at 405-10 (Kennedy, J., dissenting); id. at 410 (Thomas, J., joined by Scalia, J., dissenting).
through subterfuge. He said that overruling *Buckley* would allow legislatures to look at new options and would allow courts to consider other constitutional tests.

In 2003, a majority of the Court more clearly applied intermediate scrutiny to contribution regulations in *Federal Election Commission v. Beaumont*. The Court majority once again stated that different results in contribution versus expenditure cases since *Buckley* meant that a different standard of review was implicit ever since *Buckley*. The Court noted, “[T]he basic premise we have followed in setting First Amendment standards for reviewing political financial restrictions [is that] the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association.”

In *McConnell v. Federal Election Commission*, the Court upheld the major provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). Specifically, the Court upheld a ban on political parties using “soft money,” that is, money not subject to the reporting requirements and limits specified in BCRA. The Court noted, “We are also mindful of the fact that in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny. Considerations of stare decisis, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided.” Although the Court’s statement that “we have consistently applied less rigorous scrutiny to contribution restrictions aimed at the prevention of corruption and the appearance of corruption” is of questionably accuracy for every case before 2000, it is true that the case results have been different, and the standard was clearly different in *Colorado II* and *Beaumont*.

As for what the difference in scrutiny was in *Buckley* until *McConnell*, Justice Kennedy noted in his dissent in *McConnell* that in his view it was not standard intermediate scrutiny, since in *Buckley* the Court required the government to justify even contribution regulation by the compelling government interest of preventing corruption. As Kennedy noted, “Thus, though *Buckley* subjected expenditure limits to strict scrutiny and contribution limits to less exacting review, it held neither could withstand constitutional challenge unless it was shown to advance the anticorruption interest.” Further, as Kennedy noted, the Court required in *Buckley* that the regulations regarding contributions had to be directly related to advancing the interest in preventing corruption. As Kennedy noted, it had to prevent direct *quid pro quo* concerns. As Kennedy stated, “To ignore the fact that in *Buckley* the money at issue was given to candidates, creating an obvious quid pro quo danger as much as it led

---

45 *Id.* at 137-38.
46 *Id.* at 138 n.40.
47 *Id.* at 291-92, 295-96 (Kennedy, J., dissenting), citing *Buckley*, 424 U.S. at 26-27.
to the candidates also providing access to the donors, is to ignore the Court's comments in *Buckley* that show quid pro quo was of central importance to the analysis. . . . And it ignores that in *Colorado II*, the party spending was that which was coordinated with a particular candidate, thereby implicating quid pro quo dangers.”

To the extent that *Buckley* has a lower standard of scrutiny for contributions, this analysis would suggest that *Buckley* adopted the level of scrutiny called in this Coursebook loose strict scrutiny, which involves a compelling government interest, direct relationship analysis, but not the “least restrictive alternative” test of strict scrutiny. However, the majorities in *Colorado II*, *Beaumont*, and *McConnell* rejected this understanding of *Buckley*, by only requiring “significantly important” interests to regulate contributions – the intermediate standard of review – not compelling government interests, although the usual interests used by the government to regulate, corruption and the appearance of corruption, are viewed as compelling government interests anyway.

Using intermediate review, the Court did strike down in *McConnell* a provision that prohibited persons 17 years old or younger from making contributions to candidates or political parties. There was no showing of significant fraud by parents using their children as conduits for evading contribution limitations, and thus no important government interest to advance. Also, the regulation was substantially more burdensome than necessary. Rather than an absolute ban, the government could have adopted counting the contributions given by a minor against the limitations on the family unit in order to prevent fraud by the adult.48


Once again reflecting increased skepticism toward campaign finance laws since Justice Alito replaced Justice O’Connor on the Court in 2006, the Court in *Randall v. Sorrell*49 struck down Vermont’s contribution limits on the amount any single individual can contribute to the campaign of a candidate for state office during a "two-year general election cycle." Those limits were: “governor, lieutenant governor, and other statewide offices, $400; state senator, $300; and state representative, $200.” Applying the intermediate scrutiny approach adopted in *McConnell*, a plurality, composed of Chief Justice Roberts, and Justices Breyer and Alito, said such limitations failed the third prong of intermediate scrutiny by being substantially too burdensome, and not leaving individuals ample alternative ways to exercise their First Amendment right to fund candidates of their choice. The plurality noted that the Vermont limitations were “substantially lower than both the limits we have previously upheld and comparable limits in other States.” Justices Scalia, Kennedy, and Thomas concurred only in the judgment, with each indicating a continuing willingness to depart from *McConnell’s* less than strict scrutiny approach for contribution

48 *Id.* at 231-32.

49 126 S. Ct. 2479, 2486-87, 2491-94 (2006); *id.* at 2501 (Kennedy, J., concurring in the judgment); *id.* at 2501-02 (Thomas, J., joined by Scalia, J., concurring in the judgment).
limitations, and apply strict scrutiny instead. Justice Souter, joined by Justices Stevens and Ginsburg, would have upheld the contribution limitations under *McConnell’s* intermediate review. Justice Souter stated, “Low though they are, one cannot say that ‘the contribution limitation[s are] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless.’” In a separate dissent, Justice Stevens indicated that he would now depart from *Buckley*’s strict scrutiny approach to expenditure limitations, and apply intermediate scrutiny to both expenditure and contribution limitations.50

In *Minnesota Citizens Concerned for Life, Inc. v. Kelley*,51 the Eighth Circuit considered the constitutionality of a state statute than banned religious, charitable, and educational organizations from soliciting contributions from candidates or their committees, except for business advertisements, regular payments by candidates who were members of an organization for more than six months before becoming a candidate, or ordinary contributions at church services. The court concluded that the statute was not narrowly drawn because the statute “bans such requests for any amount even when the organization has no knowledge that the prospective donor is a candidate or committee, or the solicitation otherwise has no potential to affect voting behavior.”

The principle that the government may not enhance the relative voice of one candidate was reinforced in *Davis v. Federal Election Commission*.52 In *Davis*, a 5-4 Court invalidated the “Millionaire’s Amendment” to campaign financing laws that allowed a candidate to receive treble the normal limit on individual contributions and unlimited party expenditures if the other candidate is regarded as self-financing because of spending more than $350,000 of personal funds. Justice Alito’s opinion for the Court, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas, said that because the Amendment imposed a substantial burden on exercise of the First Amendment right to use personal funds for campaign speech, the provision could not stand unless justified by a compelling state interest. Preventing corruption or the appearance of corruption have been identified as compelling interests for restricting campaign finances. However, those interests are not advanced by the Amendment. If there is a public perception that current contribution limits are allowing wealthy people to buy seats in Congress, the obvious remedy is to raise or eliminate those limits, not to impose different contribution and coordinated party expenditure limits on candidates vying for the same seat. A government goal to reduce the natural advantage that wealthy individuals possess in campaigns for government office is not a compelling interest; indeed, it may not even be a legitimate government objective. Justice Stevens, dissenting with Justices Souter, Ginsburg, and Breyer, said the Amendment does not deprive the millionaire of any speech, it merely assisted the opponent of a self-financed candidate attempt to make his voice heard. Preventing corruption or the appearance of corruption are not the only interests sufficient to justify campaign finance regulations.

50  Id. at 2508 (Stevens, J., dissenting), citing *Buckley*, 424 U.S. at 264 (White, J., concurring in part and dissenting in part); id. at 2512-13 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting), citing *Shrink Missouri*, 528 U.S. at 377.

51  427 F.3d 1106, 1116-17 (8th Cir. 2005).

Of almost equal concern is the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.\textsuperscript{53}

The Court ruled similarly in \textit{Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett}\textsuperscript{54} that an Arizona law was unconstitutional which provided that candidates for state office who accept public financing can receive additional money – roughly one dollar for every dollar spent by opposing privately financed candidate – once a set spending limit is reached. The Court held there was no compelling interest to equalize electoral funding. As in \textit{Davis}, the 4 liberal instrumentalist Justices dissented based on a compelling interest to counteract the corruption of large campaign contributions. In \textit{McCutcheon v. Federal Elections Commission},\textsuperscript{55} a 5-4 Court held that aggregate contribution limits placed on an individual donor’s contributions during an election cycle failed \textit{Buckley}’s less than strict scrutiny review, because they limit the number of separate candidates an individual can support, although a similar overall limit was upheld in \textit{Buckley}.

The cumulative effect of cases decided since 2006 suggest stricter review of campaign contribution legislation, while not officially overruling \textit{McConnell}. See, e.g., Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010) (municipal cap on acceptance of contributions by any person making independent expenditures supporting or opposing a candidate unconstitutional as applied to local chamber of commerce’s PAC); Dallman v. Ritter, 225 P.3d 610 (Colo. 2010) (prohibiting political contributions from holders of no-bid contracts with state entities unconstitutional, in suit brought by various labor unions, companies, and hospitals); Lair v. Motl, 2016 WL 2894861 (D. Mont. 2016) (Montana law limiting gubernatorial contributions to $650 in the current election cycle, and as low as $170 for state legislators, unconstitutional). \textit{But see} Preston v. Leake, 660 F.3d 726 (4th Cir. 2011) (North Carolina statute prohibiting lobbyists from making campaign contributions to candidates for certain state positions constitutional under \textit{Buckley}’s “closely drawn” test); Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012) (limitations on corporations contributing to candidates constitutional after \textit{Citizens United}, as that case involved expenditures, not contributions); United States v. Danielczyk, 683 F.3d 611 (4th Cir. 2012) (century-old federal ban on direct corporate contributions to federal candidates valid despite \textit{Citizens United}); Republican Party of Louisiana v. FEC, 219 F. Supp. 3d 86 (D.D.C. 2016) (3-judge district court) (Bipartisan Campaign Reform Act’s provision barring state and local political parties from using contributions of soft money for activities affecting federal elections constitutional, \textit{relying on} Republican National Committee v. FEC, 698 F. Supp. 2d 150 (D.D.C. 2010), \textit{aff’d}, 561 U.S. 1040 (2010)), \textit{aff’d}, 137 S. Ct. 2178 (2017) (Thomas & Gorsuch, JJ., would set case for argument); Holmes v. FEC, 875 F.3d 1153 (D.C. Cir. 2017) (11-0 \textit{en banc}) (separate contribution limits for federal offices of $2,600 for primary and general election constitutional).

\textsuperscript{53} \textit{Id.} at 2777-82 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

\textsuperscript{54} 131 S. Ct. 2806, 2812-13 (2011); \textit{id.} at 2829 (Kagan, J., joined by Ginsburg, Breyer & Sotomayor, JJ., dissenting).

\textsuperscript{55} 134 S. Ct. 1434 (2014); \textit{Id.} at 1465 (Breyer, J., joined by Ginsburg, Sotomayor & Kagan, J., dissenting) (court should follow \textit{Buckley}’s holding).
4. Disclosure Requirements after Buckley

Cases involving disclosure requirements were dealt with in Buckley under a strict scrutiny, direct relationship, least restrictive alternative approach. Each of the cases relied upon by the Court for the proper standard of review, such as NAACP v. Alabama and Gibson v. Florida Legislative Investigation Committee, involved a compelling government interest test. In applying the test in Buckley, the Court concluded that the disclosure requirements for contributions or expenditures above a specified amount did “directly serve” the government interests in preventing corruption and the appearance of corruption, and were “an essential means of gathering data necessary to detect violations of the contribution limitations,” a least restrictive alternative approach. In 1982, this principle had been applied to excuse enforcement of disclosure requirements for candidates of the Socialist Workers Party, which had been subjected to harassment by both government officials and private parties. Nevertheless, based upon the loose language used in cases prior to 1976 regarding the standard of review in cases related to freedom of political association issues, discussed at § 10.3.1 nn.15-20, the Court talked in Buckley about disclosure requirements serving “substantial government interests” and there being a “substantial relation[ship]” between means and ends.

One of the disclosure requirements in Buckley required disclosure by persons who make contributions or expenditures aggregating over $100 in a calendar year for communications that expressly advocate the election or defeat of a clearly identified candidate. The Court stated this disclosure requirement triggered the “same strict standard of scrutiny” as applied to groups. The Court admitted this low limit might discourage participation by some citizens, but said that where to draw the line was best left to Congress, and was not “wholly without rationality.” Why the Court used rational basis language was unexplained. That line has since been amended to $200.

A different kind of required disclosure was struck down in 1995 in McIntyre v Ohio Elections Commission. In McIntyre, a 7-2 Court invalidated an Ohio statute that prohibited the distribution of anonymous campaign literature dealing with a proposed school tax levy. Relying on Talley v. California, which had held that the First Amendment protects the distribution of unsigned handbills urging a boycott, Justice Stevens said that the reasoning in that case was broad enough to cover a

---


57 Id. at 67-68.


59 424 U.S. at 64, 68.

60 Id. at 74-76, 83-84.

61 514 U.S. 334, 347-57 (1995), citing Talley, 362 U.S. 60, 64-66 (1960); id. at 358 (Ginsburg, J., concurring); id. at 358-59 (Thomas, J., concurring in the judgment).
respected tradition of anonymity in the advocacy of political issues. Where a law burdens core political speech, the Court applies “exacting” scrutiny, presumably strict scrutiny. The Court noted that Ohio’s interest in providing the electorate with relevant information is no stronger here than with respect to other components of content that an author is free to include or exclude. Ohio’s interest in preventing fraudulent and libelous statements carries special weight during election campaigns and might justify a limited identification requirement. However, this prohibition is not Ohio’s principal weapon against fraud, and it is not narrowly tailored since the prohibition encompasses documents not arguably false or misleading and not closely connected to an election. Justice Ginsburg, concurring, said the Court had not held a state, “in other, larger circumstances,” may not require the speaker to disclose its interest by disclosing its identity. Justice Thomas concurred only in the judgment because he believed that freedom of speech or the press, as originally understood, protected anonymous political leafletting, as evidenced by the Framers universal practice of publishing anonymous articles and pamphlets. Justice Thomas recognized that there was a recent tradition of barring anonymous publications, but said that the historical evidence from the framing outweighs that recent tradition.

Justice Scalia dissented, with Chief Justice Rehnquist. Justice Scalia said that frequent use of anonymous electioneering did not establish that it was a constitutional right. Instead, the Court should respect the long established legislative practice of barring anonymous electioneering, begun in 1890, and since adopted by all states except California, a practice that does not go to the heart of free speech. Even if he were to forget practice and reason from case law, Justice Scalia said he would reach the same result because the Court has not established a clear rule of law. The Court’s approach leaves unclear whether states could ban anonymity with respect to parade permits, theater presentations, letters to the editor, or municipal public-access cable performers.62

A later case in this series is *Buckley v. American Constitutional Law Foundation (ACLF)*,63 decided in 1999. There the Court invalidated a number of laws regulating the process of soliciting signatures to quality initiatives for the ballot, chief among them a requirement that circulators wear identification badges and be registered voters. The laws also required the names and addresses of circulators to be reported, along with the amount paid to each circulator. The Court said the restrictions significantly inhibited communication and were not justified by state interests in fraud detection, informing voters, and administrative efficiency. While agreeing that strict scrutiny was appropriate to test the direct and substantial burden of requiring circulators to wear identification

62 *Id.* at 317-78 (Scalia, J., joined by Rehnquist, C.J., dissenting).

63 525 U.S. 182, 201-05 (1999); *id.* at 215-18 (O’Connor, J., joined by Breyer, J., concurring in the judgment in part, and dissenting in part); *id.* at 226 (Rehnquist, C.J., dissenting). See also ACLU of Nevada v. Heller, 378 F.3d 979, 987-1002 (9th Cir. 2004) (Nevada statute requiring groups publishing “material or information relating to an election, candidate or any question on the ballot” to disclose on publication names and addresses of its financial sponsors unconstitutional, as not narrowly tailored to state’s interests in helping voters evaluate information, combating fraud, or enforcing election disclosure and contribution laws).
badges, Justice O’Connor, joined by Justice Breyer, said that requiring circulators to be registered voters only indirectly and incidently burdens communication, and that the reporting requirements were incremental and insubstantial. Thus, they concluded these regulations should be tested under Burdick v. Takashi, excerpted at § 11.2.2, which is a 2nd-order reasonableness test for less than substantial burdens on the fundamental freedom of association and the right to vote. Justice Rehnquist, also dissenting, was concerned that striking down the requirement that circulators be registered voters threatened a host of historically established regulations.

Where the issue involves anonymity in the context of candidates for office, many lower courts have distinguished McIntyre and ACLF and upheld the state regulations. For example, in Majors v. Abell, per Judge Posner, the Seventh Circuit upheld an Indiana statute requiring political advertising that "expressly advocat[es] the election or defeat of a clearly identified candidate" contain "a disclaimer that appears and is presented in a clear and conspicuous manner to give the reader or observer adequate notice of the identity of persons who paid for . . . the communication." The court noted that when dealing with elections for office, rather than referenda or other ballot initiatives, “‘disclosure protects the integrity of the electoral process by ensuring that the words of an independent group are not mistakenly understood as having come from the mouth of a candidate’ [and it] also deters corruption by identifying large contributors who may be seeking a quid pro quo and – a related point – it provides information helpful to the enforcement of the provisions of election campaign law, both also being purposes that had been emphasized in Buckley.” In an unusual opinion dubitante (neither concurrence nor dissent), Judge Easterbrook noted that given the lack of clarity in the law based on Buckley, McIntyre, and ACLF, he could not “be confident that my colleagues are wrong in thinking that five Justices will go along” with upholding this statute. However, since “Indiana contends that it is entitled to regulate all electioneering by every speaker in order to avoid drawing lines,” he did not understand “how that position can be reconciled with established principles of constitutional law” applying narrow tailoring analysis.

John Doe No. 1 v. Reed
130 S. Ct. 2811 (2010)

Chief Justice ROBERTS delivered the opinion of the Court.

The State of Washington allows its citizens to challenge state laws by referendum. Roughly four percent of Washington voters must sign a petition to place such a referendum on the ballot. That petition, which by law must include the names and addresses of the signers, is then submitted to the government for verification and canvassing, to ensure that only lawful signatures are counted. The Washington Public Records Act (PRA) authorizes private parties to obtain copies of government documents, and the State construes the PRA to cover submitted referendum petitions.

64 361 F.3d 349, 351-55 (7th Cir. 2004), citing, inter alia, Federal Election Comm’n v. Public Citizen, 268 F.3d 1283, 1287-91 (11th Cir. 2001) (per curiam); Gable v. Patton, 142 F.3d 940, 944-45 (6th Cir. 1998); Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 646-48 (6th Cir. 1997); Majors, 361 F.3d at 355-58 (Easterbrook, J., dubitante).
This case arises out of a state law extending certain benefits to same-sex couples, and a corresponding referendum petition to put that law to a popular vote. Respondent intervenors invoked the PRA to obtain copies of the petition, with the names and addresses of the signers. Certain petition signers and the petition sponsor objected, arguing that such public disclosure would violate their rights under the First Amendment.

The course of this litigation, however, has framed the legal question before us more broadly. The issue at this stage of the case is not whether disclosure of this particular petition would violate the First Amendment, but whether disclosure of referendum petitions in general would do so. We conclude that such disclosure does not as a general matter violate the First Amendment, and we therefore affirm the judgment of the Court of Appeals. We leave it to the lower courts to consider in the first instance the signers' more focused claim concerning disclosure of the information on this particular petition, which is pending before the District Court.

We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed “exacting scrutiny.” See, e.g., Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam) (“Since NAACP v. Alabama [357 U.S. 449 (1958),] we have required that the subordinating interests of the State [offered to justify compelled disclosure] survive exacting scrutiny”); Citizens United, supra, 130 S. Ct., at 914 (“The Court has subjected [disclosure] requirements to ‘exacting scrutiny’” (quoting Buckley, supra, at 64)); Davis v. Federal Election Comm'n, 128 S. Ct. 2759, 2775 (2008) (governmental interest in disclosure “must survive exacting scrutiny” (quoting Buckley, supra, at 64)); Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 204 (1999) (ACLF) (finding that disclosure rules “fail[ed] exacting scrutiny” (internal quotation marks omitted)).

That standard “requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” Citizens United, 130 S. Ct., at 914 (quoting Buckley, supra, at 64, 66). To withstand this scrutiny, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” Davis, supra, 128 S. Ct., at 2774 (citing Buckley, supra, at 68, 71).

Respondents assert two interests to justify the burdens of compelled disclosure under the PRA on First Amendment rights: (1) preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability; and (2) providing information to the electorate about who supports the petition. See, e.g., Brief for Respondent Reed 39-42, 44-45. Because we determine that the State's interest in preserving the integrity of the electoral process suffices to defeat the argument that the PRA is unconstitutional with respect to referendum petitions in general, we need not, and do not, address the State's “informational” interest.

The State's interest in preserving the integrity of the electoral process is undoubtedly important. “States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally.” ACLF, 525 U.S., at 191. The State's interest is particularly strong with respect to efforts to root out fraud, which not
only may produce fraudulent outcomes, but has a systemic effect as well: It “drives honest citizens out of the democratic process and breeds distrust of our government.” Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam); see also Crawford v. Marion County Elec. Bd., 553 U.S. 181, 196 (2008) (opinion of Stevens, J.). The threat of fraud in this context is not merely hypothetical; respondents and their amici cite a number of cases of petition-related fraud across the country to support the point. See Brief for Respondent Reed 43; Brief for State of Ohio et al. as Amici Curiae 22-24.

But the State's interest in preserving electoral integrity is not limited to combating fraud. That interest extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. See Brief for Respondent Reed 42. That interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is “essential to the proper functioning of a democracy.” Id., at 39.

Plaintiffs contend that the disclosure requirements of the PRA are not “sufficiently related” to the interest of protecting the integrity of the electoral process. Brief for Petitioners 51. They argue that disclosure is not necessary because the secretary of state is already charged with verifying and canvassing the names on a petition, advocates and opponents of a measure can observe that process, and any citizen can challenge the secretary's actions in court. See Wash. Rev. Code §§ 29A.72.230, 29A.72.240. They also stress that existing criminal penalties reduce the danger of fraud in the petition process. See Brief for Petitioners 50; §§ 29A.84.210, 29A.84.230, 29A.84.250.

But the secretary's verification and canvassing will not catch all invalid signatures: The job is large and difficult (the secretary ordinarily checks “only 3 to 5% of signatures,” Brief for Respondent WFST 54), and the secretary can make mistakes, too, see Brief for Respondent Reed 42. Public disclosure can help cure the inadequacies of the verification and canvassing process.

Disclosure also helps prevent certain types of petition fraud otherwise difficult to detect, such as outright forgery and “bait and switch” fraud, in which an individual signs the petition based on a misrepresentation of the underlying issue. See Brief for Respondent WFST 9-11, 53-54; cf. Brief for Massachusetts Gay and Lesbian Political Caucus et al. as Amici Curiae 18–22 (detailing “bait and switch” fraud in a petition drive in Massachusetts). The signer is in the best position to detect these types of fraud, and public disclosure can bring the issue to the signer's attention.

Public disclosure thus helps ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we reject plaintiffs' argument and conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process.

Plaintiffs' more significant objection is that “the strength of the governmental interest” does not “reflect the seriousness of the actual burden on First Amendment rights.” Davis, 128 S. Ct., at 2774 (citing Buckley, 424 U.S., at 68); see, e.g., Brief for Petitioners 12-13, 30. According to plaintiffs,
the objective of those seeking disclosure of the R-71 petition is not to prevent fraud, but to publicly identify those who had validly signed and to broadcast the signers' political views on the subject of the petition. Plaintiffs allege, for example, that several groups plan to post the petitions in searchable form on the Internet, and then encourage other citizens to seek out the R-71 signers. See App. 11; Brief for Petitioners 8, 46-47.

Plaintiffs explain that once on the Internet, the petition signers' names and addresses “can be combined with publicly available phone numbers and maps,” in what will effectively become a blueprint for harassment and intimidation. Id., at 46. To support their claim that they will be subject to reprisals, plaintiffs cite examples from the history of a similar proposition in California, see, e.g., id., at 2-6, 31-32, and from the experience of one of the petition sponsors in this case, see App. 9.

In related contexts, we have explained that those resisting disclosure can prevail under the First Amendment if they can show “a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties.” Buckley, supra, at 74; see also Citizens United, 130 S. Ct., at 915. The question before us, however, is not whether PRA disclosure violates the First Amendment with respect to those who signed the R-71 petition, or other particularly controversial petitions. The question instead is whether such disclosure in general violates the First Amendment rights of those who sign referendum petitions.

The problem for plaintiffs is that their argument rests almost entirely on the specific harm they say would attend disclosure of the information on the R–71 petition, or on similarly controversial ones. See, e.g., Brief for Petitioners 10, 26-29, 46, 56. But typical referendum petitions “concern tax policy, revenue, budget, or other state law issues.” Brief for Respondent WFST 36 (listing referenda); see also App. 26 (stating that in recent years the State has received PRA requests for petitions supporting initiatives concerning limiting motor vehicle charges; government regulation of private property; energy resource use by certain electric utilities; long-term care services for the elderly and persons with disabilities; and state, county, and city revenue); id., at 26–27 (stating that in the past 20 years, referendum measures that have qualified for the ballot in the State concerned land-use regulation; unemployment insurance; charter public schools; and insurance coverage and benefits). Voters care about such issues, some quite deeply – but there is no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case.

Plaintiffs have offered little in response. They have provided us scant evidence or argument beyond the burdens they assert disclosure would impose on R-71 petition signers or the signers of other similarly controversial petitions. Indeed, what little plaintiffs do offer with respect to typical petitions in Washington hurts, not helps: Several other petitions in the State “have been subject to release in recent years,” plaintiffs tell us, Brief for Petitioners 50, but apparently that release has come without incident.
Justice THOMAS, dissenting.

Just as “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy,” Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam), so too is citizen participation in those processes, which necessarily entails political speech and association under the First Amendment. Wash. Rev. Code § 42.56.001, et seq. (2008), severely burdens those rights and chills citizen participation in the referendum process. Given those burdens, I would hold that Washington's decision to subject all referendum petitions to public disclosure is unconstitutional because there will always be a less restrictive means by which Washington can vindicate its stated interest in preserving the integrity of its referendum process. I respectfully dissent.

Washington first contends that it has a compelling interest in “transparency and accountability,” which it claims encompasses several subordinate interests: preserving the integrity of its election process, preventing corruption, deterring fraud, and correcting mistakes by the secretary of state or by petition signers. See Brief for Respondent Reed 40-42; 57-59.

It is true that a State has a substantial interest in regulating its referendum and initiative processes “to protect the[ir] integrity and reliability.” ACLF, 525 U.S., at 191. But Washington points to no precedent from this Court recognizing “correcting errors” as a distinct compelling interest that could support disclosure regulations. And our cases strongly suggest that preventing corruption and deterring fraud bear less weight in this particular electoral context: the signature-gathering stage of a referendum or initiative drive. The Court has twice observed that “‘the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.’” Id., at 203 (quoting Meyer v. Grant, 486 U.S. 414, 427 (1988)). Similarly, because “[r]eferenda are held on issues, not candidates for public office,” the “risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.” First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 790 (1978) (citations omitted).

We should not abandon those principles merely because Washington and its amici can point to a mere eight instances of initiative-related fraud, see Brief for Respondent Reed 42; Brief for State of Ohio et al. as Amici Curiae 22-24, among the 809 initiative measures placed on state ballots in this country between 1988 and 2008, see Initiative and Referendum Institute, Initiative Use 2 (Feb.2009). If anything, these meager figures reinforce the conclusion that the risks of fraud or corruption in the initiative and referendum process are remote and thereby undermine Washington's claim that those two interests should be considered compelling for purposes of strict scrutiny.

Thus, I am not persuaded that Washington's interest in protecting the integrity and reliability of its referendum process, as the State has defined that interest, is compelling. . . . Even assuming the interest is compelling, on-demand disclosure of a referendum petition to any person under the PRA is “a blunderbuss approach” to furthering that interest, Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 642 (1996) (Thomas, J., concurring in judgment and dissenting in part) (internal quotation marks omitted), not the least restrictive means of doing so. The events that prompted petitioners’ complaint in this case demonstrate as much.
As Washington explained during oral argument, after the secretary of state receives signed referendum petitions, his “first step . . . is to take them to his archiving section and to have them digitized. As soon as they're digitized, they're available on disks for anyone who requests them” under the PRA. Tr. of Oral Arg. 30. In this case, two organizations announced their intention to obtain the digitized names and addresses of referendum signers and post them “online, in a searchable format.”

There is no apparent reason why Washington must broadly disclose referendum signers' names and addresses in this manner to vindicate the interest that it invokes here. Washington – which is in possession of that information because of referendum regulations that petitioners do not challenge, – could put the names and addresses of referendum signers into a similar electronic database that state employees could search without subjecting the name and address of each signer to wholesale public disclosure. The secretary could electronically cross-reference the referendum database against the “statewide voter registration list” contained in Washington's “statewide voter registration database,” § 29A.08.651(1), to ensure that each referendum signer meets Washington's residency and voter registration requirements, see § 29A.72.130. . . .

An electronic referendum database would also enable the secretary to determine whether multiple entries correspond to a single registered voter, thereby detecting whether a voter had signed the petition more than once. In addition, the database would protect victims of “forgery” or “bait and switch’ fraud.” Ibid. In Washington, “a unique identifier is assigned to each legally registered voter in the state.” § 29A.08.651(4). Washington could create a Web site, linked to the electronic referendum database, where a voter concerned that his name had been fraudulently signed could conduct a search using his unique identifier to ensure that his name was absent from the database – without requiring disclosure of the names and addresses of all the voluntary, legitimate signers.

Washington admits that creating this sort of electronic referendum database “could be done.” Tr. of Oral Arg. 51. Implementing such a system would not place a heavy burden on Washington; “the Secretary of State's staff” already uses an “electronic voter registration database” in its “verification process.” Id., at 50.

Washington nevertheless contends that its citizens must “have access to public records . . . to independently evaluate whether the Secretary properly determined to certify or not to certify a referendum to the ballot.” Brief for Respondent Reed 41. “[W]ithout the access to signed petitions that the PRA provides,” Washington argues, its “citizens could not fulfill their role as the final judge of public business.” Ibid. (internal quotation marks omitted).

But Washington's Election Code already gives Washington voters access to referendum petition data. Under § 29A.72.230, “[t]he verification and canvass of signatures on the [referendum] petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records except upon” court order. Each side is entitled to at least two such observers, although the secretary may increase that number if, in his opinion, doing so would not “cause undue delay or disruption of the verification process.” Ibid.
It is readily apparent that Washington can vindicate its stated interest in “transparency and accountability” through a number of more narrowly tailored means than wholesale public disclosure. Accordingly, this interest cannot justify applying the PRA to a referendum petition.

Washington also contends that it has a compelling interest in “providing relevant information to Washington voters,” and that on-demand disclosure to the public is a narrowly tailored means of furthering that interest. Brief for Respondent Reed 44. This argument is easily dispatched, since this Court has already rejected it in a similar context.

In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Court held that an Ohio law prohibiting anonymous political pamphleting violated the First Amendment. One of the interests Ohio had invoked to justify that law was identical to Washington's here: the “interest in providing the electorate with relevant information.” Id., at 348. The Court called that interest “plainly insufficient to support the constitutionality of [Ohio's] disclosure requirement.” Id., at 349. “The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.” Id., at 348. “Don't underestimate the common man,” we advised. Id., at 348, n.11 (internal quotation marks omitted). “People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message. . . . And then, once they have done so, it is for them to decide what is ‘responsible,’ what is valuable, and what is truth.” Ibid. (internal quotation marks omitted).

This observation applies equally to referendum measures. People are intelligent enough to evaluate the merits of a referendum without knowing who supported it.

The majority’s tested disclosure regulations in *Reed* by requiring “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest. Citizens United, 130 S. Ct., at 914 (quoting Buckley, supra, at 64, 66).” This followed *McConnell*’s quote, 540 U.S. 93, 710 (2003), from *Buckley*, which reflected *Buckley*’s loose language adopting what is viewed today as intermediate review, not strict scrutiny. Justice Thomas’ dissent in *Reed* did apply a strict scrutiny, least restrictive alternative analysis. The majority’s intermediate review is perhaps justified by viewing most disclosure requirements not as content-based regulations of speech, but content-neutral concerns of “combating fraud, detecting invalid signatures, and fostering government transparency and accountability.” It remains to be seen whether intermediate review will continue to be applied in later disclosure cases, or if the court will return to strict scrutiny, or adopt the suggestion by Justices O’Connor and Breyer in *American Constitutional Law Foundation (ACLF)*, discussed at § 10.3.4 n.63, that strict scrutiny be used for disclosure requirements which are substantial burdens, but only 2nd-order reasonableness for less than substantial burdens.

For recent cases involving disclosure, see Chula Vista Citizens for Jobs and Fair Competition v. Norris, 2014 WL 2695532 (2014) (requirement that names of official proponents appear on text of proposition used by circulators to solicit voter signatures unconstitutional under *Reed*); Libertarian Party of Virginia v. Judd, 718 F.3d 308 (4th Cir. 2013) (Virginia law requiring witnesses to verify
each signature gathered for a petition to nominate a candidate for the ballot in statewide elections is not narrowly tailored and fails strict scrutiny applicable to severe burdens on access to the ballot; Americans for Prosperity Foundation v. Becerra, 2018 WL 4320193 (9th Cir. 2018) (requiring nonprofits to report names and addresses of anyone contributing more than 2% of annual contributions constitutional under Reed); Coalition for Secular Government v. Williams, 815 F.3d 1267 (10th Cir. 2016) (application of disclosure requirement to group spending more than $3,500 to advocate against a state referendum unconstitutional under Reed); Wisconsin Right to Life, Inc. v. Barland, 751 F.3d 804 (7th Cir. 2014) (registration and reporting requirements for independent-expenditure committee spending more than $300 unconstitutional as over broad and too burdensome on small committees, and thus distinguishable from the disclosure limit for committees spending more than $10,000 upheld in Citizens United). See generally Minnesota Citizens Concerned for Life, Inc. v. Swanson, 640 F.3d 304 (8th Cir. 2011) (statute requiring corporations to funnel campaign contributions through “political funds” valid disclosure requirement).

§ 10.4 Regulation of Political Speech by Judges

Speech made during the course of election campaigns by judges raise special First Amendment problems. As Justice Ginsburg has noted:

Unlike their counterparts in the political branches, judges are expected to refrain from catering to particular constituencies or committing themselves on controversial issues in advance of adversarial presentation. Their mission is to decide "individual cases and controversies" on individual records, neutrally applying legal principles, and, when necessary, "stand[ing] up to what is generally supreme in a democracy: the popular will." A judiciary capable of performing this function, owing fidelity to no person or party, is a "longstanding Anglo-American tradition," an essential bulwark of constitutional government, a constant guardian of the rule of law. The guarantee of an independent, impartial judiciary enables society to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." "Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, p. 466 (C. Rossiter ed.1961).

The ability of the judiciary to discharge its unique role rests to a large degree on the manner in which judges are selected. The Framers sought to advance the judicial function in the federal courts through the protections of Article III, which provide for the selection of judges by the President on the Advice and Consent of the Senate. In many states, however, citizens choose judges directly in elections. As of 2005, “fourteen states [Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Nebraska, New Mexico, Rhode Island, Utah, Vermont, and Wyoming] and the District of Columbia use a merit selection process [Governor selects from a slate of judges (typically 3-5) recommended by an independent commission, with a retention election some years

after service on the bench]. Another six states have opted to appoint their state judiciaries directly [with four (California, Maine, New Jersey, and New Hampshire) appointed by the Governor, while two (Virginia and South Carolina) appointed by the state legislature]. Eight states [Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania, Texas, and West Virginia] use partisan elections and thirteen [Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin] use nonpartisan elections. The other nine states [Arizona, Florida, Indiana, Kansas, Missouri, New York, Oklahoma, South Dakota, and Tennessee] use a combination of methods, often referred to as ‘hybrid’ systems.\(^{66}\)

Recognizing that the election of judges poses special problems, many states have sought to preserve judicial integrity by either making judicial elections nonpartisan, or by preventing candidates for judicial office from publicly making known how they would decide issues likely to come before them as judges. The Court considered such a regulation in Republican Party of Minnesota v. White.

**Republican Party of Minnesota v. White**


Justice SCALIA delivered the opinion of the Court

[Ed.: As interpreted by the Minnesota Supreme Court, Minn. Code of Judicial Conduct, Canon 5A(3)(d)(i) “prohibits a judicial candidate from stating [i.e., announcing] his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions – and in the latter context as well, if he expresses the view that he is not bound by stare decisis.” The government argued that the “announce clause” served the compelling governmental interest in ensuring the impartiality, or at least the appearance of impartiality, of judges. In ruling the “announce clause” unconstitutional, the Court responded:]

One meaning of "impartiality" in the judicial context – and of course its root meaning – is the lack of bias for or against either party to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used. . . .

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest at all, inasmuch as it does not restrict speech for or against particular parties, but rather speech for or against particular issues. To be sure, when a case arises that turns on a legal issue on which the

---

judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. Any party taking that position is just as likely to lose.

It is perhaps possible to use the term "impartiality" in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular legal view. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a compelling state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. . . . Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."67

[A third definition of impartiality demands] not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an equal chance to win the legal points in the case, but at least some chance . . . .

Respondents argue that the announce clause serves the interest in open-mindedness, or at least in the appearance of openmindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. . . . More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication – in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this. See Minn. Code of Judicial Conduct, Canon 4(B) (2002) ("A judge may write, lecture, teach, speak and participate in other extra-judicial activities concerning the law . . . ").

67 Id. at 777-78.
Some commentators have argued that statements made in campaigns for judicial office may have a greater tendency to pressure judges to decide later cases consistent with those comments, and that would undermine judicial independence. Such comments thus cause special problems that do not exist in campaigns for legislative and executive branch offices, since those office-holders are expected to act in political ways consistent with their campaign promises. Further, the amount of money flowing to judicial elections is likely to increase given reduced limitations on the kinds of advertisements that can be run for candidates for judicial office. Indeed, after White, spending on judicial campaign ads more than doubled between 2002 and 2006.

Justice Stevens, joined by Justices Souter, Ginsburg and Breyer, stated in dissent in White, “I do not agree with th[e] unilocular, ‘an election is an election,’ approach. . . . I would differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota’s choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office.” Justice Stevens also noted that the announce clause “serves the State’s interest in maintaining both the appearance of this form of impartiality and its actuality.” The majority acknowledged that some of the speech prohibited by the clause “may well exhibit a bias against parties— including Justice Stevens’ example of an election speech stressing the candidate’s unbroken record of affirming convictions for rape.” However, the Court noted that the question under strict scrutiny is not whether the announce clause serves this interest at all, but whether it is narrowly tailored to serve this interest as the least burdensome effective alternative, which it was not.

After White, a number of states amended their Codes of Judicial Conduct to forbid judicial candidates only from making “pledges or promises” or “committing to issues” likely to come before the court. Such limitations have typically been ruled unconstitutional under White. For example, in Kansas Judicial Watch v. Stout, a district court held as overbroad a “pledges or promises” clause in the context of chilling free speech rights of candidates who feared discipline for answering candidate questionnaires distributed by political action committees asking the candidate for views on a range of “hot-button” social issues which might come before the court for review. The court

---


69 See generally Caufield, supra note 66, at 636-47, and sources cited therein.

70 White, 536 U.S. at 777 n.7; id. at 800-01 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting); id. at 805-06 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting).

noted, however, that if the clause were narrowly drawn to ban only pledges, promises, or commitments to decide an issue in a particular way, rather than limiting any pledge or promise to the faithful and impartial performance of duties, it would likely be constitutional as directly related to ensuring judges are impartial in the third sense in White of “open-mindedness” in the performance of judicial duties. As the court noted, "A campaign promise to rule a certain way on a legal issue likely to come before the court is so uniquely destructive of open-mindedness and confidence in the judiciary that recusal might not satisfactorily protect the state's interest in maintaining judicial open-mindedness." As example of the difference, the court noted that it would be legitimate for a candidate to say "I promise to be tough on crime," or "I promise to uphold the First Amendment." It would violate “open-mindedness” to say, "I promise to never invalidate a search on Fourth Amendment grounds." Only the latter statement could be proscribed by a Code of Judicial Conduct.

In contrast, some state courts after White have upheld generic “pledges or promises” clauses against First Amendment attack to discipline judicial candidates for statements such as I pledge “to assist our law enforcement officers as they aggressively work towards cleaning up our city streets” or I promise “to help law enforcement by putting criminals where they belong – behind bars.”

In Siefert v. Alexander, the Seventh Circuit held that a Wisconsin judicial ethics rule barring judges or judicial candidates from being members of a political party was unconstitutional under strict scrutiny, but that a rule preventing judges or judicial candidates from personal solicitation of contributions was constitutional as advancing a compelling interest in preventing corruption and the appearance of corruption. The Court also held that a ban on judges or judicial candidates endorsing others in partisan elections was constitutional, viewing it as a regulation of government workers, and thus subject to the 3rd-order rational review Pickering balancing test, at § 8.3. In Wersel v. Sexton, applying strict scrutiny, the Eighth Circuit held constitutional in a 7-5 en banc decision Minnesota Code of Judicial Conduct provisions prohibiting judicial candidates from publicly endorsing or opposing candidates for a different public office, soliciting funds for political organizations or candidates, and personally soliciting or accepting campaign funds, viewing the provisions as narrowly tailored to serve the compelling interests in maintaining judicial impartiality and the appearance of judicial impartiality. On the other hand, in Wolfson v. Concannon, an Arizona provision prohibiting, among other things, judicial candidates from giving speeches on behalf of other candidates, was held unconstitutional under strict scrutiny, disagreeing with Wersel v. Sexton. See generally Williams-Yulee v. Florida Bar, 135 S. Ct. 1656 (2015) (rule baring judicial candidates from personally soliciting campaign funds satisfies strict scrutiny) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting); French v. Jones, 876 F.3d 1228 (9th Cir. 2017) (prohibiting judicial candidates from seeking or accepting political endorsements constitutional after Williams-Yulee).

---

72 In re Watson, 794 N.E.2d 1, 4-8 (N.Y.2003); In re Kinsey, 842 So.2d 77, 85-87 (Fla. 2003).
73 608 F.3d 974 (7th Cir. 2010).
74 674 F.3d 1010 (8th Cir. 2012) (en banc).
75 750 F.3d 1145 (9th Cir. 2014).
Free speech rights also apply to the issue of judicial statements that can lead to recusal from the bench. As has been noted:

Pursuant to Canon 3 (E)(1) of the ABA Model Code of Judicial Conduct, a judge must disqualify himself when his impartiality might reasonably be questioned. Thus, the question is "[w]ould a person of ordinary prudence in the judge's position knowing all of the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?" Under this test, proof of actual bias is not required. The test can be satisfied if a reasonable person might reasonably surmise the existence of bias or prejudice under the particular circumstances of the case. Accordingly, in some instances, a judge who would, in fact, try a case fairly could be barred under the test if a reasonable person might reasonably question his ability to do so.

Although the reasonable person standard of review appears to favor litigants insofar as proof of actual judicial bias is not required, in practice, a variety of evidentiary factors tend to sustain the presumption of impartiality. Facts presented as evidence of judicial bias must be "substantial." Prejudice cannot be asserted on the basis of unsupported facts; nor do adverse rulings alone establish bias. Absent bad faith, erroneous rulings do not call for discipline.76

An additional evidentiary hurdle is created by the so-called “extra-judicial source” doctrine. Under this doctrine:

"[r]ulings on issues of law or attitudes concerning legal issues' do not establish bias or prejudice requiring recusal unless those rulings or attitudes are the product of bias and prejudice of an extra-judicial source." This doctrine generally limits evidence of judicial bias to external factors standing apart from the judge's participation in the case. Judicial bias, therefore, cannot typically be pled based on facts the judge learned while handling the case. Nor does judicial bias encompass the judge's views in relation to the nature of the crime for which the defendant stands charged. Judicial speech reflecting the community's views of the crime also falls beyond the parameters of bias delineated by the extra-judicial source doctrine. Accordingly, to demonstrate judicial prejudice, the litigant generally must show the bias is "personal in nature," directed toward the litigant himself, and the product of factors arising outside the judicial function.

The extra-judicial source doctrine is not, however, absolute. An exception to it is made when otherwise protected conduct or speech becomes so markedly impartial that the ability to judge fairly is demonstrably impossible. The exception will apply only in those rare instances when objection to the conduct is made at trial or the conduct was so "grossly improper" as to affect the outcome.77

---


77 Id. at 276-77 (citations omitted).
In *Liteky v. United States*, the Court held that the extrajudicial source doctrine applies to 28 U.S.C. § 455(a) of the United States Code governing trials in federal courts. It has been noted, “The Court's twin assertions – that judicial rulings alone will almost never provide a sufficient basis for partiality motions, and that opinions formed on the basis of past or present courtroom events will also be insufficient unless a deep-seated antagonism or favoritism could be shown that would render fair judgement impossible – provide judges with powerful weapons with which to defend themselves from meritless attacks upon their integrity.” Further, even when the litigant is able to present admissible evidence of judicial impropriety, such evidence still must be strong enough to overthrow the presumption of the judge's integrity. It has been noted, “As might be expected, given the prevailing reasonable person standard, the point at which judicial conduct is deemed to have overstepped that line is extremely subjective and remarkably fluid from case to case. In addition, the presumption of integrity is so strong that, typically, a single remark made during the course of proceedings, although acknowledged to be improper, will not, in itself, be sufficient to require recusal. . . . The burden of proof in judicial bias actions is difficult for any litigant to surmount.

---

A separate problem involves the attempt to regulate false or deceptive speech made about candidates for office. *See, e.g.*, Susan B. Anthony List v. Driehaus, 814 F.3d 466 (6th Cir. 2016) (Ohio’s political false statement law not narrowly tailored to promote compelling interest in preserving integrity of the political process); Commonwealth v. Lucas, 34 N.E.3d 1242 (Mass. 2015) (similar law invalid under Massachusetts Constitution; counterspeech appropriate remedy); Attorney Grievance Comm’n of Maryland v. Stanalonis, 126 A.3d 6 (Md. 2015) (judicial candidate who sent fliers saying incumbent judge “opposes registration of convicted sexual predators” did not violate state ethics rules, even though more accurate to say the judge “opposed placing his clients” in the registry when representing them); In re Judicial Campaign Complaint Against O’Toole, 24 N.E.3d 1114 (Ohio 2014) (constitutional to prohibit judicial candidate from making “knowingly false” statements; overbroad to regulate “misleading or deceptive” statements).

Another problem which has emerged are laws regulating voters’ speech concerning “ballot selfies” which indicate the party has voted, and for which candidate. *See generally* Rideout v. Gardner, 838 F.3d 65 (1st Cir. 2016) (ban on ballot selfies, argued by state to prevent vote buying or voter coercion, not narrowly tailored under strict scrutiny; states did not show more narrowly tailored statute banning use of selfie to buy or coerce votes would not be effective); Silverberg v. Board of Elections of New York, 216 F. Supp. 3d 411 (S.D.N.Y. 2016) (preliminary injunction against ban on ballot selfies, brought 13 days before election, denied).

---


80 Sparling, *supra* note 76, at 277-78
PART XI: FREEDOM OF ASSEMBLY AND ASSOCIATION

CHAPTER 11: FREEDOM OF ASSEMBLY AND ASSOCIATION RIGHTS

§ 11.1 Freedom to Assemble and Petition the Government for Grievances .......................... 549

§ 11.2 Freedom of Association in the Context of Political Parties and Elections ............ 557

§ 11.3 Freedom of Association and Social Organizations ............................................. 576

§ 11.4 Freedom of Association Applied to Groups Alleged to Post a Threat of Violence Action or Other Harmful Conduct .......................................................... 594

§ 11.1 Freedom to Assemble and Petition the Government for Grievances

The text of the First Amendment provides, in part, “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Particularly beginning in the 1830s, many Southern states before the Civil War limited the rights of anti-slavery Southerners to freedom of speech and the right to petition the federal government on matters related to slavery. At the time, such limitations did not violate the First Amendment, as the Supreme Court had properly held in 1833 in Barron v. Baltimore that the framers and ratifiers of the Bill of Rights intended that they only apply to the federal government. As discussed at § 14.3.1(B), of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2 (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials), part of the purpose behind the 14th Amendment’s Privileges or Immunities Clause was to make the Bill of Rights provisions applicable against states, a result that is in force today as part of the incorporation of most provisions of the Bill of Rights, including all of the First Amendment, into the 14th Amendment Due Process Clause.

Except for the pre-Civil War actions in the South, rarely have federal, state, or local governments tried to limit the right of individuals “peaceably to assemble” or petition for “a redress of grievances.” Thus, the Court has had few opportunities to consider this right. In 1867, in Crandall v. Nevada, the Court did note that the Constitution protects the right of a person “to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions.


3 73 U.S. (6 Wall.) 35, 44 (1867).
He has the right to free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice in the several States.” Following up on Crandell in 1873, the Court included in the Slaughter-House Cases this set of rights, along with others, such as the right “to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government,” as among the rights of United States citizenship protected by the Privileges or Immunities Clause of the 14th Amendment. This “right to petition” is also applicable against the states as an aspect of the incorporation of the First Amendment under the 14th Amendment Due Process Clause. See Lozman v. City of Riviera Beach, 138 S. Ct.1945 (2018) (First Amendment retaliatory arrest claim for exercising right to petition not barred by fact city had probable cause to arrest for behavior at city council meeting; whether probable cause would bar such claims in other contexts not addressed).

In Borough of Duryea, Pa. v. Guarnieri, the Court held that Garcetti, excerpted at § 8.3.4, applies when the complaint is brought for retaliation against a government employee in violation of a First Amendment right to petition for a redress of grievances, as well as a free speech case.

Borough of Duryea, Pa. v. Guarnieri
131 S. Ct. 2488 (2011)

Justice KENNEDY delivered the opinion of the court.

Among other rights essential to freedom, the First Amendment protects “the right of the people . . . to petition the Government for a redress of grievances.” U.S. Const., Amdt. 1. This case concerns the extent of the protection, if any, that the Petition Clause grants public employees in routine disputes with government employers. Petitions are a form of expression, and employees who invoke the Petition Clause in most cases could invoke as well the Speech Clause of the First Amendment. To show that an employer interfered with rights under the Speech Clause, the employee, as a general rule, must show that his speech was on a matter of public concern, as that term is defined in the precedents of this and other courts. Here the issue is whether that test applies when the employee invokes the Petition Clause.

Alone among the Courts of Appeals to have addressed the issue, the Court of Appeals for the Third Circuit has held that the public concern test does not limit Petition Clause claims by public employees. For the reasons stated below, this conclusion is incorrect.

This case arises under the Petition Clause, not the Speech Clause. The parties litigated the case on the premise that Guarnieri's grievances and lawsuit are petitions protected by the Petition Clause. This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes. “[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government.” Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896-897 (1984).

________________________

4 83 U.S. (16 Wall.) 36 (1873).
Although this case proceeds under the Petition Clause, Guarnieri just as easily could have alleged that his employer retaliated against him for the speech contained within his grievances and lawsuit. That claim would have been subject to the public concern test already described. Because Guarnieri chose to proceed under the Petition Clause, however, the Court of Appeals applied a more generous rule. Following the decision of the Court of Appeals in *San Filippo Jr. v. Bongiovanni*, 30 F.3d 424, 443 [(3rd Cir. 1994)], Guarnieri was deemed entitled to protection from retaliation so long as his petition was not a “sham.” Under that rule, defendants and other public employers might be liable under the Petition Clause even if the same conduct would not give rise to liability under the Speech Clause.

It is not necessary to say that the two Clauses are identical in their mandate or their purpose and effect to acknowledge that the rights of speech and petition share substantial common ground. This Court has said that the right to speak and the right to petition are “cognate rights.” *Thomas v. Collins*, 323 U.S. 516, 530 (1945); see also*Wayte v. United States*, 470 U.S. 598, 610, n.11 (1985). “It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances.” *Thomas*, 323 U.S., at 530. Both speech and petition are integral to the democratic process, although not necessarily in the same way. The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs. Beyond the political sphere, both speech and petition advance personal expression, although the right to petition is generally concerned with expression directed to the government seeking redress of a grievance.

Courts should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims. See ibid. (rights of speech and petition are “not identical”). Interpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right. A petition conveys the special concerns of its author to the government and, in its usual form, re-quests action by the government to address those concerns. See *Sure-Tan Inc.*, supra, at 896-897.

This Court's opinion in *McDonald v. Smith*, 472 U.S. 479 (1985), has sometimes been interpreted to mean that the right to petition can extend no further than the right to speak; but *McDonald* held only that speech contained within a petition is subject to the same standards for defamation and libel as speech outside a petition. In those circumstances the Court found “no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions.” Id., at 485. There may arise cases where the special concerns of the Petition Clause would provide a sound basis for a distinct analysis; and if that is so, the rules and principles that define the two rights might differ in emphasis and formulation.

As other Courts of Appeals have recognized, however, claims of retaliation by public employees do not call for this divergence. The close connection between these rights has led Courts of Appeals other than the Third Circuit to apply the public concern test developed in Speech Clause cases to Petition Clause claims by public employees.
The substantial government interests that justify a cautious and restrained approach to the protection of speech by public employees are just as relevant when public employees proceed under the Petition Clause. Petitions, no less than speech, can interfere with the efficient and effective operation of government. A petition may seek to achieve results that “contravene governmental policies or impair the proper performance of governmental functions.” Garcetti [v. Ceballos, 547 U.S. 410.] 419 [(2006)]. Government must have authority, in appropriate circumstances, to restrain employees who use petitions to frustrate progress towards the ends they have been hired to achieve. A petition, like other forms of speech, can bring the “mission of the employer and the professionalism of its officers into serious disrepute.” Roe, 543 U.S., at 81. A public employee might, for instance, use the courts to pursue personal vendettas or to harass members of the general public. That behavior could cause a serious breakdown in public confidence in the government and its employees. And if speech or petition were directed at or concerned other public employees, it could have a serious and detrimental effect on morale.

This case illustrates these risks and costs. Guarnieri's attorney invited the jury to review myriad details of government decisionmaking. She questioned the council's decision to issue directives in writing, rather than orally, Tr. 66 (Apr. 14, 2008); the council's failure to consult the mayor before issuing the directives, id., at 105 (Apr. 15, 2008); the amount of money spent to employ “Philadelphia lawyers” to defend Guarnieri's legal challenges, id., at 191-193:7-10 (Apr. 14, 2008); 152-153 (Apr. 16, 2008); and the wisdom of the council's decision to spend money to install Global Positioning System devices on police cars, id., at 161-162 (same). Finally, the attorney invited the jury to evaluate the council's decisions in light of an emotional appeal on behalf of Guarnieri's “little dog Hercules, little white fluffy dog and half Shitsu.” Id., at 49:13-14 (Apr. 14, 2008). It is precisely to avoid this intrusion into internal governmental affairs that this Court has held that, “while the First Amendment invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee grievance.’” Garcetti, supra, at 420 (quoting Connick, 461 U.S., at 154).

The right to petition traces its origins to Magna Carta, which confirmed the right of barons to petition the King. W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 467 (rev.2d ed.1958). The Magna Carta itself was King John's answer to a petition from the barons. Id., at 30-38. Later, the Petition of Right of 1628 drew upon centuries of tradition and Magna Carta as a model for the Parliament to issue a plea, or even a demand, that the Crown refrain from certain actions. 3 Car. 1, ch. 1 (1627). The Petition of Right stated four principal grievances: taxation without consent of Parliament; arbitrary imprisonment; quartering or billeting of soldiers; and the imposition of martial law. After its passage by both Houses of Parliament, the Petition received the King's assent and became part of the law of England. See S. Gardiner, The First Two Stuarts and the Puritan Revolution, 1603-1660, pp. 60-61 (1886). The Petition of Right occupies a place in English constitutional history superseded in importance, perhaps, only by Magna Carta itself and the Declaration of Right of 1689.

The following years saw use of mass petitions to address matters of public concern. See 8 D. Hume, History of England from the Invasion of Julius Caesar to the Revolution in 1688, p. 122 (1763) (“Tumultuous petitioning . . . was an admirable expedient . . . for spreading discontent, and for
uniting the nation in any popular clamour’”). In 1680, for instance, more than 15,000 persons signed a petition regarding the summoning and dissolution of Parliament, “one of the major political issues agitating the nation.” Knights, London's ‘Monster’ Petition, 36 Historical Journal 39, 40–43 (1993). Nine years later, the Declaration of Right listed the illegal acts of the sovereign and set forth certain rights of the King's subjects, one of which was the right to petition the sovereign. It stated that “it is the Right of the Subjects to petition the King, and all Commitments and Prosecutions for such Petitioning are Illegal.” 1 W. & M., ch. 2; see also L. Schwoerer, The Declaration of Rights, 1689, pp. 69-71 (1981).

The Declaration of Independence of 1776 arose in the same tradition. After listing other specific grievances and wrongs, it complained, “In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.” The Declaration of Independence ¶ 30.

After independence, petitions on matters of public concern continued to be an essential part of contemporary debates in this country's early history. Two years before the adoption of the Constitution, James Madison's Memorial and Remonstrance against Religious Assessments, an important document in the history of the Establishment Clause, was presented to the General Assembly of the Commonwealth of Virginia as a petition. See 1 D. Laycock, Religious Liberty: Overviews and History 90 (2010); Arizona Christian School Tuition Organization v. Winn, 131 S. Ct. 1436, 1446-47 (2011). It attracted over 1,000 signatures. Laycock, supra, at 90, n.153. During the ratification debates, Antifederalists circulated petitions urging delegates not to adopt the Constitution absent modification by a bill of rights. Boyd, Antifederalists and the Acceptance of the Constitution: Pennsylvania, 1787-1792, 9 Publius, No. 2, pp. 123, 128-133 (Spring 1979).

Petitions to the National Legislature also played a central part in the legislative debate on the subject of slavery in the years before the Civil War. See W. Miller, Arguing About Slavery (1995). Petitions allowed participation in democratic governance even by groups excluded from the franchise. See Mark, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 Ford. L.Rev. 2153, 2182 (1998). For instance, petitions by women seeking the vote had a role in the early woman's suffrage movement. See Cogan & Ginzberg, 1846 Petition for Woman's Suffrage, New York State Constitutional Convention, 22 Signs 427, 437-438 (1997). The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.

Petitions to the courts and similar bodies can likewise address matters of great public import. In the context of the civil rights movement, litigation provided a means for “the distinctive contribution of a minority group to the ideas and beliefs of our society.” NAACP v. Button, 371 U.S. 415, 431 (1963). Individuals may also “engag[e] in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public.” In re Primus, 436 U.S. 412, 431 (1978). Litigation on matters of public concern may facilitate the informed public participation that is a cornerstone of democratic society. It also allows individuals to pursue desired ends by direct appeal to government officials charged with applying the law.
The government may not misuse its role as employer unduly to distort this deliberative process. See
garcetti, 547 u.s., at 419. Public employees are “the members of a community most likely to have
informed and definite opinions” about a wide range of matters related, directly or indirectly, to their
employment. Pickering, 391 U.S., at 572. Just as the public has a right to hear the views of public
employees, the public has a right to the benefit of those employees’ participation in petitioning
activity. Petitions may “allow the public airing of disputed facts” and “promote the evolution of the
law by supporting the development of legal theories,” NLRB, 536 U.S., at 532 (internal quotation
marks omitted), and these and other benefits may not accrue if one class of knowledgeable and
motivated citizens is prevented from engaging in petitioning activity. When a public employee seeks
to participate, as a citizen, in the process of deliberative democracy, either through speech or
petition, “it is necessary to regard the [employee] as the member of the general public he seeks to
be.” Pickering, supra, at 574.

The framework used to govern Speech Clause claims by public employees, when applied to the
Petition Clause, will protect both the interests of the government and the First Amendment right. If
a public employee petitions as an employee on a matter of purely private concern, the employee's
First Amendment interest must give way, as it does in speech cases. Roe, 543 U.S., at 82-83. When
a public employee petitions as a citizen on a matter of public concern, the employee's First
Amendment interest must be balanced against the countervailing interest of the government in the
effective and efficient management of its internal affairs. Pickering, supra, at 568. If that balance
favors the public employee, the employee's First Amendment claim will be sustained. If the
interference with the government's operations is such that the balance favors the employer, the
employee's First Amendment claim will fail.

Justice THOMAS, concurring in the judgment.

For the reasons set forth by Justice Scalia, I seriously doubt that lawsuits are “petitions” within the
original meaning of the Petition Clause of the First Amendment. Unreasoned statements to the
contrary in this Court's prior decisions do not convince me otherwise. Like the Court, however, I
need not decide that question today because “[t]he parties litigated the case on the premise that
Guarnieri's grievances and lawsuit are petitions protected by the Petition Clause.” Ante, at 2494.

I also largely agree with Justice Scalia about the framework for assessing public employees'
retaliation claims under the Petition Clause. The “public concern” doctrine of Connick v. Myers, 461
U.S. 138 (1983), is rooted in the First Amendment's core protection of speech on matters of public
concern and has no relation to the right to petition. I would not import that test into the Petition
Clause. Rather, like Justice Scalia, I would hold that “the Petition Clause protects public employees
against retaliation for filing petitions unless those petitions are addressed to the government in its
capacity as the petitioners' employer, rather than its capacity as their sovereign.” Post, at 2506.

Justice SCALIA, concurring in the judgment in part and dissenting in part.

I disagree with two aspects of the Court's reasoning. First, the Court is incorrect to state that our
“precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and
other forums established by the government for resolution of legal disputes.” Ante, at 2494. Our first opinion clearly saying that lawsuits are “Petitions” under the Petition Clause came less than 40 years ago. In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), an opinion by Justice Douglas, the Court asserted that “[t]he right of access to the courts is indeed but one aspect of the right of petition.” Id., at 510. As authority it cited two habeas corpus cases, Johnson v. Avery, 393 U.S. 483 (1969), and Ex parte Hull, 312 U.S. 546 (1941), neither of which even mentioned the Petition Clause. The assertion, moreover, was pure dictum. The holding of California Motor Transport was that the Noerr-Pennington doctrine, a judicial gloss on the Sherman Act that had been held to immunize certain lobbying (legislature-petitioning) activity, did not apply to sham litigation that “sought to bar . . . competitors from meaningful access to adjudicatory tribunals,” 404 U.S., at 510-512. The three other cases cited by the Court as holding that lawsuits are petitions, ante, at 2505, are all statutory interpretation decisions construing the National Labor Relations Act, albeit against the backdrop of the Petition Clause. See BE & K Constr. Co. v. NLRB, 536 U.S. 516, 534-536 (2002); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896-897 (1984) Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741-743 (1983). The Court has never actually held that a lawsuit is a constitutionally protected “Petition,” nor does today's opinion hold that. The Court merely observes that “[t]he parties litigated the case on the premise that Guarnieri's grievances and lawsuit are petitions protected by the Petition Clause,” ante, at 2494, and concludes that Guarnieri's 42 U.S.C. § 1983 claim would fail even if that premise were correct.

I find the proposition that a lawsuit is a constitutionally protected “Petition” quite doubtful. The First Amendment's Petition Clause states that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” The reference to “the right of the people” indicates that the Petition Clause was intended to codify a pre-existing individual right, which means that we must look to historical practice to determine its scope. See District of Columbia v. Heller, 554 U.S. 570, 579, 592 (2008).

There is abundant historical evidence that “Petitions” were directed to the executive and legislative branches of government, not to the courts. In 1765, the Stamp Act Congress stated “[t]hat it is the right of the British subjects in these colonies to petition the King or either House of Parliament.” Declaration of Rights and Grievances, Art. 13, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 195, 198 (1971); it made no mention of petitions directed to the courts. As of 1781, seven state constitutions protected citizens' right to apply or petition for redress of grievances; all seven referred only to legislative petitions. See Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: De-fining the Right, 60 Ohio St. L.J. 557, 604-605, n.159 (1999). The Judiciary Act of 1789 did not grant federal trial courts jurisdiction to hear lawsuits arising under federal law; there is no indication anyone ever thought that this restriction infringed on the right of citizens to petition the Federal Government for redress of grievances. The fact that the Court never affirmed a First Amendment right to litigate until its unsupported dictum in 1972 – after having heard almost 200 years' worth of lawsuits, untold numbers of which might have been affected by a First Amendment right to litigate – should give rise to a strong suspicion that no such right exists. “[A] universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional: Principles of liberty fundamental enough to have been embodied within constitutional guarantees are not readily erased from the Nation's
consciousness.” Nevada Comm'n on Ethics v. Carrigan, ante, at 2493 (internal quotation marks omitted).

I acknowledge, however, that scholars have made detailed historical arguments to the contrary. See, e.g., Andrews, supra, at 595-625; Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 Nw. U.L. Rev. 899, 903-962 (1997). As the Court's opinion observes, the parties have not litigated the issue, and so I agree we should leave its resolution to another day.

Second, and of greater practical consequence, I disagree with the Court's decision to apply the “public concern” framework of Connick v. Myers, 461 U.S. 138 (1983), to retaliation claims brought under the Petition Clause. The Court correctly holds that the Speech Clause and Petition Clause are not co-extensive, ante, at 2494-2495. It acknowledges, moreover, that the Petition Clause protects personal grievances addressed to the government, ante, at 2498. But that is an understatement – rather like acknowledging that the Speech Clause protects verbal expression. “[T]he primary responsibility of colonial assemblies was the settlement of private disputes raised by petitions.” Higginson, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 145 (1986). “[T]he overwhelming majority of First Congress petitions presented private claims.” 8 Documentary History of the First Federal Congress 1789-1791, p. xviii (K. Bowling, W. DiGiacomantonio, & C. Bickford eds.1998). The Court nonetheless holds that, at least in public employment cases, the Petition Clause and Speech Clause should be treated identically, so that since the Speech Clause does not prohibit retaliation against public employees for speaking on matters of private concern, neither does the Petition Clause. The Court gives two reasons for this: First, “[a] different rule for each First Amendment claim would . . . add to the complexity and expense of compliance with the Constitution” and “would provide a ready means for public employees to circumvent the test's protections,” and second, “[p]etitions to the government . . . assume an added dimension when they seek to advance political, social, or other ideas of interest to the community as a whole.” Ante, at 2498.

Neither reason is persuasive. As to the former: The complexity of treating the Petition Clause and Speech Clause separately is attributable to the inconsiderate disregard for judicial convenience displayed by those who ratified a First Amendment that included both provisions as separate constitutional rights. A plaintiff does not engage in pernicious “circumvention” of our Speech Clause precedents when he brings a claim premised on a separate enumerated right to which those precedents are inapplicable.

As to the latter: Perhaps petitions on matters of public concern do in some sense involve an “added dimension,” but that “added dimension” does not obliterate what has traditionally been the principal dimension of the Petition Clause. The public-concern limitation makes sense in the context of the Speech Clause, because it is speech on matters of public concern that lies “within the core of First Amendment protection.” Engquist v. Oregon Dept. of Agriculture, 553 U.S. 591, 600 (2008). The Speech Clause “has its fullest and most urgent application to speech uttered during a campaign for political office.” Citizens United v. Federal Election Comm'n, 130 S.Ct. 876, 898 (2010) (internal quotation marks omitted). The unique protection granted to political speech is grounded in the
history of the Speech Clause, which “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” Connick, supra, at 145 (internal quotation marks omitted).

But the mere fact that we have a longstanding tradition of granting heightened protection to speech of public concern does not suggest that a “public concern” requirement should be written into other constitutional provisions. We would not say that religious proselytizing is entitled to more protection under the Free Exercise Clause than private religious worship because public proclamations are “core free exercise activity.” Nor would we say that the due process right to a neutral adjudicator is heightened in the context of litigation of national importance because such litigation is somehow at the “core of the due process guarantee.” Likewise, given that petitions to redress private grievances were such a high proportion of petitions at the founding – a proportion that is infinitely higher if lawsuits are considered to be petitions – it is ahistorical to say that petitions on matters of public concern constitute “core petitioning activity.” In the Court's view, if Guarnieri had submitted a letter to one of the borough of Duryea’s council members protesting a tax assessment that he claimed was mistaken; and if the borough had fired him in retaliation for that petition; Guarnieri would have no claim for a Petition Clause violation. That has to be wrong. It takes no account of, and thus frustrates, the principal purpose of the Petition Clause.

§ 11.2 Freedom of Association In the Context of Political Parties and Elections

The text of the First Amendment provides, in part, “Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” From this text, the Court has inferred a related First Amendment right of freedom of association. As stated in NAACP v. Alabama ex rel. Patterson: “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . [F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment.” Thus, under both a First Amendment analysis against the federal government, and a 14th Amendment analysis against state or local action, there is a right to freedom of assembly and a right to petition the government for grievances, and a freedom of association.

As the Court noted in NAACP v. Alabama ex rel. Patterson, “Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” Thus, persons have a right to express themselves not only by what they say, the freedom of speech, but also by what groups they join, a freedom of association. As this right is fundamental, cases involving “severe” or “substantial” or “undue” burdens on associational rights


trigger strict scrutiny review, as the Court noted in *Timmons v. Twin Cities Area New Party*. However, the “freedom of association” is an unenumerated right, merely related to the textually specific rights of “freedom to assemble” and to “petition the government for a redress of grievances.” As is true for a number of unenumerated fundamental rights in the modern era, like the fundamental unenumerated right to vote, discussed at § 24.3 of Charles D. Kelso & R. Randall Kelso, *American Constitutional Law: An E-Coursebook Volumes 1 & 2* (2018 Orig. Ed. 2014) (http://libguides.stcl.edu/kelsomaterials), for less than substantial burden the court applies a 2nd-order reasonableness balancing test.

Cases involving government limitations on individuals’ freedom of association can arise in numerous contexts. Sometimes the freedom of association right will be paired with another constitutional right, such as the freedom of speech versus compelled association, as in using union fees, discussed at § 4.3.2, or fees on businesses, discussed at § 4.4, to promote certain kinds of speech, or freedom of speech and association regarding campaign finance, discussed at § 10.3. In addition, the freedom of association can come into conflict with other government policies, such as limiting the right of governments to fire or discipline employees for patronage reasons, discussed at § 11.2.1; or regulating political parties to help ensure free and fair elections, discussed at § 11.2.2; or eliminating discrimination against certain groups of people, discussed at § 11.3; or regulating groups that may pose a threat of violent action or other harmful conduct, discussed at § 11.4.

1. **Patronage Cases**

In 1976, the Court held in *Elrod v. Burns* that public employees may not be discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation. Justice Brennan delivered an opinion in which Justices White and Marshall joined. Justice Brennan said the individual’s ability to act according to his beliefs and to associate with others of his political persuasion is constrained by the patronage system, and the threat of retaliation triggers strict scrutiny. Thus, the government must show a compelling interest is served by means least restrictive of freedom of belief and association. Justice Brennan considered three different goals suggested for preserving the spoils system and explained why those goals did not justify the spoils system:

1. The need to insure effective government and the efficiency of public employees: The alleged lack of incentive of persons not members of the party in control is offset by the inefficiency of wholesale replacement; there's no assurance that replacements will be more qualified; it's doubtful that difference of political persuasion motivates poor performance; and means less intrusive than patronage are available: discharge for cause and the availability of merit systems.

---


2. The need for political loyalty of employees: Limiting patronage dismissals to policymaking positions is sufficient to achieve this goal.

3. Preserve democratic process: Patronage may hamper the democratic process and parties can be nurtured by less intrusive and equally effective means.

Justices Stewart and Blackmun concurred in the judgment, but limited themselves to one question: whether a non-policymaking, nonconfidential government employee can be discharged or threatened with discharge from a job he is satisfactorily performing on the sole ground of his political beliefs. They did not join in the strict scrutiny review of the Brennan plurality opinion.\(^\text{10}\)

Justice Powell dissented with Chief Justice Burger and Justice Rehnquist. Beneficiaries of a patronage system should not be heard to challenge the system when it comes their turn to be replaced. Justice Powell agreed that the constitutional issue is determined by balancing, \textit{i.e.}, whether the hiring practices sufficiently advance important state interests to justify the consequent burdening of First Amendment interests. But he said that patronage hiring promotes important state interests in stimulating political activity and strengthening parties, particularly in obscure elective offices.\(^\text{11}\)

The result in \textit{Elrod} was followed and extended in 1980. In \textit{Branti v. Finkel},\(^\text{12}\) the Court held that the First Amendment protects an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs. The public defender sought to defend the discharge on the grounds that: (1) \textit{Elrod v. Burns} is limited to situations where employees are coerced into pledging allegiance to a party they would not voluntarily support and does not apply where, as here, the employee is only required to be sponsored by the party in power, and (2) even if party sponsorship is an unconstitutional condition for employment of clerks, deputies, and janitors, it is acceptable for an assistant public defender.

Writing for the Court in response to the first contention, Justice Stevens first noted that Justice Brennan said that a patronage system has an inevitable tendency to coerce employees into compromising their true beliefs, and that even requiring sponsorship would have that tendency. Second, the First Amendment protects a person from the denial of a benefit because of his political beliefs. Justice Stevens wrote that unless the government can demonstrate a “vital interest” such as “maintaining government effectiveness and efficiency” requiring that a person's private beliefs conform to those of the hiring authority, as might be true for “the Governor of a State” who might “appropriately believe that the official duties of various assistants who help him write speeches, explain his view to the press, or communicate with the legislator,” those beliefs cannot be the sole basis for discharge.

\(^{10}\) \textit{Id.} at 374-75 (Stewart, J., joined by Blackmun, J., concurring in the judgment).

\(^{11}\) \textit{Id.} at 376 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting).

Applying his test to the facts, Justice Stevens concluded that the continued employment of an assistant public defender cannot be conditioned upon allegiance to the political party in control of the county government. He said that it would undermine rather than promote the effective performance of an assistant public defender to make tenure depend on allegiance to the dominant political party. The assistant public defender's primary responsibility is to the client and so any policymaking must relate to the needs of clients and not political concerns, and confidential information arising from representing clients has no bearing on partisan political concerns.13

Justice Stewart, dissenting, said that *Elrod v. Burns* does not apply since the respondents are confidential employees because of the necessity of mutual confidence and trust in the kind of professional association that occurs in the public defender's office— analogous to a firm of lawyers in the private sector. Justice Powell, dissenting with Justices Rehnquist and Stewart, said that the Court had largely ignored the substantial interests served by patronage, and that the Court's standard would create uncertainty. Regarding patronage interests, Justice Powell added that implementation of policy often depends on the cooperation of public employees who do not hold policymaking posts. Further, the decision may impair the right of local voters to structure their government because here they had delegated to the public defender the power to choose his assistants. The decision to place certain governmental positions within a civil service system is a sensitive political judgment that should be left to the voters and to elected representatives of the people.14

In *Rutan v. Republican Party of Illinois*, the Court extended *Elrod* to hirings, promotions, and transfers of government employees. The Court indicated in *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016) (Thomas, J., joined by Alito, J., dissenting), that employees are protected under *Elrod/Rutan* when demoted because the government official mistakenly believed that he had supported a particular candidate for mayor, even though he actually did not.

**Rutan v. Republican Party of Illinois**

497 U.S. 62 (1990)

Justice BRENNAN delivered the opinion of the Court.

To the victor belong only those spoils that may be constitutionally obtained. *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved Today we are asked to decide the constitutionality of several related political patronage practices—whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support.

---

13 *Id.* at 519-20.

14 *Id.* at 520-21 (Stewart, J., dissenting); *id.* at 521-26 (Powell, J., joined by Rehnquist, J., and Stewart, J., as to Part I, dissenting).
The petition and cross-petition before us arise from a lawsuit protesting certain employment policies and practices instituted by Governor James Thompson of Illinois. On November 12, 1980, the Governor issued an executive order proclaiming a hiring freeze for every agency, bureau, board, or commission subject to his control. The order prohibits state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action. It affects approximately 60,000 state positions. More than 5,000 of these become available each year as a result of resignations, retirements, deaths, expansions, and reorganizations. The order proclaims that “no exceptions” are permitted without the Governor's “express permission after submission of appropriate requests to [his] office.” Governor's Executive Order No. 5 (Nov. 12, 1980), Brief for Petitioners and Cross-Respondents 11 (emphasis added).

Requests for the Governor's “express permission” have allegedly become routine. Permission has been granted or withheld through an agency expressly created for this purpose, the Governor's Office of Personnel (Governor's Office). Agencies have been screening applicants under Illinois' civil service system, making their personnel choices, and submitting them as requests to be approved or disapproved by the Governor's Office. Among the employment decisions for which approvals have been required are new hires, promotions, transfers, and recalls after layoffs.

By means of the freeze, according to petitioners and cross-respondents, the Governor has been using the Governor's Office to operate a political patronage system to limit state employment and beneficial employment-related decisions to those who are supported by the Republican Party. In reviewing an agency's request that a particular applicant be approved for a particular position, the Governor's Office has looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels.

Five people (including the three petitioners) brought suit against various Illinois and Republican Party officials in the United States District Court for the Central District of Illinois. They alleged that they had suffered discrimination with respect to state employment because they had not been supporters of the State's Republican Party and that this discrimination violates the First Amendment. Cynthia B. Rutan has been working for the State since 1974 as a rehabilitation counselor. She claims that since 1981 she has been repeatedly denied promotions to supervisory positions for which she was qualified because she had not worked for or supported the Republican Party. Franklin Taylor, who operates road equipment for the Illinois Department of Transportation, claims that he was denied a promotion in 1983 because he did not have the support of the local Republican Party. Taylor also maintains that he was denied a transfer to an office nearer to his home because of opposition from the Republican Party chairmen in the counties in which he worked and to which he requested a transfer. James W. Moore claims that he has been repeatedly denied state employment as a prison guard because he did not have the support of Republican Party officials.

The two other plaintiffs, before the Court as cross-respondents, allege that they were not recalled after layoffs because they lacked Republican credentials. Ricky Standefer was a state garage worker who claims that he was not recalled, although his fellow employees were, because he had voted in
a Democratic primary and did not have the support of the Republican Party. Dan O'Brien, formerly
a dietary manager with the mental health department, contends that he was not recalled after a layoff
because of his party affiliation and that he later obtained a lower paying position with the corrections
department only after receiving support from the chairman of the local Republican Party.

In *Elrod*, supra, we decided that a newly elected Democratic sheriff could not constitutionally
engage in the patronage practice of replacing certain office staff with members of his own party
“when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with,
that party.” Id., 427 U.S., at 351, 373 (plurality opinion), and 375 (Stewart, J., joined by Blackmun,
J., concurring in judgment). The plurality explained that conditioning public employment on the
provision of support for the favored political party “unquestionably inhibits protected belief and
association.” Id., at 359. It reasoned that conditioning employment on political activity pressures
employees to pledge political allegiance to a party with which they prefer not to associate, to work
for the election of political candidates they do not support, and to contribute money to be used to
further policies with which they do not agree. The latter, the plurality noted, had been recognized
by this Court as “tantamount to coerced belief.” Id., 427 U.S., at 355 (citing Buckley v. Valeo, 424
U.S. 1, 19 (1976)). At the same time, employees are constrained from joining, working for or
contributing to the political party and candidates of their own choice. Elrod, supra, 427 U.S., at 355-
356. “[P]olitical belief and association constitute the core of those activities protected by the First
Amendment,” the plurality emphasized. 427 U.S., at 356. Both the plurality and the concurrence
drew support from *Perry v. Sindermann*, 408 U.S. 593 (1972), in which this Court held that the
State's refusal to renew a teacher's contract because he had been publicly critical of its policies
imposed an unconstitutional condition on the receipt of a public benefit. See Elrod, supra, 427 U.S.,
at 359 (plurality opinion) and 375 (Stewart, J., concurring in judgment).

The Court then decided that the government interests generally asserted in support of patronage fail
to justify this burden on First Amendment rights because patronage dismissals are not the least
restrictive means for fostering those interests. See Elrod, supra, 427 U.S., at 372-373 (plurality
opinion) and 375 (Stewart, J., concurring in judgment). The plurality acknowledged that a
government has a significant interest in ensuring that it has effective and efficient employees. It
expressed doubt, however, that “mere difference of political persuasion motivates poor
performance” and concluded that, in any case, the government can ensure employee effectiveness
and efficiency through the less drastic means of discharging staff members whose work is
inadequate. 427 U.S., at 365-366. The plurality also found that a government can meet its need for
politically loyal employees to implement its policies by the less intrusive measure of dismissing, on
political grounds, only those employees in policymaking positions. Id., at 367. Finally, although the
plurality recognized that preservation of the democratic process “may in some instances justify
limitations on First Amendment freedoms,” it concluded that the “process functions as well without
the practice, perhaps even better.” Patronage, it explained, “can result in the entrenchment of one
or a few parties to the exclusion of others” and “is a very effective impediment to the associational
and speech freedoms which are essential to a meaningful system of democratic government.” Id.,
at 368-370.
Four years later, in *Branti*, supra, we decided that the First Amendment prohibited a newly appointed public defender, who was a Democrat, from discharging assistant public defenders because they did not have the support of the Democratic Party. The Court rejected an attempt to distinguish the case from *Elrod*, deciding that it was immaterial whether the public defender had attempted to coerce employees to change political parties or had only dismissed them on the basis of their private political beliefs.

Respondents urge us to view *Elrod* and *Branti* as inapplicable because the patronage dismissals at issue in those cases are different in kind from failure to promote, failure to transfer, and failure to recall after layoff. Respondents initially contend that the employee petitioners' and cross-respondents' First Amendment rights have not been infringed because they have no entitlement to promotion, transfer, or rehire. We rejected just such an argument in *Elrod*, 427 U.S., at 359-360 (plurality opinion) and 375 (Stewart, J., concurring in judgment), and *Branti*, 445 U.S., at 514-515, as both cases involved state workers who were employees at will with no legal entitlement to continued employment. In *Perry*, 408 U.S., at 596-598, we held explicitly that the plaintiff teacher's lack of a contractual or tenure right to re-employment was immaterial to his First Amendment claim. We explained the viability of his First Amendment claim as follows: “For at least a quarter-century, this Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to ‘produce a result which [it] could not command directly.’ Speiser v. Randall, 357 U.S. 513, 526 [(1958)]. Such interference with constitutional rights is impermissible.” Id., 408 U.S., at 597 (emphasis added).

Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees. This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds are adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.

The same First Amendment concerns that underlay our decisions in *Elrod*, supra, and *Branti*, supra, are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a “temporary” layoff. These are significant penalties and are imposed for the exercise of rights
guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms. See Elrod, supra, 427 U.S., at 362-363 (plurality opinion) and 375 (Stewart, J., concurring in judgment); Branti, supra, 445 U.S., at 515-516.

A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. See Elrod, supra, 427 U.S., at 365-368 (plurality opinion); Branti, supra, 445 U.S., at 518, and 520, n.14. Likewise, the “preservation of the democratic process” is no more furthered by the patronage promotions, transfers, and rehires at issue here than it is by patronage dismissals. First, “political parties are nurtured by other, less intrusive and equally effective methods.” Elrod, supra, 427 U.S., at 372-373 (plurality opinion). Political parties have already survived the substantial decline in patronage employment practices in this century. See Elrod, supra, at 369, and n.23 (plurality opinion); see also L. Sabato, Goodbye to Good-time Charlie 67 (2d ed. 1983) (“The number of patronage positions has significantly decreased in virtually every state”); Congressional Quarterly Inc., State Government, CQ's Guide to Current Issues and Activities 134 (T. Beyle ed. 1989-1990) (“Linkage[s] between political parties and government office-holding . . . have died out under the pressures of varying forces [including] the declining influence of election workers when compared to media and money-intensive campaigning, such as the distribution of form letters and advertising”); Sorauf, Patronage and Party, 3 Midwest J. Pol. Sci. 115, 118-120 (1959) (many state and local parties have thrived without a patronage system). Second, patronage decidedly impairs the elective process by discouraging free political expression by public employees. See Elrod, 427 U.S., at 372 (plurality opinion) (. . . proper functioning of a democratic system “is indispensably dependent on the unfettered judgment of each citizen on matters of political concern”). Respondents, who include the Governor of Illinois and other state officials, do not suggest any other overriding government interest in favoring Republican Party supporters for promotion, transfer, and rehire.

We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. In doing so, we reject the Seventh Circuit's view of the appropriate constitutional standard by which to measure alleged patronage practices in government employment. The Seventh Circuit proposed that only those employment decisions that are the “substantial equivalent of a dismissal” violate a public employee's rights under the First Amendment. 868 F.2d, at 954-957. We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. See Elrod, supra, 427 U.S., at 356-357 (plurality opinion); West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 642 (1943). The First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.
Justice SCALIA, with whom The Chief Justice and Justice KENNEDY join, and with whom Justice O'CONNOR joins as to Parts II and III, dissenting.

Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an “appropriate requirement.” Ante, at 2732. It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See Marbury v. Madison, 1 Cranch 137 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

The merit principle for government employment is probably the most favored in modern America, having been widely adopted by civil service legislation at both the state and federal levels. But there is another point of view, described in characteristically Jacksonian fashion by an eminent practitioner of the patronage system, George Washington Plunkitt of Tammany Hall: “I ain't up on sillygisms, but I can give you some arguments that nobody can answer. First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay.” W. Riordon, Plunkitt of Tammany Hall 13 (1963). It may well be that the Good Government Leagues of America were right, and that Plunkitt, James Michael Curley, and their ilk were wrong; but that is not entirely certain. As the merit principle has been extended and its effects increasingly felt; as the Boss Tweeds, the Tammany Halls, the Pendergast Machines, the Byrd Machines, and the Daley Machines have faded into history; we find that political leaders at all levels increasingly complain of the helplessness of elected government, unprotected by “party discipline,” before the demands of small and cohesive interest groups.

The choice between patronage and the merit principle – or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts – is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution. Fourteen years ago, in *Elrod v. Burns*, 427 U.S. 347 (1976), the Court did that. *Elrod* was limited however, as was the later decision of *Branti v. Finkel*, 445 U.S. 507 (1980), to patronage firings, leaving it to state and federal legislatures to determine when and where political affiliation could be taken into account in hirings and promotions. Today the Court makes its constitutional civil service reform absolute, extending to all decisions regarding government employment. [T]he First Amendment has never been thought to require this disposition, which may well have disastrous consequences for our political system.

The Court limits patronage on the ground that the individual's interest in uncoerced belief and expression outweighs the systemic interests invoked to justify the practice. Ante, at 2734-2735. The opinion indicates that the government may prevail only if it proves that the practice is “narrowly tailored to further vital government interests.” Ante, at 2736.
That strict-scrutiny standard finds no support in our cases. Although our decisions establish that
government employees do not lose all constitutional rights, we have consistently applied a lower
level of scrutiny when “the governmental function operating . . . [is] not the power to regulate or
license, as lawmaker, an entire trade or profession, or to control an entire branch of private business,
but, rather, as proprietor, to manage [its] internal operatio [ns] . . . .” Cafeteria & Restaurant Workers
v. McElroy, 367 U.S. 886, 896 (1961). When dealing with its own employees, the government may
not act in a manner that is “patently arbitrary or discriminatory,” id., at 898, but its regulations are
valid if they bear a “rational connection” to the governmental end sought to be served, Kelley v.

In particular, restrictions on speech by public employees are not judged by the test applicable to
similar restrictions on speech by nonemployees. We have said that “[a] governmental employer may
subject its employees to such special restrictions on free expression as are reasonably necessary to
activities by federal employees, we said that “it is not necessary that the act regulated be anything
more than an act reasonably deemed by Congress to interfere with the efficiency of the public
service.” We reaffirmed Mitchell in Civil Service Comm’n v. Letter Carriers, 413 U.S., at 556, over
a dissent by Justice Douglas arguing against application of a special standard to Government
employees, except insofar as their “job performance” is concerned, id., at 597. We did not say that
the Hatch Act was narrowly tailored to meet the government's interest, but merely deferred to the
judgment of Congress, which we were not “in any position to dispute.” Id., at 567. Indeed, we
recognized that the Act was not indispensably necessary to achieve those ends, since we repeatedly
noted that “Congress at some time [may] come to a different view.” Ibid.; see also id., at 555, 564.
In Broadrick v. Oklahoma, 413 U.S. 601 (1973), we upheld similar restrictions on state employees,
though directed “at political expression which if engaged in by private persons would plainly be
protected by the First and Fourteenth Amendments,” id., at 616.

To the same effect are cases that specifically concern adverse employment action taken against
public employees because of their speech. In Pickering v. Board of Education of Township High
School Dist., 391 U.S. 563, 568 (1968), we recognized: “[T]he State has interests as an employer
in regulating the speech of its employees that differ significantly from those it possesses in
connection with regulation of the speech of the citizenry in general. The problem in any case is to
arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters
of public concern and the interest of the State, as an employer, in promoting the efficiency of the
public services it performs through its employees.”

Because the restriction on speech is more attenuated when the government conditions employment
than when it imposes criminal penalties, and because “government offices could not function if
every employment decision became a constitutional matter,” Connick v. Myers, 461 U.S., at 143,
we have held that government employment decisions taken on the basis of an employee's speech do
not “abridg[e] the freedom of speech,” U.S. Const., Amdt. 1, merely because they fail the
narrow-tailoring and compelling-interest tests applicable to direct regulation of speech. We have not
subjected such decisions to strict scrutiny, but have accorded “a wide degree of deference to the
employer's judgment" that an employee's speech will interfere with close working relationships. 461 U.S., at 152.

It is self-evident that eliminating patronage will significantly undermine party discipline; and that as party discipline wanes, so will the strength of the two-party system. But, says the Court, “[p]olitical parties have already survived the substantial decline in patronage employment practices in this century.” Ante, at 2737. This is almost verbatim what was said in Elrod, see 427 U.S., at 369. Fourteen years later it seems much less convincing. Indeed, now that we have witnessed, in 18 of the last 22 years, an Executive Branch of the Federal Government under the control of one party while the Congress is entirely or (for two years) partially within the control of the other party; now that we have undergone the most recent federal election, in which 98% of the incumbents, of whatever party, were returned to office; and now that we have seen elected officials changing their political affiliation with unprecedented readiness, Washington Post, Apr. 10, 1990, p. A1, the statement that “political parties have already survived” has a positively whistling-in-the-graveyard character to it. Parties have assuredly survived—but as what? As the forges upon which many of the essential compromises of American political life are hammered out? Or merely as convenient vehicles for the conducting of national Presidential elections?

The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular. When getting a job, as opposed to effectuating a particular substantive policy, is an available incentive for party workers, those attracted by that incentive are likely to work for the party that has the best chance of displacing the “ins,” rather than for some splinter group that has a more attractive political philosophy but little hope of success. Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated, as each has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream. The stabilizing effects of such a system are obvious. See Toinet & Glenn, Clientelism and Corruption in the “Open” Society, at 208. In the context of electoral laws we have approved the States' pursuit of such stability, and their avoidance of the “splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government.” Storer v. Brown, 415 U.S. 724, 736 (1974) (upholding law disqualifying persons from running as independents if affiliated with a party in the past year).

Equally apparent is the relatively destabilizing nature of a system in which candidates cannot rely upon patronage-based party loyalty for their campaign support, but must attract workers and raise funds by appealing to various interest groups. See Tolchin & Tolchin, To the Victor, at 127-130. There is little doubt that our decisions in Elrod and Branti, by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade. See, e.g., Fitts, The Vice of Virtue, 136 U. Pa. L. Rev. 1567, 1603-1607 (1988). Our decision today will greatly accelerate the trend. It is not only campaigns that are affected, of course, but the subsequent behavior of politicians once they are in power. The replacement of a system firmly based in party discipline with one in which each office-holder comes to his own accommodation with competing interest groups produces “a dispersion of political influence that may inhibit a political party from enacting its programs into law.” Branti, supra, at 531 (Powell, J., dissenting).
Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. See, e.g., Elrod, 427 U.S. at 379 (Powell, J., dissenting); Cornwell, Bosses, Machines and Ethnic Politics, in Ethnic Group Politics 190, 195-197 (H. Bailey, Jr., & E. Katz eds. 1969). By supporting and ultimately dominating a particular party “machine,” racial and ethnic minorities have – on the basis of their politics rather than their race or ethnicity – acquired the patronage awards the machine had power to confer. No one disputes the historical accuracy of this observation, and there is no reason to think that patronage can no longer serve that function.

While the patronage system has the benefits argued for above, it also has undoubted disadvantages. It facilitates financial corruption, such as salary kickbacks and partisan political activity on government-paid time. It reduces the efficiency of government, because it creates incentives to hire more and less qualified workers and because highly qualified workers are reluctant to accept jobs that may only last until the next election. And, of course, it applies some greater or lesser inducement for individuals to join and work for the party in power.

To hear the Court tell it, this last is the greatest evil. That is not my view, and it has not historically been the view of the American people. Corruption and inefficiency, rather than abridgment of liberty, have been the major criticisms leading to enactment of the civil service laws—for the very good reason that the patronage system does not have as harsh an effect upon conscience, expression, and association as the Court suggests. As described above, it is the nature of the pragmatic, patronage-based, two-party system to build alliances and to suppress rather than foster ideological tests for participation in the division of political “spoils.” What the patronage system ordinarily demands of the party worker is loyalty to, and activity on behalf of, the organization itself rather than a set of political beliefs. He is generally free to urge within the organization the adoption of any political position; but if that position is rejected he must vote and work for the party nonetheless. The diversity of political expression (other than expression of party loyalty) is channeled, in other words, to a different stage—to the contests for party endorsement rather than the partisan elections. It is undeniable, of course, that the patronage system entails some constraint upon the expression of views, particularly at the partisan-election stage, and considerable constraint upon the employee's right to associate with the other party. It greatly exaggerates these, however, to describe them as a general “coercion of belief,” ante, at 2735, quoting Branti, 445 U.S., at 516; see also ante, at 2737; Elrod, supra, 427 U.S., at 355 (plurality opinion). Indeed, it greatly exaggerates them to call them “coercion” at all, since we generally make a distinction between inducement and compulsion. The public official offered a bribe is not “coerced” to violate the law, and the private citizen offered a patronage job is not “coerced” to work for the party. In sum, I do not deny that the patronage system influences or redirects, perhaps to a substantial degree, individual political expression and political association. But like the many generations of Americans that have preceded us, I do not consider that a significant impairment of free speech or free association.

In emphasizing the advantages and minimizing the disadvantages (or at least minimizing one of the disadvantages) of the patronage system, I do not mean to suggest that that system is best. It may not always be; it may never be. To oppose our Elrod-Branti jurisprudence, one need not believe that the patronage system is necessarily desirable; nor even that it is always and everywhere arguably desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice,
and should therefore be left to the judgment of the people's elected representatives. The choice in question, I emphasize, is not just between patronage and a merit-based civil service, but rather among various combinations of the two that may suit different political units and different eras: permitting patronage hiring, for example, but prohibiting patronage dismissal; permitting patronage in most municipal agencies but prohibiting it in the police department; or permitting it in the mayor's office but prohibiting it everywhere else. I find it impossible to say that, always and everywhere, all of these choices fail our “balancing” test.

In 1996, in Board of County Commissioners v. Umbehr and O’Hare Truck Service, Inc. v. City of Northlake, independent contractors were protected under the First Amendment from retaliatory government action. In these cases, the natural law Justices O’Connor, Kennedy, and Souter, joined instrumentalist Justices Stevens, Ginsburg, and Breyer, to create a majority on the Court for applying Pickering-style balancing. (Pickering applied, not the strict scrutiny of Elrod/Rutan, because the case involved retaliation against a government employee for speech on a matter of public concern). Although he had typically dissented in earlier cases, Chief Justice Rehnquist joined the majority in the independent contractor cases, perhaps viewing this line of cases as now “settled law.”

2. Election Cases

Cases involving burdens on associational rights also take place in the context of regulations of political parties and elections. Where the burden is great, strict scrutiny applies. For example, in California Democratic Party v. Jones, the Court was confronted with a referendum provision that converted the state's primary election from a closed primary to a blanket primary in which voters could vote for any candidate regardless of voter's or candidate's party affiliation. The Court stated, “We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.”

On the other hand, lesser burdens on associational rights trigger less exacting review. As the Court noted in Burdick v. Takushi, a state's "important regulatory interests" will usually be enough to justify “reasonable, nondiscriminatory restrictions."


16 Umbehr, 518 U.S. at 670 (O’Connor, J., opinion for the Court) (Rehnquist, C.J., joins all but Part II-B-1 of this opinion); id. at 686 (Scalia, J., joined by Thomas, J., dissenting); O’Hare Truck Service, 518 U.S. 712, 714 (1996) (Kennedy, J., opinion for the Court); id. at 686 n.* (Scalia, J., joined by Thomas, J., dissenting).

17 530 U.S. 567, 582 (2002). In 2010, California voters approved Proposition 14, a top-two system, where the top two vote getters in a primary among all candidates advance to the general election. That system has so far operated without any successful constitutional challenge.

Burdick v. Takashi
504 U.S. 428 (1992)

Justice WHITE delivered the opinion of the Court.

The issue in this case is whether Hawaii's prohibition on write-in voting unreasonably infringes upon its citizens' rights under the First and Fourteenth Amendments. Petitioner contends that the Constitution requires Hawaii to provide for the casting, tabulation, and publication of write-in votes. The Court of Appeals for the Ninth Circuit disagreed, holding that the prohibition, taken as part of the State's comprehensive election scheme, does not impermissibly burden the right to vote. 937 F.2d 415, 422 (1991). We affirm.

Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold.

It is beyond cavil that “voting is of the most fundamental significance under our constitutional structure.” Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979). It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986). The Constitution provides that States may prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” Art. I, § 4, cl. 1, and the Court therefore has recognized that States retain the power to regulate their own elections. Sugarman v. Dougall, 413 U.S. 634, 647 (1973); Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217 (1986). Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” Storer v. Brown, 415 U.S. 724, 730.

Election laws will invariably impose some burden upon individual voters. Each provision of a code, “whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects – at least to some degree – the individual's right to vote and his right to associate with others for political ends.” Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. See Brief for Petitioner 32-37. Accordingly, the mere fact that a State's system “creates barriers ... tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.” Bullock v. Carter, 405 U.S. 134, 143 (1972); Anderson, supra, 460 U.S., at 788; McDonald v. Board of Election Comm'rs of Chicago, 394 U.S. 802 (1969).

Instead, as the full Court agreed in Anderson, 460 U.S., at 788-789; id., at 808, 817 (Rehnquist, J., dissenting), a more flexible standard applies. A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put
forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff's rights.” Id., at 789. Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” Norman v. Reed, 502 U.S. 279, 289 (1992). But when a state election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State's important regulatory interests are generally sufficient to justify” the restrictions. Anderson, 460 U.S., at 788; see also id., at 788-789, n.9. We apply this standard in considering petitioner's challenge to Hawaii's ban on write-in ballots.

We turn next to the interests asserted by Hawaii to justify the burden imposed by its prohibition of write-in voting. Because we have already concluded that the burden is slight, the State need not establish a compelling interest to tip the constitutional scales in its direction. Here, the State's interests outweigh petitioner's limited interest in waiting until the eleventh hour to choose his preferred candidate.

Hawaii's interest in “avoid[ing] the possibility of unrestrained factionalism at the general election,” Munro, 415 U.S., at 196, provides adequate justification for its ban on write-in voting in November. The primary election is “an integral part of the entire election process,” Storer, supra, 415 U.S., at 735, and the State is within its rights to reserve “[t]he general election ballot . . . for major struggles . . . [and] not a forum for continuing intraparty feuds.” Ibid.; Munro, supra, 479 U.S., at 735, 196, 199. The prohibition on write-in voting is a legitimate means of averting divisive sore-loser candidacies. Hawaii further promotes the two-stage, primary-general election process of winnowing out candidates, see Storer, supra, 415 U.S., at 735, by permitting the unopposed victors in certain primaries to be designated office-holders. See Haw. Rev. Stat. §§ 12-41, 12-42 (1985). This focuses the attention of voters upon contested races in the general election. This would not be possible, absent the write-in voting ban.

Justice KENNEDY, with whom Justice BLACKMUN and Justice STEVENS, join, dissenting.

The question before us is whether Hawaii can enact a total ban on write-in voting. The majority holds that it can, finding that Hawaii's ballot access rules impose no serious limitations on the right to vote. Indeed, the majority in effect adopts a presumption that prohibitions on write-in voting are permissible if the State's ballot access laws meet constitutional standards. I dissent because I disagree with the presumption, as well as the majority's specific conclusion that Hawaii's ban on write-in voting is constitutional.

The record demonstrates the significant burden that Hawaii's write-in ban imposes on the right of voters such as petitioner to vote for the candidates of their choice. In the election that triggered this lawsuit, petitioner did not wish to vote for the one candidate who ran for state representative in his district. Because he could not write in the name of a candidate he preferred, he had no way to cast a meaningful vote. Petitioner's dilemma is a recurring, frequent phenomenon in Hawaii because of
the State's ballot access rules and the circumstance that one party, the Democratic Party, is predominant. It is critical to understand that petitioner's case is not an isolated example of a restriction on the free choice of candidates. The very ballot access rules the Court cites as mitigating his injury in fact compound it system wide.

As a starting point, it is useful to remember that until the late 1800's, all ballots cast in this country were write-in ballots. The system of state-prepared ballots, also known as the Australian ballot system, was introduced in this country in 1888. See L.E. Fredman, The Australian Ballot: The Story of an American Reform ix (1968). Prior to this, voters prepared their own ballots or used preprinted tickets offered by political parties. Since there were no state-imposed restrictions on whose name could appear on a ballot, individuals could always vote for the candidates of their choice.

State-prepared ballots were considered to be a progressive reform to reduce fraudulent election practices. The pre-printed ballots offered by political parties had often been in distinctive colors so that the party could determine whether one who had sold his vote had used the right ballot. Id., at 22. The disadvantage of the new ballot system was that it could operate to constrict voter choice. In recognition of this problem, several early state courts recognized a right to cast write-in votes. See, e.g., Sanner v. Patton, 155 Ill. 553, 562-564 (1895) (“[I]f the construction contended for by appellee [prohibiting write-in voting] be the correct one, the voter is deprived of the constitutional right of suffrage; he is deprived of the right of exercising his own choice; and where this right is taken away there is nothing left worthy of the name of the right of suffrage – the boasted free ballot becomes a delusion”); Patterson v. Hanley, 68 P. 821, 823 (Cal. 1902) (“Under every form of ballot of which we have had any experience the voter has been allowed – and it seems to be agreed that he must be allowed – the privilege of casting his vote for any person for any office by writing his name in the proper place”); and Oughton v. Black, 212 Pa. 1, 6-7, 61 A. 346, 348 (1905) (“Unless there was such provision to enable the voter, not satisfied to vote any ticket on the ballot, or for any names appearing on it, to make up an entire ticket of his own choice, the election as to him would not be equal, for he would not be able to express his own individual will in his own way”).

As these courts recognized, some voters cannot vote for the candidate of their choice without a write-in option. In effect, a write-in ban, in conjunction with other restrictions, can deprive the voter of the opportunity to cast a meaningful ballot. As a consequence, write-in prohibitions can impose a significant burden on voting rights. See Reynolds v. Sims, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government”).

Because Hawaii's write-in ban, when considered in conjunction with the State's ballot access laws, imposes a significant burden on voters such as petitioner, it must put forward the state interests which justify the burden so that we can assess them. I do not think it necessary here to specify the level of scrutiny that should then be applied because, in my view, the State has failed to justify the write-in ban under any level of scrutiny.

The interest that has the best potential for acceptance, in my view, is that of preserving the integrity of party primaries by preventing sore loser candidacies during the general election. As the majority
points out, we have acknowledged the State's interest in avoiding party factionalism. A write-in ban
does serve this interest to some degree by eliminating one mechanism which could be used by sore
loser candidates. But I do not agree that this interest provides “adequate justification” for the ban.  
Ante, at 2066. As an initial matter, the interest can at best justify the write-in prohibition for general
elections; it cannot justify Hawaii's complete ban in both the primary and the general election. And
with respect to general elections, a write-in ban is a very overinclusive means of addressing the
problem; it bars legitimate candidacies as well as undesirable sore loser candidacies. If the State
desires to prevent sore loser candidacies, it can implement a narrow provision aimed at that
particular problem.

The second interest advanced by the State is enforcing its policy of permitting the unopposed victors
in certain primaries to be designated as officeholders without having to go through the general
election. The majority states that “[t]his would not be possible, absent the write-in voting ban.” Ibid.
This makes no sense. As petitioner's counsel acknowledged during oral argument, “[t]o the degree
that Hawaii has abolished general elections in these circumstances, there is no occasion to cast a
write-in ballot.” Tr. of Oral Arg. 14. If anything, the argument cuts the other way because this
provision makes it all the more important to allow write-in voting in the primary elections because
primaries are often dispositive.

Hawaii justifies its write-in ban in primary elections as a way to prevent party raiding. Petitioner
argues that this alleged interest is suspect because the State created the party raiding problem in the
first place by allowing open primaries. I agree. It is ironic for the State to raise this concern when
the risk of party raiding is a feature of the open primary system the State has chosen. The majority
suggests that write-in voting presents a particular risk of circumventing the primary system because
state law requires candidates in party primaries to be members of the party. Again, the majority's
argument is not persuasive. If write-in voters mount a campaign for a candidate who does not meet
state-law requirements, the candidate would be disqualified from the election.

The State also cites its interest in promoting the informed selection of candidates, an interest it
claims is advanced by “flushing candidates into the open a reasonable time before the election.”
Brief for Respondents 44. I think the State has it backwards. The fact that write-in candidates often
do not conduct visible campaigns seems to me to make it more likely that voters who go to the
trouble of seeking out these candidates and writing in their names are well informed. The state
interest may well cut the other way.

The State cites interests in combating fraud and enforcing nomination requirements. But the State
does not explain how write-in voting presents a risk of fraud in today's polling places. As to the
State's interest in making sure that ineligible candidates are not elected, petitioner's counsel pointed
out at argument that approximately 20 States require write-in candidates to file a declaration of
candidacy and verify that they are eligible to hold office a few days before the election. Tr. of Oral
Arg. 13.
The Court has applied the same kind of analysis in cases involving the right of access to the ballot. For example, in *Timmons v. Twin Cities Area New Party*, the Court dealt with Minnesota’s ban on a candidate appearing on the ballot as the candidate of more than one party. While most states prohibit such a “fusion” ticket, some states will allow a candidate to appear on more than one line on the ballot, such as a candidate appearing on both the Republican and Libertarian Party lines, or a candidate appearing on both the Democratic and Green Party lines. In this case, the majority concluded that Minnesota’s ban on “fusion” tickets was a less than “severe” burden on political party rights, and that “Minnesota’s interests in avoiding voter confusion and overcrowded ballots, preventing party splintering and disruptions of the two-party system, and being able to clearly identify the election winner.” The dissenting opinions viewed the law’s ban on “fusion” tickets as a “severe” burden on minor party rights, and thus concluded strict scrutiny should apply.

A less than “severe” burden was also found in *Clingman v. Beaver*. In *Clingman*, the Oklahoma state law prevented a political party form inviting registered voters of other parties to vote in its primary, but permitted voters registered as independents to vote in the primary. Because of the “independent” option, the law was viewed as a less than severe burden on political associational rights, and upheld, consistent with *Burdick*, as being supported by legitimate interests in preserving political parties as viable and identifiable groups, retaining the importance of party affiliation, and minimizing the effects of party-splintering. In dissent, Justice Stevens, joined by Justices Souter and Ginsburg, viewed the state law as having a substantial burden both on the individual’s right to vote and on the political party’s right to open its primary to registered voters of others, as the Libertarian Party wished to do in this case. For them, the state law was unconstitutional under strict scrutiny.

In *Washington State Grange v. Washington State Republican Party*, a 7-2 Court refused to find that a “party preference” primary election ballot requirement was a severe burden on political parties’ associational rights. Because it did not impose a severe burden, the Court applied a second-order reasonableness analysis. Under that standard, the Court upheld the law against a facial attack. The law required candidates to identify themselves on the ballot by a self-designated party preference.

19 520 U.S. 351, 358, 364 (1997); id. at 374 (Stevens, J., joined by Ginsburg, J., & Souter, J., dissenting); id. at 382 (Souter, J., dissenting).

20 544 U.S. 581, 590-97 (2005); id. at 598-99 (O’Connor, J., joined by Breyer, J., concurring in part and concurring in the judgment) (“Oklahoma's semiclosed primary law” imposes “only a modest, nondiscriminatory burden on respondents' associational rights,” and “this burden is justified by the State's legitimate regulatory interests”); id. at 608-10, 617-18 (Stevens, J., joined by Souter & Ginsburg, JJ., dissenting) (Oklahoma’s law “diminishes the value of two important rights protected by the First Amendment: the individual citizen's right to vote for the candidate of her choice and a political party's right to define its own mission”; “it is not a mere ‘burden’; it is a prohibition,” which should trigger a strict scrutiny, “compelling government interest” analysis).

21 128 S. Ct. 1184, 1193, 1195-96 (2008); id. at 1197-98 (Scalia, J., joined by Kennedy, J., dissenting).
The plaintiffs argued that this self-identification interfered with the association rights of political parties. Justice Thomas wrote for the Court, “There is simply no basis to presume that a well-informed electorate will interpret a candidate’s party-preference designation to mean that the candidate is that party’s chosen nominee or representative or that the party associates with or approves of the candidate.” Justice Scalia, dissenting with Justice Kennedy, said there was a severe burden on parties’ associational rights. Thus, strict scrutiny was required. Scalia said it does not take a study to establish that when statements of party connection are the sole information listed next to candidate names on the ballot, those statements will affect voters’ perception of what the candidate stands for, what the party stands for, and whom they should elect.

In *New York State Bd. of Elections v. Lopez Torres*,

the Court considered whether the First Amendment was violated by a New York requirement which created two avenues to be on the ballot: political parties select their nominees for Supreme Court Justices at a convention of delegates chosen by party members in a primary election; others can qualify for the election ballot by a petition signed by the lesser of 5 percent of the number of votes last cast for Governor in the judicial district or either 3,500 or 4,000 voters, depending on the size of the district. Plaintiffs contended that because of the influence of party leaders this system made it difficult for persons who lack party connections to be chosen as a delegate or become a party nominee. Justice Scalia wrote for the Court: “But it is hardly a manageable constitutional question for judges – especially for judges in our legal system, where traditional electoral practice gives no hint of even the existence, much less the content, of a constitutional requirement for a ‘fair shot’ at party nomination.” Justice Stevens, concurring with Justice Souter, agreed with the Court’s analysis, citing former Justice Thurgood Marshall’s remark: “The Constitution does not prohibit legislatures from adopting stupid laws.” Justice Kennedy, concurring with Justice Breyer, said that the New York system would be subject to more intense scrutiny if the designated primary system were the sole means of gaining access to the ballot.

On burdens on political parties, see also *Pisano v. Strach*, 743 F.3d 927 (4th Cir. 2014) (requirement for “new” political parties to have petition signed by 2% of total number of voters who voted in the most recent election for Governor by June 1 in advance of November election not a severe burden; reasonableness review applied); *Ohio Council 8 American Federation of State, Cty. & Mun. Emps., AFL-CIO v. Husted*, 814 F.3d 329 (6th Cir. 2016) (Ohio law precluding candidates for judicial office from listing political affiliation on ballot constitutional as reasonable); *Marcellus v. Virginia State Board of Elections*, 849 F.3d 169 (4th Cir. 2017) (reasonable for Virginia to prohibit political party identification for local offices in order to minimize partisanship for local government, promote impartial governance, and maximize number of citizens eligible to hold office). But see *Sanders County Republican Cen. Comm. v. Bullock*, 698 F.3d 741 (9th Cir. 2012) (Montana law banning political party endorsements of judicial candidates unconstitutional as not advancing a compelling interest and not being narrowly tailored); Libertarian Party of Virginia v. *Judd*, 718 F.3d 308 (4th Cir. 2013) (Virginia law requiring witnesses to verify each signature gathered for petition to nominate candidate in statewide elections severe burden; not narrowly tailored under strict scrutiny).

---

---

22 128 S. Ct. 791, 799 (2008); id. at 801 (Stevens, J., joined by Souter, J., concurring); id. at 803 (Kennedy, J., joined by Breyer, J., as to Part II, concurring in the judgment).
In 1984, in *Roberts v. United States Jaycees*, the plaintiffs contended that the exclusion of women from the Jaycees violated the Minnesota Human Rights Act. That Act prohibited discrimination on the basis of gender by a business offering goods or services to the public. The Court held that the Constitution was not violated by application of the Act to the Jaycees.

In deciding the case, the Court recognized that the freedom of association is a fundamental right. Justice Brennan said that two forms of association were protected by the First Amendment: “intimate association,” a phase of personal liberty, and “expressive association,” a meeting together for First Amendment activities such as speech, assembly, petition for redress of grievances, and the exercise of religion. In *Roberts*, there had been no burden on the freedom of intimate association, since the Jaycees were neither small nor selective. However, there was a burden on the freedom of expressive association that required application of a strict scrutiny approach.

In applying strict scrutiny, Justice Brennan noted that Minnesota had a “compelling interest in eradicating discrimination against its female citizens.” The Act banning exclusion of women from the Jaycees was directly related to advancing that interest. Regarding narrow tailoring, Justice Brennan stated that the record did not demonstrate any serious burdens on the male members’ freedom of expression. He said there was no basis in the record “for concluding that admission of women as full voting members will impede the organization’s ability to engage in these protected activities or to disseminate its preferred views.” Thus, the statute was not unconstitutionally oppressive. Further, the statute was not unconstitutionally overinclusive since there were no less burdensome alternatives that would effectively advance the state’s compelling interest in eradicating discrimination against women. The requirement under First Amendment review to engage in both oppressiveness and overinclusiveness analysis is discussed at § 1.4.1 text at end of section.

Similar cases have yielded similar results. A representative case is *Board of Directors of Rotary International v. Rotary Club of Duarte*, which involved whether a California statute that requires California Rotary Clubs to admit women members violates the First Amendment.

**Board of Directors of Rotary International v. Rotary Club of Duarte**  
481 U.S. 537 (1987)

Justice POWELL delivered the opinion of the Court.

Rotary International (International) is a nonprofit corporation founded in 1905, with headquarters in Evanston, Illinois. It is “an organization of business and professional men united worldwide who

---

24 Id. at 617-23.
25 Id. at 623-29.
provide humanitarian service, encourage high ethical standards in all vocations, and help build good will and peace in the world." Rotary Manual of Procedure 7 (1981) (hereinafter Manual), App. 35. Individual members belong to a local Rotary Club rather than to International. In turn, each local Rotary Club is a member of International. Ibid. In August 1982, shortly before the trial in this case, International comprised 19,788 Rotary Clubs in 157 countries, with a total membership of about 907,750. Brief for Appellants 7.

In 1977 the Rotary Club of Duarte, California, admitted Donna Bogart, Mary Lou Elliott, and Rosemary Freitag to active membership. International notified the Duarte Club that admitting women members is contrary to the Rotary constitution. After an internal hearing, International's board of directors revoked the charter of the Duarte Club and terminated its membership in Rotary International. The Duarte Club's appeal to the International Convention was unsuccessful.

The Duarte Club and two of its women members filed a complaint in the California Superior Court for the County of Los Angeles. The complaint alleged, inter alia, that appellants' actions violated the Unruh Civil Rights Act, Cal. Civ. Code Ann. § 51 (West 1982). Appellees sought to enjoin International from enforcing its restrictions against admitting women members, revoking the Duarte Club's charter, or compelling delivery of the charter to any representative of International. Appellees also sought a declaration that appellants' actions had violated the Unruh Act.

The California Court of Appeal reversed. 178 Cal. App.3d 1035, 224 Cal. Rptr. 213 (1986). It held that both Rotary International and the Duarte Rotary Club are business establishments subject to the provisions of the Unruh Act. For purposes of the Act, a “business’ embraces everything about which one can be employed,” and an “establishment” includes “not only a fixed location, but also a permanent ‘commercial force or organization’ or a ‘permanent settled position (as in life or business).” O'Connor v. Village Green Owners Assn., 662 P.2d 427, 430 (Cal. 1983) (quoting Burks v. Poppy Construction Co., 370 P.2d 313, 316 (Cal. 1962)). The Court of Appeal identified several “businesslike attributes” of Rotary International, including its complex structure, large staff and budget, and extensive publishing activities. The court held that the trial court had erred in finding that the business advantages afforded by membership in a local Rotary Club are merely incidental. It stated that testimony by members of the Duarte Club “leaves no doubt that business concerns are a motivating factor in joining local clubs,” and that “business benefits [are] enjoyed and capitalized upon by Rotarians and their businesses or employers.” 178 Cal. App.3d, at 1057, 224 Cal. Rptr., at 226. The Court of Appeal rejected the trial court's finding that the Duarte Club does not provide goods, services, or facilities to its members. In particular, the court noted that members receive copies of the Rotary magazine and numerous other Rotary publications, are entitled to wear and display the Rotary emblem, and may attend conferences that teach managerial and professional techniques.

The court also held that membership in Rotary International or the Duarte Club does not give rise to a “continuous, personal, and social” relationship that “take[s] place more or less outside public view.” Ibid. (internal quotation marks and citations omitted). The court further concluded that admitting women to the Duarte Club would not seriously interfere with the objectives of Rotary International. Finally, the court rejected appellants' argument that their policy of excluding women
is protected by the First Amendment principles set out in Roberts v. United States Jaycees, 468 U.S. 609 (1984). It observed that “[n]othing we have said prevents, or can prevent, International from adopting or attempting to enforce membership rules or restrictions outside of this state.” Id., 178 Cal. App.3d, at 1066, 224 Cal. Rptr., at 231. The court ordered appellants to reinstate the Duarte Club as a member of Rotary International, and permanently enjoined them from enforcing or attempting to enforce the gender requirement against the Duarte Club.

The California Supreme Court denied appellants' petition for review. We postponed consideration of our jurisdiction to the hearing on the merits. 479 U.S. 929 (1986). We conclude that we have appellate jurisdiction, and affirm the judgment of the Court of Appeal.

In Roberts v. United States Jaycees, supra, we upheld against First Amendment challenge a Minnesota statute that required the Jaycees to admit women as full voting members. Roberts provides the framework for analyzing appellants' constitutional claims. As we observed in Roberts, our cases have afforded constitutional protection to freedom of association in two distinct senses. First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities. In many cases, government interference with one form of protected association will also burden the other form of association. In Roberts we determined the nature and degree of constitutional protection by considering separately the effect of the challenged state action on individuals' freedom of private association and their freedom of expressive association. We follow the same course in this case.

The Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Such relationships may take various forms, including the most intimate. See Moore v. East Cleveland, 431 U.S. 494, 503-504 (1977) (plurality opinion). We have not attempted to mark the precise boundaries of this type of constitutional protection. The intimate relationships to which we have accorded constitutional protection include marriage, Zablocki v. Redhail, 434 U.S. 374, 383-386 (1978); the begetting and bearing of children, Carey v. Population Services International, 431 U.S. 678, 684-686 (1977); child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); and cohabitation with relatives, Moore v. East Cleveland, supra, 431 U.S., at 503-504. Of course, we have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the First Amendment protects those relationships, including family relationships, that presuppose “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.” Roberts v. United States Jaycees, supra, 468 U.S., at 619-620. But in Roberts we observed that “[d]etermining the limits of state authority over an individual's freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.” 468 U.S., at 620 (citing Runyon v. McCrory, 427 U.S. 160, 187-189 (1976) (Powell, J., concurring)). In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we
consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship.468 U.S., at 620.

The evidence in this case indicates that the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection. The size of local Rotary Clubs ranges from fewer than 20 to more than 900. App. to Juris. Statement G-15 (deposition of Herbert A. Pigman, General Secretary of Rotary International). There is no upper limit on the membership of any local Rotary Club. About 10 percent of the membership of a typical club moves away or drops out during a typical year. 2 Rotary Basic Library, Club Service 9-11 (1981), App. 88. The clubs therefore are instructed to “keep a flow of prospects coming” to make up for the attrition and gradually to enlarge the membership. Ibid. The purpose of Rotary “is to produce an inclusive, not exclusive, membership, making possible the recognition of all useful local occupations, and enabling the club to be a true cross section of the business and professional life of the community.” 1 Rotary Basic Library, Focus on Rotary 60-61 (1981), App. 84. The membership undertakes a variety of service projects designed to aid the community, to raise the standards of the members' businesses and professions, and to improve international relations. Such an inclusive “fellowship for service based on diversity of interest,” ibid., however beneficial to the members and to those they serve, does not suggest the kind of private or personal relationship to which we have accorded protection under the First Amendment. To be sure, membership in Rotary Clubs is not open to the general public. But each club is instructed to include in its membership “all fully qualified prospective members located within its territory,” to avoid “arbitrary limits on the number of members in the club,” and to “establish and maintain a membership growth pattern.” Manual 139, App. 61-62.

Many of the Rotary Clubs' central activities are carried on in the presence of strangers. Rotary Clubs are required to admit any member of any other Rotary Club to their meetings. Members are encouraged to invite business associates and competitors to meetings. At some Rotary Clubs, the visitors number “in the tens and twenties each week.” App. to Juris. Statement G-24 (deposition of Herbert A. Pigman, General Secretary of Rotary International). Joint meetings with the members of other organizations, and other joint activities, are permitted. The clubs are encouraged to seek coverage of their meetings and activities in local newspapers. In sum, Rotary Clubs, rather than carrying on their activities in an atmosphere of privacy, seek to keep their “windows and doors open to the whole world,” 1 Rotary Basic Library, Focus on Rotary 60-61 (1981), App. 85. We therefore conclude that application of the Unruh Act to local Rotary Clubs does not interfere unduly with the members' freedom of private association.

The Court also has recognized that the right to engage in activities protected by the First Amendment implies “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” Roberts v. United States Jaycees, 468 U.S., at 622. For this reason, “[i]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. . . .” Hishon v. King & Spalding, 467 U.S. 69, 80, n.4 (1984) (Powell, J., concurring) (citing NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958)). In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes.
As a matter of policy, Rotary Clubs do not take positions on “public questions,” including political or international issues. Manual 115, App. 58-59. To be sure, Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment. But the Unruh Act does not require the clubs to abandon or alter any of these activities. It does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community. Indeed, by opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross section of community leaders with a broadened capacity for service.

Even if the Unruh Act does work some slight infringement on Rotary members’ right of expressive association, that infringement is justified because it serves the State’s compelling interest in eliminating discrimination against women. See Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) (right of association may be limited by state regulations necessary to serve a compelling interest unrelated to the suppression of ideas). On its face the Unruh Act, like the Minnesota public accommodations law we considered in Roberts, makes no distinctions on the basis of the organization’s viewpoint. Moreover, public accommodations laws “plainly serv[e] compelling state interests of the highest order.” 468 U.S., at 624. In Roberts we recognized that the State’s compelling interest in assuring equal access to women extends to the acquisition of leadership skills and business contacts as well as tangible goods and services. Id., at 626. The Unruh Act plainly serves this interest. We therefore hold that application of the Unruh Act to California Rotary Clubs does not violate the right of expressive association afforded by the First Amendment.

Justice SCALIA concurs in the judgment.

Justice BLACKMUN and Justice O’CONNOR took no part in the consideration or decision of this case.

Where the individuals’ interest in association was greater, and thus strict scrutiny was harder for the state to meet. This difference was highlighted in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston. In this 1995 case, the Court held that private citizens who organized a parade could not be required to include among the marchers a gay, lesbian, and bi-sexual group imparting a message that the organizers did not wish to convey. The Supreme Judicial Court of Massachusetts had held that the parade was a public accommodation within the meaning of the state’s anti-discrimination statute, that the plaintiffs were excluded in violation of the statute because of their sexual orientation, and that the First Amendment did not protect the defendants because it was not possible to discern any specific expressive purpose in the parade. The Supreme Court disagreed with this last conclusion and held that the First Amendment freedom of association did protect the defendants.

For a unanimous Court, Justice Souter said that not many parades are beyond the realm of expressive activity. A “narrow, succinctly articulable message” is not a condition of constitutional protection. It is enough to constitute expressive activity if the marchers “are making some sort of collective point.” Further, one who is speaking privately, through a parade, is entitled to select components much as do newspaper editors. Here, there was no intent or effect to exclude homosexuals as such. Thus, the compelling interest in eradicating discrimination in membership, critical to the decisions in *Roberts* and *Rotary Club*, was not involved here. Instead, the disagreement went to the admission of a separate gay, lesbian, and bisexual parade unit marching under its own banner. The Massachusetts court, in effect, had declared the sponsor's speech to be a public accommodation. However, that violated the parade organizer's autonomy to choose the content of its own message, as it chose to do by excluding the homosexual parade unit. The Court distinguished *Turner Broadcasting*, discussed at § 10.1 n.1, in which cable operators were required to set aside channels for designated broadcast signals. In that case, there was little risk that viewers would assume that messages carried on the system were endorsed by the cable operator, and the government's interest was not in altering speech, but in the content-neutral reason of survival of speakers. For this reason, the Court did not apply strict scrutiny review in *Turner Broadcasting*, but only intermediate review.

Similar protection for a private organization to control its message was given in *Boy Scouts of America v. Dale*.

*Boy Scouts of America v. Dale*

530 U.S. 640 (2000)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioners are the Boy Scouts of America and the Monmouth Council, a division of the Boy Scouts of America (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts readmit Dale. This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association. We hold that it does.

James Dale entered Scouting in 1978 at the age of eight by joining Monmouth Council's Cub Scout Pack 142. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

27 *Id.* at 568-81.
Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/Gay Alliance.

Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts “specifically forbid membership to homosexuals.” App. 137.


The New Jersey Superior Court's Chancery Division granted summary judgment in favor of the Boy Scouts. The court held that New Jersey's public accommodations law was inapplicable because the Boy Scouts was not a place of public accommodation, and that, alternatively, the Boy Scouts is a distinctly private group exempted from coverage under New Jersey's law. The court rejected Dale's common-law claim, holding that New Jersey's policy is embodied in the public accommodations law. The court also concluded that the Boy Scouts' position in respect of active homosexuality was clear and held that the First Amendment freedom of expressive association prevented the government from forcing the Boy Scouts to accept Dale as an adult leader.

The New Jersey Superior Court's Appellate Division affirmed the dismissal of Dale's common-law claim, but otherwise reversed and remanded for further proceedings. 706 A.2d 270 (N.J. App. 1998). It held that New Jersey's public accommodations law applied to the Boy Scouts and that the Boy Scouts violated it. The Appellate Division rejected the Boy Scouts' federal constitutional claims.

The New Jersey Supreme Court affirmed the judgment of the Appellate Division. . . . With respect to the right to intimate association, the court concluded that the Boy Scouts' “large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not ‘sufficiently personal or private to warrant constitutional protection’ under the freedom of intimate association.” 734 A.2d, at 1221 (quoting Duarte, supra, at 546). With respect to the right of expressive association, the court “agree[d] that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development of its members.” 734 A.2d, at 1223. But the court concluded that it was “not persuaded . . . that a shared goal of Boy Scout members is to associate in order to preserve the view
that homosexuality is immoral.” Ibid., 734 A.2d, at 1223-1224 (internal quotation marks omitted). Accordingly, the court held “that Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not ‘affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.’” Id., at 615 (quoting Duarte, supra, at 548). The court also determined that New Jersey has a compelling interest in eliminating “the destructive consequences of discrimination from our society,” and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose. 160 N.J., at 619-620. Finally, the court addressed the Boy Scouts' reliance on Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), in support of its claimed First Amendment right to exclude Dale. The court determined that Hurley did not require deciding the case in favor of the Boy Scouts because “the reinstatement of Dale does not compel Boy Scouts to express any message.” 160 N.J., at 624.

In Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984), we observed that “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. See ibid. (stating that protection of the right to expressive association is “especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority”). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is “intrusion into the internal structure or affairs of an association” like a “regulation that forces the group to accept members it does not desire.” Id., at 623. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, “[f]reedom of association . . . plainly presupposes a freedom not to associate.” Ibid.

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 13 (1988) [Ed.: city anti-discrimination ordinance applied to organizations with over 400 members validly banned gender discrimination at members-only club]. But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden “by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” Roberts, supra, at 623.

To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in “expressive association.” The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. See Hurley,
The record reveals the following. The Boy Scouts is a private, nonprofit organization. According to its mission statement:

“It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential. The values we strive to instill are based on those found in the Scout Oath and Law: Scout Oath: On my honor I will do my best; To do my duty to God and my country and to obey the Scout Law; To help other people at all times; To keep myself physically strong, mentally awake, and morally straight. Scout Law: A Scout is: Trustworthy Obedient Loyal Cheerful Helpful Thrifty Friendly Brave Courteous Clean Kind Reverent.” App. 184.

Thus, the general mission of the Boy Scouts is clear: “[T]o instill values in young people.” Ibid. The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values – both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See Roberts, supra, at 636 (O'Connor, J., concurring) (“Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement”).

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints.

The values the Boy Scouts seeks to instill are “based on” those listed in the Scout Oath and Law. App. 184. The Boy Scouts explains that the Scout Oath and Law provide “a positive moral code for living; they are a list of ‘do's' rather than ‘don'ts.'” Brief for Petitioners 3. The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms “morally straight” and “clean.”

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. See supra, at 2451 and this page. And the terms “morally straight” and “clean” are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being “morally straight” and “clean.” And others may believe that engaging in homosexual conduct is contrary to being “morally straight” and “clean.” The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the “exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership . . . [and] contradicts Boy Scouts' overarching objective to reach 'all eligible youth.'” 734 A.2d, at 1226. The court concluded that the exclusion of members like Dale “appears antithetical to the organization's goals and philosophy.” Ibid. But our cases reject
this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent. See Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 124 (1981) ("[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); see also Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

The Boy Scouts asserts that it “teach[es] that homosexual conduct is not morally straight,” Brief for Petitioners 39, and that it does “not want to promote homosexual conduct as a legitimate form of behavior,” Reply Brief for Petitioners 5. We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs.

We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not “promote homosexual conduct as a legitimate form of behavior.” Reply Brief for Petitioners 5. As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression. See, e.g., La Follette, supra, at 123-124 (considering whether a Wisconsin law burdened the National Party's associational rights and stating that “a State, or a court, may not constitutionally substitute its own judgment for that of the Party”). That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have “become leaders in their community and are open and honest about their sexual orientation.” App. 11. Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

_Hurley_ is illustrative on this point. There we considered whether the application of Massachusetts' public accommodations law to require the organizers of a private St. Patrick's Day parade to include among the marchers an Irish-American gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment rights. We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner. We observed: “[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals . . . . The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.” 515 U.S., at 574-575.
Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not “promote homosexual conduct as a legitimate form of behavior.” Reply Brief for Petitioners 5. As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster because of the following findings: “Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.” 734 A.2d, at 1223.

We disagree with the New Jersey Supreme Court's conclusion drawn from these findings.

First, associations do not have to associate for the “purpose” of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in Hurley was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants.

Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues – a fact that the Boy Scouts disputes with contrary evidence – the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be “expressive association.” The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. In this same vein, Dale makes much of the claim that the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant. The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.
State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains. See, e.g., Hurley, supra, at 571-572 (explaining the history of Massachusetts' public accommodations law); Romer v. Evans, 517 U.S. 620, 627-629 (1996) (describing the evolution of public accommodations laws). Over time, the public accommodations laws have expanded to cover more places. New Jersey's statutory definition of "[a] place of public accommodation" is extremely broad. The term is said to "include, but not be limited to," a list of over 50 types of places. N.J. Stat. Ann. § 10:5–5(l) (West Supp.2000); see Appendix, infra, at 2458-2459. Many on the list are what one would expect to be places where the public is invited. For example, the statute includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public, like summer camps and roof gardens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location. As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

We recognized in cases such as Roberts and Duarte that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. In Roberts, we said “[i]ndeed, the Jaycees has failed to demonstrate . . . any serious burdens on the male members' freedom of expressive association.” 468 U.S., at 626. In Duarte, we said: “[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes.” 481 U.S., at 548 (internal quotation marks and citations omitted).

We thereupon concluded in each of these cases that the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws.

In Hurley, we said that public accommodations laws “are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.” 515 U.S., at 572. But we went on to note that in that case “the Massachusetts [public accommodations] law has been applied in a peculiar way” because “any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own.” Id., at 572-573. And in the associational freedom cases such as Roberts, Duarte, and New York State Club Assn., after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any “serious burden” on the organization's rights of expressive association. [T]he associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other.
Dale contends that we should apply the intermediate standard of review enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968), to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech – in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable.

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. “While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.” Hurley, 515 U.S., at 579.

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

BSA's claim finds no support in our cases. We have recognized “a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.” Roberts, 468 U.S., at 618. And we have acknowledged that “when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association . . . may be implicated.” Ibid. But “[t]he right to associate for expressive purposes is not . . . absolute”; rather, “the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which . . . the constitutionally protected liberty is at stake in a given case.” Id., at 623, 618. Indeed, the right to associate does not mean “that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution.” New York State Club Assn., Inc. v. City of New York, 487 U.S. 1, 13 (1988) [Ed.: Club with more than 400 members cannot engage in “race, creed or sex” discrimination]. For example, we have routinely and easily rejected assertions of this right by expressive organizations with discriminatory membership policies, such as private schools, law firms, and labor organizations. In fact, until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law. To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy.

The majority's argument relies exclusively on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). In that case, petitioners John Hurley and the South Boston Allied War Veterans Council ran a privately operated St. Patrick's Day parade. Respondent, an organization known as “GLIB,” represented a contingent of gays, lesbians, and bisexuals who sought to march in the petitioners' parade “as a way to express pride in their Irish heritage as openly
gay, lesbian, and bisexual individuals.” Id., at 561. When the parade organizers refused GLIB's admission, GLIB brought suit under Massachusetts' antidiscrimination law. That statute, like New Jersey's law, prohibited discrimination on account of sexual orientation in any place of public accommodation, which the state courts interpreted to include the parade. Petitioners argued that forcing them to include GLIB in their parade would violate their free speech rights.

We agreed. We first pointed out that the St. Patrick's Day parade – like most every parade – is an inherently expressive undertaking. Id., at 568-570. Next, we reaffirmed that the government may not compel anyone to proclaim a belief with which he or she disagrees. Id., at 573-574. We then found that GLIB's marching in the parade would be an expressive act suggesting the view “that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals.” Id., at 574. Finally, we held that GLIB's participation in the parade “would likely be perceived” as the parade organizers' own speech – or at least as a view which they approved – because of a parade organizer's customary control over who marches in the parade. Id., at 575. Though Hurley has a superficial similarity to the present case, a close inspection reveals a wide gulf between that case and the one before us today.

First, it was critical to our analysis that GLIB was actually conveying a message by participating in the parade – otherwise, the parade organizers could hardly claim that they were being forced to include any unwanted message at all. Our conclusion that GLIB was conveying a message was inextricably tied to the fact that GLIB wanted to march in a parade, as well as the manner in which it intended to march. We noted the “inherent expressiveness of marching [in a parade] to make a point,” id., at 568, and in particular that GLIB was formed for the purpose of making a particular point about gay pride, id., at 561, 570. More specifically, GLIB “distributed a fact sheet describing the members' intentions” and, in a previous parade, had “marched behind a shamrock-strewn banner with the simple inscription ‘Irish American Gay, Lesbian and Bisexual Group of Boston.’” Id. at 570. “[A] contingent marching behind the organization's banner,” we said, would clearly convey a message. Id., at 574. Indeed, we expressly distinguished between the members of GLIB, who marched as a unit to express their views about their own sexual orientation, on the one hand, and homosexuals who might participate as individuals in the parade without intending to express anything about their sexuality by doing so. Id., at 572-573.

Second, we found it relevant that GLIB's message “would likely be perceived” as the parade organizers' own speech. Id., at 575. That was so because “[p]arades and demonstrations . . . are not understood to be so neutrally presented or selectively viewed” as, say, a broadcast by a cable operator, who is usually considered to be “merely ‘a conduit’ for the speech” produced by others. Id., at 575-576. Rather, parade organizers are usually understood to make the “customary determination about a unit admitted to the parade.” Id., at 575.

Dale's inclusion in the Boy Scouts is nothing like the case in Hurley. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.
The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone – unlike any other individual's – should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label “homosexual.” That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority. As counsel for BSA remarked, Dale “put a banner around his neck when he . . . got himself into the newspaper. . . . He created a reputation. . . . He can't take that banner off. He put it on himself. . . .” See Tr. of Oral Arg. 25.

Another difference between this case and *Hurley* lies in the fact that *Hurley* involved the parade organizers' claim to determine the content of the message they wish to give at a particular time and place. The standards governing such a claim are simply different from the standards that govern BSA's claim of a right of expressive association. Generally, a private person or a private organization has a right to refuse to broadcast a message with which it disagrees, and a right to refuse to contradict or garble its own specific statement at any given place or time by including the messages of others. An expressive association claim, however, normally involves the avowal and advocacy of a consistent position on some issue over time. This is why a different kind of scrutiny must be given to an expressive association claim, lest the right of expressive association simply turn into a right to discriminate whenever some group can think of an expressive object that would seem to be inconsistent with the admission of some person as a member or at odds with the appointment of a person to a leadership position in the group.

Furthermore, it is not likely that BSA would be understood to send any message, either to Scouts or to the world, simply by admitting someone as a member. Over the years, BSA has generously welcomed over 87 million young Americans into its ranks. In 1992 over one million adults were active BSA members. 734 A.2d 1196, 1200 (N.J. 1999). The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling. Indeed, in this case there is no evidence that the young Scouts in Dale's troop, or members of their families, were even aware of his sexual orientation, either before or after his public statements at Rutgers University.

It is equally farfetched to assert that Dale's open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster. For an Olympic gold medal winner or a Wimbledon tennis champion, being “openly gay” perhaps communicates a message – for example, that openness about one's sexual orientation is more virtuous than concealment; that a homosexual person can be a capable and virtuous person who should be judged like anyone else; and that homosexuality is not immoral – but it certainly does not follow that they necessarily send a message on behalf of the organizations that sponsor the activities in which they excel. The fact that such persons participate in these organizations is not usually construed to convey a message on behalf of those organizations any more than does the inclusion of women, African-Americans, religious minorities, or any other discrete group. Surely the organizations are not forced by antidiscrimination laws to take any position on the legitimacy of any individual's private beliefs or private conduct.
Unfavorable opinions about homosexuals “have ancient roots.” Bowers v. Hardwick, 478 U.S. 186, 192 (1986). Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. Id., at 196-197 (Burger, C. J., concurring); Loving v. Virginia, 388 U.S. 1, 3 (1967). See also Mathews v. Lucas, 427 U.S. 495, 520 (1976) (Stevens, J., dissenting) (“Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white”). Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association's and the American Psychological Association's removal of “homosexuality” from their lists of mental disorders; a move toward greater understanding within some religious communities; Justice Blackmun's classic opinion in Bowers; Georgia's invalidation of the statute upheld in Bowers; and New Jersey's enactment of the provision at issue in this case. Indeed, the past month alone has witnessed some remarkable changes in attitudes about homosexuals.

That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis so wisely advised, “we must be ever on our guard, lest we erect our prejudices into legal principles.”

If we would guide by the light of reason, we must let our minds be bold. I respectfully dissent.

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

I join Justice Stevens's dissent but add this further word on the significance of Part VI of his opinion. There, Justice Stevens describes the changing attitudes toward gay people and notes a parallel with the decline of stereotypical thinking about race and gender. The legitimacy of New Jersey's interest in forbidding discrimination on all these bases by those furnishing public accommodations is, as Justice Stevens indicates, acknowledged by many to be beyond question. The fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case.

Boy Scouts of America (BSA) is entitled, consistently with its own tenets and the open doors of American courts, to raise a federal constitutional basis for resisting the application of New Jersey's law. BSA has done that and has chosen to defend against enforcement of the state public accommodations law on the ground that the First Amendment protects expressive association: individuals have a right to join together to advocate opinions free from government interference. See Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984). BSA has disclaimed any argument that Dale's past or future actions, as distinct from his unapologetic declaration of sexual orientation, would justify his exclusion from BSA. See Tr. of Oral Arg. 12-13.
The right of expressive association does not, of course, turn on the popularity of the views advanced by a group that claims protection. Whether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group's rights. I conclude that BSA has not made out an expressive association claim, therefore, not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message. As Justice Stevens explains, no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way. To require less, and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expressive association into an easy trump of any antidiscrimination law.

Following Dale, a number of state and municipal governments responded to the Boy Scout’s clearer position on homosexuality by refusing the Boy Scouts access to public facilities, rescinding contractual relations, revoking privileges, or barring the Boy Scouts from participating in state-sponsored charitable programs. Numerous private organizations also retracted existing funding or refused to contribute to the Scouts, including at least 50 United Way chapters that stopped making financial contributions. As a matter of constitutional law, public entities, such as local public schools, would need to satisfy strict scrutiny to justify excluding the Scouts from equal access to public facilities if the reason for denying the Scouts’ access was viewpoint discrimination based on the Scouts’ position regarding homosexuality. An interest in ensuring compliance with local or state anti-discrimination laws would be a compelling interest for purposes of strict scrutiny. Under the underinclusiveness aspect of strict scrutiny, however, the government would have to show that all groups engaging in discriminatory practices in violation of government policy were being banned from access, not just the Scouts, or else the special burden placed on the Scouts would be the result of “unnecessary underinclusiveness,” and thus not the least discriminatory alternative. In some cases, the Scouts successfully challenged restrictions on access to public facilities on this ground.


29 See, e.g., Boy Scouts of America, South Florida Council v. Till, 136 F. Supp. 2d 1295, 1303-04, 1311 (S.D. Fla., 2001). Cf. Christian Legal Society v. Walker, 453 F.3d 853, 861-67 (7th Cir. 2006) (applying strict scrutiny based on viewpoint discrimination, preliminary injunction granted against public law school that revoked Christian Legal Society’s student organizational status for refusing membership to practicing homosexuals in violation of school’s anti-discrimination policy banning discrimination on grounds of sexual orientation, in part because the Muslim Students’ Association and Adventist Campus Ministries were recognized as student organizations despite their restricted memberships); Jana-Rock Construction, Inc. v. New York State Dep’t of Economic Develop., 438 F.3d 195, 207-09, 211-14 (2nd Cir. 2006) (“unnecessarily underinclusive” analysis needing to be done regarding whether it is constitutional to exclude persons of Portuguese and Spanish descent in affirmative action program for Hispanics, defined as Latin American Hispanics).
Where school administrators provide support for Boy Scout recruitment activities during school time for which student attendance and attention are mandatory, some courts have concluded that local schools boards have engaged in unlawful discriminatory conduct based on state or local anti-discrimination provisions.\textsuperscript{30} In other cases, courts have held that even if the First Amendment applies, because denial of access was to discourage discriminatory action of the Boy Scouts, such action was viewpoint neutral. Where the denial took place in a nonpublic forum, such as a government sponsored charity program, only rational review was triggered,\textsuperscript{31} as is typically for non-viewpoint discrimination in a nonpublic forum, discussed at § 1.2.6 & Table 3. Rational review has also been applied when the government denied funding or subsidies to Boy Scout groups,\textsuperscript{32} consistent with government grant and subsidies cases discussed at § 4.2. Faced with public pressure, the Boy Scouts voted in 2013 to change their national membership policy to allow youths to join without regard to sexual orientation; in 2015 to allow adult homosexuals to participate in leadership positions; and in 2017 lifted the ban on transgendered youths being Scouts. Local scout troops affiliated with churches may still restrict membership at the local level on religious grounds.

Outside the specific context of the Boy Scouts and homosexuality, the doctrine of \textit{Boy Scouts v. Dale} may have wider applicability. One author has noted, “The media has treated Dale mainly as a battle in the ongoing Kulturkampf between gay rights activists and their conservative opponents. However, . . . Dale was about the right of non-profit, private, expressive organizations of all ideological stripes – including church schools . . . – to set their membership and employment rules free from government interference.”\textsuperscript{33} This author concluded that district court precedents that a Christian school may not fire an unmarried teacher for becoming pregnant, contrary to Christian doctrine on sexual activity outside of marriage, should be decided differently after Dale.\textsuperscript{34}

On applicability of anti-discrimination laws, see also Elane Photography, LLC v. Willock, 309 P.3d 53 (N. Mex. 2012) (commercial photography business that offers its services to the public constitutes a “public accommodation” under New Mexico Human Rights Act, and thus cannot discriminate in service based on sexual orientation); Brush & Nib Studio, LC v. City of Phoenix, 418 P.3d 426, 441 (Ariz. Ct. App. 2018) (anti-discrimination law applied to wedding invitation and other wedding design business is a compelling interest and ban on denying service to same-sex couples is constitutional under \textit{Roberts v. United States Jaycees}, cited at the beginning of § 11.3).

\begin{thebibliography}{9}
\bibitem{31} See, e.g., Boy Scouts of America v. Wyman, 335 F.3d 80, 93-98 (2nd Cir. 2003).
\bibitem{32} Evans v. City of Berkeley, 40 Cal. Rptr. 3d 205, 211-17 (Cal. 2006).
\bibitem{34} \textit{Id.} at 83-90, citing Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3rd Cir. 1993); Vigars v. Valley Christian Center of Dublin, California, 805 F. Supp. 802 (N.D. Cal. 1992); Dolter v. Wahlert High Sch., 483 F. Supp. 266 (N.D. Iowa 1980).
\end{thebibliography}
On applicability of law burdening freedom of association of groups generally, see Laborers Local 236, AFL-CIO v. Walker, 749 F.3d 628 (7th Cir. 2014) (Wisconsin statute restricting collective bargaining ability of unions by providing that state and local government employers can bargain with most public unions (those not defined as “public safety employees”) only over base wages, and eliminating payroll deductions for union dues, does not violate union’s freedom of association or the right to petition the government for grievances, since provisions act directly only on state and local employers, not the unions).

§ 11.4 Freedom of Association Applied To Groups Alleged to Post a Threat of Violent Action of Other Harmful Conduct

1. Violent Action

The Court has considered a number of cases involving government regulations that sanction individuals for membership in groups alleged to pose a threat of violent action. Where the group engages in activity that involves “unprotected speech,” such as advocacy of imminent lawless action, discussed at § 6.2.1, membership in such a group is “unprotected” under a freedom of association analysis. As the Court stated in Scales v. United States, 35 “[T]he advocacy with which we are here concerned is not constitutionally protected speech . . . . We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.”

Where a threat of lawless action is not imminent, the First Amendment applies. During the Cold War, a number of these cases involved membership in the Communist Party. During the Holmesian era, inquiry into membership by the government tended to be upheld. For example, in 1951, in Garner v. Board of Public Works of the City of Los Angeles, 36 the Court held that a city could require its employees by affidavit to disclose their past or present membership in the Communist Party.

The outcome of these cases changed during the instrumentalist era. The Court required a finding that the individual shared in the illegal intent for the government to be able to regulate. For example, in 1967, in Keyishian v. Board of Regents, 37 the Court struck down as unconstitutional a conviction for membership in the Communist Party because there was no proof that the individual knew of any illegal objectives of the Party or intended to further them. Relying on Garner, four Holmesian Justices dissented in Keyishian. In United States v. Robel, 38 the Court made it clear that

37 385 U.S. 589, 605-10 (1967); id. at 623-25 (Clark, J., joined by Harlan, Stewart & White, JJ., dissenting).
38 389 U.S. 258, 264-68 (1967); id. at 268 (Marshall, J., took no part in the consideration or decision of this case); id. at 282-88 (White, J., joined by Harlan, J., dissenting).
mere “membership” in such a group was not enough to satisfy a strict scrutiny approach. The
government would have to show that the individual actively affiliated with the group, knowing of
its illegal activities, and had a specific intent to promote those ends. Only Holmesian Justices White
and Harlan were in dissent.

More recently, lower federal courts have upheld federal statutes passed after the terrorist attacks on
the World Trade Center in New York and other places on September 11, 2001 which have made it
a crime to provide “material support or resources to a foreign terrorist organization” so designated
by the federal government, despite the lack of a specific intent element regarding the terrorist
group’s goals. The courts have held that these statutes do not directly ban “expressive association,”
but rather the “conduct of providing material support,” and thus should be analyzed as content-
neutral regulations based on the harmful secondary effects of such conduct under O’Brien’s
intermediate scrutiny approach. Under such intermediate scrutiny, the statutes have been upheld as
constitutional as substantially related to curbing the spread of international terrorism, and not
substantially more burdensome than necessary.  

Where no such plausible content-neutral reason is apparent from the facts, a strict scrutiny approach
is used to determine the validity of the government regulation. For example, in Shelton v. Tucker, the
question was whether the state of Arkansas could ask its teachers to disclose every single
organization with which the teacher had been associated over a five-year period. The Court noted
that the “breadth of legislative abridgment must be viewed in the light of less drastic means for
achieving the same basic purpose,” and, applying a least restrictive alternative approach, held the
regulation unconstitutional because the state’s end in terms of “fitness and competency of its
teachers” could “be more narrowly achieved.”

An example of a regulation that might survive strict scrutiny would be a regulation merely requiring
faculty at private universities to affirm allegiance to the Constitution. For example, in Knight v.
Board of Regents, a three-judge district court held that a state does not violate the First Amendment
by requiring teachers at private schools to support the governmental systems which shelter and
nourish the institutions in which they teach. One author has noted that, as of 2003, 14 states
required loyalty oaths of teachers to uphold the Constitution, with 7 of those oaths applying to
teachers at private schools in addition to public schools. From that author’s perspective, such oaths
applied to teachers at private schools should be viewed as unconstitutional under strict scrutiny as

---

39 See, e.g., United States v. Afshari, 426 F.3d 1150, 1159-62 (9th Cir. 2005), rehearing en banc denied, 446 F.3d 915, 915 (2006); United States v. Hammoud, 381 F.3d 316, 328-31 (4th Cir. 2004). But see Afshari, 446 F.3d at 915-22 (Kozinski, J., joined by Pregerson, Reinhardt, Thomas & Paez, JJ., dissenting from denial of rehearing en banc) (ban on giving money should be viewed as prior restraint on speech, triggering strict scrutiny of Freedman v. Maryland, discussed at § 5.1).


not being directly related to controlling illegal conduct.\textsuperscript{42} For oaths taken by public school teachers, the \textit{Pickering} third-order rational review test would apply for speech by government employees, discussed at § 8.3, giving the government a better chance of success, as in \textit{Ohlson v. Phillips}.\textsuperscript{43}

Where the burden on a right of association is viewed as slight, as for a rule limiting the rights of prisoners to receive visitors, the Supreme Court indicated in \textit{Overton v. Bazzetta}\textsuperscript{44} that the proper standard of review is the 2nd-order reasonableness approach used in \textit{Turner v. Safley}. In an unusual case, the Second Circuit held in \textit{Church of American Knights of the Ku Klux Klan v. Kerik}\textsuperscript{45} that a ban on persons wearing masks at public gatherings, based on a concern with public safety and reducing criminal or violent activity, with an exception for masquerades, did not implicate the First Amendment at all. The court viewed the wearing of a mask as adding nothing to the expressive conduct of wearing a hood and robe. Probably the better analysis would be to view the regulation as either a minimal burden on associational rights triggering 2nd-order reasonableness review, or as a burden on speech in a public forum based on content-neutral concerns of reducing criminal activity, triggering an intermediate scrutiny approach, as analyzed by the district court in the case.

\section*{2. Other Kinds of Harms}

In \textit{NAACP v. Button}, the Court considered a Virginia statute that made it a crime for a person to refer another person to certain attorneys or group of attorneys, such as the legal staff of the NAACP.

\textbf{NAACP v. Button}  
\textbf{371 U.S. 415 (1963)}

Justice BRENNAN delivered the opinion of the Court.

This case originated in companion suits by the National Association for the Advancement of Colored People, Inc. (NAACP), and the NAACP Legal Defense and Education Fund, Inc. (Defense


Fund), brought in 1957 in the United States District Court for the Eastern District of Virginia. The suits sought to restrain the enforcement of Chapters 31, 32, 33, 35 and 36 of the Virginia Acts of Assembly, 1956 Extra Session, on the ground that the statutes, as applied to the activities of the plaintiffs, violated the Fourteenth Amendment. A three-judge court convened pursuant to 28 U.S.C. § 2281, after hearing evidence and making fact-findings, struck down Chapters 31, 32 and 35 but abstained from passing upon the validity of Chapters 33 and 36 pending an authoritative interpretation of these statutes by the Virginia courts. The complainants thereupon petitioned in the Circuit Court of the City of Richmond . . . . The Circuit Court held the chapters to be both applicable and constitutional. The holding was sustained by the Virginia Supreme Court of Appeals as to Chapter 33, but reversed as to Chapter 36, which was held unconstitutional under both state and federal law. Since no cross-petition was filed to review the Supreme Court of Appeals’ disposition of Chapter 36, the only issue before us is the constitutionality of Chapter 33.

There is no substantial dispute as to the facts; the dispute centers about the constitutionality under the Fourteenth Amendment of Chapter 33, as construed and applied by the Virginia Supreme Court of Appeals to include NAACP’s activities within the statute's ban against “the improper solicitation of any legal or professional business.” The Conference ordinarily will finance only cases in which the assisted litigant retains an NAACP staff lawyer to represent him. The Conference maintains a legal staff of 15 attorneys, all of whom are Negroes and members of the NAACP. The staff is elected at the Conference's annual convention. Each legal staff member must agree to abide by the policies of the NAACP, which, insofar as they pertain to professional services, limit the kinds of litigation which the NAACP will assist. Thus the NAACP will not underwrite ordinary damages actions, criminal actions in which the defendant raises no question of possible racial discrimination, or suits in which the plaintiff seeks separate but equal rather than fully desegregated public school facilities. The staff decides whether a litigant, who may or may not be an NAACP member, is entitled to NAACP assistance. The Conference defrays all expenses of litigation in an assisted case, and usually, although not always, pays each lawyer on the case a per diem fee not to exceed $60, plus out-of-pocket expenses. The assisted litigant receives no money from the Conference or the staff lawyers. The staff member may not accept, from the litigant or any other source, any other compensation for his services in an NAACP-assisted case. None of the staff receives a salary or retainer from the NAACP; the per diem fee is paid only for professional services in a particular case. This per diem payment is smaller than the compensation ordinarily received for equivalent private professional work. The actual conduct of assisted litigation is under the control of the attorney, although the NAACP continues to be concerned that the outcome of the lawsuit should be consistent with NAACP’s policies already described. A client is free at any time to withdraw from an action.

Chapter 33 as construed limits First Amendment freedoms. As this Court said in Thomas v. Collins, 323 U.S. 516, 537, ‘Free trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.’ Thomas was convicted for delivering a speech in connection with an impending union election under National Labor Relations Board auspices, without having first registered as a ‘labor organizer.’ He urged workers to exercise their rights under the National Labor Relations Act and join the union he represented. This Court held that the registration requirement as applied to his activities was constitutionally invalid. In the instant case, members of the NAACP urged Negroes aggrieved by the allegedly unconstitutional segregation of public schools in Virginia
to exercise their legal rights and to retain members of the Association's legal staff. Like Thomas, the Association and its members were advocating lawful means of vindicating legal rights.

We hold that Chapter 33 as construed violates the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association. In so holding, we reject two further contentions of respondents. The first is that the Virginia Supreme Court of Appeals has guaranteed free expression by expressly confirming petitioner's right to continue its advocacy of civil-rights litigation. But in light of the whole decree of the court, the guarantee is of purely speculative value. As construed by the Court, Chapter 33, at least potentially, prohibits every cooperative activity that would make advocacy of litigation meaningful. If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights. Broad prophylactic rules in the area of free expression are suspect. See, e.g., Near v. Minnesota, 283 U.S. 697; Shelton v. Tucker, 364 U.S. 479; Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

Resort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain. Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular. They are not an object of general competition among Virginia lawyers; the problem is rather one of an apparent dearth of lawyers who are willing to undertake such litigation. There has been neither claim nor proof that any assisted Negro litigants have desired, but have been prevented from retaining, the services of other counsel. We realize that an NAACP lawyer must derive personal satisfaction from participation in litigation on behalf of Negro rights, else he would hardly be inclined to participate at the risk of financial sacrifice. But this would not seem to be the kind of interest or motive which induces criminal conduct.

A final observation is in order. Because our disposition is rested on the First Amendment as absorbed in the Fourteenth, we do not reach the considerations of race or racial discrimination which are the predicate of petitioner's challenge to the statute under the Equal Protection Clause. That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner. See, e.g., Near v. Minnesota, 283 U.S. 697; Terminiello v. Chicago, 337 U.S. 1; Kunz v. New York, 340 U.S. 290. For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

Justice DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words. This Virginia Act is not applied across the board to all groups that use this method of obtaining and managing litigation, but instead reflects a legislative purpose to penalize the N.A.A.C.P. because it promotes desegregation of the races. Our
decision in *Brown v. Board of Education*, 347 U.S. 483, holding that maintenance of public schools segregated by race violated the Equal Protection Clause of the Fourteenth Amendment, was announced May 17, 1954. The amendments to Virginia's code, here in issue, were enacted in 1956. Arkansas, Florida, Georgia, Mississippi, South Carolina, and Tennessee also passed laws following our 1954 decision which brought within their barratry statutes attorneys paid by an organization such as the N.A.A.C.P. and representing litigants without charge.

The bill, here involved, was one of five that Virginia enacted “as parts of the general plan of massive resistance to the integration of schools of the state under the Supreme Court's decrees.” Those are the words of Judge Soper, writing for the court in *N.A.A.C.P. v. Patty*, D.C., 159 F. Supp. 503, 515. He did not indulge in guesswork. He reviewed the various steps taken by Virginia to resist our Brown decision, starting with the Report of the Gray Commission on November 11, 1955. Id., at 512. He mentioned the “interposition resolution” passed by the General Assembly on February 1, 1956, the constitutional amendment made to carry out the recommendation of the Report of the Gray Commission, and the address of the Governor before the General Assembly that enacted the five laws, including the present one. Id., at 513-515. These are too lengthy to repeat here. But they make clear the purpose of the present law – as clear a purpose to evade our prior decisions as was the legislation in *Lane v. Wilson*, 307 U.S. 268, another instance of a discriminatory state law. The fact that the contrivance used is subtle and indirect is not material to the question. “The Amendment nullifies sophisticated as well as simple-minded modes of discrimination.” Id., at 275. There we looked to the origins of the state law and the setting in which it operated to find its discriminatory nature. It is proper to do the same here.

Discrimination also appears on the face of this Act. The line drawn in § 54-78 is between an organization which has ‘no pecuniary right or liability’ in a judicial proceeding and one that does. As we said in *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 459, the N.A.A.C.P. and its members are “in every practical sense identical. The Association . . . is but the medium through which its individual members seek to make more effective the expression of their own views.” Under the statute those who protect a “pecuniary right or liability” against unconstitutional invasions may indulge in “the solicitation . . . of business for [an] attorney,” while those who protect other civil rights may not. This distinction helps make clear the purpose of the legislation, which, as Judge Soper said, was part of the program of “massive resistance” against *Brown v. Board of Education*, supra.

Justice WHITE, concurring in part and dissenting in part.

I agree that as construed by the Virginia Supreme Court, Chapter 33 does not proscribe only the actual control of litigation after its commencement, that it does forbid, under threat of criminal punishment, advising the employment of particular attorneys, and that as so construed the statute is unconstitutional.

Nor may the statute be saved simply by saying it prohibits only the “control” of litigation by a lay entity, for it seems to me that upon the record before us the finding of “control” by the Virginia Supreme Court must rest to a great extent upon an inference from the exercise of those very rights
which this Court or the Virginia Supreme Court, or both, hold to be constitutionally protected: advising Negroes of their constitutional rights, urging them to institute litigation of a particular kind, recommending particular lawyers and financing such litigation. Surely it is beyond the power of any State to prevent the exercise of constitutional rights in the name of preventing a lay entity from controlling litigation.

Justice HARLAN, whom Justice CLARK and Justice STEWART join, dissenting.

No member of this Court would disagree that the validity of state action claimed to infringe rights assured by the Fourteenth Amendment is to be judged by the same basic constitutional standards whether or not racial problems are involved. No worse setback could befall the great principles established by Brown v. Board of Education, 347 U.S. 483, than to give fairminded persons reason to think otherwise. With all respect, I believe that the striking down of this Virginia statute cannot be squared with accepted constitutional doctrine in the domain of state regulatory power over the legal profession.

The interest which Virginia has here asserted is that of maintaining high professional standards among those who practice law within its borders. This Court has consistently recognized the broad range of judgments that a State may properly make in regulating any profession. See, e.g., Dent v. West Virginia, 129 U.S. 114; Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608; Williamson v. Lee Optical Co., 348 U.S. 483. But the regulation of professional standards for members of the bar comes to us with even deeper roots in history and policy, since courts for centuries have possessed disciplinary powers incident to the administration of justice. See Cohen v. Hurley, 366 U.S. 117, 123-124; Konigsberg v. State Bar, 366 U.S. 36.

The regulation before us has its origins in the long-standing common-law prohibitions of champerty, barratry, and maintenance, the closely related prohibitions in the Canons of Ethics against solicitation and intervention by a lay intermediary, and statutory provisions forbidding the unauthorized practice of law. The Court recognizes this formidable history, but puts it aside in the present case on the grounds that there is here no element of malice or of pecuniary gain, that the interests of the NAACP are not to be regarded as substantially different from those of its members, and that we are said to be dealing here with a matter that transcends mere legal ethics – the securing of federally guaranteed rights. But these distinctions are too facile. They do not account for the full scope of the State's legitimate interest in regulating professional conduct. For although these professional standards may have been born in a desire to curb malice and self-aggrandizement by those who would use clients and the courts for their own pecuniary ends, they have acquired a far broader significance during their long development.

[A] State's felt need for regulation of professional conduct may reasonably extend beyond mere "ambulance chasing." In People ex rel. Courtney v. Association of Real Estate Taxpayers, 354 Ill. 102, 187 N.E. 823, a nonprofit corporation was held in contempt for engaging in the unauthorized practice of law. The Association was formed by citizens desiring to mount an attack on the constitutionality of certain tax rolls. Membership was solicited by the circulation of blank forms authorizing employment of counsel on the applicant's behalf and asking that property be listed for
litigation. The attorneys were selected, paid, and controlled by the corporation, which made their services available to the taxpayer members at no cost.

Similarly, several decisions have condemned the provision of counsel for their members by nonprofit automobile clubs, even in instances involving challenges to the validity of a statute or ordinance. In re Maclub of America, Inc., 295 Mass. 45, 3 N.E.2d 272, 105 A.L.R. 1360; People ex rel. Chicago Bar Ass'n v. Chicago Motor Club, 362 Ill. 50, 199 N.E. 1; see Opinion 8, Opinions of the Committee on Professional Ethics and Grievances, American Bar Assn.

The NAACP may be no more than the sum of the efforts and views infused in it by its members; but the totality of the separate interests of the members and others whose causes the petitioner champions, even in the field of race relations, may far exceed in scope and variety that body's views of policy, as embodied in litigating strategy and tactics. Thus it may be in the interest of the Association in every case to make a frontal attack on segregation, to press for an immediate breaking down of racial barriers, and to sacrifice minor points that may win a given case for the major points that may win other cases too. But in a particular litigation, it is not impossible that after authorizing action in his behalf, a Negro parent, concerned that a continued frontal attack could result in schools closed for years, might prefer to wait with his fellows a longer time for good-faith efforts by the local school board than is permitted by the centrally determined policy of the NAACP. Or he might see a greater prospect of success through discussions with local school authorities than through the litigation deemed necessary by the Association. The parent, of course, is free to withdraw his authorization, but is his lawyer, retained and paid by petitioner and subject to its directions on matters of policy, able to advise the parent with that undivided allegiance that is the hallmark of the attorney-client relation? I am afraid not.

Indeed, the potential conflict in the present situation is perhaps greater than those in the union, automobile club, and some of the other cases discussed above. For here, the interests of the NAACP go well beyond the providing of competent counsel for the prosecution or defense of individual claims; they embrace broadly fixed substantive policies that may well often deviate from the immediate, or even long-range, desires of those who choose to accept its offers of legal representations.

Third, it is said that the practices involved here must stand on a different footing because the litigation that petitioner supports concerns the vindication of constitutionally guaranteed rights.

But surely state law is still the source of basic regulation of the legal profession, whether an attorney is pressing a federal or a state claim within its borders. See In re Brotherhood of Railroad Trainmen, supra. The true question is whether the State has taken action which unreasonably obstructs the assertion of federal rights. Here, it cannot be said that the underlying state policy is inevitably inconsistent with federal interests. The State has sought to prohibit the solicitation and sponsoring of litigation by those who have no standing to initiate that litigation themselves and who are not simply coming to the assistance of indigent litigants. Thus the state policy is not unrelated to the federal rules of standing – the insistence that federal court litigants be confined to those who can demonstrate a pressing personal need for relief. See McCabe v. Atchison, T. & S.F.R. Co., 235 U.S.
151, 162; Massachusetts v. Mellon, 262 U.S. 447, 488; cf. Stark v. Wickard, 321 U.S. 288, 304-305, and cases cited therein. This is a requirement of substance as well as form. It recognizes that, although litigation is not something to be avoided at all costs, it should not be resorted to in undue haste, without any effort at extrajudicial resolution, and that those lacking immediate private need may make unnecessary broad attacks based on inadequate records. Nor is the federal interest in impeding precipitate resort to litigation diminished when that litigation concerns constitutional issues; if anything, it is intensified. United Public Workers v. Mitchell, 330 U.S. 75, 86-91.

Chapter 33 as construed does no more than prohibit petitioner and those associated with it from soliciting legal business for its staff attorneys or, under a fair reading of the state court's opinion and amounting to the same thing, for ‘outside’ attorneys who are subject to the Association's control in the handling of litigation which it refers to them. Such prohibitions bear a strong and direct relation to the area of legitimate state concern. In matters of policy, involving the form, timing, and substance of litigation, such attorneys are subject to the directions of petitioner and not of those nominally their clients. Further, the methods used to obtain litigants are not conducive to encouraging the kind of attorney-client relationships which the State reasonably may demand. There inheres in these arrangements, then, the potentialities of divided allegiance and diluted responsibility which the State may properly undertake to prevent.

The important function of organizations like petitioner in vindicating constitutional rights is not of course to be minimized, but that function is not, in my opinion, substantially impaired by this statute. Of cardinal importance, this regulatory enactment as construed does not in any way suppress assembly, or advocacy of litigation in general or in particular. Moreover, contrary to the majority's suggestion, it does not, in my view, prevent petitioner from recommending the services of attorneys who are not subject to its directions and control. See pp. 352-356, infra. And since petitioner may contribute to those who need assistance, the prohibition should not significantly discourage anyone with sufficient interest from pressing his claims in litigation or from joining with others similarly situated to press those claims. It prevents only the solicitation of business for attorneys subject to petitioner's control, and as so limited, should be sustained.
PART XII: THE RELIGION CLAUSES OF THE FIRST AMENDMENT

CHAPTER 12: BASIC ESTABLISHMENT CLAUSE DOCTRINE

§ 12.1 Introduction to Establishment Clause Doctrine ........................................... 603

§ 12.2 Four Approaches to Establishment Clause Doctrine Generally .................. 604

§ 12.3 Post-1954 Cases Involving Religious Influences Within Public Schools ............ 629

§ 12.4 Post-1954 Cases Involving Government Aid to Private Religious Schools ........... 643

§ 12.1 Introduction to Establishment Clause Doctrine

The Establishment and Free Exercise Clauses of the First Amendment provide that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Although this text literally creates only a congressional barrier, and thus originally states could establish their own state religions, the Establishment and Free Exercise Clauses have been incorporated into the 14th Amendment’s Due Process Clause, and thus today impose the same limits on states as on the federal government, as discussed at CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2 § 14.3 (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials). As with the freedom of speech and the press, this incorporation occurred for the Establishment and Free Exercise Clauses during the 1920s.1

Under the Establishment Clause, four different tests have been used to find an “establishment of religion.” They are: (1) whether the government action has a sole purpose to advance religion, or a principal or primary effect to advance religion, or creates an excessive entanglement between church and state, the so-called Lemon test; (2) whether an objective observer would think the government action was an “endorsement” of religion, thus departing from a “strict neutrality” approach toward religion; (3) whether the government action is “coercing or proselytizing” religion; and (4) whether the government action is an “unreasonable accommodation” of religion given our Nation’s “history and traditions.” In general the “Lemon test” reflects a liberal instrumentalist approach, the “endorsement” test reflects a natural law approach, the “coercion or proselytizing” test reflects a Holmesian approach, and the “history and traditions” test reflects a formalist approach.

As will be seen below, the Lemon case has been supported by recent liberal instrumentalist Justices on the Court, such as Justices Stevens and Ginsburg, as the precedents decided under the Lemon test

---

predominantly reflect the liberal policy of a strong separation of church and state. Justice O’Connor advocated replacing the *Lemon* test with an “endorsement” test, which Justices Blackmun, Souter and Breyer have followed in various cases. Justice Kennedy has focused more on “coercion” or “proselytizing” of religion. Chief Justice Rehnquist, and Justices Scalia and Thomas, have focused more on specific historical examples of accommodation between church and state at the time the Constitution was ratified, as well as specific legislative and executive traditions since ratification. That will likely be the approach of Chief Justice Roberts and Justice Alito. It is unclear whether Justices Sotomayor and Kagan will follow the *Lemon* test or an “endorsement” test approach.

§ 12.2 Four Approaches to Establishment Clause Doctrine Generally

1. The Natural Law Approach

In his treatise, *Commentaries on the Constitution of the United States*, published in 1833, Joseph Story wrote: "Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." Story continued: "The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age."

However, Justice Story understood that the Establishment Clause went far beyond responding to this limited vision. He noted in his treatise, “It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject. . . . Thus, the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship.” Justice Story added, “But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition . . . of all religious tests.”

---


3. *Id.* § 1873.
He could also have noted that the official presidential oath of office provides, in Article I, § 1, cl. 8, “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” Underscoring an intent to exclude religion from the national government’s life, there is no “so help me God” final clause to the oath, despite the wide-spread use of that phrase then, as now, to swear in witnesses at trials and in other oaths of the time.

In a later edition of Story’s COMMENTARIES, the editor added the following remark, viewed as consistent with Story’s beliefs: “[M]any regard it as a matter of serious concern that the Constitution does not expressly recognize the Supreme Being, or the fact that the nation is Christian, and are in favor of an amendment which shall embrace such recognition. The subject, however, appears as yet but slightly to influence the public mind.” Whether or not one regards this as a matter of serious concern, it is clear that even strong supporters of Christianity believed that to be consistent with Story’s views a constitutional amendment would be needed to commit the United States to the existence of a Supreme Being or to the country being a Christian nation. Even Justice Douglas’ famous dictum in Zorach v. Clauson⁴ that “we are a religious people whose institutions presuppose a Supreme Being” was stated in the context of applying a “no endorsement”-like, “strict neutrality” approach toward religion, and was used only to indicate that government being “hostile to religion” also violates the requirement of government “neutrality” under the Establishment Clause.

At the time of its ratification, the Establishment Clause prevented the federal government from interfering with the established churches in many states, typically Anglican or Congregationalist, as that would have been a law “respecting” the establishment of religion. Those state establishments all disappeared by the 1830s on freedom of religion grounds.⁶ When the Establishment Clause became incorporated into the 14th Amendment, the same vision of strict neutrality toward religion became applicable against the states. The Court noted in Everson v. Board of Education⁷ that the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers." In School District of Abington Township v. Schempp,⁸ the Court stated, "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality."

---

⁴ Id. at §§ 1879 n.(a) (5th ed. 1891) (Melville M. Bigelow, ed.).
⁵ 343 U.S. 306, 313 (1952).
⁷ 330 U.S. 1, 18 (1947).
A similarly broad principle of neutrality toward religion was expressed by James Madison, the principal drafter of the Establishment Clause. As the Court noted in Wallace v. Jaffree, in his "Memorial and Remonstrance Against Religious Assessments, 1785," James Madison wrote, in part:

1. Because we hold it for a fundamental and undeniable truth, “that Religion or the duty which we owe to our Creator and the [Manner of discharging it, can be directed only by reason and] conviction, not by force or violence.” The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. . . .

3. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?9

Madison held these views his whole life. Quoting from letters of Madison, a court noted in 1872: “‘Religion is not within the purview of human government.’ And again [Madison] says, ‘Religion is essentially distinct from human government, and exempt from its cognizance. A connection between them is injurious to both. There are causes in the human breast which insure the perpetuity of religion without the aid of law.’”10

The history surrounding the drafting of the Establishment Clause supports this vision of strict neutrality. As Justice Souter noted in Lee v. Weisman: “What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of ‘a religion,’ ‘a national religion,’ ‘one religious sect,’ or specific ‘articles of faith.’ The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for ‘religion’ in general.”11

---


Wallace v. Jaffree
472 U.S. 38 (1985)

Justice STEVENS delivered the opinion of the Court.

[T]he constitutionality of three Alabama statutes [is] questioned: (1) § 16-1-20, enacted in 1978, which authorized a 1-minute period of silence in all public schools “for meditation”; (2) § 16-1-20.1, enacted in 1981, which authorized a period of silence “for meditation or voluntary prayer”; and (3) § 16-1-20.2, enacted in 1982, which authorized teachers to lead “willing students” in a prescribed prayer to “Almighty God . . . the Creator and Supreme Judge of the world.”

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States. But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again. [See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)].

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See Board of Education v. Barnette, 319 U.S. 624, 633-634 (1943); id., at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.” Id., at 637.

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects – or even intolerance among “religions” – to encompass intolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943): “If there is any fixed star in our constitutional constellation, it is that no
The sponsor of the bill that became § 16-1-20.1, Senator Donald Holmes, inserted into the legislative record – apparently without dissent – a statement indicating that the legislation was an “effort to return voluntary prayer” to the public schools. Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated: “No, I did not have no other purpose in mind.” The State did not present evidence of any secular purpose.

The unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor of § 16-1-20.1 is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. The District Court found that the 1981 statute and its 1982 sequel had a common, nonsecular purpose. The wholly religious character of the later enactment is plainly evident from its text. When the differences between § 16-1-20.1 and its 1978 predecessor, § 16-1-20, are examined, it is equally clear that the 1981 statute has the same wholly religious character.

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served by § 16-1-20 before the enactment of § 16-1-20.1. Thus, only two conclusions are consistent with the text of § 16-1-20.1: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.

We must, therefore, conclude that the Alabama Legislature intended to change existing law and that it was motivated by the same purpose that the Governor's answer to the second amended complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes' testimony frankly described. . . . The addition of “or voluntary prayer” indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is “whether the government intends to convey a message of endorsement or disapproval of religion.”

[Dissents of Chief Justice Burger, and Justices Rehnquist and White, appear in the discussion of the formalist approach to the Establishment Clause, excerpted at § 12.2.2.]
The Court’s view in \textit{Wallace v. Jaffree} requiring strict neutrality regarding religion by government does not mean that all expressions by government officials of their belief in a Supreme Being are unconstitutional, or that all statements directed to them in their public capacities are unconstitutional. Such individuals, after all, have their own Free Exercise rights. Thus, statements addressed to government officials to aid them in the performance of their public duties, such as beginning each day’s legislative session with a prayer, as in \textit{Marsh v. Chambers}, excerpted at § 13.3, or beginning Supreme Court sessions with the phrase “God Save this Honorable Court,” are not unconstitutional. Personal statements by the President, such as “God Bless America” at the end of presidential speeches, also do not create an Establishment Clause problem.

By the same token, the oath most persons take at trial to “tell the truth, the whole truth, and nothing but the truth, so help me God” does not create an Establishment Clause problem, since the government does not require the individual to add the phrase “so help me God” if the individual objects. Similarly, as Justice O’Connor noted, concurring in \textit{Elk Grove Unified School District v. Newdow},\textsuperscript{12} “the oaths of judicial office, citizenship, and military and civil service all end with the (optional) phrase ‘[S]o help me God.’” See 28 U.S.C. § 453; 5 U.S.C. § 3331; 10 U.S.C. § 502; 8 CFR § 337.1.” The phrase mentioning God must be optional, however. In \textit{Torcaso v. Watkins},\textsuperscript{13} a case involving a Maryland statute that required an individual to profess a belief in God to become a notary public, a unanimous Supreme Court held, “We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’ Neither [a State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”

This view of liberty of conscience subsumed those who believed government should be kept separate from religion: (1) in order to protect religion, as evangelicals tended to hold; (2) in order to protect the secular interests of government, as Jefferson and other Deists tended to hold; or (3) in order to protect both, as Madison held. In his treatise, Professor Tribe noted:

\begin{quote}
[A]t least three distinct schools of thought . . . influenced the drafters of the [Religion Clauses]: first, the evangelical view (associated primarily with Roger Williams) that “worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained”; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests (public and private) “against ecclesiastical depredations and incursions”; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one.\textsuperscript{14}
\end{quote}

\textsuperscript{12} 542 U.S. 1, 36 n.* (2004) (O’Connor, J., concurring in the judgment).

\textsuperscript{13} 367 U.S. 488, 495 (1961).

\textsuperscript{14} \textsc{Laurence Tribe, American Constitutional Law} 1158-59 (2d ed. 1988) (citations omitted).
Regarding the enactment of the Northwest Territory Ordinance of 1787, that Ordinance supports a view of separation of church and state. Trying to use the Ordinance as an example of government accommodation of religion, Justice Scalia noted in his dissent in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*: “The [First Congress] reenacted the Northwest Territory Ordinance of 1787, . . . of which provided: ‘Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.’”15 While the background clause of this provision underscores the importance of “religion, morality, and knowledge,” the operative part of the provision states only that “schools and the means of education shall forever be encouraged.” It does not mention any government role to encourage “religion.” This is true despite the belief of most of the framers and ratifiers that religion tended to aid individuals in behaving morally. Even someone traditionally viewed as a religious skeptic, like Benjamin Franklin, noted that for most individuals religious beliefs aided them in not behaving in such a self-centered, or self-interested, manner.16

This drafting is consistent with Madison’s views, noted at § 12.2.1 n.10, that there are “causes in the human breast which insure the perpetuity of religion without the aid of law.” It is also consistent with other choices made by the framers and ratifiers, such as omitting the words, “So help me God,” from the official Presidential oath. President Washington, and later Presidents, have their free speech and free exercise rights to add that phrase at the end, if they so wish, but the framers and ratifiers were clear such a phrase was not part of the official oath of office.

While arguments of practice are relevant in a natural law constitutional analysis, the fact that the traditional practices of many states following ratification did not always live up to this vision of strict neutrality and liberty of conscience is not determinative from a natural law perspective. An analogous example involves the Equal Protection Clause as interpreted in *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Sweatt v. Painter*, 339 U.S. 629 (1950); and *Brown v. Board of Education*, 347 U.S. 483 (1954). As discussed at § 20.2-20.3 of *Charles D. Kelso & R. Randall Kelso, American Constitutional Law: An E-Coursebook Volumes 1 & 2* (2014) (http://libguides.stcl.edu/kelsomaterials), despite ratification of the Equal Protection Clause after the Civil War, during the formalist era the Court tolerated whites treating non-whites as second-class citizens based on traditional practices upholding, among other things, segregated schools, parks, restaurants, hotels, and railways cars under the doctrine of “separate but equal,” as permitted by *Plessy* and its progeny. During the Holmesian era, the Court banned the most extreme forms of such second-class treatment, as in *Sweatt*, where separate public law schools for whites and non-whites (University of Texas and Texas Southern University) were not in fact “equal.” However, it was not until *Brown*, and the cases which followed, that the Court rejected root-and-branch such second-class treatment. Every member of the Court today recognizes *Plessy* violated the central mandate of the Equal Protection Clause from its inception and allowed decades of unconstitutional behavior.

---


Similarly, state treatment of non-Christians – whether Moslems, Jews, Buddhists, Hindus, agnostics, atheists, or others – as second-class citizens by state endorsement of Christianity, such as posting the Ten Commandments in classrooms or courthouses, violates the central mandate of the Establishment Clause protecting liberty of conscience. The fact that such practices occurred over many decades does not make them lawful, just as decades of Jim Crow laws did not make those laws constitutional.

2. The Formalist Approach

As with other constitutional doctrines, the formalist approach to the Establishment Clause focuses on literal interpretation and specific historical intent, buttressed, as in substantive due process analysis, by specific legislative and executive practice, as discussed at §§ 25.1 nn.8-10 & 27.1.1 nn.5-6 of Charles D. Kelso & R. Randall Kelso, American Constitutional Law: An E-Coursebook Volumes 1 & 2 (2018 Orig. Ed. 2014) (http://libguides.stcl.edu/kelsomaterials). While such use of legislative and executive practice after ratification is inconsistent with a formalist preference for “static” interpretation, it is likely adopted here, as in the substantive due process area, for pragmatic reasons or as a matter of “settled law.” Aspects of literalness and specific historical intent could be used to support the concept of strict neutrality, as noted above at § 12.2.1. However, the result of most formalist analysis is more accommodating toward religion.

A representative case involves formalist dissents in Wallace v. Jaffree. Wallace involved a statute that provided at the beginning of each school day “a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer.” Given its legislative history, the majority held the statute endorsed prayer in violation of neutrality between church and state.

Wallace v. Jaffree
472 U.S. 38 (1985)

Chief Justice BURGER, dissenting.

Some who trouble to read the opinions in these cases will find it ironic – perhaps even bizarre – that on the very day we heard arguments in the cases, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation – or a moment of silence.

Inevitably some wag is bound to say that the Court's holding today reflects a belief that the historic practice of the Congress and this Court is justified because members of the Judiciary and Congress are more in need of Divine guidance than are schoolchildren. Still others will say that all this controversy is “much ado about nothing,” since no power on earth – including this Court and Congress – can stop any teacher from opening the school day with a moment of silence for pupils to meditate, to plan their day – or to pray if they voluntarily elect to do so.
It makes no sense to say that Alabama has “endorsed prayer” by merely enacting a new statute “to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence,” ante, at 2501 (O'Connor, J., concurring in judgment) (emphasis added). To suggest that a moment-of-silence statute that includes the word “prayer” unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion. . . . Today's decision recalls the observations of Justice Goldberg: “[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.” Abington School District v. Schempp, 374 U.S. 203, 306 (1963) (concurring opinion).

Justice WHITE, dissenting.

As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question “May I pray?” This is so even if the Alabama statute is infirm, which I do not believe it is, because of its peculiar legislative history.

Justice REHNQUIST, dissenting.

Thirty-eight years ago this Court, in Everson v. Board of Education, 330 U.S. 1, 16 (1947), summarized its exegesis of Establishment Clause doctrine thus: “In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’ Reynolds v. United States, [98 U.S. 145, 164 (1879) ].”

This language from Reynolds, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.” 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached
observer as a less than ideal source of contemporary history as to the meaning of the Religion
Clauses of the First Amendment.

Jefferson's fellow Virginian, James Madison, with whom he was joined in the battle for the
enactment of the Virginia Statute of Religious Liberty of 1786, did play as large a part as anyone
in the drafting of the Bill of Rights. He had two advantages over Jefferson in this regard: he was
present in the United States, and he was a leading Member of the First Congress. But when we turn
to the record of the proceedings in the First Congress leading up to the adoption of the Establishment
Clause of the Constitution, including Madison's significant contributions thereto, we see a far
different picture of its purpose than the highly simplified “wall of separation between church and
State.”

The language Madison proposed for what ultimately became the Religion Clauses of the First
Amendment was this: “The civil rights of none shall be abridged on account of religious belief or
worship, nor shall any national religion be established, nor shall the full and equal rights of
conscience be in any manner, or on any pretext, infringed.” Id., at 434.

On the same day that Madison proposed them, the amendments which formed the basis for the Bill
of Rights were referred by the House to a Committee of the Whole, and after several weeks' delay
were then referred to a Select Committee consisting of Madison and 10 others. The Committee
revised Madison's proposal regarding the establishment of religion to read: “[N]o religion shall be
established by law, nor shall the equal rights of conscience be infringed.” Id., at 729.

The Committee's proposed revisions were debated in the House on August 15, 1789. The entire
debate on the Religion Clauses is contained in two full columns of the “Annals,” and does not seem
particularly illuminating. See id., at 729-731. Representative Peter Sylvester of New York expressed
his dislike for the revised version, because it might have a tendency “to abolish religion altogether.”
Representative John Vining suggested that the two parts of the sentence be transposed; Representative Elbridge Gerry thought the language should be changed to read “that no religious
doctrine shall be established by law.” Id., at 729. Roger Sherman of Connecticut had the traditional
reason for opposing provisions of a Bill of Rights – that Congress had no delegated authority to
“make religious establishments”– and therefore he opposed the adoption of the amendment. Representative Daniel Carroll of Maryland thought it desirable to adopt the words proposed, saying
“[h]e would not contend with gentlemen about the phraseology, his object was to secure the
substance in such a manner as to satisfy the wishes of the honest part of the community.”

Madison then spoke, and said that “he apprehended the meaning of the words to be, that Congress
should not establish a religion, and enforce the legal observation of it by law, nor compel men to
worship God in any manner contrary to their conscience.” Id., at 730. He said that some of the state
conventions had thought that Congress might rely on the Necessary and Proper Clause to infringe
the rights of conscience or to establish a national religion, and “to prevent these effects he presumed
the amendment was intended, and he thought it as well expressed as the nature of the language
would admit.” Ibid.
Representative Benjamin Huntington then expressed the view that the Committee's language might “be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it.” Huntington, from Connecticut, was concerned that in the New England States, where state-established religions were the rule rather than the exception, the federal courts might not be able to entertain claims based upon an obligation under the bylaws of a religious organization to contribute to the support of a minister or the building of a place of worship. He hoped that “the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all.” Id., at 730-731.

Madison responded that the insertion of the word “national” before the word “religion” in the Committee version should satisfy the minds of those who had criticized the language. “He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word ‘national’ was introduced, it would point the amendment directly to the object it was intended to prevent.” Id., at 731. Representative Samuel Livermore expressed himself as dissatisfied with Madison's proposed amendment, and thought it would be better if the Committee language were altered to read that “Congress shall make no laws touching religion, or infringing the rights of conscience.” Ibid.

Representative Gerry spoke in opposition to the use of the word “national” because of strong feelings expressed during the ratification debates that a federal government, not a national government, was created by the Constitution. Madison thereby withdrew his proposal but insisted that his reference to a “national religion” only referred to a national establishment and did not mean that the Government was a national one. The question was taken on Representative Livermore's motion, which passed by a vote of 31 for and 20 against. Ibid.

The following week, without any apparent debate, the House voted to alter the language of the Religion Clauses to read “Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.” Id., at 766. The floor debates in the Senate were secret, and therefore not reported in the Annals. The Senate on September 3, 1789, considered several different forms of the Religion Amendment, and reported this language back to the House: “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.” C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment 130 (1964).

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference; the version which emerged from the conference was that which ultimately found its way into the Constitution as a part of the First Amendment. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The House and the Senate both accepted this language on successive days, and the Amendment was proposed in this form.

It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a
national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring
neutrality on the part of government between religion and irreligion. Thus the Court's opinion in
Everson – while correct in bracketing Madison and Jefferson together in their exertions in their
home State leading to the enactment of the Virginia Statute of Religious Liberty – is totally incorrect
in suggesting that Madison carried these views onto the floor of the United States House of
Representatives when he proposed the language which would ultimately become the Bill of Rights.

There are two main problems with use of this history to support a view that the Establishment Clause
does not require neutrality toward religion, but only no discrimination among sects. First, similar
to Justice Story’s view of the Establishment Clause, Madison believed that the federal government
was granted no affirmative power over religion. For Madison, that principle was reflected in the fact
that Article I, § 8 contained no power over religion. Second, as noted in Justice Souter’s passage
from Lee v. Weisman, cited at § 12.2.1 n.11, the framers rejected Madison’s more limited proposal
regarding “national religion” in favor of the broader language of the Establishment Clause.

In his opinion in Wallace, Justice Rehnquist also referred to passages by Justice Story concerning
the general sense of the American people, cited at § 12.2.1 n.2, to support the view that the
Establishment Clause only banned preferentialist statements in favor of one religious sect over
another. Conspicuous by its absent in Justice Rehnquist’s opinion, however, was citation to Justice
Story’s ultimate conclusion that the Establishment Clause was drafted as a prophylactic ban on any
national governmental power over religion, discussed at § 12.2.1 n.3.

Even under Justice Rehnquist’s view, which would permit nonpreferentialist statements of religion,
just not discrimination among religious sects, the typical formalist analysis is to view the facts in
an accommodationist manner. For example, Professor Strossen has noted about Justice Scalia:

A woman in the audience asked Justice Scalia why the rabbi's prayer in Lee v. Weisman
[excerpted at § 12.3, and involving a benediction at a high school graduation], which closely
paraphrased a traditional Jewish prayer of thanksgiving – the "Shehecheyanu" – did not violate
even Justice Scalia's limited view of the Establishment Clause. . . . He said that, despite its
traditional Jewish nature, the prayer at issue in Weisman was nonetheless not sufficiently
"sectarian" to trigger his limited version of the Establishment Clause because it was "not
uncongenial to any other religion." I fully share the questioner's flabbergasted response, which
she expressed in these understated terms: "That's a very interesting view of sectarianism." One
has to wonder, if Justice Scalia does not deem this government-sponsored prayer sufficiently
sectarian to violate his nonpreferentialist conception of the Establishment Clause, what
government-sponsored prayer, if any, would satisfy that limited conception.18


18 Nadine Strossen, Religion and Politics: A Reply to Justice Antonin Scalia, 24 Fordham Urb.
In 2005, in Van Orden v. Perry,19 excerpted at § 13.3, a case permitting a plaque of the Ten Commandments to be included among 16 other plaques on grounds in front of the Texas Capitol building, Justice Scalia phrased his preferred approach to the Establishment Clause as follows: “I would prefer [doctrine] that is in accord with our Nation's past and present practices, and that can be consistently applied – the central relevant feature of which is that there is nothing unconstitutional in a State's favoring religion generally, honoring God through public prayer and acknowledgment, or, in a nonproselytizing manner, venerating the Ten Commandments.” In support of such an approach, one commentator has noted, “Some of the earliest American colonies began as havens for religious believers. Religious institutions operated nearly the entire educational system in eighteenth-century America. . . . During the eighteenth century, Congress consistently permitted the performance of invocations and religious services in the United States Capitol.”20

Justice Thomas has argued for an even more accommodationist approach toward religion. In his view, the Establishment Clause should be viewed as not having been incorporated against the states,21 while also supporting the view that “establishment of religion” should be read “necessarily [to] involve actual legal coercion,” based in part on Justice Scalia’s observation that the “coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.”22

The final aspect of a formalist approach involves noting various traditional governmental practices that have supported religion throughout our Nation’s history, but which are claimed to violate a strict neutrality conception of the Establishment Clause.23 As noted at § 12.2.1 nn.12-13, some of these practices, like Presidential Oaths or Thanksgiving Day proclamations, do not necessarily violate a neutrality approach. Practices which do violate neutrality, such as posting the Ten Commandments in schools or courtrooms, should not make valid a formalist conception of the Establishment Clause, given text, purpose, and history arguments in favor of a strict neutrality approach, discussed at § 12.2.1, and discussion of Jim Crow laws and equal protection, noted at § 12.2.1 text following n.16.


23 See, e.g., McCreary County, Kentucky v. ACLU of Kentucky 125 S. Ct. 2722, 2748, 2750 (2005) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting); Wallace, 472 U.S. at 100-04 (Rehnquist, J., dissenting).

Page 616
In addition, it is perhaps not surprising that alleged “non-preferentialist” expressions of religion, particularly those tolerated in 19th-century and 20th-century America during the formalist era between 1873 and 1937, came against a backdrop of pervasive anti-Semitism24 and pervasive anti-Catholicism.25 That history of discrimination cautions of the dangers of embracing a “customs and traditions” formalist approach, and underscores the Framing generation’s concerns, as expressed by Madison, cited at § 12.2.1 n.9, that “in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.”

3. The Holmesian Approach

Like the natural law approach, the Holmesian approach to the Establishment Clause is based on the text, purpose, and history behind the clause, which, as noted at § 12.2.1, supports a view of government neutrality toward religion. However, reflecting the Holmesian deference-to-government mentality, the Holmesian application of neutrality is more deferential toward government than the natural law approach. For most Holmesians, this has meant that government must “coerce” or “proselytize” religion, not merely “endorse” religion, for the governmental practice to violate the neutrality principle. On the other hand, based on great deference to legislative and executive practice, some Holmesians have embraced the formalist approach toward the Establishment Clause which is based more on legislative and executive customs and traditions, as discussed at § 12.2.2. This has been true especially for conservative Holmesians, such as Justice Reed in the 1940s,26 or Justice Stewart in the 1960s,27 or Chief Justice Rehnquist in the 1980s through 2000s.28 Centrist and liberal Holmesians, however, such as Justices Frankfurter and Jackson in the 1940s through 1960s, have focused more on “proselytizing” or “coercion” as the appropriate inquiry.


26 See, e.g., Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 250-56 (1948) (Reed, J., dissenting) (customs and traditions support a public school during school hours having students attend voluntarily a class in religious education).


28 See, e.g., Wallace v. Jaffree. 472 U.S. 38, 100-03 (1985) (Rehnquist, J., dissenting) (customs and traditions support a moment of silence at the beginning of the public school day where the state statute provided that the moment of silence was for “meditation or prayer”); Lee v. Weisman, 505 U.S. 577, 632-36 (1992) (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting) (customs and traditions support school-sponsored benediction at high school graduation ceremony).
For example, Justice Jackson noted in *West Virginia State Board of Education v. Barnette*, 29 “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” In *Everson v. Board of Education*, 30 Justices Jackson and Frankfurter, in dissent, concluded that permitting aid to private religious schools was a form of proselytizing religion. In a dissent joined by Justices Frankfurter, Jackson, and Burton, Justice Rutledge said that the object of the Establishment Clause was to prevent any such aid to proselytize religion: “It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.”

This focus on “coercion” as the touchstone of Establishment Clause analysis is consistent with an emphasis on legislative and executive practice, which, during the first 150 years of the Nation’s history, was predominantly concerned with: “(1) institutional mingling between government and religion, (2) direct governmental support for a particular religion, (3) special privileges for a particular religion, or (4) coercion of religious belief, including the punishing of non-adherents.”

**Everson v. Board of Education**

330 U.S. 1 (1947)

Justice BLACK delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

The New Jersey statute is challenged as a “law respecting an establishment of religion.” The First Amendment, as made applicable to the states by the Fourteenth, Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, commands that a state ‘shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ These words of the First Amendment reflected

29 319 U.S. 624, 642 (1943).

30 330 U.S. 1, 18-28 (1947) (Jackson, J., joined by Frankfurter, J., dissenting); id. at 31-32 (Rutledge, J., joined by Frankfurter, Jackson & Burton, JJ., dissenting).

in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression ‘law respecting an establishment of religion,’ probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting the ‘establishment of religion’ requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

These practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights'
provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.” Reynolds v. United States, supra, 98 U.S. at page 164. We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power. See Interstate Consolidated Street Ry. Co. v. Commonwealth of Massachusetts, Holmes, J., supra 207 U.S. at 85, 88. New Jersey cannot consistently with the “establishment of religion” clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very
real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See Pierce v. Society of Sisters, 268 U.S. 510. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

Justice JACKSON, joined by FRANKFURTER, J., dissenting.

The Court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are inescapable on the record.

The Court concludes that this “legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools,” and it draws a comparison between “state provisions intended to guarantee free transportation” for school children with services such as police and fire protection, and implies that we are here dealing with “laws authorizing new types of public services . . . .” This hypothesis permeates the opinion. The facts will not bear that construction.

The Township of Ewing is not furnishing transportation to the children in any form; it is not operating school busses itself or contracting for their operation; and it is not performing any public service of any kind with this taxpayer's money. All school children are left to ride as ordinary paying passengers on the regular busses operated by the public transportation system. What the Township does, and what the taxpayer complains of, is at stated intervals to reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools. This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public busses they travel as fast and no faster, and are as safe and no safer, since their parents are reimbursed as before.
In addition to thus assuming a type of service that does not exist, the Court also insists that we must close our eyes to a discrimination which does exist. The resolution which authorizes disbursement of this taxpayer's money limits reimbursement to those who attend public schools and Catholic schools. That is the way the Act is applied to this taxpayer.

The New Jersey Act in question makes the character of the school, not the needs of the children determine the eligibility of parents to reimbursement. The Act permits payment for transportation to parochial schools or public schools but prohibits it to private schools operated in whole or in part for profit. Children often are sent to private schools because their parents feel that they require more individual instruction than public schools can provide, or because they are backward or defective and need special attention. If all children of the state were objects of impartial solicitude, no reason is obvious for denying transportation reimbursement to students of this class, for these often are as needy and as worthy as those who go to public or parochial schools. Refusal to reimburse those who attend such schools is understandable only in the light of a purpose to aid the schools, because the state might well abstain from aiding a profit-making private enterprise. Thus, under the Act and resolution brought to us by this case children are classified according to the schools they attend and are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths.

Justice RUTLEDGE, with whom Justice FRANKFURTER, Justice JACKSON and Justice BURTON agree, dissenting.

Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own. Today as then the furnishing of “contributions of money for the propagation of opinions which he disbelieves” is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever mount may be sought or given to that end.

The funds used here were raised by taxation. The Court does not dispute nor could it that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not “support” in law. But Madison and Jefferson were concerned with aid and support in fact not as a legal conclusion “entangled in precedents.” Remonstrance, Par. 3. Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.

Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedal form, pay the New Jersey tax. When the money so raised is used to pay for transportation to religious schools, the Catholic taxpayer to the extent of his proportionate share pays for the transportation of Lutheran, Jewish and otherwise religiously affiliated children to receive their non-Catholic religious instruction. Their parents likewise pay proportionately for the transportation of Catholic children to receive Catholic instruction. Each thus contributes to “the
propagation of opinions which he disbelieves” in so far as their religious differ, as do others who accept no creed without regard to those differences. Each thus pays taxes also to support the teaching of his own religion, an exaction equally forbidden since it denies “the comfortable liberty” of giving one's contribution to the particular agency of instruction he approves.

New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. Under the test they framed it cannot be said that the cost of transportation is no part of the cost of education or of the religious instruction given. That it is a substantial and a necessary element is shown most plainly by the continuing and increasing demand for the state to assume it. Nor is there pretense that it relates only to the secular instruction given in religious schools or that any attempt is or could be made toward allocating proportional shares as between the secular and the religious instruction. It is precisely because the instruction is religious and relates to a particular faith, whether one or another, that parents send their children to religious schools under the Pierce doctrine. And the very purpose of the state's contribution is to defray the cost of conveying the pupil to the place where he will receive not simply secular, but also and primarily religious, teaching and guidance.

Consistent with the dissenter’s view in Everson, in 1948, the Court invalidated an Illinois “released time” program in Illinois ex rel. McCollum v. Board of Education.32 In this program, religious teachers, employed by private religious groups, were permitted to come weekly into public school buildings during regular hours and, for children of parents who consented, substitute their religious teaching for the secular education in which other children continued to participate. The Court said that the state was helping to provide pupils with religious instruction through the state's machinery in violation of the separation of church and state. The only dissenter was Justice Reed, who pointed out that Thomas Jefferson approved such a program at the University of Virginia. Adopting the formalist focus on customs and tradition, as conservative Holmesian Chief Justice Rehnquist has often done, conservative Holmesian Justice Reed allowed this history of past practice to be determinative of constitutional meaning.

In Zorach v. Clauson,33 decided in 1952, the Court upheld a "released time" program in which students, whose parents had authorized their participation, could leave the school building and go to religious centers for religious instruction or devotional exercises. Other students remained in their classrooms. In dissent, Justice Jackson noted that there was still an element of coercion present, since the school “serves as a temporary jail for a pupil who will not go to church.” Jackson said, “This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages, first, that the State compel each student to yield a large part of his time for public secular education and, second, that some of it be 'released' to him on condition that he devote it to sectarian religious purposes.”

32 333 U.S. 203, 211-12 (1948); id. at 250-56 (Reed, J., dissenting).

33 343 U.S. 306, 308-10 (1952); id. at 324 (Jackson, J., dissenting).
Justice Frankfurter also dissented in *Zorach*. He stated, “When constitutional issues turn on facts, it is a strange procedure indeed not to permit the facts to be established. When such is the case, there are weighty considerations for us to require the State court to make its determination only after a thorough canvass of all the circumstances and not to bar them from consideration. If we are to decide this case on the present record, however, a strict adherence to the usage of courts in ruling on the sufficiency of pleadings would require us to take as admitted the facts pleaded in the appellants' complaint, including the fact of coercion, actual and inherent. Even on a more latitudinarian view, I cannot see how a finding that coercion was absent, deemed critical by this Court in sustaining the practice, can be made here, when appellants were prevented from making a timely showing of coercion because the courts below thought it irrelevant.”

A case example involving Holmesian concern with proselytizing and coercion, versus formalist focus on historical traditions, versus natural law strict neutrality, appeared in *Lee v. Weisman*, excerpted at § 12.3. The critical fifth vote in *Lee v. Weisman* to hold unconstitutional an invocation or benediction at a high school graduation ceremony was Justice Kennedy, who authored the majority opinion for the Court. Based on history, the formalist approach would have permitted such an invocation or benediction, while the natural law strict neutrality approach was against it. Focusing on the Holmesian concern with “coercion,” Justice Kennedy noted that opening the graduation with an invocation or benediction created a coercive pressure on students to participate in, or appear to participate in, a religious exercise, given the fact that presence at graduation is, in a practical sense, obligatory. Justice Kennedy explained that “the lesson of history that was and is the inspiration for the Establishment Clause, [is] the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk the freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.”

An indication of how close the issue of “coercion” is in *Weisman* is the fact that, according to Justice Blackmun’s private court papers, which were made public in 2004, Justice Kennedy initially voted in the case to uphold the graduation invocation and benediction as not being coercive. He was assigned to write that opinion, but in drafting the opinion he changed his mind, eventually viewing the invocation and benediction as creating too much subtle coercive pressure. He thus switched his vote and wrote the opinion for himself and the other more liberal Justices on the Court. Perhaps this partly explains Justice Scalia’s bitter dissent, and his focus on why in his view there was no unconstitutional coercion present in *Weisman*.

---

34 *Id.* at 322-23 (Frankfurter, J., dissenting).

35 *Id.* at 591-92.

36 See, *e.g.*, Charles Lane, *Blackmun’s papers shine spotlight on control of high court*, Washington Post (March 8, 2004)

37 505 U.S at 636-44 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).
4. The Instrumentalist Approach

In 1971, in *Lemon v. Kurtzman*, the Court invalidated statutes of Rhode Island and Pennsylvania that provided financial aid to non-public schools or their teachers, the schools being primarily Roman Catholic schools. The Rhode Island statute paid a bonus of up to 15% of the regular salary for teachers of secular subjects, provided the teacher used only teaching materials used in the public schools and agreed not to teach a course in religion while receiving the supplement. The Pennsylvania law reimbursed schools for expenditures on secular educational services involving salaries, textbooks, and instructional materials. Although more of a conservative formalist during his time on the Court, in this case Chief Justice Burger based his decision on following the precedents of the instrumentalist era. Thus, the so-called “Lemon test” reflects a liberal instrumentalist perspective on the Establishment Clause. In *Lemon*, Chief Justice Burger noted that three concerns may be gleaned from the Court’s recent Establishment Clause cases:

1. The law must have a secular legislative purpose;
2. Its principal or primary effect must be one that neither advances nor inhibits religion;
3. The law must not foster an excessive government entanglement with religion.

*Lemon v. Kurtzman*

403 U.S. 602 (1971)

Chief Justice BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster “an excessive government entanglement with religion.” *Walz*, supra, at 674.

---

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

In *Allen* the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were in fact instrumental in the teaching of religion. 392 U.S., at 248. The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion.

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Zorach v. Clauson, 343 U.S. 306, 312 (1952); Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting). Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. . . . Here we find that both statutes foster an impermissible degree of entanglement.

*(a) Rhode Island program*

The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act.
The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statues either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools constituted “an integral part of the religious mission of the Catholic Church.” The various characteristics of the schools make them “a powerful vehicle for transmitting the Catholic faith to the next generation.” This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

(b) Pennsylvania program

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system that is very similar to the one existing in Rhode Island. According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes “any subject matter expressing religious teaching, or the morals or forms of worship of any sect.” In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.
Justice Douglas concurred, with Justice Black. Justice Douglas said that the principal “raison d’être” for the existence and growth of Catholic schools in this country was that Protestant groups were perverting the public schools by using them to propagate their faith. After much conflict during the 19th century, religious instruction was eliminated from public schools and the use of public funds to support religious schools was banned. The situation now has changed and public funds are supplied to sectarian schools in various ways. But this may result in two kinds of forbidden entanglement: government through grants or otherwise may (1) punish a sect for propagation of its faith or (2) deprive a teacher, under threats of reprisal, of the right to give a sectarian construction to matters of history or literature, or to use the teaching of those subjects to inculcate a religious creed or dogma. Justice White, dissenting in part, said that the states were helping to finance the important secular function of education. That religion may incidentally benefit does not convert the laws into impermissible establishments of religion. In his view, the Rhode Island Act clearly augmented the salaries of teachers in nonpublic schools teaching only secular subjects, and thus was constitutional, while a trial should have been held on whether the Pennsylvania Act, which on its face only reimbursed for secular educational services, in fact financed religious instruction by the state.39

In applying the Lemon test, the Court has noted that the state's motive, benign or not, is not determinative. In 1943, the Court had noted in West Virginia State Board of Education v. Barnette:

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.40

Reflecting these concerns, the Lemon test, particularly as applied by liberal instrumentalist Justices, has been used to support sensitivity to religious diversity and the inclusion of all persons of different faiths or non-believers as equal citizens in American society.41 It also supports pluralistic democracy by serving as “a prophylactic measure that (1) protects religious liberty and autonomy, including the protection of taxpayers from being forced to support religious ideologies to which they are opposed; (2) stands for equal citizenship without regard to religion, . . . ; (3) protects against the destabilizing

39 Id. at 626-42 (Douglas, J., joined by Black, J., concurring); id. at 665-71 (White, J., concurring in part and dissenting in part).


influence of having the polity divided along religious lines; (4) promotes political community; (5) safeguards the autonomy of the state to protect the public interest; (6) shelters churches from the corrupting influences of the state; and (7) promotes religion in the private sphere.”

Even under the instrumentalist approach as reflected in Lemon, the Court held in McGowan v. Maryland that a state law requiring businesses to be closed on Sunday, while having “strongly religious origin[s],” and thus being accommodating to religion, was nonetheless permissible because it had a secular purpose of providing “a uniform day of rest for all citizens.” In Walz v. Tax Commission of City of New York, the Court held that granting property tax exemptions to “religious, educational, or charitable” non-profit organizations did not violate the Establishment Clause, but was a neutral law in support of non-profit enterprises generally. In Gillette v. United States, the Court held that creating an exception to draft laws for conscientious objectors was valid, despite such an exemption having a purpose of accommodating views of religious conscientious objectors, because the law was supported by the secular, pragmatic consideration of the difficulty of converting a sincere conscientious objector into an effective fighting man. In Rosenberger v. Rector and Visitors of the University of Virginia, excerpted at § 2.2, the Court permitted a university to impose on students a fee to support a diversity of viewpoints, including religious viewpoints, because excluding religious viewpoints would be “hostile” to religion and would deny individuals rights under the Free Speech Clause of the First Amendment. In addition, in a number of cases involving the Free Exercise Clause, such as Sherbert v. Verner, excerpted at § 14.2, the Court has held that states must accommodate the beliefs of religious citizens by exempting them from generally applicable regulations, and this is not an unconstitutional legislative purpose.

§ 12.3 Post-1954 Cases Involving Religious Influences Within Public Schools

The matter of prayer in school was first considered during the instrumentalist era in Engel v. Vitale, decided in 1962. In Engel, the Court struck down a policy of having teachers, at the beginning of each school day, say a non-denominational prayer. Students were not compelled to join in the prayer over their parents’ objection. The Court noted that, because of the Establishment Clause’s ban on any law “respecting an establishment of religion,” a state is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any
program of governmentally sponsored religious activity – even if observance by students is voluntary. Here, there was an indirect coercive pressure on religious minorities to conform to the prevailing officially approved religion. Moving beyond this Holmesian focus on “coercion” as the touchstone of the analysis, the Court then noted, “But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”

Justice Douglas, concurring in *Engel*, said that the state cannot finance a religious exercise, such as this prayer, even if the dollar amounts are minuscule. For Justice Douglas, “no matter how briefly the prayer is said, . . . the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution.” Justice Douglas acknowledged that under this view it is also unconstitutional to open each legislative session with a prayer given by a chaplain paid by Congress, or for the Supreme Court’s Crier to open each Court session with the phrase, “God save the United States and this Honorable Court.” The only dissenter was Holmesian Justice Stewart, who said that an official religion was not being established by letting those who want to say a prayer say it. Justice Stewart concluded that no one was being “coerced,” and the state had merely recognized and followed “deeply entrenched and highly cherished spiritual traditions of our Nation.” Justices Frankfurter and White took no part in the decision of the case.

One year later, in *School District of Abington Township v. Schempp*, the Court struck down a Pennsylvania law that required that at least 10 verses from the Holy Bible shall be read, without comment, at the opening of public school on each school day, with children to be excused upon the written request of their parents or guardian. Justice Clark said that the state law required a religious exercise conducted by the state. Pointing to “alternative use” of the King James version of the Bible or the Catholic Douay version, Justice Clark wrote of the “pervading religious character” of the readings, and that the Bible was not being used as an instrument for moral inspiration or a reference for the teaching of secular subjects. The Court rejected as defenses that individual students may be excused on parental request or that the encroachment on the First Amendment might be relatively minor, or that unless these religious exercises were permitted there will be a "religion of secularism" hostile to religion. Justice Clark did acknowledge, however, that the Bible is worthy of study for its literary and historic qualities if presented objectively as part of a secular program of education.

As in *Engel*, Justice Stewart dissented in this case. In this case, he grounded his analysis more clearly in a Holmesian concern with “coercion,” rather than a formalist concern with “customs and traditions.” He stated, “[I]f such exercises were held either before or after the official school day,

---

48 *Id.* at 439-44 (Douglas, J., concurring).

49 *Id.* at 436 (Frankfurter, J., took no part in the decision of the case; White, J., took no part in the consideration or decision of the case); *id.* at 444-50 (Stewart, J., dissenting).


51 *Id.* at 223-27.
or if the school schedule were such that participation were merely one among a number of desirable alternatives, it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief. On the other hand, a law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who did not wish to participate. And even under a law containing an excusal provision, if the exercises where held during the school day, and no equally desirable alternative were provided by the school authorities, the likelihood that children might be under at least some psychological compulsion to participate would be great.**52

In 1980, in Stone v. Graham,53 the Court held that display of a copy of the Ten Commandments on the walls of public classrooms violated the Establishment Clause as its sole purpose was to advance religion. The decision was per curiam, and summarily reached without full briefing and argument.

The Court held in 1985 in Wallace v. Jaffree,54 excerpted at § 12.2.1, that an Alabama statute which provided that at the beginning of each school day “a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer” was unconstitutional as having the purpose of advancing religion. In cases since 1986, statutes providing for “a moment of silence” at the beginning of each school day have been upheld if based on the secular purposes to solemnize the beginning of the school day; to help enable students to pause, settle down, compose themselves, and focus on the day ahead, making for a better learning environment; and to create a better atmosphere to deal with problems of student self-respect, discipline, and violence. For example, in 2001, in Brown v. Gilmore,55 the Fourth Circuit upheld a Virginia “minute of silence” statute which provided for a minute of silence at the beginning of the school day so that “each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.”

52 Id. at 318-19 (Stewart, J., dissenting)

53 449 U.S. 39, 40-43 (1980). Four Justices dissented in the case. Chief Justice Burger and Justice Blackmun indicated they would grant certiorari and give the case plenary consideration. Justice Stewart also dissented from the summary reversal, indicating his view that, so far as appears, the lower courts applied correct constitutional criteria. Justice Rehnquist filed a dissent, stating that the statute did have a secular purpose of acknowledging the role the Ten Commandments has played in the social, cultural, and historical development of our Nation. Id. at 43 (Burger, C.J., joined by Blackmun, J., dissenting); id. at 43 (Stewart, J., dissenting); id. at 44-46 (Rehnquist, J., dissenting).


55 258 F.3d 265, 270-73, 277-78 (4th Cir. 2001) (focus on solmenization and student violence). See also Bown v. Gwinnett County Sch. Dist., 112 F. 3d 1464, 1471-72 (11th Cir. 1997) (upholding Georgia’s moment of silence statute based on the purposes to provide students with a moment of quiet reflection to think about the upcoming day and to help develop self-respect and discipline). See generally Elizabeth Anne Walsh, Shh! State Legislators Bite Your Tongues: Semantics Dictate the Constitutionality of Public School “Moment of Silence” Statutes, 43 Cath. Law. 225 (2004).
In 1987, in *Edwards v. Aguillard*, the Court held that Louisiana's Creationism Act, which forbade the teaching of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of “creation science,” was unconstitutional because the purpose of the Creationism Act was to endorse a particular religious doctrine regarding creation. Dissenting in *Aguillard*, Justice Scalia, joined by Chief Justice Rehnquist, observed:

[D]iscerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. . . . In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, . . . or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for the sole purpose of even a single legislator is probably to look for something that does not exist.

Since *Aguillard*, a similar issue has resurfaced regarding legislative attempts to require the theory of “Intelligent Design” (ID) to be taught in science classes along with the theory of evolution. While not explicitly based on the story of creation in Genesis, the theory of intelligent design does posit some intelligent force overseeing nature, rather than Darwin’s theory of natural selection. As of 2014, this issue had not reached the Supreme Court, but, in *Kitzmiller v. Dover Area School District*, a lower federal court ruled that requiring ID to be taught in public school constituted government endorsement of religion, under the endorsement test, and had a religious purpose, thus violating the first prong of the *Lemon* test. The court noted, “Although proponents of [ID] occasionally suggest that the designer could be a space alien or a time-traveling cell biologist, no serious alternative to God as the designer has been proposed by members.” Quoting the views of the National Academy of Sciences, the court also noted, “Creationism, intelligent design, and other claims of supernatural intervention in the origin of life or of species are not science because they are not testable by the methods of science. These claims subordinate observed data to statements based on authority, revelation, or religious belief.”

---


Most commentators have similarly concluded that teaching “Intelligent Design” would violate the Lemon test, Justice O’Connor’s endorsement test, or Justice Kennedy’s “coercion or proselytizing” test.60 However, one author has argued that “intelligent design theory [is] about the limits of scientific explanation,” and that the real question in these cases should be whether “theories about the limits of science belong in science courses?”61 Other authors have been more willing to embrace ID, with one author arguing that ID has “presented an array of sophisticated and empirically grounded arguments supporting the notion that intelligent agency may do a better job of accounting for certain aspects of the natural world, or the natural world as a whole, than non-agent explanations, such as natural selection or scientific laws working on the unguided interaction of matter.”62

An easier case for unconstitutionality would be any attempt to ban the teaching of evolution in the public schools, such as occurred in the famous Scopes trial in Tennessee in 1925, or was involved in a similar Arkansas statute invalidated by the Supreme Court in 1968. Both cases involved a state statute that prohibited public school teachers and public university professors from teaching the theory that humans evolved from other species, or from using textbooks that contained material on evolution. In Epperson v. Arkansas,63 a unanimous Court invalidated the Arkansas statute, with Justice Fortas’ majority opinion holding that the statute had a sole purpose to advance religion, noting, "It is clear that fundamentalist sectarian conviction was and is the law's reason for existence."

By the beginning of the natural law era, in 1986, the Court had concluded that statements appearing to be directly in support of religion may have a secular purpose if they reflect what the Court has called “ceremonial deism.” Under this concept, as explained by Justice O’Connor, concurring in the judgment in Elk Grove Unified School District v. Newdow:

One such purpose is to commemorate the role of religion in our history. . . . It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.


63 393 U.S. 97, 107-08 (1968); id. at 116 (Stewart, J., concurring in the result).
Facially religious references can serve other valuable purposes in public life as well. . . . Such references “serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references . . . solemnize an occasion [and not] invoke divine provenance.64

Consistent with Justice O’Connor’s concurrence in Newdow, in Newdow v. Rio Linda Union School Dist., 597 F.3d 1007 (9th Cir. 2010), the Ninth Circuit held that voluntary recitation of the Pledge of Allegiance even with the phrase “Under God” advanced the secular purposes of (1) underscoring the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which government cannot take away, and (2) adding a note of importance to the Pledge as a matter of ceremonial deism. This decision departed from the Ninth Circuit’s earlier ruling in Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003) (“Under God” in Pledge unconstitutional), vacated on standing grounds sub. nom. Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004). See also Newdow v. Peterson, 753 F.3d 105 (2nd Cir. 2014) (motto “In God We Trust” on United States currency does not violate the Establishment Clause), and cases cited therein.

If a phrase reflects “ceremonial deism,” the question of whether a particular statement violates the Establishment Clause then turns under Lemon to the question whether the statement has a “principal or primary effect” to advance religion. Under the natural law “neutrality” approach, the issue is whether it constitutes an “endorsement” of religion. Under the Holmesian approach, the issue is whether it constitutes “coercion or proselytizing” of religion.

Lee v. Weisman
505 U.S. 577 (1992)

Justice KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

It has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled “Guidelines for Civic Occasions,” prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with “inclusiveness and sensitivity,” though they acknowledge that “[p]rayer of any kind may be

---

inappropriate on some civic occasions.” App. 20-21. The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian. Agreed Statement of Facts ¶ 17, id., at 13.

Rabbi Gutterman's prayers were as follows: “INVOCATION. God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust. For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled. AMEN”

“BENEDICTION. O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. AMEN” Id., at 22-23.

The school board (and the United States, which supports it as amicus curiae) argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation. We assume this to be so in addressing the difficult case now before us, for the significance of the prayers lies also at the heart of Daniel and Deborah Weisman's case.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.” Lynch, supra, at 678; see also County of Allegheny, supra, 492 U.S., at 591, quoting Everson v. Board of Ed. of Ewing, 330 U.S. 1, 15-16 (1947). The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undeniable. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

Page 635
Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where, as we discuss below, subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the “Guidelines for Civic Occasions,” and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that “it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government,” Engel v. Vitale, 370 U.S. 421, 425 (1962), and that is what the school officials attempted to do.

Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation, to the statement of the Court of Appeals for the Sixth Circuit, picked up by Judge Campbell's dissent in the Court of Appeals in this case, that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. Stein, 822 F.2d, at 1409; 908 F.2d 1090, 1098-1099 (CA1 1990) (Campbell, J., dissenting) (case below); see also Note, Civil Religion and the Establishment Clause, 95 Yale L.J. 1237 (1986). If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.
The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. A principal ground for his view was: “[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.” Memorial and Remonstrance Against Religious Assessments (1785), in 8 Papers of James Madison 301 (W. Rachal, R. Rutland, B. Ripel, & F. Teute eds. 1973).

These concerns have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject. Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. Engel v. Vitale, supra, 370 U.S., at 425. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. See, e.g., School Dist. of Abington v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 261-262 (1990) (Kennedy, J., concurring). Our decisions in Engel v. Vitale, 370 U.S. 421 (1962), and School Dist. of Abington, supra, recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S., at 661 (Kennedy, J., concurring in judgment in part and dissenting in part). What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no
doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. Brittain, Adolescent Choices and Parent-Peer Cross-Pressures, 28 Am. Sociological Rev. 385 (June 1963); Clasen & Brown, The Multidimensionality of Peer Pressure in Adolescence, 14 J. of Youth and Adolescence 451 (Dec. 1985); Brown, Clasen, & Eicher, Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents, 22 Developmental Psychology 521 (July 1986). To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a de minimis character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. . . .

Justice BLACKMUN, with whom Justice STEVENS and Justice O'CONNOR join, concurring.

I join the Court's opinion today because I find nothing in it inconsistent with the essential precepts of the Establishment Clause developed in our precedents. The Court holds that the graduation prayer is unconstitutional because the State “in effect required participation in a religious exercise,” Ante, at 2659. Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.
But it is not enough that the government restrain from compelling religious practices: It must not engage in them either. See Schempp, 374 U.S., at 305 (Goldberg, J., concurring). The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion. See, e.g., id., at 223; id., at 229 (Douglas, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 72 (1985) (O'Conner, J., concurring in judgment) (“The decisions [in Engel and Schempp] acknowledged the coercion implicit under the statutory schemes, but they expressly turned only on the fact that the government was sponsoring a manifestly religious exercise” (citation omitted)); Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973) (“[P]roof of coercion . . . [is] not a necessary element of any claim under the Establishment Clause”). The Establishment Clause proscribes public schools from “conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred,” County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 593 (1989) (internal quotation marks omitted; emphasis in original), even if the schools do not actually “impos[e] pressure upon a student to participate in a religious activity.” Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part and concurring in judgment). The mixing of government and religion can be a threat to free government, even if no one is forced to participate. When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.

Justice SOUTER, with whom Justice STEVENS and Justice O'CONNOR join, concurring.

[T]his Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement. For example, in County of Allegheny, [492 U.S. 573 (1989)], we forbade the prominent display of a nativity scene on public property; without contesting the dissent's observation that the crèche coerced no one into accepting or supporting whatever message it proclaimed, five Members of the Court found its display unconstitutional as a state endorsement of Christianity. Id., at 589-594, 598-602. Likewise, in Wallace v. Jaffree, 472 U.S. 38 (1985), we struck down a state law requiring a moment of silence in public classrooms not because the statute coerced students to participate in prayer (for it did not), but because the manner of its enactment “convey[ed] a message of state approval of prayer activities in the public schools.” Id., at 61; see also id., at 67-84 (O'Connor, J., concurring in judgment). Cf. Engel v. Vitale, 370 U.S., at 431 (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that”).

While the Establishment Clause's concept of neutrality is not self-revealing, our recent cases have invested it with specific content: the State may not favor or endorse either religion generally over nonreligion or one religion over others. See, e.g., County of Allegheny, 492 U.S., at 589-594, 598-602; see also Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L.Rev. 993 (1990). This principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, ensuring that religious belief is irrelevant to every citizen's standing in the political community, see County of Allegheny, supra, 492 U.S., at 594; J. Madison, Memorial and Remonstrance Against Religious Assessments (1785), in 5 The
Founders' Constitution, at 82-83, and protecting religion from the demeaning effects of any governmental embrace, see id., at 83. Now, as in the early Republic, “religion & Govt. will both exist in greater purity, the less they are mixed together.” Letter from J. Madison to E. Livingston (July 10, 1822), in 5 The Founders' Constitution, at 106. Our aspiration to religious liberty, embodied in the First Amendment, permits no other standard.

Justice SCALIA, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice THOMAS join, dissenting.

Three Terms ago, I joined an opinion recognizing that the Establishment Clause must be construed in light of the “[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.” That opinion affirmed that “the meaning of the Clause is to be determined by reference to historical practices and understandings.” It said that “[a] test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.” County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 657, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

These views of course prevent me from joining today's opinion, which is conspicuously bereft of any reference to history. In holding that the Establishment Clause prohibits invocations and benedictions at public-school graduation ceremonies, the Court – with nary a mention that it is doing so – lays waste a tradition that is as old as public-school graduation ceremonies themselves, and that is a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally. As its instrument of destruction, the bulldozer of its social engineering, the Court invents a boundless, and boundlessly manipulable, test of psychological coercion . . . .

The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced “peer-pressure” coercion; it lies, rather, in the Court's making violation of the Establishment Clause hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. L. Levy, The Establishment Clause 4 (1986). Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches. Id., at 3-4.

The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference). I will further acknowledge for the sake of argument that, as some scholars have argued, by 1790 the term “establishment” had acquired an additional meaning – “financial support of religion generally, by public taxation” – that reflected the development of “general or multiple” establishments, not limited
to a single church. Id., at 8-9. But that would still be an establishment coerced by force of law. And I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, see Church of Holy Trinity v. United States, 143 U.S. 457 (1892), ruled out of order government-sponsored endorsement of religion – even when no legal coercion is present, and indeed even when no ersatz, “peer-pressure” psycho-coercion is present – where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ). But there is simply no support for the proposition that the officially sponsored nondenominational invocation and benediction read by Rabbi Gutterman—with no one legally coerced to recite them – violated the Constitution of the United States. To the contrary, they are so characteristically American they could have come from the pen of George Washington or Abraham Lincoln himself.

Thus, while I have no quarrel with the Court's general proposition that the Establishment Clause “guarantees that government may not coerce anyone to support or participate in religion or its exercise,” ante, at 2655, I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty – a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud. The Framers were indeed opposed to coercion of religious worship by the National Government; but, as their own sponsorship of nonsectarian prayer in public events demonstrates, they understood that “[s]peech is not coercive; the listener may do as he likes.” American Jewish Congress v. Chicago, 827 F.2d, at 132 (Easterbrooke, J., dissenting).

In 2000, the Court returned to religious observance in schools, this time to a student prayer delivered before a football game. In Santa Fe Independent School District v. Doe, the Court held by a 6-3 vote that school involvement in the process of selecting the student speaker invited and encouraged religious messages. Reflecting the endorsement theory, the Court opinion noted, “Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.” The Court also noted that the prayer was “coercive” under Justice Kennedy’s opinion in Lee v. Weisman. Attendance at a high school football game, particularly for team members and cheerleaders, was as obligatory as attendance at the high school graduation in Lee, and the fact that a student delivered the prayer did not alter the improper effect of coercing those present to participate in an act of religious worship. The Court noted, “[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”

---

Chief Justice Rehnquist, dissenting with Justices Scalia and Thomas, said the majority opinion “bristles with hostility to all things religious in public life.” The Court should not declare the policy invalid on its face because it has plausible secular purposes – to solemnize the event, to promote good sportsmanship, and thereby also to promote student safety. The dissent noted that “‘[i]t has not been the Court's practice, in considering facial challenges to statutes . . . to strike them down in anticipation that particular applications may result in unconstitutional [behavior.]’”66

In Borden v. School Dist. of the Township of East Brunswick, 523 F.3d 153 (3rd Cir. 2008), the Third Circuit held that a public school district did not violate the First Amendment rights of a football coach in barring him from kneeling on one knee and bowing his head – avowedly out of respect for his players – while they engaged in pregame prayer, where the coach had a previous 23-year-history of “orchestrating” player prayers. The court concluded that a reasonable observer would have concluded that his proposed silent kneeling, when viewed from history and context, endorsed religion. Cf. Kennedy v. Bremerton School District, 869 F.3d 813 (9th Cir. 2017) (High School Coach who prayed at midfield following football games could be fired by high school as his speech was in the course of employment as defined in Garcetti, excerpted at § 8.3.4, and thus did not trigger Pickering, as discussed at § 8.3.2; high school had legitimate reason to fire the coach because of concerns his action might be held to violate the Establishment Clause).

See generally Doe ex rel. Doe v. Elmbrook School District, 687 F.3d 840 (7th Cir. 2012) (public school district’s use of evangelical church for its high school graduation ceremonies constitutes endorsement of religion and is coercive); Morgan v. Swanson, 755 F.3d 757 (5th Cir. 2014) (principal has qualified immunity when he refused to permit parent attending an in-class winter party with his son to distribute candy canes bearing a religious message; any right parent may have to distribute material on a non-viewpoint discriminatory basis was not clearly established).

Despite these conclusions, other aspects of religious influences in public schools do not pose the same kind of problem under Lemon, the endorsement test, or the coercion or proselytizing test. For example, it is reasonably well-established that public schools can teach and perform sacred choral music as an integral part of a complete and historically accurate music education, to broaden the students' understanding of musical culture, and to increase the students' awareness of diversity. Such use is permissible as long as the sacred choral music does not predominate the music selection to create a principal or primary effect to advance religion under Lemon; or lead an objective observer to conclude the school is endorsing religion, under the endorsement test; or involve proselytizing or coercing students to participate in a religious, rather than musical, event, under the coercion test.67


Public schools can also teach about religion and religious influences on society and historical events. Indeed, as far back as 1963 in *School District of Abington Township v. Schempp*, discussed at § 12.3 nn.51-53, the Court acknowledged that reading passages from religious works, such as the Bible, the Torah, or the Koran, was permissible when presented objectively as part of a secular program of education, as they are worthy of study for their literary and historic qualities.

Although schools may include sacred choral music as part of overall music curriculum, a school is not required to do so. Thus, in *Stratechuk v. Board of Education, South Orange-Maplewood School Dist.*, the Third Circuit held that a school district policy to bar performance of religious holiday music at seasonal shows, while continuing to allow it to be taught in class, had a legitimate secular purpose of avoiding potential Establishment Clause problems, particularly given a history at the school of parental complaints in the past about which religious holiday music had been included.

§ 12.4 Post-1954 Cases Involving Government Aid to Private Religious Schools

As noted at § 12.3, nn.53-64, Justices have disagreed on whether certain acts in public schools involved a purely religious purpose, or whether some secular purpose was present. The other two prongs of the *Lemon* test have also caused disagreements among the Justices.

Regarding the second “principal or primary effect” prong of *Lemon*, inconsistencies can be noted in the Court’s decisions. For example, the Court has found a primary effect to advance religion in providing funds to repair “physical facilities” at a private religious school, but only an incidental effect where funds were provided to build “secular buildings” on a religious campus; a primary effect to advance religion by providing loans of “instructional equipment and materials” to private

---


70 587 F.3d 597, 604-06 (3rd Cir. 2009).


schools, but only an incidental effect to provide "secular textbooks" to students\(^\text{73}\); a primary effect to advance religion to provide tuition grants to parents of children attending private schools, but only an incidental effect where tax benefits for textbooks, tuition, and transportation were granted to parents for children in public or private schools, despite the fact that parents of children in private schools would get most of the benefit, since private tuition is the main part of the expense, and 96% of children attending private schools attended religious schools;\(^\text{74}\) and a primary effect to advance religion when secular teachers provided a range of remedial, supplemental, or auxiliary services in religious schools, but no primary effect when those same services were provided to students attending religious schools off-campus.\(^\text{75}\)

Regarding the third “excessive entanglement” prong of Lemon, an attempt to police the risk that religious messages will be conveyed in a school program funded by public funds has constituted excessive entanglement of religion. At the same time, no excessive entanglement existed in annual state grants to private colleges, including religiously affiliated institutions, where none of the money could be used for sectarian (i.e., religious) purposes, although four judges dissenting would have found excessive entanglement from the institution’s dependency on receiving the grant money.\(^\text{76}\) Recordkeeping and disclosure requirements associated with routine collection of sales taxes on sale of religious materials was held to create no excessive entanglement, while recordkeeping and disclosure requirements on charities soliciting funds in a city, where disclosure included names, salaries, and criminal histories of solicitors, and reports of funds collected, was held to constitute excessive entanglement when applied to religious organizations.\(^\text{77}\)

---


In 1994, in Board of Education of Kiryas Joel Village School District v. Grumet,\(^78\) the Court, per Justice Souter, struck down the establishment of the Kiryas Joel Village School District. Justice Souter noted, “The village of Kiryas Joel in Orange County, New York, is a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism,” and its incorporators intentionally drew its boundaries under the state's general village incorporation law to exclude all but Satmars. Given this fact, there was no assurance of religious neutrality in the exercise of its school district power. In a concurring opinion, Justice Stevens, joined by Justices Blackmun and Ginsburg, agreed that this was more establishing than accommodating religion. In a separate concurrence, Justice Blackmun noted that the Grumet decision was consistent with the Lemon test, and its 30-year progeny, even though Justice Souter’s opinion did not explicitly apply the Lemon test. Agreeing with the result, Justice O'Connor said that the real problem here was that this was a legislatively drawn religious classification singling out a particular group for favorable religious treatment. Justice Kennedy similarly noted that the real vice was drawing political boundaries on the basis of religion.\(^79\) Dissenting in Grumet, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, indicated that the Lemon test should be rejected in favor of an accommodationist approach toward religion based upon text, history, and tradition, that is, as discussed at § 12.2.2, a formalist approach to the Establishment Clause.\(^80\)

For Justice Kennedy, other aspects of government support for private religious schools do not pose the same kind of problem of proselytizing or coercion as prayer in schools, or benedictions at high school graduations, or posting of the Ten Commandments in schools. Even under the endorsement test, such support is more likely to be held constitutional, although on narrower grounds. Thus, restrictions on aid to schools has been relaxed since 1986 in the post-instrumentalist era. The critical case embracing a more accommodating approach of aid to religious schools was Agostini v. Felton.

\textit{Agostini v. Felton}  
521 U.S. 203 (1997)

Justice O'CONNOR delivered the opinion of the Court.

In Aguilar v. Felton, 473 U.S. 402 (1985), this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, petitioners – the parties bound by that injunction – seek relief from its operation. Petitioners maintain that Aguilar cannot be squared with our

\(^78\) 512 U.S. 687, 690, 702-08 (1994); \textit{id.} at 710-11 (Blackmun, J., concurring); \textit{id.} at 711-12 (Stevens, J., joined by Blackmun & Ginsburg, JJ., concurring).

\(^79\) \textit{Id.} at 716-18 (O’Connor, J., concurring in part and concurring in the judgment); \textit{id.} at 722, 730-32 (Kennedy, J., concurring in the judgment).

\(^80\) \textit{Id.} at 732, 743-52 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause decisions and further conclude that, on the facts presented here, petitioners are entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the operation of the District Court's prospective injunction.

The question we must answer is a simple one: Are petitioners entitled to relief from the District Court's permanent injunction under Rule 60(b)? Rule 60(b)(5), the subsection under which petitioners proceeded below, states: “On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application.”

In *Rufo v. Inmates of Suffolk County Jail*, [502 U.S. 367,] 384 [(1992)], we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show “a significant change either in factual conditions or in law.” A court may recognize subsequent changes in either statutory or decisional law. See *Railway Employees v. Wright*, 364 U.S. 642, 652-653 (1961) (consent decree should be vacated under Rule 60(b) in light of amendments to the Railway Labor Act); *Rufo*, supra, at 393 (vacating denial of Rule 60(b)(5) motion and remanding so District Court could consider whether consent decree should be modified in light of *Bell v. Wolfish*, 441 U.S. 520 (1979)); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 437-438 (1976) (injunction should have been vacated in light of *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971)). In order to evaluate whether *Aguilar* has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which *Aguilar*, as well as its companion case, *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), rested.

In *Ball*, the Court evaluated two programs implemented by the School District of Grand Rapids, Michigan. The district's Shared Time program, the one most analogous to Title I, provided remedial and “enrichment” classes, at public expense, to students attending nonpublic schools. The classes were taught during regular school hours by publicly employed teachers, using materials purchased with public funds, on the premises of nonpublic schools. The Shared Time courses were in subjects designed to supplement the “core curriculum” of the nonpublic schools. Id., at 375-376. Of the 41 nonpublic schools eligible for the program, 40 were “‘pervasively sectarian’” in character – that is, “‘the purpose[s] of [those] schools [was] to advance their particular religions.’” Id., at 379.

The Court conducted its analysis by applying the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.” 473 U.S., at 382-383 (quoting Lemon, supra, at 612-613) (citations and internal quotation marks omitted).

The Court acknowledged that the Shared Time program served a purely secular purpose, thereby satisfying the first part of the so-called *Lemon* test. 473 U.S., at 383. Nevertheless, it ultimately concluded that the program had the impermissible effect of advancing religion. Id., at 385.
The Court found that the program violated the Establishment Clause's prohibition against “government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith” in at least three ways. Ibid. First, drawing upon the analysis in Meek v. Pittenger, 421 U.S. 349 (1975), the Court observed that “the teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs.” 473 U.S., at 385. Meek invalidated a Pennsylvania program in which full-time public employees provided supplemental “auxiliary services” – remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services – to nonpublic school children at their schools. 421 U.S., at 367-373. Although the auxiliary services themselves were secular, they were mostly dispensed on the premises of parochial schools, where “an atmosphere dedicated to the advancement of religious belief [was] constantly maintained.” Meek, 421 U.S., at 371. Instruction in that atmosphere was sufficient to create “[t]he potential for impermissible fostering of religion.” Id., at 372. Cf. Wolman v. Walter, 433 U.S., at 248 (upholding programs employing public employees to provide remedial instruction and guidance counseling to nonpublic school children at sites away from the nonpublic school).

The Court concluded that Grand Rapids' program shared these defects. 473 U.S., at 386. As in Meek, classes were conducted on the premises of religious schools. Accordingly, a majority found a “substantial risk” that teachers – even those who were not employed by the private schools – might “subtly (or overtly) conform their instruction to the [pervasively sectarian] environment in which they [taught].” 473 U.S., at 388. The danger of “state-sponsored indoctrination” was only exacerbated by the school district's failure to monitor the courses for religious content. Id., at 387. Notably, the Court disregarded the lack of evidence of any specific incidents of religious indoctrination as largely irrelevant, reasoning that potential witnesses to any indoctrination – the parochial school students, their parents, or parochial school officials – might be unable to detect or have little incentive to report the incidents. Id., at 388-389.

The presence of public teachers on parochial school grounds had a second, related impermissible effect: It created a “graphic symbol of the ‘concert or union or dependency’ of church and state, id., at 391 (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)), especially when perceived by “children in their formative years,” 473 U.S., at 390. The Court feared that this perception of a symbolic union between church and state would “convey[y] a message of government endorsement . . . of religion” and thereby violate a “core purpose” of the Establishment Clause. Id., at 389.

Third, the Court found that the Shared Time program impermissibly financed religious indoctrination by subsidizing “the primary religious mission of the institutions affected.” Id., at 385. The Court separated its prior decisions evaluating programs that aided the secular activities of religious institutions into two categories: those in which it concluded that the aid resulted in an effect that was “indirect, remote, or incidental” (and upheld the aid); and those in which it concluded that the aid resulted in “a direct and substantial advancement of the sectarian enterprise” (and invalidated the aid). Id., at 393 (internal quotation marks omitted). In light of Meek and Wolman, Grand Rapids' program fell into the latter category. In those cases, the Court ruled that a state loan of instructional equipment and materials to parochial schools was an impermissible form of “direct aid” because it “advanced the primary, religion-oriented educational function of the sectarian school,” 473 U.S.,
at 395 (citations and internal quotation marks omitted), by providing “in-kind” aid (e.g., instructional materials) that could be used to teach religion and by freeing up money for religious indoctrination that the school would otherwise have devoted to secular education. Given the holdings in Meek and Wolman, the Shared Time program – which provided teachers as well as instructional equipment and materials – was surely invalid. 473 U.S., at 395. The Ball Court likewise placed no weight on the fact that the program was provided to the student rather than to the school. Nor was the impermissible effect mitigated by the fact that the program only supplemented the courses offered by the parochial schools. Id., at 395-397.

Distilled to essentials, the Court's conclusion that the Shared Time program in Ball had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking. Additionally, in Aguilar there was a fourth assumption: that New York City's Title I program necessitated an excessive government entanglement with religion because public employees who teach on the premises of religious schools must be closely monitored to ensure that they do not inculcate religion.

Our more recent cases have undermined the assumptions upon which Ball and Aguilar relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since Aguilar was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. See Witters, 474 U.S., at 485-486; Bowen v. Kendrick, 487 U.S. 589, 602-604 (1988) (concluding that Adolescent Family Life Act had a secular purpose); Board of Ed. of Westside Community Schools (Dist.66) v. Mergens, 496 U.S. 226, 248-249 (1990) (concluding that Equal Access Act has a secular purpose); cf. Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down Louisiana law that required creationism to be discussed with evolution in public schools because the law lacked a legitimate secular purpose). Likewise, we continue to explore whether the aid has the “effect” of advancing or inhibiting religion. What has changed since we decided Ball and Aguilar is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to Aguilar have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in Meek and Ball that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993), we examined whether the IDEA, 20 U.S.C. § 1400 et seq., was constitutional as applied to a deaf student who sought to bring his state-employed sign-language interpreter with him to his Roman Catholic high school. We held that this was permissible, expressly disavowing the notion that “the Establishment Clause [laid] down [an] absolute bar to the placing of a public
employee in a sectarian school.” 509 U.S., at 13. “Such a flat rule, smacking of antiquated notions of ‘taint,’ would indeed exalt form over substance.” Ibid. We refused to presume that a publicly employed interpreter would be pressured by the pervasively sectarian surroundings to inculcate religion by “add[ing] to [or] subtract[ing] from” the lectures translated. Ibid. In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. Id., at 12. Because the only government aid in Zobrest was the interpreter, who was herself not inculcating any religious messages, no government indoctrination took place and we were able to conclude that “the provision of such assistance [was] not barred by the Establishment Clause.” Id., at 13. Zobrest therefore expressly rejected the notion – relied on in Ball and Aguilar – that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students. Zobrest also implicitly repudiated another assumption on which Ball and Aguilar turned: that the presence of a public employee on private school property creates an impermissible “symbolic link” between government and religion.

Second, we have departed from the rule relied on in Ball that all government aid that directly assists the educational function of religious schools is invalid. In Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986), we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. Even though the grant recipient clearly would use the money to obtain religious education, we observed that the tuition grants were “‘made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited.’” Id., at 487 (quoting Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 782-783, n.38 (1973)). The grants were disbursed directly to students, who then used the money to pay for tuition at the educational institution of their choice. In our view, this transaction was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate part or all of the check to a religious institution. In both situations, any money that ultimately went to religious institutions did so “only as a result of the genuinely independent and private choices of ” individuals. 474 U.S., at 487. The same logic applied in Zobrest, where we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction, because the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a “result of the private decision of individual parents” and “[could not] be attributed to state decisionmaking.” 509 U.S., at 10 (emphasis added). Because the private school would not have provided an interpreter on its own, we also concluded that the aid in Zobrest did not indirectly finance religious education by “relie[ing] [the] sectarian schoo[l] of costs [it] otherwise would have borne in educating [its] students.” Id., at 12.

Zobrest and Witters make clear that, under current law, the Shared Time program in Ball and New York City's Title I program in Aguilar will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in Ball to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination,
any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. National Coalition for Public Ed. & Religious Liberty v. Harris, 489 F. Supp. 1248, 1262, 1267 (S.D.N.Y.1980); Felton v. Secretary, United States Dept. of Ed., 739 F.2d, at 53, aff’d. *sub nom. Aguilar v. Felton*, 473 U.S. 402 (1985). Thus, both our precedent and our experience require us to reject respondents’ remarkable argument that we must presume Title I instructors to be “uncontrollable and sometimes very unprofessional.” Tr. of Oral Arg. 39.

Nor under current law can we conclude that a program placing full-time public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. In all relevant respects, the provision of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients. That aid is provided to students at whatever school they choose to attend. Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. Moreover, as in *Zobrest*, Title I services are by law supplemental to the regular curricula. 34 C.F.R. § 200.12(a) (1996). These services do not, therefore, “reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.” 509 U.S., at 12.

What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off campus, and *Aguilar* implied that providing the services off campus is entirely consistent with the Establishment Clause. Justice Souter resists the impulse to upset this implication, contending that it can be justified on the ground that Title I services are “less likely to supplant some of what would otherwise go on inside [the sectarian schools] and to subsidize what remains” when those services are offered off campus. *Post*, at 222. But Justice Souter does not explain why a sectarian school would not have the same incentive to “make patently significant cut backs” in its curriculum no matter where Title I services are offered, since the school would ostensibly be excused from having to provide the Title I-type services itself. See *ibid*. Because the incentive is the same either way, we find no logical basis upon which to conclude that Title I services are an impermissible subsidy of religion when offered on campus, but not when offered off campus. Accordingly, contrary to our conclusion in *Aguilar*, placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between church and state is inevitable, see 403 U.S., at 614, and we have always tolerated some level of involvement between the two. Entanglement must be “excessive” before it runs afoul of the Establishment Clause. See, e.g., Bowen v. Kendrick, 487 U.S., at 615-617 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits); Roemer v. Board of Public Works of Md., 426 U.S. 736, 764-765 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion).
The pre-\textit{Aguilar} Title I program does not result in an “excessive” entanglement that advances or inhibits religion. As discussed previously, the Court's finding of “excessive” entanglement in \textit{Aguilar} rested on three grounds: (i) the program would require “pervasive monitoring by public authorities” to ensure that Title I employees did not inculcate religion; (ii) the program required “administrative cooperation” between the Board and parochial schools; and (iii) the program might increase the dangers of “political divisiveness.” 473 U.S., at 413-414. Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an “excessive” entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off campus. Aguilar, supra (limiting holding to on-premises services); Walker v. San Francisco Unified School Dist., 46 F.3d 1449 (C.A.9 1995) (same); Pulido v. Cavazos, 934 F.2d 912, 919-920 (C.A.8 1991); Committee for Public Ed. & Religious Liberty v. Secretary, United States Dept. of Ed., 942 F. Supp. 842 (E.D.N.Y.1996) (same). Further, the assumption underlying the first consideration has been undermined. In \textit{Aguilar}, the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk \textit{pervasive} monitoring would be required. But after \textit{Zobrest} we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that \textit{pervasive} monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here. See Bowen, supra, at 615-617.

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accord, Witters, 474 U.S., at 488-489 (“[T]he mere circumstance that [an aid recipient] has chosen to use neutrally available state aid to help pay for [a] religious education [does not] confer any message of state endorsement of religion”); Bowen, supra, at 613-614 (finding no “symbolic link” when Congress made federal funds neutrally available for adolescent counseling). \[Ed.: By this analysis, Justice O'Connor brought the third \textit{Lemon} prong of “excessive entanglement” under the “endorsement” analysis, consistent with her analysis of “entanglement” in her dissent in \textit{Aguilar}, 472 U.S. at 428-30.\]

The doctrine of \textit{stare decisis} does not preclude us from recognizing the change in our law and overruling \textit{Aguilar} and those portions of \textit{Ball} inconsistent with our more recent decisions. As we
have often noted, “[s]tare decisis is not an inexorable command.” Payne v. Tennessee, 501 U.S. 808, 828 (1991), but instead reflects a policy judgment that “in most matters it is more important that the applicable rule of law be settled than that it be settled right,” Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996); Payne, supra, at 828; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result) (“The doctrine of stare decisis . . . has only a limited application in the field of constitutional law”). Thus, we have held in several cases that stare decisis does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law. United States v. Gaudin, 515 U.S. 506, 521 (1995) (stare decisis may yield where a prior decision's “underpinnings [have been] eroded, by subsequent decisions of this Court”); Alabama v. Smith, 490 U.S. 794, 803 (1989) (noting that a “later development of . . . constitutional law” is a basis for overruling a decision); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992) (observing that a decision is properly overruled where “development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking”). As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided Ball and Aguilar, so our decision to overturn those cases rests on far more than “a present doctrinal disposition to come out differently from the Court of [1985].” Casey, supra, at 864. We therefore overrule Ball and Aguilar to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, and with whom Justice BREYER joins as to Part II, dissenting.

In this novel proceeding, petitioners seek relief from an injunction the District Court entered 12 years ago to implement our decision in Aguilar v. Felton, 473 U.S. 402 (1985). For the reasons given by Justice Ginsburg, the Court's holding that petitioners are entitled to relief under Federal Rule of Civil Procedure 60(b) is seriously mistaken. The Court's misapplication of the Rule is tied to its equally erroneous reading of our more recent Establishment Clause cases, which the Court describes as having rejected the underpinnings of Aguilar and portions of Aguilar's companion case, School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). The result is to repudiate the very reasonable line drawn in Aguilar and Ball, and to authorize direct state aid to religious institutions on an unparalleled scale, in violation of the Establishment Clause's central prohibition against religious subsidies by the government.

I respectfully dissent.

II

The Court today ignores this doctrine and claims that recent cases rejected the elemental assumptions underlying Aguilar and much of Ball. But the Court errs. Its holding that Aguilar and the portion of Ball addressing the Shared Time program are “no longer good law,” ante, at 2016, rests on mistaken reading.
Zobrest v. Catalina Foothills School Dist., 509 U.S., at 13-14, held that the Establishment Clause does not prevent a school district from providing a sign-language interpreter to a deaf student enrolled in a sectarian school. The Court today relies solely on Zobrest to support its contention that we have “abandoned the presumption erected in Meek [v. Pittenger, 421 U.S. 349 (1975), and Ball that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.” Ante, at 2010. Zobrest, however, is no such sanction for overruling Aguilar or any portion of Ball.

In Zobrest, the Court did indeed recognize that the Establishment Clause lays down no absolute bar to placing public employees in a sectarian school, 509 U.S., at 13, and n.10, but the rejection of such a per se rule was hinged expressly on the nature of the employee's job, sign-language interpretation (or signing) and the circumscribed role of the signer. On this point (and without reference to the facts that the benefited student had received the same aid before enrolling in the religious school and the employee was to be assigned to the student, not to the school) the Court explained itself this way: “[T]he task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor. . . . Nothing in this record suggests that a sign-language interpreter would do more than accurately interpret whatever material is presented to the class as a whole. In fact, ethical guidelines require interpreters to ‘transmit everything that is said in exactly the same way it was intended.’” Id., at 13. The signer could thus be seen as more like a hearing aid than a teacher, and the signing could not be understood as an opportunity to inject religious content in what was supposed to be secular instruction. Zobrest accordingly holds only that in these limited circumstances where a public employee simply translates for one student the material presented to the class for the benefit of all students, the employee's presence in the sectarian school does not violate the Establishment Clause. Id., at 13-14. Cf. Lemon v. Kurtzman, 403 U.S., at 617 (“[T]eachers have a substantially different ideological character from books [and][i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not”).

The Court, however, ignores the careful distinction drawn in Zobrest and insists that a full-time public employee such as a Title I teacher is just like the signer, asserting that “there is no reason to presume that, simply because she enters a parochial school classroom, [this] teacher will depart from her assigned duties and instructions and embark on religious indoctrination. . . .” Ante, at 2012. Whatever may be the merits of this position (and I find it short on merit), it does not enjoy the authority of Zobrest. . . .

The Court next claims that Ball rested on the assumption that “any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.” Ante, at 2010. After Ball, the opinion continues, the Court departed from the rule that “all government aid that directly assists the educational function of religious schools is invalid.” Ante, at 2011. But this mischaracterizes Ball’s discussion on the point, and misreads Witters and Zobrest as repudiating the more modest proposition on which Ball in fact rested.
Ball did not establish that “any and all” such aid to religious schools necessarily violates the Establishment Clause. It held that the Shared Time program subsidized the religious functions of the parochial schools by taking over a significant portion of their responsibility for teaching secular subjects. See 473 U.S., at 396-397. The Court noted that it had “never accepted the mere possibility of subsidization . . . as sufficient to invalidate an aid program,” and instead enquired whether the effect of the proffered aid was “‘direct and substantial’” (and, so, unconstitutional) or merely “‘indirect and incidental’” (and, so, permissible), emphasizing that the question “‘is one of degree.’” Id., at 394 (quoting Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 784-785, n.39 (1973), and Zorach v. Clauson, 343 U.S. 306, 314 (1952)). Witters and Zobrest did nothing to repudiate the principle, emphasizing rather the limited nature of the aid at issue in each case as well as the fact that religious institutions did not receive it directly from the State. In Witters, the Court noted that the State would issue the disputed vocational aid directly to one student who would then transmit it to the school of his choice, and that there was no record evidence that “any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.” 474 U.S., at 488. Zobrest also presented an instance of a single beneficiary, see 509 U.S., at 4, and emphasized that the student (who had previously received the interpretive services in a public school) determined where the aid would be used, that the aid at issue was limited, and that the religious school was “not relieved of an expense that it otherwise would have assumed in educating its students,” id., at 12.

It is, accordingly, puzzling to find the Court insisting that the aid scheme administered under Title I and considered in Aguilar was comparable to the programs in Witters and Zobrest. Instead of aiding isolated individuals within a school system, New York City’s Title I program before Aguilar served about 22,000 private school students, all but 52 of whom attended religious schools. See App. 313-314. Instead of serving individual blind or deaf students, as such, Title I as administered in New York City before Aguilar (and as now to be revived) funded instruction in core subjects (remedial reading, reading skills, remedial mathematics, English as a second language) and provided guidance services. See Aguilar, supra, at 406. Instead of providing a service the school would not otherwise furnish, the Title I services necessarily relieved a religious school of “an expense that it otherwise would have assumed,” Zobrest, supra, at 12, and freed its funds for other, and sectarian, uses.

Finally, instead of aid that comes to the religious school indirectly in the sense that its distribution results from private decisionmaking, a public educational agency distributes Title I aid in the form of programs and services directly to the religious schools. In Zobrest and Witters, it was fair to say that individual students were themselves applicants for individual benefits on a scale that could not amount to a systemic supplement. But under Title I, a local educational agency (which in New York City is the Board of Education) may receive federal funding by proposing programs approved to serve individual students who meet the criteria of need, which it then uses to provide such programs at the religious schools, see App. 28-29, 38, 60, 242-243; students eligible for such programs may not apply directly for Title I funds. The aid, accordingly, is not even formally aid to the individual students (and even formally individual aid must be seen as aid to a school system when so many individuals receive it that it becomes a significant feature of the system, see Wolman v. Walter, 433 U.S., at 264 (opinion of Powell, J.)).
In sum, nothing since *Ball* and *Aguilar* and before this litigation has eroded the distinction between “direct and substantial” and “indirect and incidental.” That principled line is being breached only here and now.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

The Court today finds a way to rehear a legal question decided in respondents' favor in this very case some 12 years ago. See *Aguilar v. Felton*, 473 U.S. 402 (1985). Subsequent decisions, the majority says, have undermined *Aguilar* and justify our immediate reconsideration. This Court's Rules do not countenance the rehearing here granted. For good reason, a proper application of those Rules and the Federal Rules of Civil Procedure would lead us to defer reconsideration of *Aguilar* until we are presented with the issue in another case.

We have a rule on rehearing, Rule 44, but it provides only for petitions filed within 25 days of the entry of the judgment in question. See this Court's Rule 44.1. Although the Court or a Justice may “shorten” or extend this period, I am aware of no case in which we have extended the time for rehearing years beyond publication of our adjudication on the merits. Cf. Reid v. Covert, 354 U.S. 1 (1957) (original decision issued June 11, 1956; rehearing granted Nov. 5, 1956); Jones v. Opelika, 319 U.S. 103 (1943) (*per curiam*) (original decision issued October Term 1941; rehearing granted October Term 1942). Moreover, nothing in our procedures allows us to grant rehearing, timely or not, “except . . . at the instance of a Justice who concurred in the judgment or decision.” This Court's Rule 44.1. Petitioners have not been so bold (or so candid) as to style their plea as one for rehearing in this Court, and the Court has not taken up the petition at the instance of Justice Stevens, the only still-sitting Member of the *Aguilar* majority.

Lacking any rule or practice allowing us to reconsider the *Aguilar* judgment directly, the majority accepts as a substitute a rule governing relief from judgments or orders of the federal trial courts. See Fed. Rule Civ. Proc. 60(b)(5). The service to which Rule 60(b) has been impressed is unprecedented, and neither the Court nor those urging reconsideration of *Aguilar* contend otherwise. See, e.g., *ante*, at 2017-2018; Tr. of Oral Arg. 11 (acknowledgment by counsel for the United States that “we do not know of another instance in which Rule 60(b) has been used in this way”). The Court makes clear, fortunately, that any future efforts to expand today's ruling will not be favored. See *ante*, at 2018. I therefore anticipate that the extraordinary action taken in this case will remain aberrational.

The weakening of *Lemon* in the school aid context continued in 2000 in *Mitchell v. Helms*.*81* In a plurality opinion, Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, upheld a federal program that funded state agencies that loaned educational materials and

---

equipment to public and private schools, with the enrollment of each participating school determining the amount of aid. Justice Thomas noted that in *Agostini* the Court had modified *Lemon* for the purpose of evaluating aid to schools by stating that entanglement is not a separate inquiry, but only one criteria for deciding if there is a primary effect of advancing religion, and by revising criteria for determining the principal or primary effect of a statute. After *Agostini*, Justice Thomas said, three primary criteria are used to evaluate if government aid has the effect of impermissibly advancing religion: does the aid “result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.” Justice Thomas noted that government neutrality, rather than indoctrination, is virtually assured if an aid program literally, or figuratively, passes through the hands of numerous private citizens who can direct the aid elsewhere by their choice of a school for their children. The private citizen is making the choice, not the government.82

Justice O’Connor, joined by Justice Breyer, concurred in the judgment, but said the plurality was giving formal neutrality too much importance, and the plurality’s discussion of direct versus indirect aid, and the discussion of diversion, were flawed. For Justice O’Connor, the three *Agostini* criteria are “factors” to be weighed against an overall decision whether a reasonable observer would conclude that the government’s action constituted an “endorsement” of religion. From that perspective, as Justice O’Connor noted: “[A] government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools. In the former example, if the religious school uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement. . . . In contrast, when government aid supports a school's religious mission only because of independent decisions made by numerous individuals to guide their secular aid to that school, “[n]o reasonable observer is likely to draw from the facts . . . an inference that the State itself is endorsing a religious practice or belief.”83

Justice Souter, dissenting with Justices Stevens and Ginsburg, agreed with Justice O’Connor that the *Agostini* criteria are factors to be weighed in an overall balance concerning the principal or primary effect of any aid program. In engaging in this factor analysis, Justice Souter noted that the Court’s precedents under *Lemon* has considered “whether the government is acting neutrally in distributing its money, and about the form of the aid itself, its path from government to religious institution, its divertibility to religious nurture, its potential for reducing traditional expenditures of religious institutions, and its relative importance to the recipient, among other things.” Justice Souter continued, “At least three main lines of enquiry addressed particularly to school aid have emerged to complement [formal] neutrality. First, we have noted that two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools. Second, we have identified two important characteristics of the method of

---

82 *Id.* at 809-14, 820-25.

distributing aid: directness or indirectness of distribution and distribution by genuinely independent choice. Third, we have found relevance in at least five characteristics of the aid itself: its religious content; its cash form; its divertibility or actually diversion to religious support; its supplantation of traditional items of religious school expense; and its substantiality.” In addition, reflecting concerns with entanglement between church and state, Justice Souter noted that the Court’s precedents had expressed concern with whether state aid would “ violate a taxpayer's liberty of conscience, threaten to corrupt religion, [or] generate disputes over aid.” In this case, Justice Souter said, the plurality was rejecting the fundamental principle that had emerged from applying these factors in earlier cases of no taxpayer funded aid to a school’s religious mission. Here there was aid to the schools themselves which could be used, and was being used, to advance the religious inculcative functions of the recipient religious schools.84

The more accommodating approach toward school aid issues adopted in Mitchell continued in 2002 in Zelman v. Simmons-Harris.85 Zelman involved a pilot program adopted by the state of Ohio in 1996 to provide educational choices with families who reside in a “covered district,” defined to apply only to Cleveland. Under the program, tuition aid of up to $2,250 per year was provided to parents who chose to send their child to a school other than a Cleveland public school. Any private school, whether religious or nonreligious, could participate in the program and accept program students so long as the school was located within the boundaries of a covered district and met statewide educational standards. Participating private schools had to agree not to discriminate on the basis of race, religion, or ethnic background, or to “advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” Any public school located in a school district adjacent to the covered district could also participate in the program. Adjacent public schools were eligible to receive the same $2,250 tuition grant for each program student accepted, in addition to the full amount of per-pupil state funding attributable to each additional student, although none of the public schools chose to participate in the program.86

Given these details, the governmental aid program on its face was neutral with respect to religion, provided voucher assistance for educational expenses to a broad class of citizens, who made independent judgments whether to use the voucher to fund educational expenses at religious or secular private schools. For the Justices in the Court majority opinion in Mitchell, including Justice Kennedy, this made the program clearly constitutional. In a separate concurrence, Justice Thomas also noted that the main beneficiaries of this program would be low-income minorities living in Cleveland who wished educational alternatives to the Cleveland public schools, which were “[b]esieged by escalating financial problems and declining academic achievement.”87 Concurring as the critical fifth vote, Justice O’Connor emphasized the limited nature of the program; it did not

84 Id. at 868-69, 885, 901, 908-13 (Souter, J., joined by Stevens & Ginsburg, JJ., dissenting).
86 Id. at 643-48.
87 Id. at 652-54; id. at 676-67 (Thomas, J., concurring).

Page 657
provide “substantial” aid to the religious schools; the nonpublic schools, both religious and secular, had to accept students without regard to “race, religion, or ethnic background”; and the parents had a range of non-religious private schools from which to choose. Thus, the program could not be viewed by a reasonable observer as government endorsement of religion.

In his dissent, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, noted that under this voucher program up to $2,250 in tuition vouchers could be used by parents sending their children to religious schools. He noted, “The money will thus pay for eligible students’ instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension. Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.” Under the instrumentalist-era precedents of *Allen*, *Tilton*, and *Nyquist*, among others, this aid to religious schools, not limited to secular materials, secular instruction, or secular construction, would have violated the Establishment Clause.

Lower court opinions after *Zelman* have followed the *Zelman* approach. For example, in *Moss v. Spartanburg County School Dist. Seven*, the Fourth Circuit upheld a public school district’s policy of granting credits for off-campus religious courses offered through an accredited private institution. For any challenge not governed by *Flast v. Cohen*, 392 U.S. 83 (1968) (taxpayers have standing to challenge legislative spending programs as violating Establishment Clause), individuals also have the problem of establishing standing. *See, e.g.*, Freedom from Religious Foundation, Inc. v. Obama, 641 F.3d 803 (7th Cir. 2011) (plaintiffs did not have concrete injury to challenge federal statute, 36 U.S.C. § 119, originally passed in 1952, and amended in 1988, creating a National Day of Prayer); *Ansley v. Warren*, 2017 WL 2782622 (4th Cir. 2017) (absent specific injury plaintiffs have no standing to challenge North Carolina law allowing state magistrates to recuse themselves from performing same-sex marriages on religious grounds); *Barber v. Bryant*, 193 F. Supp. 3d 677 (S.D. Miss. 2016) (Mississippi law granting rights to discriminate to those holding religious beliefs against LGBT or unmarried persons violates neutrality under Establishment Clause; irrational under Equal Protection Clause), rev’d, 860 F.3d 345 (5th Cir. 2017) (absent specific harm, plaintiff’s generalized grievance about possible applications of statute not sufficient to grant standing).

---

88 *Id.* at 668-76 (O’Connor, J., concurring).

89 *Id.* at 686-93 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

90 683 F.3d 599 (4th Cir. 2012). *See also* American Jewish Congress v. Corporation for National and Community Service, 399 F.3d 351, 354-59 (D.C. Cir. 2005) (federally chartered corporation's AmeriCorps Education Awards Program, which places teachers in both secular and religious schools, constitutional, even though some individuals at religious schools elected to teach religion in addition to secular subjects; participants chosen without regard to religion, participants' own choice to teach religion did not have imprimatur of government endorsement, and participants who chose to teach in religious schools did so only as a result of their own private choice).
CHAPTER 13: ESTABLISHMENT CLAUSE DOCTRINE IN THE PUBLIC ARENA

§ 13.1 Post-1954 Cases Involving Public Displays with Some Religious Content 659

§ 13.2 Post-1954 Cases Involving Interplay of Free Speech and Establishment Clause Concerns in the Public Domain 683

§ 13.3 Post-1954 Cases Involving Religious Speech in Public Fora 686

§ 13.4 The Establishment Clause and Thoughts for the Future 705

§ 13.1 Post-1954 Cases Involving Public Displays with Some Religious Content

1. The Instrumentalist Era: 1954-1986

Not surprisingly, during the instrumentalist era, the pattern of results in the display cases mirrored those in the school aid cases, discussed at § 12.4. Liberal instrumentalist Justices found most displays unconstitutional if they contained a religious element. Justice O’Connor focused on whether the displays constituted a government endorsement of religion. The formalist perspective focused on whether the displays were consistent with our Nation’s history and traditions.

In Lynch v. Donnelly, a 5-4 Court allowed a creche to be included in a large Christmas display sponsored by a city and held in a private park. Chief Justice Burger spoke of the display as giving benefit to religion only in a way that was “indirect, remote, and incidental.” Thus, it did not violate the Lemon test as having a principal or primary effect to advance religion.

Lynch v. Donnelly

THE CHIEF JUSTICE delivered the opinion of the Court.

Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, Rhode Island, erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation – often on public grounds – during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads “SEASONS GREETINGS,” and the crèche at issue here. All components of this display are owned by the City.
The crèche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5 " to 5'. In 1973, when the present crèche was acquired, it cost the City $1365; it now is valued at $200. The erection and dismantling of the crèche costs the City about $20 per year; nominal expenses are incurred in lighting the crèche. No money has been expended on its maintenance for the past 10 years.

This Court has explained that the purpose of the Establishment and Free Exercise Clauses of the First Amendment is “to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.” Lemon v. Kurtzman, 403 U.S. 602, 614. At the same time, however, the Court has recognized that “total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.” Ibid. In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.

The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees. A significant example of the contemporaneous understanding of that Clause is found in the events of the first week of the First Session of the First Congress in 1789. In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate. In Marsh v. Chambers, 463 U.S. 783 (1983), we noted that seventeen Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press and religion and antagonism toward an established church were subjects of frequent discussion. We saw no conflict with the Establishment Clause when Nebraska employed members of the clergy as official Legislative Chaplains to give opening prayers at sessions of the state legislature. Id., at [787-91].

In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. Lemon, supra. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. See, e.g., Tilton v. Richardson, 403 U.S. 672, 677-678 (1971). In two cases, the Court did not even apply the Lemon “test.” We did not, for example, consider that analysis relevant in Marsh, supra. [Ed.: excerpted in this Coursebook at § 13.3.] Nor did we find Lemon useful in Larson v. Valente, 456 U.S. 228 (1982) [Ed.: excerpted in this Coursebook at § 13.4], where there was substantial evidence of overt discrimination against a particular church.

In this case, the focus of our inquiry must be on the crèche in the context of the Christmas season. See, e.g., Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Abington School District v. Schempp, [374 U.S. 203 (1963)]. In Stone, for example, we invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls. But the Court carefully pointed out that the Commandments were posted purely as a religious admonition, not “integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history,
civilization, ethics, comparative religion, or the like.” 449 U.S., at 42. Similarly, in Abington, although the Court struck down the practices in two States requiring daily Bible readings in public schools, it specifically noted that nothing in the Court's holding was intended to “indicat[e] that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.” 374 U.S., at 225. Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.

The narrow question is whether there is a secular purpose for Pawtucket's display of the crèche. The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes. The District Court's inference, drawn from the religious nature of the crèche, that the City has no secular purpose was, on this record, clearly erroneous.

The District Court found that the primary effect of including the crèche is to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular. Comparisons of the relative benefits to religion of different forms of governmental support are elusive and difficult to make. But to conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, Board of Education v. Allen, supra [Ed.: discussed at § 12.4 n.75]; expenditure of public funds for transportation of students to church-sponsored schools, Everson v. Board of Education, supra [Ed.: excerpted at § 12.2.3]; federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, Tilton, supra [Ed.: discussed at § 12.4 n.73]; noncategorical grants to church-sponsored colleges and universities, Roemer v. Board of Public Works, 426 U.S. 736 (1976) (discussed at §12.4 n.78); and the tax exemptions for church properties sanctioned in Walz, supra [397 U.S. 664 (1970)] [Ed.: discussed at § 12.2.4 n.44.] It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws upheld in McGowan v. Maryland, 366 U.S. 420 (1961) [discussed at § 12.2.4 n.43]; the release time program for religious training in Zorach, supra [Ed.: discussed at § 12.2.3 n.33]; and the legislative prayers upheld in Marsh, supra [Ed.: excerpted at § 13.3].

We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause. What was said about the legislative prayers in Marsh, 463 U.S., at [787-91], and implied about the Sunday Closing Laws in McGowan is true of the City's inclusion of the crèche: its “reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions.” See McGowan, supra, 366 U.S., at 442.

The dissent asserts some observers may perceive that the City has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, arguendo, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that “not every law that confers an ‘indirect,’
‘remote,’ or ‘incidental’ benefit upon [religion] is, for that reason alone, constitutionally invalid.” Nyquist, supra, 413 U.S., at 771; see also Widmar v. Vincent, 454 U.S. 263, 273 (1981). Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as “Christ's Mass,” or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

The District Court found that there had been no administrative entanglement between religion and state resulting from the City's ownership and use of the crèche. 525 F. Supp., at 1179. But it went on to hold that some political divisiveness was engendered by this litigation. Coupled with its finding of an impermissible sectarian purpose and effect, this persuaded the court that there was “excessive entanglement.” The Court of Appeals expressly declined to accept the District Court's finding that inclusion of the crèche has caused political divisiveness along religious lines, and noted that this Court has never held that political divisiveness alone was sufficient to invalidate governmental conduct.

Entanglement is a question of kind and degree. In this case, however, there is no reason to disturb the District Court's finding on the absence of administrative entanglement. There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the crèche. No expenditures for maintenance of the crèche have been necessary; and since the City owns the crèche, now valued at $200, the tangible material it contributes is de minimis. In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries. There is nothing here, of course, like the “comprehensive, discriminating, and continuing state surveillance” or the “enduring entanglement” present in Lemon, supra, 403 U.S., at 619-622.

Justice O'CONNOR, concurring.

I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine. The suggested approach leads to the same result in this case as that taken by the Court, and the Court's opinion, as I read it, is consistent with my analysis.

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. E.g., Larkin v. Grendel's Den, 459 U.S. 116 (1982). The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a 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 of the political community. Disapproval sends the opposite message. See generally Abington School District v. Schempp, 374 U.S. 203 (1963).
Our prior cases have used the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1970), as a guide to detecting these two forms of unconstitutional government action. It has never been entirely clear, however, how the three parts of the test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.

The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the crèche [Ed.: *i.e.*, the government’s purpose] and what message the City's display actually conveyed [Ed.: *i.e.*, the message’s effect]. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the City's action.

The meaning of a statement to its audience depends both on the intention of the speaker and on the “objective” meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government “speaks” by word or deed, some portion of the audience will inevitably receive a message determined by the “objective” content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

Applying that formulation to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. The laws upheld in *Walz v. Tax Commission*, 397 U.S. 664 (1970) (tax exemption for religious, educational, and charitable organizations), in *McGowan v. Maryland*, 366 U.S. 420 (1960) (mandatory Sunday closing law), and in *Zorach v. Clauson*, 343 U.S. 306 (1952) (released time from school for off-campus religious instruction), had such effects, but they did not violate the Establishment Clause. What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.
Pawtucket's display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche. Although the religious and indeed sectarian significance of the crèche, as the district court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display – as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood.

These features combine to make the government's display of the crèche in this particular physical setting no more an endorsement of religion than such governmental "acknowledgments" of religion as legislative prayers of the type approved in Marsh v. Chambers, 463 U.S. 783 (1983), government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the crèche likewise serves a secular purpose – celebration of a public holiday with traditional symbols. . . . It is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years. For these reasons, I conclude that Pawtucket's display of the crèche does not have the effect of communicating endorsement of Christianity.

Justice BRENNAN, with whom Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, dissenting.

The principles announced in the compact phrases of the Religion Clauses have, as the Court today reminds us, proven difficult to apply. Faced with that uncertainty, the Court properly looks for guidance to the settled test announced in Lemon v. Kurtzman, 403 U.S. 602 (1971), for assessing whether a challenged governmental practice involves an impermissible step toward the establishment of religion. Applying that test to this case, the Court reaches an essentially narrow result which turns largely upon the particular holiday context in which the City of Pawtucket's nativity scene appeared. The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a crèche standing alone, or the public display of other distinctively religious symbols such as a cross. Despite the narrow contours of the Court's opinion, our precedents in my view compel the holding that Pawtucket's inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is unconstitutional. Nothing in the history of such practices or the setting in which the City's crèche is presented obscures or diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith.
To be found constitutional, Pawtucket's seasonal celebration must at least be non-denominational and not serve to promote religion. The inclusion of a distinctively religious element like the crèche, however, demonstrates that a narrower sectarian purpose lay behind the decision to include a nativity scene. That the crèche retained this religious character for the people and municipal government of Pawtucket is suggested by the Mayor's testimony at trial in which he stated that for him, as well as others in the City, the effort to eliminate the nativity scene from Pawtucket's Christmas celebration “is a step towards establishing another religion, non-religion that it may be.” (J.A. 100). Plainly, the City and its leaders understood that the inclusion of the crèche in its display would serve the wholly religious purpose of “keep[ing] ‘Christ in Christmas.’” 525 F. Supp., at 1173. From this record, . . . it is impossible to say with the kind of confidence that was possible in McGowan v. Maryland, 366 U.S. 420, 445 (1961), that a wholly secular goal predominates.

The “primary effect” of including a nativity scene in the City's display is, as the District Court found, to place the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views. For many, the City's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing “a significant symbolic benefit to religion. . . .” Larkin v. Grendel's Den, Inc., supra, 459 U.S., at [125-26]. The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit. In this case, as in Engel v. Vitale, “[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.” 370 U.S., at 431.

Finally, it is evident that Pawtucket's inclusion of a crèche as part of its annual Christmas display does pose a significant threat of fostering “excessive entanglement.” As the Court notes, ante, at 1364, the District Court found no administrative entanglement in this case, primarily because the City had been able to administer the annual display without extensive consultation with religious officials. See 525 F. Supp., at 1179. Of course, there is no reason to disturb that finding, but it is worth noting that after today's decision, administrative entanglements may well develop. Jews and other non-Christian groups, prompted perhaps by the Mayor's remark that he will include a Menorah in future displays, can be expected to press government for inclusion of their symbols, and faced with such requests, government will have to become involved in accommodating the various demands. Cf. Committee for Public Education v. Nyquist, supra, 413 U.S., at 798 (“competing efforts [by religious groups] to gain and maintain the support of government” may “occasion[ ] considerable civil strife”). More importantly, although no political divisiveness was apparent in Pawtucket prior to the filing of respondents' lawsuit, that act, as the District Court found, unleashed powerful emotional reactions which divided the City along religious lines. 525 F. Supp., at 1180. The fact that calm had prevailed prior to this suit does not immediately suggest the absence of any division on the point for, as the District Court observed, the quiescence of those opposed to the crèche may have reflected nothing more than their sense of futility in opposing the majority. Id., at
1179. Of course, the Court is correct to note that we have never held that the potential for divisiveness alone is sufficient to invalidate a challenged governmental practice; we have, nevertheless, repeatedly emphasized that “too close a proximity” between religious and civil authorities, Schempp, supra, 374 U.S., at 259 (Brennan, J., concurring), may represent a “warning signal” that the values embodied in the Establishment Clause are at risk. Committee for Public Education v. Nyquist, supra, 413 U.S., at 798. Furthermore, the Court should not blind itself to the fact that because communities differ in religious composition, the controversy over whether local governments may adopt religious symbols will continue to fester.

Referring to the fact-specific nature of Lynch, Justice Brennan noted that “nothing in the Court's opinion suggests that the [Third Circuit] erred when it found that a city-financed platform and cross used by Pope John Paul II to celebrate mass and deliver a sermon during his 1979 visit to Philadelphia was an unconstitutional expenditure of city funds. . . . Nor does the Court provide any basis for disputing the holding of the [Eleventh Circuit] that the erection and maintenance of an illuminated Latin cross on state park property violates the Establishment Clause.”

2. The Modern Natural Law Era: 1986-2005

Since 1986, the endorsement theory of Justice O’Connor has gained adherents among instrumentalist Justices and has been the key factor in display cases decided prior to Justice O’Connor’s retirement from the Court in 2005. As with the school cases, Justice Kennedy has tended to focus on whether the displays involve coercion or proselytizing of religion, and the formalist perspective has focused on whether the displays are consistent with our Nation’s history and traditions. The continuing vitality of these “endorsement” precedents remains to be seen after Justice O’Connor’s retirement from the Court in 2005 and replacement by more formalist Justice Alito in 2006.

**County of Allegheny v. American Civil Liberties Union**


Justice BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, an opinion with respect to Parts I and II, in which Justice STEVENS and Justice O’CONNOR join, an opinion with respect to Part III-B, in which Justice STEVENS joins, an opinion with respect to Part VII, in which Justice O’CONNOR joins, and an opinion with respect to Part VI.

This litigation concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first is a crèche placed on the Grand Staircase of the Allegheny County Courthouse. The second is a Chanukah menorah placed just outside the City-
The Court of Appeals for the Third Circuit ruled that each display violates the Establishment Clause of the First Amendment because each has the impermissible effect of endorsing religion. 842 F.2d 655 (1988). We agree that the crèche display has that unconstitutional effect but reverse the Court of Appeals' judgment regarding the menorah display.

III
A

Under the Lemon analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion. 403 U.S., at 612-613. This trilogy of tests has been applied regularly in the Court's later Establishment Clause cases.

Our subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of “endorsing” religion, a concern that has long had a place in our Establishment Clause jurisprudence. See Engel v. Vitale, 370 U.S. 421, 436 (1962). Thus, in Wallace v. Jaffree, 472 U.S., at 60, the Court held unconstitutional Alabama's moment-of-silence statute because it was “enacted . . . for the sole purpose of expressing the State's endorsement of prayer activities.” The Court similarly invalidated Louisiana's “Creationism Act” because it “endorses religion” in its purpose. Edwards v. Aguillard, 482 U.S. 578, 593 (1987). And the educational program in School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389-392 (1985), was held to violate the Establishment Clause because of its “endorsement” effect. See also Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion) (tax exemption limited to religious periodicals “effectively endorses religious belief”).

Of course, the word “endorsement” is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause. Thus, it has been noted that the prohibition against governmental endorsement of religion “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.” Wallace v. Jaffree, 472 U.S., at 70 (O'Connor, J., concurring in judgment) (emphasis added). Accord, Texas Monthly, Inc. v. Bullock, 489 U.S., at 27, 28 (separate opinion concurring in judgment) (reaffirming that “government may not favor religious belief over disbelief” or adopt a “preference for the dissemination of religious ideas”); Edwards v. Aguillard, 482 U.S., at 593 (“preference” for particular religious beliefs constitutes an endorsement of religion); Abington School District v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (“The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion”). Moreover, the term “endorsement” is closely linked to the term “promotion,” Lynch v. Donnelly, 465 U.S., at 691 (O'Connor, J., concurring), and this Court long since has held that government “may not . . . promote one religion or religious theory against another or even against the militant opposite,” Epperson v. Arkansas, 393 U.S. 97, 104 (1968). See also Wallace v. Jaffree, 472 U.S., at 59-60 (using the concepts of endorsement, promotion, and favoritism interchangeably).
Whether the key word is “endorsement,” “favoritism,” or “promotion,” the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from “making adherence to a religion relevant in any way to a person's standing in the political community.” Lynch v. Donnelly, 465 U.S., at 687 (O'Connor, J., concurring).

IV

We turn first to the county's crèche display. There is no doubt, of course, that the crèche itself is capable of communicating a religious message. See Lynch, 465 U.S., at 685 (majority opinion); id., at 692 (O'Connor, J., concurring); id. at 701 (Brennan, J., dissenting); id., at 727 (Blackmun, J., dissenting). Indeed, the crèche in this lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear. “Glory to God in the Highest!” says the angel in the crèche – Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious – indeed sectarian – just as it is when said in the Gospel or in a church service.

Under the Court's holding in Lynch, the effect of a crèche display turns on its setting. Here, unlike in Lynch, nothing in the context of the display detracts from the crèche's religious message. The Lynch display composed a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell. Similarly, whatever a “talking” wishing well may be, it obviously was a center of attention separate from the crèche. Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.

The floral decoration surrounding the crèche cannot be viewed as somehow equivalent to the secular symbols in the overall Lynch display. The floral frame, like all good frames, serves only to draw one's attention to the message inside the frame. The floral decoration surrounding the crèche contributes to, rather than detracts from, the endorsement of religion conveyed by the crèche. It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies. The county could not say that surrounding the cross with traditional flowers of the season would negate the endorsement of Christianity conveyed by the cross on the Grand Staircase. Its contention that the traditional Christmas greens negate the endorsement effect of the crèche fares no better.

Nor does the fact that the crèche was the setting for the county's annual Christmas-carol program diminish its religious meaning. First, the carol program in 1986 lasted only from December 3 to December 23 and occupied at most one hour a day. JEV 28. The effect of the crèche on those who viewed it when the choirs were not singing – the vast majority of the time – cannot be negated by the presence of the choir program. Second, because some of the carols performed at the site of the crèche were religious in nature, those carols were more likely to augment the religious quality of the scene than to secularize it.

Furthermore, the crèche sits on the Grand Staircase, the “main” and “most beautiful part” of the building that is the seat of county government. App. 157. No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the
“display of the crèche in this particular physical setting,” Lynch, 465 U.S., at 692 (O'Connor, J., concurring), the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message.

The fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization, rather than communicating a message of its own. But the Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (government support of the distribution of religious messages by religious organizations violates the Establishment Clause). Indeed, the very concept of “endorsement” conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message.

Finally, the county argues that it is sufficient to validate the display of the crèche on the Grand Staircase that the display celebrates Christmas, and Christmas is a national holiday. This argument obviously proves too much. It would allow the celebration of the Eucharist inside a courthouse on Christmas Eve. While the county may have doubts about the constitutional status of celebrating the Eucharist inside the courthouse under the government's auspices, see Tr. of Oral Arg. 8-9, this Court does not. The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.

VI

The display of the Chanukah menorah in front of the City-County Building may well present a closer constitutional question. The menorah, one must recognize, is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. While no challenge has been made here to the display of the tree and the sign, their presence is obviously relevant in determining the effect of the menorah's display. The necessary result of placing a menorah next to a Christmas tree is to create an “overall holiday setting” that represents both Christmas and Chanukah – two holidays, not one. See Lynch, 465 U.S., at 692 (O'Connor, J., concurring).

The mere fact that Pittsburgh displays symbols of both Christmas and Chanukah does not end the constitutional inquiry. If the city celebrates both Christmas and Chanukah as religious holidays, then it violates the Establishment Clause. The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone.
Conversely, if the city celebrates both Christmas and Chanukah as secular holidays, then its conduct is beyond the reach of the Establishment Clause. Because government may celebrate Christmas as a secular holiday, it follows that government may also acknowledge Chanukah as a secular holiday. Simply put, it would be a form of discrimination against Jews to allow Pittsburgh to celebrate Christmas as a cultural tradition while simultaneously disallowing the city’s acknowledgment of Chanukah as a contemporaneous cultural tradition.

Accordingly, the relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems far more plausible and is also in line with *Lynch*.

The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. See American Civil Liberties Union of Illinois v. St. Charles, 794 F.2d 265, 271 (CA7), cert. denied, 479 U.S. 961 (1986); L. Tribe, American Constitutional Law 1295 (2d ed. 1988) (Tribe). Numerous Americans place Christmas trees in their homes without subscribing to Christian religious beliefs, and when the city's tree stands alone in front of the City-County Building, it is not considered an endorsement of Christian faith. Indeed, a 40-foot Christmas tree was one of the objects that validated the crèche in *Lynch*. The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.

The tree, moreover, is clearly the predominant element in the city's display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition.

Justice O'CONNOR, with whom Justice BRENNAN and Justice STEVENS join as to Part II, concurring in part and concurring in the judgment.

II

In his separate opinion, Justice Kennedy asserts that the endorsement test “is flawed in its fundamentals and unworkable in practice.” *Post*, at 3141 (opinion concurring in judgment in part and dissenting in part). In my view, neither criticism is persuasive. As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that
government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message “that religion or a particular religious belief is favored or preferred.” Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389 (1985). See also Beschle, The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor, 62 Notre Dame L. Rev. 151 (1987); Note, Developments in the Law – Religion and the State, 100 Harv. L.Rev. 1606, 1647 (1987) (Developments in the Law). We live in a pluralistic society. Our citizens come from diverse religious traditions or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

An Establishment Clause standard that prohibits only “coercive” practices or overt efforts at government proselytization, post, at 3136–3137, 3138–3139, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis. See, e.g., Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973) (“[W]hile proof of coercion might provide a basis for a claim under the Free Exercise Clause, it is not a necessary element of any claim under the Establishment Clause”); Engel v. Vitale, 370 U.S. 421, 430 (1962). To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy. See Abington School District v. Schempp, 374 U.S. 203, 223(1963) (“The distinction between the two clauses is apparent – a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended”). See also Laycock, “Nonpreferential” Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L. Rev. 875, 922 (1986) (“If coercion is also an element of the establishment clause, establishment adds nothing to free exercise”). Moreover, as even Justice Kennedy recognizes, any Establishment Clause test limited to “direct coercion” clearly would fail to account for forms of “[s]ymbolic recognition or accommodation of religious faith” that may violate the Establishment Clause. Post, at 3137.

I continue to believe that the endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols. Moreover, commentators in the scholarly literature have found merit in the approach. See, e.g., Beschle, supra, at 174; Comment, Lemon Reconstituted: Justice O'Connor's Proposed Modifications of the Lemon Test for Establishment Clause Violations, 1986 B.Y.U. L.Rev. 465; Marshall, “We Know It When We See It”: The Supreme Court and Establishment, 59 S. Cal. L. Rev. 495 (1986). I also remain convinced that the endorsement test is capable of consistent application. Indeed, it is notable that the three Courts of Appeals which have considered challenges to the display of a crèche standing alone at city hall have each concluded, relying in part on endorsement analysis, that such a practice sends a message to nonadherents of Christianity that they are outsiders in the political community. See 842 F.2d 655 (CA3 1988); American Jewish Congress
v. Chicago, 827 F.2d 120, 127-128 (CA7 1987); ACLU v. Birmingham, 791 F.2d 1561, 1566-1567 (CA6), cert. denied, 479 U.S. 939 (1986). See also Friedman v. Board of County Commissioners of Bernalillo County, 781 F.2d 777, 780-782 (CA10 1985) (en banc) (county seal including Latin cross and Spanish motto translated as “With This We Conquer,” conveys a message of endorsement of Christianity), cert. denied, 476 U.S. 1169 (1986). To be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins. But that is true of many standards in constitutional law, and even the modified coercion test offered by Justice Kennedy involves judgment and hard choices at the margin. He admits as much by acknowledging that the permanent display of a Latin cross at city hall would violate the Establishment Clause, as would the display of symbols of Christian holidays alone. Post, at 3137, 3139, n.3. Would the display of a Latin cross for six months have such an unconstitutional effect, or the display of the symbols of most Christian holidays and one Jewish holiday? Would the Christmastime display of a crèche inside a courtroom be “coercive” if subpoenaed witnesses had no opportunity to “turn their backs” and walk away? Post, at 3139. Would displaying a crèche in front of a public school violate the Establishment Clause under Justice Kennedy's test? We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding Establishment Clause cases, and that is not a problem unique to the endorsement test.

III

For reasons which differ somewhat from those set forth in Part VI of Justice Blackmun's opinion, I also conclude that the city of Pittsburgh's combined holiday display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty does not have the effect of conveying an endorsement of religion.

Although Justice Blackmun's opinion acknowledges that a Christmas tree alone conveys no endorsement of Christian beliefs, it formulates the question posed by Pittsburgh's combined display of the tree and the menorah as whether the display “has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society.” Ante, at 3112-3113 (emphasis added).

That formulation of the question disregards the fact that the Christmas tree is a predominantly secular symbol and, more significantly, obscures the religious nature of the menorah and the holiday of Chanukah. The opinion is correct to recognize that the religious holiday of Chanukah has historical and cultural as well as religious dimensions, and that there may be certain “secular aspects” to the holiday. But that is not to conclude, however, as Justice Blackmun seems to do, that Chanukah has become a “secular holiday” in our society. Ibid. The Easter holiday celebrated by Christians may be accompanied by certain “secular aspects” such as Easter bunnies and Easter egg hunts; but it is nevertheless a religious holiday. Similarly, Chanukah is a religious holiday with strong historical components particularly important to the Jewish people. Moreover, the menorah is the central religious symbol and ritual object of that religious holiday. Under Justice Blackmun's view, however, the menorah “has been relegated to the role of a neutral harbinger of the holiday
season,” Lynch, 465 U.S., at 727 (Blackmun, J., dissenting), almost devoid of any religious significance. In my view, the relevant question for Establishment Clause purposes is whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs.

The message of pluralism conveyed by the city's combined holiday display is not a message that endorses religion over nonreligion. Just as government may not favor particular religious beliefs over others, “government may not favor religious belief over disbelief.” Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring in judgment); Wallace v. Jaffree, 472 U.S., at 52-54; id., at 70 (O'Connor, J., concurring in judgment). Here, by displaying a secular symbol of the Christmas holiday season rather than a religious one, the city acknowledged a public holiday celebrated by both religious and nonreligious citizens alike, and it did so without endorsing Christian beliefs. A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens. In short, in the holiday context, this combined display in its particular physical setting conveys neither an endorsement of Judaism or Christianity nor disapproval of alternative beliefs, and thus does not have the impermissible effect of “mak[ing] religion relevant, in reality or public perception, to status in the political community.” Lynch, supra, 465 U.S., at 692 (concurring opinion).

Justice BRENNAN, with whom Justice MARSHALL and Justice STEVENS join, concurring in part and dissenting in part.

I have previously explained at some length my views on the relationship between the Establishment Clause and government-sponsored celebrations of the Christmas holiday. See Lynch v. Donnelly, 465 U.S. 668, 694-726 (1984) (dissenting opinion). I continue to believe that the display of an object that “retains a specifically Christian [or other] religious meaning,” id., at 708, is incompatible with the separation of church and state demanded by our Constitution. I therefore agree with the Court that Allegheny County's display of a crèche at the county courthouse signals an endorsement of the Christian faith in violation of the Establishment Clause, and join Parts III-A, IV, and V of the Court's opinion. I cannot agree, however, that the city's display of a 45-foot Christmas tree and an 18-foot Chanukah menorah at the entrance to the building housing the mayor's office shows no favoritism towards Christianity, Judaism, or both. Indeed, I should have thought that the answer as to the first display supplied the answer to the second.

According to the Court, the crèche display sends a message endorsing Christianity because the crèche itself bears a religious meaning, because an angel in the display carries a banner declaring “Glory to God in the highest!,” and because the floral decorations surrounding the crèche highlight it rather than secularize it. The display of a Christmas tree and Chanukah menorah, in contrast, is said to show no endorsement of a particular faith or faiths, or of religion in general, because the Christmas tree is a secular symbol which brings out the secular elements of the menorah. And, Justice Blackmun concludes, even though the menorah has religious aspects, its display reveals no
endorsement of religion because no other symbol could have been used to represent the secular aspects of the holiday of Chanukah without mocking its celebration. Rather than endorsing religion, therefore, the display merely demonstrates that “Christmas is not the only traditional way of observing the winter-holiday season,” and confirms our “cultural diversity.” Ante, at 3113-15. Thus, the decision as to the menorah rests on three premises: the Christmas tree is a secular symbol; Chanukah is a holiday with secular dimensions, symbolized by the menorah; and the government may promote pluralism by sponsoring or condoning displays having strong religious associations on its property. None of these is sound.

Justice Blackmun, in his acceptance of the city's message of “diversity,” ante, at 3115, and, even more so, Justice O'Connor, in her approval of the “message of pluralism and freedom to choose one's own beliefs,” ante, at 3122, appear to believe that, where seasonal displays are concerned, more is better. Whereas a display might be constitutionally problematic if it showcased the holiday of just one religion, those problems vaporize as soon as more than one religion is included. I know of no principle under the Establishment Clause, however, that permits us to conclude that governmental promotion of religion is acceptable so long as one religion is not favored. We have, on the contrary, interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion. See, e.g., Everson v. Board of Education of Ewing, 330 U.S. 1, 15 (1947); Wallace v. Jaffree, 472 U.S. 38, 52-54 (1985).

Nor do I discern the theory under which the government is permitted to appropriate particular holidays and religious objects to its own use in celebrating “pluralism.” The message of the sign announcing a “Salute to Liberty” is not religious, but patriotic; the government's use of religion to promote its own cause is undoubtedly offensive to those whose religious beliefs are not bound up with their attitude toward the Nation.

The uncritical acceptance of a message of religious pluralism also ignores the extent to which even that message may offend. Many religious faiths are hostile to each other, and indeed, refuse even to participate in ecumenical services designed to demonstrate the very pluralism Justices Blackmun and O'Connor extol. To lump the ritual objects and holidays of religions together without regard to their attitudes toward such inclusiveness, or to decide which religions should be excluded because of the possibility of offense, is not a benign or beneficent celebration of pluralism: it is instead an interference in religious matters precluded by the Establishment Clause.

The government-sponsored display of the menorah alongside a Christmas tree also works a distortion of the Jewish religious calendar. As Justice Blackmun acknowledges, “the proximity of Christmas [may] account[ for] the social prominence of Chanukah in this country.” Ante, at 3097. It is the proximity of Christmas that undoubtedly accounts for the city's decision to participate in the celebration of Chanukah, rather than the far more significant Jewish holidays of Rosh Hashanah and Yom Kippur. Contrary to the impression the city and Justices Blackmun and O'Connor seem to create, with their emphasis on “the winter-holiday season,” December is not the holiday season for Judaism. Thus, the city's erection alongside the Christmas tree of the symbol of a relatively minor Jewish religious holiday, far from conveying “the city's secular recognition of different traditions for celebrating the winter-holiday season,” ante, at 3115 (Blackmun, J.), or “a message of pluralism
and freedom of belief,” ante, at 3123 (O'Connor, J.), has the effect of promoting a Christianized version of Judaism. The holiday calendar they appear willing to accept revolves exclusively around a Christian holiday. And those religions that have no holiday at all during the period between Thanksgiving and New Year's Day will not benefit, even in a second-class manner, from the city's once-a-year tribute to “liberty” and “freedom of belief.” This is not “pluralism.”

Justice KENNEDY, with whom The CHIEF JUSTICE, Justice WHITE, and Justice SCALIA join, concurring in the judgment in part and dissenting in part.

The majority holds that the County of Allegheny violated the Establishment Clause by displaying a crèche in the county courthouse, because the “principal or primary effect” of the display is to advance religion within the meaning of Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents, and I dissent from this holding. The crèche display is constitutional, and, for the same reasons, the display of a menorah by the city of Pittsburgh is permissible as well. On this latter point, I concur in the result, but not the reasoning, of Part VI of Justice Blackmun's opinion.

It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation or attendance at a religious activity, see Engel v. Vitale, 370 U.S. 421 (1962); McGowan v. Maryland, supra, 366 U.S., at 452 (discussing McCollum v. Board of Education of School Dist. No. 71, Champaign County, supra ), requiring religious oaths to obtain government office or benefits, Torcaso v. Watkins, 367 U.S. 488 (1961), or delegating government power to religious groups, Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982). The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object. See McGowan v. Maryland, supra, 366 U.S., at 441, quoting 1 Annals of Congress 730 (1789) (James Madison, who proposed the First Amendment in Congress, “‘apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience’”); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (the Religion Clauses “forestall[1] compulsion by law of the acceptance of any creed or the practice of any form of worship”).

As Justice Blackmun observes, ante, at 3103, n.47, some of our recent cases reject the view that coercion is the sole touchstone of an Establishment Clause violation. See Engel v. Vitale, supra, 370 U.S., at 430 (dictum) (rejecting, without citation of authority, proposition that coercion is required to demonstrate an Establishment Clause violation); Abington School District v. Schempp, supra, 374 U.S., at 223; Nyquist, 413 U.S., at 786. That may be true if by “coercion” is meant direct coercion in the classic sense of an establishment of religion that the Framers knew. But coercion need not be a direct tax in aid of religion or a test oath. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not
because government speech about religion is *per se* suspect, as the majority would have it, but because such an obstructive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion. Cf. Friedman v. Board of County Comm'rs of Bernalillo County, 781 F.2d 777 (CA10 1985) (en banc) (Latin cross on official county seal); American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc., 698 F.2d 1098 (CA11 1983) (cross erected in public park); Lowe v. Eugene, 254 Or. 518, 463 P.2d 360 (1969) (same). Speech may coerce in some circumstances, but this does not justify a ban on all government recognition of religion. As Chief Justice Burger wrote for the Court in *Walz*: “The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.” 397 U.S., at 669.

This is most evident where the government's act of recognition or accommodation is passive and symbolic, for in that instance any intangible benefit to religion is unlikely to present a realistic risk of establishment. Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal. Our cases reflect this reality by requiring a showing that the symbolic recognition or accommodation advances religion to such a degree that it actually “establishes a religion or religious faith, or tends to do so.” Lynch, 465 U.S., at 678.

These principles are not difficult to apply to the facts of the cases before us. In permitting the displays on government property of the menorah and the crèche, the city and county sought to do no more than “celebrate the season,” Brief for Petitioner County of Allegheny in No. 87-2050, p. 27, and to acknowledge, along with many of their citizens, the historical background and the religious, as well as secular, nature of the Chanukah and Christmas holidays. This interest falls well within the tradition of government accommodation and acknowledgment of religion that has marked our history from the beginning. It cannot be disputed that government, if it chooses, may participate in sharing with its citizens the joy of the holiday season, by declaring public holidays, installing or permitting festive displays, sponsoring celebrations and parades, and providing holiday vacations for its employees. All levels of our government do precisely that. As we said in *Lynch*, “Government has long recognized – indeed it has subsidized – holidays with religious significance.” 465 U.S., at 676.

If government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality, that many of its citizens celebrate its religious aspects as well. Judicial invalidation of government's attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious. The Religion Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so. See *Lynch v. Donnelly*, *supra*;
There is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

There is no realistic risk that the crèche and the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion. *Lynch* is dispositive of this claim with respect to the crèche, and I find no reason for reaching a different result with respect to the menorah. Both are the traditional symbols of religious holidays that over time have acquired a secular component. *Ante*, at 3093-3094, and n.3, 3096-3097, and n.29. Without ambiguity, *Lynch* instructs that “the focus of our inquiry must be on the [religious symbol] in the context of the [holiday] season,” 465 U.S., at 679. In that context, religious displays that serve “to celebrate the Holiday and to depict the origins of that Holiday” give rise to no Establishment Clause concern. Id., at 681. If Congress and the state legislatures do not run afoul of the Establishment Clause when they begin each day with a state-sponsored prayer for divine guidance offered by a chaplain whose salary is paid at government expense, I cannot comprehend how a menorah or a crèche, displayed in the limited context of the holiday season, can be invalid.

---

Another leading display case came before the Court in 1995, *Capitol Square Review and Advisory Board v. Pinette*. The question in *Pinette* was whether a state violated the Establishment Clause when it permitted a private party (the Ku Klux Klan) to display an unattended religious symbol (a cross) in a traditional public forum (Capitol Square, located next to the statehouse). Justice Scalia announced the judgment of the Court upholding what the state had done, and he delivered an opinion joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. In the crucial part IV of his opinion, Justice Scalia wrote that religious expression cannot violate the Establishment Clause where it “(1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms.” Both conditions were satisfied here and so the state could not bar the cross. Justice Thomas, concurring, said that erection of the cross in this case was primarily a political act, not a Christian act, so the case may not involve the Establishment Clause at all.

---


3 *Id.* at 769-70 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy & Thomas, JJ.).

4 *Id.* at 770-72 (Thomas, J., concurring).
Justice O’Connor, concurring, joined by Justices Souter and Breyer, wrote that the Establishment Clause inquiry cannot be distilled into such a fixed, *per se* rule. For example, she noted, under her endorsement test, the presence of a sign disclaiming government sponsorship or endorsement of the Klan cross would help make clear the state’s role to the community. She said this followed from the fact that the analysis should be from the perspective of a reasonable objective observer in possession of the relevant facts. She disagreed with the dissenting views that endorsement had occurred, because a reasonable observer in possession of the facts would be aware that Capitol Square was a public space in which many groups, both secular and religious, engaged in expressive conduct.5

Justice Stevens, dissenting, said that for a religious display to violate the Establishment Clause, it is enough that some reasonable observers would attribute a religious message to the state. Endorsement does not have to be established from the perspective of Justice O’Connor’s “ideal” reasonable observer, “‘a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment,’” similar to the reasonable person in tort law. Here there was a single unattended religious display, and it is unlikely that all reasonable viewers knew about the history of the square. Justice Ginsburg, also dissenting, pointed out that the cross stood alone in close proximity to the statehouse. Near the cross were the government’s flags and the government’s statutes. No other private display was in sight. No plainly visible sign informed the public that the cross belonged to the Klan and that Ohio’s government did not endorse the display’s message.6

In 2005, in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky,*7 a 5-Justice majority of Justices Stevens, O’Connor, Souter, Ginsburg and Breyer held that posting a version of the Ten Commandments in a courthouse was unconstitutional. Justice Souter’s majority opinion struck down the display based on the first prong of *Lemon,* that its primary purpose was to advance religion. In reaching this conclusion, Justice Souter modified the *Lemon* purpose inquiry to hold that even if some valid secular purpose can be identified which is not a “sham,” *Lemon* is not satisfied if the government’s “primary purpose” was to advance religion, and the secular purpose was only “secondary.” This revision is consistent with an endorsement approach, since if the primary purpose is to advance religion, an objective observer would conclude that the government is endorsing

5 *Id.* at 772-78 (O’Connor, J., joined by Souter & Breyer, JJ., concurring in part and concurring in the judgment).

6 *Id.* at 797-800 & n.5 (Stevens, J., dissenting), *citing id.* at 779-80 (O’Connor, J., joined by Souter & Breyer, JJ., concurring in part and concurring in the judgment); *id.* at 817-18 (Ginsburg, J., dissenting).

7 125 S. Ct. 2722, 2735-37, 2739-41, 2745 (2005); Edwards v. Aguillard, 482 U.S. 578, 586-89 (1987). *See also* ACLU of Ohio Foundation, Inc. v. Ashbrook, 375 F.3d 484 (6th Cir.2004) (judge’s display of a framed poster in his courtroom of the Ten Commandments, which he created himself on his computer, unconstitutional, despite being displayed across from a similarly styled framed poster of the Bill of Rights).
religion, even if a secondary secular purpose also existed. While mention had been made in passing in *Edwards v. Aguillard* of such a “primary purpose” analysis, all cases before *McCreary* that involved government action failing the first prong of *Lemon* had involved no valid secular purpose or a sham secular purpose, including *Aguillard*, where the Court held that the requirement to teach “creation science” along with “evolution” was motivated by solely a religious purpose, and that any proposed secular purpose was a “sham.”

Justice O’Connor, concurring, noted that the “primary purpose” behind the counties’ display was relevant because, under her endorsement test, it conveyed “an unmistakable message of endorsement to the reasonable observer.” Indeed, consistent with this view on “primary purpose,” in 1987, Justice O’Connor had joined with Justice Powell, concurring in *Aguillard*, noting that to violate the Establishment Clause the “religious purpose must predominate.”

In dissent, in Part I of his opinion, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, would have upheld the display of the Ten Commandments based on a “customs and traditions” formalist approach. In Part II of his dissent, Justice Scalia criticized the majority for shifting the focus in *Lemon* from “actual” government purposes to how government purposes would be “perceived” by an objective observer under an “endorsement” inquiry, and for modifying *Lemon* to hold that “primary” or “predominate” religious purposes, rather than “sole” religious purposes, can violate the first prong of the *Lemon* test. Even under *Lemon*, in Part III of his dissent, Justice Scalia concluded that the display was motivated not by a religious purpose, but by a non-coercive secular acknowledgment of the role the Ten Commandments have played in our Nation’s moral and legal history. Parts II and III of Justice Scalia’s dissent were joined by Justice Kennedy, reflecting his “coercion” approach to the Establishment Clause, and rejection of the “endorsement” test.

On the same day *McCreary* was decided, the Court also considered a plaque of the Ten Commandments which was included among 16 other plaques on grounds in front of the Texas Capitol building. Eight Justices on the Court decided *McCreary* and *Van Orden* the same way. Justices Stevens, O’Connor, Souter, and Ginsburg concluded that this plaque also constituted an endorsement of religion. As stated in Justice Souter’s dissent, “[A] pedestrian happening upon the monument at issue here needs no training in religious doctrine to realize that the statement of the

---


9 *Id.* at 2748-64 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., and joined in Parts II and III by Kennedy, J., dissenting). In *ACLU of Kentucky v. McCreary County, Kentucky*, 607 F.3d 439 (6th Cir. 2010), the preliminary injunction against the display of the Ten Commandments, affirmed by the Supreme Court in *McCreary County*, was made a permanent injunction.

10 *Id.* at 2893, 2895 (Souter, J., joined by Stevens & Ginsburg, J., dissenting), *citing* County of Allegheny, 492 U.S. at 598-99; *id.* at 2891 (O’Connor, J., dissenting).
Commandments, quoting God himself, proclaims that the will of the divine being is the source of obligation to obey the rules, including the facially secular ones.” Responding to an argument that the 16 other plaques reduced the religious message conveyed by the plaque, Justice Souter responded, “But 17 monuments with no common appearance, history, or esthetic role scattered over 22 acres is not [one display]. . . . One monument expresses admiration for pioneer women. One pays respect to the fighters of World War II. And one quotes the God of Abraham whose command is the sanction for moral law. . . . In like circumstances, we rejected an argument similar to the State's, noting in County of Allegheny that ‘[t]he presence of Santas or other Christmas decorations elsewhere in the [courthouse] fail to negate the [crèche's] endorsement effect . . . . [T]he crèche . . . was its own display distinct from any other decorations . . . in the building.”

As they had in McCreary, Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas, found no coercion or proselytizing in the placement of the plaque, and said that the plaque was consistent with the Nation’s history and traditions. For them, whatever “may be the fate of the Lemon test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.”

The different outcome in Van Orden from McCreary, upholding the Ten Commandments plaque in Van Orden, while striking down the Ten Commandments plaque in the courtroom in McCreary, was based on Justice Breyer’s shifting his vote in the two cases.

Van Orden v. Perry
125 S. Ct. 2854 (2005)

Justice BREYER, concurring in the judgment.

In School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963), Justice Goldberg, joined by Justice Harlan, wrote, in respect to the First Amendment's Religion Clauses, that there is “no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.” Id., at 306 (concurring opinion). One must refer instead to the basic purposes of those Clauses. They seek to “assure the fullest possible scope of religious liberty and tolerance for all.” Id., at 305. They seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike. Zelman v. Simmons-Harris, 536 U.S. 639, 717-729 (2002) (Breyer, J., dissenting). They seek to maintain that “separation of church and state” that has long been critical to the “peaceful dominion that religion exercises in [this] country,” where the “spirit of religion” and the “spirit of freedom” are productively “united,” “reign[ing] together” but in separate spheres “on the same soil.” A. de Tocqueville, Democracy in America 282-283 (1835) (H. Mansfield & D. Winthrop transls. and eds.2000). They seek to further the basic principles set forth today by Justice O'Connor in her concurring opinion in McCreary County v. American Civil Liberties Union of Ky., 545 U.S., at 881.

11 Id. at 2861-64 (plurality opinion of Rehnquist, C.J., joined by Scalia, Thomas & Kennedy, JJ.).
The case before us is a borderline case. It concerns a large granite monument bearing the text of the Ten Commandments located on the grounds of the Texas State Capitol. On the one hand, the Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the Deity. On the other hand, focusing on the text of the Commandments alone cannot conclusively resolve this case. Rather, to determine the message that the text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display.

In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message (about proper standards of social conduct). And in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law) – a fact that helps to explain the display of those tablets in dozens of courthouses throughout the Nation, including the Supreme Court of the United States. See generally App. to Brief for United States as Amicus Curiae 1a-7a.

Here the tablets have been used as part of a display that communicates not simply a religious message, but a secular message as well. The circumstances surrounding the display's placement on the capitol grounds and its physical setting suggest that the State itself intended the latter, nonreligious aspects of the tablets' message to predominate. And the monument's 40-year history on the Texas state grounds indicates that that has been its effect.

The group that donated the monument, the Fraternal Order of Eagles, a private civic (and primarily secular) organization, while interested in the religious aspect of the Ten Commandments, sought to highlight the Commandments' role in shaping civic morality as part of that organization's efforts to combat juvenile delinquency. See Tex. S. Con. Res. 16, 57th Leg., Reg. Sess. (1961). . . .

The physical setting of the monument, moreover, suggests little or nothing of the sacred. See Appendix A, infra. The monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the “ideals” of those who settled in Texas and of those who have lived there since that time. Tex. H. Con. Res. 38, 77th Leg., Reg. Sess. (2001); see Appendix B, infra. [Ed.: The 17 Monuments are: “Heroes of the Alamo, Hood’s Brigade, Confederate Soldiers, Volunteer Fireman, Terry’s Texas Rangers, Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, The Boy Scout’s Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers.” 125 S Ct. At 2857 n.1]. The setting does not readily lend itself to meditation or any other religious activity. But it does provide a context of history and moral ideals.

If these factors provide a strong, but not conclusive, indication that the Commandments' text on this monument conveys a predominantly secular message, a further factor is determinative here. As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental
way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to “engage in” any “religious practic[e],” to “compel” any “religious practic[e],” or to “work deterrence” of any “religious belief.” Schempp, 374 U.S., at 305 (Goldberg, J., concurring). Those 40 years suggest that the public visiting the capitol grounds has considered the religious aspect of the tablets' message as part of what is a broader moral and historical message reflective of a cultural heritage.

This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state. See, e.g., Weisman, 505 U.S., at 592; Stone v. Graham, 449 U.S. 39 (1980) *(per curiam).* This case also differs from *McCreary County,* where the short (and stormy) history of the courthouse Commandments' displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them. See ante, at 2738-2740 (opinion of the Court). That history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document. And, in today's world, in a Nation of so many different religious and comparable nonreligious fundamental beliefs, a more contemporary state effort to focus attention upon a religious text is certainly likely to prove divisive in a way that this longstanding, pre-existing monument has not.

Following *Van Orden,* the Eighth Circuit held *en banc* in *ACLU Nebraska Foundation v. City of Plattsmouth, Nebraska*12 that a granite monument in a city park displaying the Ten Commandments did not violate the Establishment Clause. The monument was donated to the city by a civic organization and was displayed without objection for several decades prior to commencement of lawsuit challenging the display. The monument was erected in a corner of the park, 10 blocks from city hall, and the words of the monument faced away from the park and its picnic benches and recreational equipment. The court also noted that the Ten Commandments have undeniable historic meaning in addition to their religious significance, and use of the text of the Ten Commandments to acknowledge the role of religion in our Nation's heritage are “replete throughout our country.” The court noted, “Buildings housing the Library of Congress, the National Archives, the Department of Justice, the Court of Appeals and District Court for the District of Columbia, and the United States House of Representatives all include depictions of the Ten Commandments. . . . Indeed, in the United States Supreme Court's own Courtroom, a frieze depicts Moses holding tablets that represent the Ten Commandments, and the Ten Commandments decorate the metal gates and doors around the Courtroom.” A dissenting opinion in *Plattsmouth* noted that, unlike the display in *Van Orden,* the monument's religious message here stood alone with nothing to suggest a broader historical or secular context. The dissent also noted that “the oft noted image of Moses holding two tablets, depicted on the frieze in the Supreme Court's courtroom [and other areas around the

12 419 F.3d 772, 774-77 (8th Cir. 2005) *(en banc* opinion) (citations omitted).
courtroom], appears in the company of seventeen other lawmakers, both religious and secular.” In contrast, in Green v. Haskell County Board of Commissioners, the 10th Circuit held that placement of a Ten Commandments monument on a county courthouse lawn was an endorsement of religion, particularly given comments by commissioners concerning the religious significance of the message. See also Prescott v. Oklahoma Capitol Preservation Comm’n, 373 P.3d 1032 (Okla. 2015) (Ten Commandments display on Oklahoma capitol grounds invalid under Oklahoma Constitution); Felix v. Bloomfield, 841 F.3d 848 (10th Cir. 2016) (5-foot tall, 3,400-pound monument displaying the Ten Commandments on city hall lawn unconstitutional as endorsement of religion).

§ 13.2 Post-1954 Cases Involving Interplay Between Free Speech and Establishment Clause Concerns in the Public Domain

As noted at § 4.1 n.6, in Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125, 1129 (2009), a unanimous Court held that placing in a city’s public park a passive monument containing the Seven Aphorisms of Summum would not violate the Free Speech Clause because it would be government speech, unregulated by the Free Speech Clause. See also Freedom from Religion Foundation, Inc. v. City of Warren, Michigan, 707 F.3d 686 (6th Cir. 2013) (city’s annual holiday display that included several secular symbols, as well as a nativity scene, constitutional under Lynch v. Donnelly and County of Allegheny; display is government speech and thus city’s refusal to add secular message, including the phrase “religion is but myth and superstition,” raises no free speech issue); Dawson v. City of Grand Haven, 2016 WL 7611556 (Mich. Ct. App. 2016) (not reported in N.W.2d) (no free speech issue raised by city’s refusal to display cross on Vietnam War memorial on “Dewey Hill” overlooking “Grand River,” despite city in the past displaying the cross when asked and paid for by First Reformed Church for its occasional “Worship on the Waterfront” services).

In Salazar v. Buono, 130 S. Ct. 1803 (2010), in 1934 private citizens had placed a Latin cross on a rock outcropping in a remote section of the Mojave Desert, owned by the federal government, in order to honor American soldiers who died in World War I. In 2004, the federal government passed a statute to transfer the cross and land on which it stood to a private party, the Veterans of Foreign Wars, to avoid a violation of the Establishment Clause. A 5-4 Court remanded the case to the district court to determine whether a “reasonable observer” would view the transfer as an endorsement of religion. Id. at 1821 (Kennedy, J., announcing judgment of the Court). Justice Kennedy’s plurality opinion strongly indicated the transfer should be viewed as constitutional. He noted, “Here, one Latin cross in the desert evokes far more than religion. It evokes thousands of small crosses in foreign fields marking the graves of Americans who fell in battles, battles whose tragedies are compounded if the fallen are forgotten.” Id. at 1820 (Kennedy, J., joined by Roberts, C.J., and by Alito, J., in part). Similarly, Chief Justice Roberts indicated that transferring the land was likely

---

13 Id. at 778-81 (Bye, J., joined by M.S. Arnold, J., dissenting) (citations omitted).

14 568 F.3d 784 (10th Cir. 2009). The county was also ordered to pay over 10 years $199,000 in attorneys’ fees to the prevailing party. CNN Wire Staff, Oklahoma county must pay up in Ten Commandments case (July 28, 2010) (Internet cite).
constitutional, because it would be permissible “for the Government to tear down the cross, sell the land to the Veterans of Foreign War, and return the cross to them, with the VFW immediately raising the cross again. . . . I do not see how it can make a difference for the Government to skip that empty ritual and do what Congress told it to do – sell the land with the cross on it.” *Id.* at 1821 (Roberts, C.J., concurring). Justice Alito would have ruled the transfer was permissible without a remand. *Id.* at 1821 (Alito, J., concurring in part and concurring in the judgment). Justices Scalia and Thomas would have permitted the transfer based on the view that the parties challenging the transfer did not have standing, but were raising only a generalized grievance insufficient for Article III standing. *Id.* at 1824 (Scalia, J., joined by Thomas, J., concurring in the judgment).

Three Justices dissented on grounds that the proposed transfer itself was an endorsement of the Latin cross. *Id.* at 1828, 1839 (Stevens, J., joined by Ginsburg & Sotomayor, JJ., dissenting). Justice Breyer dissented on grounds that given the case’s procedural posture, the district court’s ban on transfer of the property was covered by an original injunction, which had earlier been affirmed. *Id.* at 1843 (Breyer, J., dissenting). In contrast, Justice Kennedy noted in his plurality opinion that since the government’s right to transfer was not litigated in earlier cases, the original injunction did not cover that contingency. *Id.* at 1817 (Kennedy, J., joined by Roberts, C.J., and by Alito, J., in part).

The accommodation permitted in *Buono*, of course, has its limits. For example, in *American Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), the Tenth Circuit held unconstitutional a sequence of crosses erected on Utah highways to memorialize fallen Utah Highway Patrol state troopers, as they would convey endorsement of Christianity to a reasonable observer. *See also Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011) (symbolism, history, and prominence of a 43-foot cross, which had been incorporated into a war memorial, sends a message that sacrifices of Christian soldiers are valued more highly), *on remand*, 2013 WL 6528884 (S.D. Cal. 2013) (not reported in F. Supp. 2d) (cross ordered removed); *Tearpock-Martini v. Borough of Shickshinny*, 756 F.3d 232 (3rd Cir. 2014) (Establishment Clause claim against a directional sign (“Bible Baptist Church Welcomes You!” with a directional arrow “1 Block”) sponsored by Baptist church and erected on public land may go ahead, since, even though rejecting application of the equitable “continuing-violation” exception to timely filing, each day’s display constitutes a new potential violation, and thus claim not barred by any statute of limitations that might apply if viewed from date the sign was originally displayed), *on remand*, 98 F. Supp. 697 (M.D. Pa. 2015) (while case can proceed on Establishment Clause violation, qualified immunity protects city officials from damage actions since any constitutional violated would not be “clearly established”); *American Humanist Ass’n v. Maryland-National Capital Park & Planning Comm’n*. 874 F3d 195 (4th Cir. 2017) (40-foot tall Latin Cross, established in memory of soldiers who died in World War I, unconstitutional as primary effect of endorsing religion and excessive entangles government in religion).

During the instrumentalist era, concern about a possible violation of the Establishment Clause was used by some public schools as a justification for refusing to allow groups with a religious perspective to use school facilities. However, since 1986, that justification has not often been successfully invoked, as courts typically have concluded that denial of equal access to school facilities violates the free speech rights of such groups, as in *Lamb’s Chapel v. Center Moriches*
Consistent with *Lamb’s Chapel* and *Rosenberger*, the Court held in 2001 in *Good News Club v. Milford Central School* that a public school violated the free speech rights of a religious club that was excluded from meeting after hours on school premises. Delivering the opinion of the Court, Justice Thomas said that the exclusion here, as in *Lamb’s Chapel* and *Rosenberger*, constituted viewpoint discrimination. Justice Thomas explained that the school permitted the use of its facilities for any group that promoted the moral and character development of children. Here, the club sought to address that subject from a religious standpoint. He said that even though the club’s activities may be decidedly religious in nature, they can also properly be characterized as the teaching of morals and character development. Allowing the club to use the school facilities here, as in *Lamb’s Chapel*, would not violate the Establishment Clause because the activities were not sponsored by the school, would not occur during school hours, and would have been open to the public. Any danger of misperceiving an endorsement of religion was no greater than the danger of a perceived hostility toward the religious viewpoint of the club if it were excluded from the public forum.

Justice Scalia, concurring, said that there was absolutely no legal coercion in this situation and that religious expression could not violate the Establishment Clause where it was purely private conduct in a traditional or designated public forum, since any speech would be literally that of the private actor, not the government. Justice Breyer, concurring, speculated that a child participating in the program might perceive an endorsement of religion by the school, but Justice Breyer indicated that he would not presume government endorsement. That issue could be dealt with at trial.

Justice Stevens, dissenting, said that the district court correctly classified the religious speech involved here as aimed principally at proselytizing or inculcating belief in a particular religious faith. Similarly, Justice Souter, joined by Justice Ginsburg, said in his dissent that the club meets for the evangelical service of worship and not merely the teaching of morals and character from a religious point of view. The forum is not anything like the sites for wide-ranging intellectual exchange that were involved in *Lamb’s Chapel*. Indeed, rather than the school location being used to foster an atmosphere of exchange of ideas, the school’s physical location appeared to be the whole point. Attendance tripled when moved to that setting. Reaching a similar conclusion, the Ninth Circuit has held that a county’s library refusal to allow religious services in the library is a

---

18 *Id.* at 120-21 (Scalia, J., concurring); *id.* at 128-30 (Breyer, J., concurring in part).
19 *Id.* at 131-34 (Stevens, J., dissenting); *id.* at 137-39, 142-45 (Souter, J., joined by Ginsburg, J., dissenting).
permissible exclusion meant to preserve the limited public forum for “educational, cultural or community interest” activities, and does not constitute viewpoint discrimination.20

While public schools may permit religious organization to use their facilities on a non-discriminatory basis during after school hours, they are not required to open their schools for worship services. See Bronx Household of Faith v. Board of Education of the City of New York, 750 F.3d 184 (2nd Cir. 2014). Cf. Barnes-Wallace v. San Diego, 704 F.3d 1067 (9th Cir. 2012) (San Diego’s rent-free leases of property to Boy Scouts – an organization that at the time prohibited atheists, agnostics, or “open or avowed” homosexuals from being members – does not violate the Establishment Clause because the city provides similar leases to both secular and religious nonprofit organizations) (the Boy Scouts have since changed their national membership policy to permit homosexuals to be members, as discussed at § 11.3 following Boy Scouts of America v. Dale).

§ 13.3 Post-1954 Cases Involving Religious Speech in Public Fora

Marsh v. Chambers
463 U.S. 783 (1983)

Chief Justice BURGER delivered the opinion of the Court.

The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. Robert E. Palmer, a Presbyterian minister, has served as chaplain since 1965 at a salary of $319.75 per month for each month the legislature is in session.

Ernest Chambers is a member of the Nebraska Legislature and a taxpayer of Nebraska. Claiming that the Nebraska Legislature's chaplaincy practice violates the Establishment Clause of the First Amendment, he brought this action under 42 U.S.C. § 1983, seeking to enjoin enforcement of the practice. After denying a motion to dismiss on the ground of legislative immunity, the District Court, 504 F. Supp. 585, held that the Establishment Clause was not breached by the prayers, but was violated by paying the chaplain from public funds. It therefore enjoined the Legislature from using public funds to pay the chaplain; it declined to enjoin the policy of beginning sessions with prayers. Cross-appeals were taken.

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, “God save the United States and this Honorable Court.” The same invocation occurs at all sessions of this Court.

20 Faith Center Church Evangelistic Ministries v. Glover, 462 F.3d 1194 (9th Cir. 2006).
The tradition in many of the colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain. See e.g., 1 J. of the Continental Cong. 26 (1774); 2 J. of the Continental Cong. 12 (1775); 5 J. of the Continental Cong. 530 (1776); 6 J. of the Continental Cong. 887 (1776); 27 J. of the Continental Cong. 683 (1784). See also 1 A. Stokes, Church and State in the United States 448-450 (1950). Although prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. Thus, on April 7, 1789, the Senate appointed a committee “to take under consideration the manner of electing Chaplains.” J. of the Sen. 10. On April 9, 1789, a similar committee was appointed by the House of Representatives. On April 25, 1789, the Senate elected its first chaplain, J. of the Sen. 16; the House followed suit on May 1, 1789, J. of the H.R. 26. A statute providing for the payment of these chaplains was enacted into law on Sept. 22, 1789. 2 Annals of Cong. 2180; 1 Stat. 71.

On Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights, J. of the Sen. 88; J. of the H.R. 121. Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood. Nebraska Journal of the Council at the First Regular Session of the General Assembly 16 (Jan. 22, 1855).

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent. An act “passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning”. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888).

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an “establishment” of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, “[w]e are a religious people whose institutions presuppose a Supreme Being.” Zorach v. Clauson, 343 U.S. 306, 313 (1952).

We turn then to the question of whether any features of the Nebraska practice violate the Establishment Clause. Beyond the bare fact that a prayer is offered, three points have been made: first, that a clergyman of only one denomination – Presbyterian – has been selected for 16 years; second, that the chaplain is paid at public expense; and third, that the prayers are in the
Judeo-Christian tradition. [FN 14: Palmer characterizes his prayers as “nonsectarian,” “Judeo Christian,” and with “elements of the American civil religion.” App. 75 and 87. (Deposition of Robert E. Palmer). Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator. Id., at 49.] Weighed against the historical background, these factors do not serve to invalidate Nebraska's practice.

The Court of Appeals was concerned that Palmer's long tenure has the effect of giving preference to his religious views. We, no more than Members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. To the contrary, the evidence indicates that Palmer was reappointed because his performance and personal qualities were acceptable to the body appointing him. Palmer was not the only clergyman heard by the Legislature; guest chaplains have officiated at the request of various legislators and as substitutes during Palmer's absences. Tr. of Oral Arg. 10. Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.

Nor is the compensation of the chaplain from public funds a reason to invalidate the Nebraska Legislature's chaplaincy; remuneration is grounded in historic practice initiated, as we noted earlier, ante, at 3333-3334, by the same Congress that adopted the Establishment Clause of the First Amendment. The Continental Congress paid its chaplain, see e.g., 6 J. of the Continental Cong. 887 (1776), as did some of the states, see e.g., Debates and other Proceedings of the Convention of Va. 470 (June 26, 1788). Currently, many state legislatures and the United States Congress provide compensation for their chaplains, Brief for Nat'l Conference of State Legislatures as Amicus Curiae 3; 2 U.S.C. §§ 61d and 84-2; H.R. Res. 7, 96th Cong., 1st Sess. (1979). Nebraska has paid its chaplain for well over a century, see 1867 Neb. Laws §§ 2-4 (June 21, 1867), reprinted in, Neb.Gen'l Stat. 459 (1873). The content of the prayer is not of concern to judges where, as here, 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. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

The Court today has written a narrow and, on the whole, careful opinion. In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its “unique history,” ante, at 3335, is generally exempted from the First Amendment's prohibition against “the establishment of religion.” The Court's opinion is consistent with dictum in at least one of our prior decisions, and its limited rationale should pose little threat to the overall fate of the Establishment Clause. Moreover, disagreement with the Court requires that I confront the fact that some twenty years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, I came very close to endorsing essentially the result reached by the Court today. [Ed.: Schempp, 374 U.S. 203, 299-300 (1963) (Brennan, J., concurring).] Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other State Legislatures, is unconstitutional. It is contrary to the doctrine as well
underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.

That the "purpose" of legislative prayer is preeminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws," ante, at 3336, is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play -- formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose -- could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.

The "primary effect" of legislative prayer is also clearly religious. As we said in the context of officially sponsored prayers in the public schools, "prescribing a particular form of religious worship," even if the individuals involved have the choice not to participate, places "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion . . . ." Engel v. Vitale, 370 U.S. 421, 431 (1962). More importantly, invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." Larkin v. Grendel's Den, 103 S. Ct. 505, 511 (1982). See Abington School Dist. v. Schempp, 374 U.S. 203, 224 (1963).

Finally, there can be no doubt that the practice of legislative prayer leads to excessive "entanglement" between the State and religion. Lemon pointed out that "entanglement" can take two forms: First, a state statute or program might involve the state impermissibly in monitoring and overseeing religious affairs. 403 U.S., at 614-622. In the case of legislative prayer, the process of choosing a "suitable" chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid.

Second, excessive "entanglement" might arise out of "the divisive political potential" of a state statute or program. 403 U.S., at 622. "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process." Ibid. (citations omitted).

In this case, this second aspect of entanglement is also clear. The controversy between Senator Chambers and his colleagues, which had reached the stage of difficulty and rancor long before this lawsuit was brought, has split the Nebraska Legislature precisely on issues of religion and religious conformity. App. 21-24. The record in this case also reports a series of instances, involving legislators other than Senator Chambers, in which invocations by Reverend Palmer and others led to controversy along religious lines. And in general, the history of legislative prayer has been far more eventful -- and divisive -- than a hasty reading of the Court's opinion might indicate.
In a democratically elected legislature, the religious beliefs of the chaplain tend to reflect the faith of the majority of the lawmakers' constituents. Prayers may be said by a Catholic priest in the Massachusetts Legislature and by a Presbyterian minister in the Nebraska Legislature, but I would not expect to find a Jehovah's Witness or a disciple of Mary Baker Eddy or the Reverend Moon serving as the official chaplain in any state legislature. Regardless of the motivation of the majority that exercises the power to appoint the chaplain, it seems plain to me that the designation of a member of one religious faith to serve as the sole official chaplain of a state legislature for a period of 16 years constitutes the preference of one faith over another in violation of the Establishment Clause of the First Amendment.

In *Marsh*, the prayer opening the legislative session was nondenominational, as noted in the majority opinion at footnote 14. Where the prayer is not nondenominational, but favors a particular religious tenet, such as referencing “Jesus Christ, our Lord,” most lower courts held such prayers were unconstitutional. See, e.g., Joyner v. Forsyth County, 653 F.3d 341 (4th Cir. 2011), cert. denied, 132 S. Ct. 1097 (2012); Galloway v. Town of Greece, New York, 681 F.3d 20 (2nd Cir. 2102), cert. granted, Town of Greece, New York v. Galloway, 133 S. Ct. 2388 (2013). But see Pelphrey v. Cobb County, Georgia, 547 F.3d 1263 (11th Cir. 2008) (denominational prayers permissible as long as legislature offers prayer opportunities by volunteer clergy or other members of the community on a non-discriminatory basis, even where more than 95% of volunteers are Christian, and 70% of prayers contained Christian references, such as “in Jesus' name we pray.”). The Supreme Court considered this issue in *Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014).

**Town of Greece, New York v. Galloway**

134 S. Ct. 1811 (2014).

KENNEDY, J., delivered the opinion of the Court, except as to Part II-B. ROBERTS, C.J., and ALITO, J., joined the opinion in full, and SCALIA and THOMAS, JJ., joined except as to Part II-B. ALITO, J., filed a concurring opinion, in which SCALIA, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined as to Part II. BREYER, J., filed a dissenting opinion. KAGAN, J., filed a dissenting opinion, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

Justice KENNEDY delivered the opinion of the Court, except as to Part II-B.

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

Greece, a town with a population of 94,000, is in upstate New York. For some years, it began its monthly town board meetings with a moment of silence. In 1999, the newly elected town supervisor,
John Auberger, decided to replicate the prayer practice he had found meaningful while serving in the county legislature. Following the roll call and recitation of the Pledge of Allegiance, Auberger would invite a local clergyman to the front of the room to deliver an invocation. After the prayer, Auberger would thank the minister for serving as the board's “chaplain for the month” and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures. App. 22a-25a.

Some of the ministers spoke in a distinctly Christian idiom; and a minority invoked religious holidays, scripture, or doctrine, as in the following prayer:

“Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter. . . . We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan. . . . Praise and glory be yours, O Lord, now and forever more. Amen.” Id., at 88a-89a.

Respondents Susan Galloway and Linda Stephens attended town board meetings to speak about issues of local concern, and they objected that the prayers violated their religious or philosophical views. At one meeting, Galloway admonished board members that she found the prayers “offensive,” “intolerable,” and an affront to a “diverse community.” Complaint in No. 08-cv-6088 (WDNY), ¶ 66. After respondents complained that Christian themes pervaded the prayers, to the exclusion of citizens who did not share those beliefs, the town invited a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess who had read press reports about the prayer controversy requested, and was granted, an opportunity to give the invocation.

Galloway and Stephens brought suit in the United States District Court for the Western District of New York. They alleged that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayers, such as those given “in Jesus' name.” 732 F. Supp. 2d 195, 203 (2010). They did not seek an end to the prayer practice, but rather requested an injunction that would limit the town to “inclusive and ecumenical” prayers that referred only to a “generic God” and would not associate the government with any one faith or belief. Id., at 210, 241.

II

In *Marsh v. Chambers*, 463 U.S. 783, the Court found no First Amendment violation in the Nebraska Legislature's practice of opening its sessions with a prayer delivered by a chaplain paid from state funds. The decision concluded that legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause. As practiced by Congress since the

*Marsh* is sometimes described as “carving out an exception” to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to “any of the formal ‘tests' that have traditionally structured” this inquiry. Id., at 796, 813 (Brennan, J., dissenting).

Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted “by reference to historical practices and understandings.” County of Allegheny, 492 U.S., at 670 (Kennedy, J., concurring in judgment in part and dissenting in part). That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society. D. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, pp. 12-13 (1997). In the 1850's, the judiciary committees in both the House and Senate reevaluated the practice of official chaplaincies after receiving petitions to abolish the office. The committees concluded that the office posed no threat of an establishment because lawmakers were not compelled to attend the daily prayer, S.Rep. No. 376, 32d Cong., 2d Sess., 2 (1853); no faith was excluded by law, nor any favored, *id.*, at 3; and the cost of the chaplain's salary imposed a vanishingly small burden on taxpayers, H. Rep. No. 124, 33d Cong., 1st Sess., 6 (1854). *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change. County of Allegheny, supra, at 670 (opinion of Kennedy, J.); see also School Dist. of Abington Township v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (“[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers”). A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent. See Van Orden v. Perry, 545 U.S. 677, 702-704 (2005) (Breyer, J., concurring in judgment).

The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures. Respondents assert that the town's prayer exercise falls outside that tradition and transgresses the Establishment Clause for two independent but mutually reinforcing reasons. First, they argue that *Marsh* did not approve prayers containing sectarian language or themes, such as the prayers offered in Greece that referred to the “death, resurrection, and ascension of the Savior Jesus Christ,” *id.*, at 88a, and the “saving sacrifice of Jesus Christ on the cross,” *id.*, at 88a. Second, they argue that the setting and conduct
of the town board meetings create social pressures that force nonadherents to remain in the room or even feign participation in order to avoid offending the representatives who sponsor the prayer and will vote on matters citizens bring before the board. The sectarian content of the prayers compounds the subtle coercive pressures, they argue, because the nonbeliever who might tolerate ecumenical prayer is forced to do the same for prayer that might be inimical to his or her beliefs.

Respondents maintain that prayer must be nonsectarian, or not identifiable with any one religion; and they fault the town for permitting guest chaplains to deliver prayers that “use overtly Christian terms” or “invoke specifics of Christian theology.” Brief for Respondents 20. A prayer is fitting for the public sphere, in their view, only if it contains the “‘most general, nonsectarian reference to God,’” id., at 33 (quoting M. Meyerson, Endowed by Our Creator: The Birth of Religious Freedom in America 11-12 (2012)), and eschews mention of doctrines associated with any one faith, Brief for Respondents 32-33. They argue that prayer which contemplates “the workings of the Holy Spirit, the events of Pentecost, and the belief that God ‘has raised up the Lord Jesus’ and ‘will raise us, in our turn, and put us by His side’” would be impermissible, as would any prayer that reflects dogma particular to a single faith tradition. Id., at 34 (quoting App. 89a and citing id., at 56a, 123a, 134a).

An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court’s cases. The Court found the prayers in *Marsh* consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could “coexist[t] with the principles of disestablishment and religious freedom.” 463 U.S., at 786. The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable. One of the Senate's first chaplains, the Rev. William White, gave prayers in a series that included the Lord's Prayer, the Collect for Ash Wednesday, prayers for peace and grace, a general thanksgiving, St. Chrysostom's Prayer, and a prayer seeking “the grace of our Lord Jesus Christ, &c.” Letter from W. White to H. Jones (Dec. 29, 1830), in B. Wilson, Memoir of the Life of the Right Reverend William White, D. D., Bishop of the Protestant Episcopal Church in the State of Pennsylvania 322 (1839); see also New Hampshire Patriot & State Gazette, Dec. 15, 1823, p. 1 (describing a Senate prayer addressing the “Throne of Grace”); Cong. Globe, 37th Cong., 1st Sess., 2 (1861) (reciting the Lord's Prayer). The decidedly Christian nature of these prayers must not be dismissed as the relic of a time when our Nation was less pluralistic than it is today. Congress continues to permit its appointed and visiting chaplains to express themselves in a religious idiom. It acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds. See, e.g., 160 Cong. Rec. S1329 (Mar. 6, 2014) (Dalai Lama) (“I am a Buddhist monk – a simple Buddhist monk – so we pray to Buddha and all other Gods”); 159 Cong. Rec. H7006 (Nov. 13, 2013) (Rabbi Joshua Gruenberg) (“Our God and God of our ancestors, Everlasting Spirit of the Universe . . .”); 159 Cong. Rec. H3024 (June 4, 2013) (Satguru Bodhinatha Veylanswami) (“Hindu scripture declares, without equivocation, that the highest of high ideals is to never knowingly harm anyone”); 158 Cong. Rec. H5633 (Aug. 2, 2012) (Imam Nayyar Imam) (“The final prophet of God, Muhammad, peace be upon him, stated: ‘The leaders of a people are a representation of their deeds’ ”).
The contention that legislative prayer must be generic or nonsectarian derives from dictum in *County of Allegheny*, 492 U.S. 573, that was disputed when written and has been repudiated by later cases. There the Court held that a crèche placed on the steps of a county courthouse to celebrate the Christmas season violated the Establishment Clause because it had “the effect of endorsing a patently Christian message.” Id., at 601. Four dissenting Justices disputed that endorsement could be the proper test, as it likely would condemn a host of traditional practices that recognize the role religion plays in our society, among them legislative prayer and the “forthrightly religious” Thanksgiving proclamations issued by nearly every President since Washington. Id., at 670-671. The Court sought to counter this criticism by recasting *Marsh* to permit only prayer that contained no overtly Christian references: “However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed. . . . The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'” Id., at 603 (quoting Marsh, supra, at 793, n.14; footnote omitted).

This proposition is irreconcilable with the facts of *Marsh* and with its holding and reasoning. *Marsh* nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content. The opinion noted that Nebraska's chaplain, the Rev. Robert E. Palmer, modulated the “explicitly Christian” nature of his prayer and “removed all references to Christ” after a Jewish lawmaker complained. 463 U.S., at 793, n.14. With this footnote, the Court did no more than observe the practical demands placed on a minister who holds a permanent, appointed position in a legislature and chooses to write his or her prayers to appeal to more members, or at least to give less offense to those who object. See Mallory, “An Officer of the House Which Chooses Him, and Nothing More”: How Should Marsh v. Chambers Apply to Rotating Chaplains?, 73 U. Chi. L. Rev. 1421, 1445 (2006). *Marsh* did not suggest that Nebraska's prayer practice would have failed had the chaplain not acceded to the legislator's request. Nor did the Court imply the rule that prayer violates the Establishment Clause any time it is given in the name of a figure deified by only one faith or creed. See Van Orden, 545 U.S., at 688, n.8 (recognizing that the prayers in *Marsh* were “often explicitly Christian” and rejecting the view that this gave rise to an establishment violation). To the contrary, the Court instructed that the “content of the prayer is not of concern to judges,” provided “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.” 463 U.S., at 794-795.

B

Respondents further seek to distinguish the town's prayer practice from the tradition upheld in *Marsh* on the ground that it coerces participation by nonadherents. They and some *amici* contend that prayer conducted in the intimate setting of a town board meeting differs in fundamental ways from the invocations delivered in Congress and state legislatures, where the public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances. Respondents argue that the public may feel subtle pressure to participate in prayers that violate their beliefs in order to please the board members from
whom they are about to seek a favorable ruling. In their view the fact that board members in small towns know many of their constituents by name only increases the pressure to conform.

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

The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of “God save the United States and this honorable Court” at the opening of this Court's sessions. See Lynch, 465 U.S., at 693 (O'Connor, J., concurring). It is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews. See Salazar v. Buono, 559 U.S. 700, 720-721 (2010) (plurality opinion); Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 308 (2000). That many appreciate these acknowledgments of the divine in our public institutions does not suggest that those who disagree are compelled to join the expression or approve its content. West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. The District Court in Marsh described the prayer exercise as “an internal act” directed at the Nebraska Legislature's “own members,” Chambers v. Marsh, 504 F. Supp. 585, 588 (D. Neb.1980), rather than an effort to promote religious observance among the public. See also Lee, 505 U.S., at 630, n.8 (Souter, J., concurring) (describing Marsh as a case “in which government officials invoke[d] spiritual inspiration entirely for their own benefit”); Atheists of Fla., Inc. v. Lakeland, 713 F.3d 577, 583 (C.A.11 2013) (quoting a city resolution providing for prayer “for the benefit and blessing of” elected leaders); Madison's Detached Memoranda 558 (characterizing prayer in Congress as “religious worship for national representatives”); Brief for U.S. Senator Marco Rubio et al. as Amici Curiae 30-33; Brief for 12 Members of Congress as Amici Curiae 6. To be sure, many members of the public find these prayers meaningful and wish to join them. But their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.
The analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity. No such thing occurred in the town of Greece.

In their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion. Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, especially where, as here, any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions. See Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring) (“The compulsion of which Justice Jackson was concerned . . . was of the direct sort – the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree”).

This case can be distinguished from the conclusions and holding of Lee v. Weisman, 505 U.S. 577. There the Court found that, in the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student. Id., at 592-594; see also Santa Fe Independent School Dist., 530 U.S., at 312. Four Justices dissented in Lee, but the circumstances the Court confronted there are not present in this case and do not control its outcome. Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even, as happened here, making a later protest. In this case, as in Marsh, board members and constituents are “free to enter and leave with little comment and for any number of reasons.” Lee, supra, at 597. Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to mature adults, who “presumably” are “not readily susceptible to religious indoctrination or peer pressure.” Marsh, 463 U.S., at 792 (internal quotation marks and citations omitted).

In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, inducting high school athletes into the town hall of fame, and presenting proclamations to volunteers, civic groups, and senior citizens. It is a moment for town leaders to recognize the achievements of their constituents and the aspects of community life that are worth celebrating. By inviting ministers to serve as chaplain for the month, and welcoming them to the front of the room alongside civic leaders, the town is acknowledging the central place that religion, and religious institutions, hold in the lives of those present.

Justice ALITO, with whom Justice SCALIA joins, concurring.

The town of Greece is a municipality in upstate New York that borders the city of Rochester. The town decided to emulate a practice long established in Congress and state legislatures by having a brief prayer before sessions of the town board. The task of lining up clergy members willing to
provide such a prayer was given to the town's office of constituent services. 732 F. Supp. 2d 195, 197-198 (W.D.N.Y.2010). For the first four years of the practice, a clerical employee in the office would randomly call religious organizations listed in the Greece “Community Guide,” a local directory published by the Greece Chamber of Commerce, until she was able to find somebody willing to give the invocation. Id., at 198. This employee eventually began keeping a list of individuals who had agreed to give the invocation, and when a second clerical employee took over the task of finding prayer-givers, the first employee gave that list to the second. Id., at 198, 199. The second employee then randomly called organizations on that list – and possibly others in the Community Guide – until she found someone who agreed to provide the prayer. Id., at 199.

Apparently, all the houses of worship listed in the local Community Guide were Christian churches. Id., at 198-200, 203. That is unsurprising given the small number of non-Christians in the area. Although statistics for the town of Greece alone do not seem to be available, statistics have been compiled for Monroe County, which includes both the town of Greece and the city of Rochester. According to these statistics, of the county residents who have a religious affiliation, about 3% are Jewish, and for other non-Christian faiths, the percentages are smaller. There are no synagogues within the borders of the town of Greece, id., at 203, but there are several not far away across the Rochester border. Presumably, Jewish residents of the town worship at one or more of those synagogues, but because these synagogues fall outside the town's borders, they were not listed in the town's local directory, and the responsible town employee did not include them on her list. Ibid. Nor did she include any other non-Christian house of worship. Id., at 198-200.

As a result of this procedure, for some time all the prayers at the beginning of town board meetings were offered by Christian clergy, and many of these prayers were distinctively Christian. But respondents do not claim that the list was attributable to religious bias or favoritism, and the Court of Appeals acknowledged that the town had “no religious animus.” 681 F.3d 20, 32 (C.A.2 2012).

For some time, the town's practice does not appear to have elicited any criticism, but when complaints were received, the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation. Id., at 23, 25; 732 F. Supp. 2d, at 197. The most recent list in the record of persons available to provide an invocation includes representatives of many non-Christian faiths. App. in No. 10-3635 (CA2), pp. A1053-A1055 (hereinafter CA2 App.).

Both Houses of Congress now advise guest chaplains that they should keep in mind that they are addressing members from a variety of faith traditions, and as a matter of policy, this advice has much to recommend it. But any argument that nonsectarian prayer is constitutionally required runs headlong into a long history of contrary congressional practice. From the beginning, as the Court notes, many Christian prayers were offered in the House and Senate, see ante, at 1818, and when rabbis and other non-Christian clergy have served as guest chaplains, their prayers have often been couched in terms particular to their faith traditions.

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

In addition, if a town attempts to go beyond simply recommending that a guest chaplain deliver a prayer that is broadly acceptable to all members of a particular community (and the groups represented in different communities will vary), the town will inevitably encounter sensitive problems. Must a town screen and, if necessary, edit prayers before they are given? If prescreening is not required, must the town review prayers after they are delivered in order to determine if they were sufficiently generic? And if a guest chaplain crosses the line, what must the town do? Must the chaplain be corrected on the spot? Must the town strike this chaplain (and perhaps his or her house of worship) from the approved list?

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


I

The Establishment Clause provides that “Congress shall make no law respecting an establishment of religion.” U.S. Const., Amdt. 1. As I have explained before, the text and history of the Clause “resist incorporation” against the States. Newdow, supra, at 45-46; see also Van Orden v. Perry, 545 U.S. 677, 692-693 (2005) (Thomas, J., concurring); Zelman v. Simmons-Harris, 536 U.S. 639, 677-680 (2002) (same). If the Establishment Clause is not incorporated, then it has no application here, where only municipal action is at issue.

II

Even if the Establishment Clause were properly incorporated against the States, the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding. “The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting); see also Perry, 545 U.S., at 693-694 (Thomas, J., concurring); Cutter v. Wilkinson, 544 U.S. 709, 729 (2005) (Thomas, J., concurring); Newdow, supra, at 52 (opinion of Thomas, J.). In a typical case, attendance at the established church was mandatory, and taxes were levied to generate church revenue. McConnell, Establishment and Disestablishment, at 2144-2146, 2152-2159. Dissenting ministers were barred from preaching, and political participation was limited to members of the established church. Id., at 2161-2168, 2176-2180.
Thus, to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the “subtle coercive pressures” allegedly felt by respondents in this case, ante, at 1819–1820.

Justice BREYER, dissenting.

As we all recognize, this is a “fact-sensitive” case. Ante, at 1825 (opinion of Kennedy, J.); see also post, at 1851-1852 (Kagan, J., dissenting); 681 F.3d 20, 34 (C.A.2 2012) (explaining that the Court of Appeals' holding follows from the “totality of the circumstances”). The Court of Appeals did not believe that the Constitution forbids legislative prayers that incorporate content associated with a particular denomination. Id., at 28. Rather, the court's holding took that content into account simply because it indicated that the town had not followed a sufficiently inclusive “prayer-giver selection process.” Id., at 30.

In my view, the Court of Appeals' conclusion and its reasoning are convincing. Justice Kagan's dissent is consistent with that view, and I join it. I also here emphasize several factors that I believe underlie the conclusion that, on the particular facts of this case, the town's prayer practice violated the Establishment Clause.

First, Greece is a predominantly Christian town, but it is not exclusively so. A map of the town's houses of worship introduced in the District Court shows many Christian churches within the town's limits. It also shows a Buddhist temple within the town and several Jewish synagogues just outside its borders, in the adjacent city of Rochester, New York. Id., at 24. Yet during the more than 120 monthly meetings at which prayers were delivered during the record period (from 1999 to 2010), only four prayers were delivered by non-Christians. And all of these occurred in 2008, shortly after the plaintiffs began complaining about the town's Christian prayer practice and nearly a decade after that practice had commenced.

Second, the town made no significant effort to inform the area's non-Christian houses of worship about the possibility of delivering an opening prayer.

Third, in this context, the fact that nearly all of the prayers given reflected a single denomination takes on significance. That significance would have been the same had all the prayers been Jewish, or Hindu, or Buddhist, or of any other denomination. The significance is that, in a context where religious minorities exist and where more could easily have been done to include their participation, the town chose to do nothing. It could, for example, have posted its policy of permitting anyone to give an invocation on its website, greeceny.gov, which provides dates and times of upcoming town board meetings along with minutes of prior meetings. It could have announced inclusive policies at the beginning of its board meetings, just before introducing the month's prayer giver. It could have provided information to those houses of worship of all faiths that lie just outside its borders and include citizens of Greece among their members. Given that the town could easily have made these or similar efforts but chose not to, the fact that all of the prayers (aside from the 2008 outliers) were given by adherents of a single religion reflects a lack of effort to include others. And that is what I take to be a major point of Justice Kagan's related discussion.
Fourth, the fact that the board meeting audience included citizens with business to conduct also contributes to the importance of making more of an effort to include members of other denominations. It does not, however, automatically change the nature of the meeting from one where an opening prayer is permissible under the Establishment Clause to one where it is not.

Fifth, it is not normally government's place to rewrite, to parse, or to critique the language of particular prayers. And it is always possible that members of one religious group will find that prayers of other groups (or perhaps even a moment of silence) are not compatible with their faith. Despite this risk, the Constitution does not forbid opening prayers. But neither does the Constitution forbid efforts to explain to those who give the prayers the nature of the occasion and the audience.

The U.S. House of Representatives, for example, provides its guest chaplains with the following guidelines, which are designed to encourage the sorts of prayer that are consistent with the purpose of an invocation for a government body in a religiously pluralistic Nation: “The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions. The length of the prayer should not exceed 150 words. The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy.” App. to Brief for Respondents 2a.

The town made no effort to promote a similarly inclusive prayer practice here.

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

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

I respectfully dissent from the Court's opinion because I think the Town of Greece's prayer practices violate that norm of religious equality – the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian. I do not contend that principle translates here into a bright separationist line. To the contrary, I agree with the Court's decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer. And I believe that pluralism and inclusion in a town hall can satisfy the constitutional requirement of neutrality; such a forum need not become a religion-free zone. But still, the Town of Greece should lose this case.

The practice at issue here differs from the one sustained in *Marsh* because Greece's town meetings involve participation by ordinary citizens, and the invocations given – directly to those citizens –
were predominantly sectarian in content. Still more, Greece's Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought (except briefly when this suit was filed) to involve, accommodate, or in any way reach out to adherents of non-Christian religions. So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.

In both Greece's and the majority's view, everything I have discussed is irrelevant here because this case involves “the tradition of legislative prayer outlined” in *Marsh v. Chambers*, 463 U.S. 783. And before I dispute the Town and Court, I want to give them their due: They are right that, under *Marsh*, legislative prayer has a distinctive constitutional warrant by virtue of tradition. As the Court today describes, a long history, stretching back to the first session of Congress (when chaplains began to give prayers in both Chambers), “ha[s] shown that prayer in this limited context could ‘coexist with the principles of disestablishment and religious freedom.’” *Ante*, at 1820 (quoting *Marsh*, 463 U.S., at 786). Relying on that “unbroken” national tradition, *Marsh* upheld (I think correctly) the Nebraska Legislature's practice of opening each day with a chaplain's prayer as “a tolerable acknowledgment of beliefs widely held among the people of this country.” Id., at 792. And so I agree with the majority that the issue here is “whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures.” *Ante*, at 1819.

Start by comparing two pictures, drawn precisely from reality. The first is of Nebraska's (unicameral) Legislature, as this Court and the state senators themselves described it. The second is of town council meetings in Greece, as revealed in this case's record.

It is morning in Nebraska, and senators are beginning to gather in the State's legislative chamber: It is the beginning of the official workday, although senators may not yet need to be on the floor. See *Chambers v. Marsh*, 504 F. Supp. 585, 590, and n.12 (D. Neb.1980); *Lee*, 505 U.S., at 597. The chaplain rises to give the daily invocation. That prayer, as the senators emphasized when their case came to this Court, is “directed only at the legislative membership, not at the public at large.” Brief for Petitioners in *Marsh* 30. Any members of the public who happen to be in attendance – not very many at this early hour – watch only from the upstairs visitors' gallery. See App. 72 in *Marsh* (senator's testimony that “as a practical matter the public usually is not there” during the prayer).

The longtime chaplain says something like the following (the excerpt is from his own amicus brief supporting Greece in this case): “O God, who has given all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to a maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State.” Brief for Robert E. Palmer 9. The chaplain is a Presbyterian minister, and “some of his earlier prayers” explicitly invoked Christian beliefs, but he “removed all references to Christ” after a single legislator complained. *Marsh*, 463 U.S., at 793, n.14; Brief for Petitioners in *Marsh* 12. The chaplain also previously invited other clergy members to give the invocation, including local rabbis. See ibid.
Now change the channel: It is evening in Greece, New York, and the Supervisor of the Town Board calls its monthly public meeting to order. Those meetings (so says the Board itself) are “the most important part of Town government.” See Town of Greece, Town Board, online at http://greeceny.gov/planning/townboard (as visited May 2, 2014 and available in Clerk of Court's case file). They serve assorted functions, almost all actively involving members of the public. The Board may swear in new Town employees and hand out awards for civic accomplishments; it always provides an opportunity (called a Public Forum) for citizens to address local issues and ask for improved services or new policies (for example, better accommodations for the disabled or actions to ameliorate traffic congestion, see Pl. Exhs. 718, 755, in No. 6:08-cv-6088 (WDNY)); and it usually hears debate on individual applications from residents and local businesses to obtain special land-use permits, zoning variances, or other licenses.

The Town Supervisor, Town Clerk, Chief of Police, and four Board members sit at the front of the meeting room on a raised dais. But the setting is intimate: There are likely to be only 10 or so citizens in attendance. A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.

As the first order of business, the Town Supervisor introduces a local Christian clergy member – denominated the chaplain of the month – to lead the assembled persons in prayer. The pastor steps up to a lectern (emblazoned with the Town's seal) at the front of the dais, and with his back to the Town officials, he faces the citizens present. He asks them all to stand and to “pray as we begin this evening's town meeting.” App. 134a. (He does not suggest that anyone should feel free not to participate.) And he says: “The beauties of spring . . . are an expressive symbol of the new life of the risen Christ. The Holy Spirit was sent to the apostles at Pentecost so that they would be courageous witnesses of the Good News to different regions of the Mediterranean world and beyond. The Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today. And so . . . [w]e pray this evening for the guidance of the Holy Spirit as the Greece Town Board meets.” Ibid.

After the pastor concludes, Town officials behind him make the sign of the cross, as do some members of the audience, and everyone says “Amen.” See 681 F.3d 20, 24 (C.A.2 2012). The Supervisor then announces the start of the Public Forum, and a citizen stands up to complain about the Town's contract with a cable company. See App. in No. 10-3635 (CA2), p. A574.

Let's count the ways in which these pictures diverge. First, the governmental proceedings at which the prayers occur differ significantly in nature and purpose. The Nebraska Legislature's floor sessions – like those of the U.S. Congress and other state assemblies – are of, by, and for elected lawmakers. Members of the public take no part in those proceedings; any few who attend are spectators only, watching from a high-up visitors' gallery.

Second . . . , the prayers in these two settings have different audiences. In the Nebraska Legislature, the chaplain spoke to, and only to, the elected representatives. Nebraska's senators were adamant on that point in briefing Marsh, and the facts fully supported them: As the senators stated, “[t]he activity is a matter of internal daily procedure directed only at the legislative membership, not at
[members of] the public.” Brief for Petitioners in Marsh 30; see Reply Brief for Petitioners in Marsh 8 (“The [prayer] practice involves no function or power of government vis-à-vis the Nebraska citizenry, but merely concerns an internal decision of the Nebraska Legislature as to the daily procedure by which it conducts its own affairs”). The same is true in the U.S. Congress and, I suspect, in every other state legislature. See Brief for Members of Congress as Amici Curiae 6 (“Consistent with the fact that attending citizens are mere passive observers, prayers in the House are delivered for the Representatives themselves, not those citizens”). As several Justices later noted (and the majority today agrees, see ante, at 1825-1826), Marsh involved “government officials invok[ing] spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead.” Lee, 505 U.S., at 630, n.8 (Souter, J., concurring).

The very opposite is true in Greece: Contrary to the majority's characterization, the prayers there are directed squarely at the citizens. Remember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing – the 10 or so members of the public, perhaps including children. And he typically addresses those people, as even the majority observes, as though he is “directing [his] congregation.” Ante, at 1826. He almost always begins with some version of “Let us all pray together.” See, e.g., App. 75a, 93a, 106a, 109a. Often, he calls on everyone to stand and bow their heads, and he may ask them to recite a common prayer with him. See, e.g., id. at 28a, 42a, 43a, 56a, 77a. He refers, constantly, to a collective “we” – to “our” savior, for example, to the presence of the Holy Spirit in “our” lives, or to “our brother the Lord Jesus Christ.” See, e.g., id., at 32a, 45a, 47a, 69a, 71a. In essence, the chaplain leads, as the first part of a town meeting, a highly intimate (albeit relatively brief) prayer service, with the public serving as his congregation.

And third, the prayers themselves differ in their content and character. Marsh characterized the prayers in the Nebraska Legislature as “in the Judeo-Christian tradition,” and stated, as a relevant (even if not dispositive) part of its analysis, that the chaplain had removed all explicitly Christian references at a senator's request. 463 U.S., at 793, n.14. And as the majority acknowledges, see ante, at 1821-1822, Marsh hinged on the view that “that the prayer opportunity ha[d] [not] been exploited to proselytize or advance any one . . . faith or belief”; had it been otherwise, the Court would have reached a different decision. 463 U.S., at 794-795.

But no one can fairly read the prayers from Greece's Town meetings as anything other than explicitly Christian – constantly and exclusively so. From the time Greece established its prayer practice in 1999 until litigation loomed nine years later, all of its monthly chaplains were Christian clergy. And after a brief spell surrounding the filing of this suit (when a Jewish layman, a Wiccan priestess, and a Baha'i minister appeared at meetings), the Town resumed its practice of inviting only clergy from neighboring Protestant and Catholic churches. See App. 129a-143a. About two-thirds of the prayers given over this decade or so invoked “Jesus,” “Christ,” “Your Son,” or “the Holy Spirit”; in the 18 months before the record closed, 85% included those references. See generally id., at 27a-143a. Many prayers contained elaborations of Christian doctrine or recitations of scripture. See, e.g., . . . id., at 94a (“For unto us a child is born; unto us a son is given. And the government shall be upon his shoulder . . .”). And the prayers usually close with phrases like “in the name of Jesus Christ” or “in the name of Your son.” See, e.g., id., at 55a, 65a, 73a, 85a.

Page 703
Still more, the prayers betray no understanding that the American community is today, as it long has been, a rich mosaic of religious faiths. See Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (plurality opinion) (recognizing even half a century ago that “we are a cosmopolitan nation made up of people of almost every conceivable religious preference”). The monthly chaplains appear almost always to assume that everyone in the room is Christian (and of a kind who has no objection to government-sponsored worship). The Town itself has never urged its chaplains to reach out to members of other faiths, or even to recall that they might be present. And accordingly, few chaplains have made any effort to be inclusive; none has thought even to assure attending members of the public that they need not participate in the prayer session. Indeed, as the majority forthrightly recognizes, see ante, at 1824, when the plaintiffs here began to voice concern over prayers that excluded some Town residents, one pastor pointedly thanked the Board “[o]n behalf of all God-fearing people” for holding fast, and another declared the objectors “in the minority and . . . ignorant of the history of our country.” App. 137a, 108a.

In 1790, George Washington traveled to Newport, Rhode Island, a longtime bastion of religious liberty and the home of the first community of American Jews. Among the citizens he met there was Moses Seixas, one of that congregation’s lay officials. The ensuing exchange between the two conveys, as well as anything I know, the promise this country makes to members of every religion.

Seixas wrote first, welcoming Washington to Newport. He spoke of “a deep sense of gratitude” for the new American Government – “a Government, which to bigotry gives no sanction, to persecution no assistance – but generously affording to All liberty of conscience, and immunities of Citizenship: deeming every one, of whatever Nation, tongue, or language, equal parts of the great governmental Machine.” Address from Newport Hebrew Congregation (Aug. 17, 1790), in 6 PGW 286, n. 1 (M. Mastromarino ed. 1996). The first phrase there is the more poetic: a government that to “bigotry gives no sanction, to persecution no assistance.” But the second is actually the more startling and transformative: a government that, beyond not aiding persecution, grants “immunities of citizenship” to the Christian and the Jew alike, and makes them “equal parts” of the whole country.

Washington responded the very next day. Like any successful politician, he appreciated a great line when he saw one– and knew to borrow it too. And so he repeated, word for word, Seixas's phrase about neither sanctioning bigotry nor assisting persecution. But he no less embraced the point Seixas had made about equality of citizenship. “It is now no more,” Washington said, “that toleration is spoken of, as if it was by the indulgence of one class of people” to another, lesser one. For “[a]ll possess alike . . . immunities of citizenship.” Letter to Newport Hebrew Congregation (Aug. 18, 1790), in 6 PGW 285. That is America's promise in the First Amendment: full and equal membership in the polity for members of every religious group, assuming only that they, like anyone “who live[s] under [the Government's] protection[,] should demean themselves as good citizens.” Ibid.

For me, that remarkable guarantee means at least this much: When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another. And that means that even in a partly legislative body, they should not confront government-sponsored worship that divides them along religious lines.
In considering this issue, probably the dissent has the better of the factual argument, and *Galloway* may eventually be overruled or limited to its facts. In any event, most cities of any size, as well as the federal government, are likely to stick more with nondenominational statements as a matter of sensitivity to the diverse communities they serve. That Justice Kennedy joined the conservative wing of the Court in this case is no surprise. *See generally* R. Randall Kelso, *Justice Kennedy’s Jurisprudence on the First Amendment Religion Clauses*, 44 McGeorge L. Rev. 103, 139-150 (2013) (noting that Kennedy rejects the “no endorsement” test in favor of the “no coercion/proselytizing” test for Establishment Clause doctrine, and outside school context rarely finds statements constitute coercion or proselytizing).

After *Galloway*, courts have struggled with whether denominational prayers opening government meetings may be given by legislators or council members themselves. *See, e.g.*, Lund v. Rowan County, 837 F.3d 407 (4th Cir. 2016) (2-1 panel: practice constitutional), *rev’d*, 863 F.3d 268 (4th Cir. 2017) (10-5 *en banc* opinion: council members giving prayers and inviting public to join unconstitutional; only Christianity mentioned and 97% of prayers mentioned “Jesus”, “Christ”, or “Savior”); Bormuth v. County of Jackson, 849 F.3d 266 (6th Cir. 2017) (2-1 panel: practice unconstitutional), *rev’d*, 870 F.3d 494 (6th Cir. 2017) (9-6 *en banc* opinion; practice constitutional under history and traditions approach of *Marsh* and *Galloway*).

Prior to *Galloway*, in *Doe v. Indian River School Dist.*., 653 F.3d 256 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012), the Third Circuit held that a local school board’s practice of opening meetings regularly attended by students with a prayer violates the Establishment Clause. In contrast, after *Galloway*, in *American Humanist Association v. McCarty*, 851 F.3d 521 (5th Cir. 2017), the Fifth Circuit held that an opening invocation or prayer at school board meetings was more like the legislative prayer upheld in *Marsh*, excerpted at §13.3, than the situation in *Weisman*, excerpted at §12.3, and *Santa Fe*, discussed at §12.3, even where students were permitted to lead the prayer.

### § 13.4 The Establishment Clause and Thoughts for the Future

In one case, in 1982, the Court approached the Establishment Clause issue from a strict scrutiny perspective. In *Larson v. Valente*, the Court concluded, “[W]hen we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”

*Larson v. Valente*

456 U.S. 228 (1982)

Justice BRENNAN delivered the opinion of the Court.

The principal question presented by this appeal is whether a Minnesota statute, imposing certain registration and reporting requirements upon only those religious organizations that solicit more than fifty per cent of their funds from nonmembers, [violates] the Establishment Clause . . . .
Appellants are John R. Larson, Commissioner of Securities, and Warren Spannaus, Attorney General, of the State of Minnesota. They are, by virtue of their offices, responsible for the implementation and enforcement of the Minnesota Charitable Solicitation Act, Minn. Stat. §§ 309.50-309.61 (1969 and Supp.1982). This Act, in effect since 1961, provides for a system of registration and disclosure respecting charitable organizations, and is designed to protect the contributing public and charitable beneficiaries against fraudulent practices in the solicitation of contributions for purportedly charitable purposes. A charitable organization subject to the Act must register with the Minnesota Department of Commerce before it may solicit contributions within the State. § 309.52.

From 1961 until 1978, all “religious organizations” were exempted from the requirements of the Act. But effective March 29, 1978, the Minnesota Legislature amended the Act so as to include a “fifty per cent rule” in the exemption provision covering religious organizations. § 309.515, subd. 1(b). This fifty per cent rule provided that only those religious organizations that received more than half of their total contributions from members or affiliated organizations would remain exempt from the registration and reporting requirements of the Act. 1978 Minn. Laws, ch. 601, § 5.

Shortly after the enactment of § 309.515, subd. 1(b), the Department notified appellee Holy Spirit Association for the Unification of World Christianity (Unification Church) that it was required to register under the Act because of the newly enacted provision. Appellees Valente, Barber, Haft, and Korman, claiming to be followers of the tenets of the Unification Church, responded by bringing the present action in the United States District Court for the District of Minnesota. Appellees sought a declaration that the Act, on its face and as applied to them through § 309.515, subd. 1(b)’s fifty per cent rule, constituted an abridgment of their First Amendment rights of expression and free exercise of religion, as well as a denial of their right to equal protection of the laws, guaranteed by the Fourteenth Amendment; appellees also sought temporary and permanent injunctive relief. Appellee Unification Church was later joined as a plaintiff by stipulation of the parties, and the action was transferred to a United States Magistrate.

Since Everson v. Board of Education, 330 U.S. 1 (1947), this Court has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can “pass laws which aid one religion” or that “prefer one religion over another.” Id., at 15. This principle of denominational neutrality has been restated on many occasions. In Zorach v. Clauson, 343 U.S. 306 (1952), we said that “[t]he government must be neutral when it comes to competition between sects.” Id., at 314. In Epperson v. Arkansas, 393 U.S. 97 (1968), we stated unambiguously: “The First Amendment mandates governmental neutrality between religion and religion. . . . The State may not adopt programs or practices . . . which ‘aid or oppose’ any religion. . . . This prohibition is absolute.” Id., at 104, 106, citing Abington School District v. Schempp, 374 U.S. 203, 225 (1963). And Justice Goldberg cogently articulated the relationship between the Establishment Clause and the Free Exercise Clause when he said that “[t]he fullest realization of true religious liberty requires that government ... effect no favoritism among sects . . . and that it work deterrence of no religious belief.” Abington School District, supra, at 305. In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.
The fifty per cent rule of § 309.515, subd. 1(b), clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents. Consequently, that rule must be invalidated unless it is justified by a compelling governmental interest, cf. Widmar v. Vincent, 454 U.S. 263, 269-270 (1981), and unless it is closely fitted to further that interest, Murdock v. Pennsylvania, 319 U.S. 105, 116-117 (1943). . . . Appellants assert, and we acknowledge, that the State of Minnesota has a significant interest in protecting its citizens from abusive practices in the solicitation of funds for charity, and that this interest retains importance when the solicitation is conducted by a religious organization. We thus agree with the Court of Appeals, 637 F.2d, at 567, that the Act, “viewed as a whole, has a valid secular purpose,” and we will therefore assume, arguendo, that the Act generally is addressed to a sufficiently “compelling” governmental interest. But our inquiry must focus more narrowly, upon the distinctions drawn by § 309.515, subd. 1(b), itself: Appellants must demonstrate that the challenged fifty per cent rule is closely fitted to further [that] interest . . . .

Appellants argue that § 309.515, subd. 1(b)'s distinction between contributions solicited from members and from nonmembers is eminently sensible. They urge that members are reasonably assumed to have significant control over the solicitation of contributions from themselves to their organization, and over the expenditure of the funds that they contribute, as well. Further, appellants note that [under] Minnesota law, members of organizations have greater access than nonmembers to the financial records of the organization. Appellants conclude: “Where the safeguards of membership funding do not exist, the need for public disclosure is obvious. . . . As public contributions increase as a percentage of total contributions, the need for public disclosure increases. . . . The particular point at which public disclosure should be required . . . is a determination for the legislature. In this case, the Act’s ‘majority’ distinction is a compelling point, since it is at this point that the organization becomes predominantly public-funded.” Brief for Appellants 29.

We reject the argument, for it wholly fails to justify the only aspect of § 309.515, subd. 1(b), under attack – the selective fifty per cent rule. Appellants' argument is based on three distinct premises: that members of a religious organization can and will exercise supervision and control over the organization's solicitation activities when membership contributions exceed fifty per cent; that membership control, assuming its existence, is an adequate safeguard against abusive solicitations of the public by the organization; and that the need for public disclosure rises in proportion with the percentage of nonmember contributions. Acceptance of all three of these premises is necessary to appellants' conclusion, but we find no substantial support for any of them in the record.

Regarding the first premise, there is simply nothing suggested that would justify the assumption that a religious organization will be supervised and controlled by its members simply because they contribute more than half of the organization's solicited income. Even were we able to accept appellants' doubtful assumption that members will supervise their religious organization under such circumstances, the record before us is wholly barren of support for appellants' further assumption that members will effectively control the organization if they contribute more than half of its solicited income. Appellants have offered no evidence whatever that members of religious organizations exempted by § 309.515, subd. 1(b)'s fifty per cent rule in fact control their organizations. Indeed, the legislative history of § 309.515, subd. 1(b), indicates precisely to the contrary. In short, the first premise of appellants' argument has no merit.
Nor do appellants offer any stronger justification for their second premise – that membership control is an adequate safeguard against abusive solicitations of the public by the organization. This premise runs directly contrary to the central thesis of the entire Minnesota charitable solicitations Act – namely, that charitable organizations soliciting contributions from the public cannot be relied upon to regulate themselves, and that state regulation is accordingly necessary. Appellants offer nothing to suggest why religious organizations should be treated any differently in this respect. And even if we were to assume that the members of religious organizations have some incentive, absent in non-religious organizations, to protect the interests of nonmembers solicited by the organization, appellants' premise would still fail to justify the fifty per cent rule: Appellants offer no reason why the members of religious organizations exempted under § 309.515, subd. 1(b)'s fifty per cent rule should have any greater incentive to protect nonmembers than the members of nonexempted religious organizations have. Thus we also reject appellants' second premise as without merit.

Finally, we find appellants' third premise – that the need for public disclosure rises in proportion with the percentage of nonmember contributions – also without merit. The flaw in appellants' reasoning here may be illustrated by the following example. Church A raises $10 million, 20 per cent from nonmembers. Church B raises $50,000, 60 per cent from nonmembers. Appellants would argue that although the public contributed $2 million to Church A and only $30,000 to Church B, there is less need for public disclosure with respect to Church A than with respect to Church B. We disagree; the need for public disclosure more plausibly rises in proportion with the absolute amount, rather than with the percentage, of nonmember contributions. The State of Minnesota has itself adopted this view elsewhere in § 309.515: With qualifications not relevant here, charitable organizations that receive annual nonmember contributions of less than $10,000 are exempted from the registration and reporting requirements of the Act. § 309.515, subd. 1(a).

We accordingly conclude that appellants have failed to demonstrate that the fifty per cent rule in § 309.515, subd. 1(b), is “closely fitted” to further a “compelling governmental interest.”

It is plain that the principal effect of the fifty per cent rule in § 309.515, subd. 1(b), is to impose the registration and reporting requirements of the Act on some religious organizations but not on others. It is also plain that, as the Court of Appeals noted, “[t]he benefit conferred [by exemption] constitutes a substantial advantage; the burden of compliance with the Act is certainly not de minimis.” 637 F.2d, at 568. We do not suggest that the burdens of compliance with the Act would be intrinsically impermissible if they were imposed evenhandedly. But this statute does not operate evenhandedly, nor was it designed to do so: The fifty per cent rule of § 309.515, subd. 1(b), effects the selective legislative imposition of burdens and advantages upon particular denominations. The “risk of politicizing religion” that inheres in such legislation is obvious, and indeed is confirmed by the provision's legislative history. For the history of § 309.515, subd. 1(b)'s fifty per cent rule demonstrates that the provision was drafted with the explicit intention of including particular religious denominations and excluding others. For example, the second sentence of an early draft of § 309.515, subd. 1(b), read: “A religious society or organization which solicits from its religious affiliates who are qualified under this subdivision and who are represented in a body or convention that elects and controls the governing board of the religious society or organization is exempt from the requirements of . . . Sections 309.52 and 309.53.” Minn. H. 1246, 1977-1978 Sess., § 4 (read
Apr. 6, 1978). The legislative history discloses that the legislators perceived that the italicized language would bring a Roman Catholic Archdiocese within the Act, that the legislators did not want the amendment to have that effect, and that an amendment deleting the italicized clause was passed in committee for the sole purpose of exempting the Archdiocese from the provisions of the Act. Transcript of Legislative Discussions of § 309.515, subd. 1(b), as set forth in Declaration of Charles C. Hunter (on file in this Court) 8-9. On the other hand, there were certain religious organizations that the legislators did not want to exempt from the Act. One State Senator explained that the fifty per cent rule was “an attempt to deal with the religious organizations which are soliciting on the street and soliciting by direct mail, but who are not substantial religious institutions in . . . our state.” Id., at 13. Another Senator said, “what you're trying to get at here is the people that are running around airports and running around streets and soliciting people and you're trying to remove them from the exemption that normally applies to religious organizations.” Id., at 14. Still another Senator, who apparently had mixed feelings about the proposed provision, stated, “I'm not sure why we're so hot to regulate the Moonies anyway.” Id., at 16.

In short, the fifty per cent rule's capacity – indeed, its express design – to burden or favor selected religious denominations led the Minnesota Legislature to discuss the characteristics of various sects with a view towards “religious gerrymandering,” Gillette v. United States, 401 U.S. 437, 452, 91 S.Ct. 828, 837, 28 L.Ed.2d 168 (1971). As the Chief Justice stated in Lemon, 403 U.S., at 620: “This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction . . . of churches.”

Justice WHITE, with whom Justice REHNQUIST joins, dissenting.

To say that the rule on its face represents an explicit and deliberate preference for some religious beliefs over others is not credible. The Court offers no support for this assertion other than to agree with the Court of Appeals that the limitation might burden the less well organized denominations. This conclusion, itself, is a product of assumption and speculation. It is contrary to what the State insists is readily evident from a list of those charitable organizations that have registered under the Act and of those that are exempt. It is claimed that the Minnesota law at issue does not constitute an establishment of religion merely because it has a disparate impact. An intentional preference must be expressed. To find that intention on the face of the provision at issue here seems to me to be patently wrong.

Justice REHNQUIST, with whom THE CHIEF JUSTICE, Justice WHITE, and Justice O'CONNOR join, dissenting.

From the earliest days of the Republic it has been recognized that “[t]his Court is without power to give advisory opinions. Hayburn's Case, 2 [U.S. (Dall.)] 409 ([1792]).” Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945). The logical corollary of this limitation has been the Court's “long . . . considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision.” Ibid. (citations
omitted). Such fundamental principles notwithstanding, the Court today delivers what is at best an advisory constitutional pronouncement. The advisory character of the pronouncement is all but conceded by the Court itself, when it acknowledges in the closing footnote of its opinion that appellees must still “prove that the Unification Church is a religious organization within the meaning of the Act” before they can avail themselves of the Court's extension of the exemption contained in the Minnesota statute. Because I find the Court's standing analysis wholly unconvincing, I respectfully dissent.

Appellees have never proved, and the lower courts have never found, that the Association is a “religious organization” for purposes of the fifty percent rule. The District Court expressly declined to make such a finding – “This court is not presently in a position to rule whether the [Association] is, in fact, a religious organization within the Act,” App. to Juris. Statement A-47 – and the Court of Appeals was content to decide the case despite the presence of this “unresolved factual dispute concerning the true character of [appellees'] organization.” 637 F.2d 562, 565 (CA8 1981) (quoting Village of Schaumburg v. Citizens for Better Environment, 444 U.S. 620, 633 (1980)). The absence of such a finding is significant, for it is by no means clear that the Association would constitute a “religious organization” for purposes of the § 309.515, subd. 1(b), exemption. The appellees' assertion in the District Court that their actions were religious was “directly contradict[ed]” by a “heavy testimonial barrage against the [Association's] claim that it is a religion.” App. to Juris. Statement A-46.

Although inconsistent with current doctrine, if the Court were to extend the strict scrutiny analysis in Larsen v. Valente to all Establishment Clause cases, that might help clarify the existing precedents, since the Court has approved some actions which clearly constitute the government endorsement of religion. As Justice Souter stated in his majority opinion in McCreary, “In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious.”21 Justice Scalia similarly acknowledged in his dissent in McCreary, “Suffice it to say here that when the government relieves churches from the obligation to pay property taxes, when it allows students to absent themselves from public school to take religious classes, and when it exempts religious organizations from generally applicable prohibitions of religious discrimination, it surely means to bestow a benefit on religious practice – but we have approved it.”22 Rather than pretending that endorsement was not taking place in those cases,


acknowledging that endorsement took place, but was justified by a compelling governmental interest, enhances reasoned, principled decisionmaking.

Application of such an approach would require first a decision whether a law “respecting an establishment of religion” was occurring. To resolve this, one of the four tests would be used: (1) whether the government has a purpose to advance religion, or principal or primary effect to advance religion, or creates an excessive entanglement between church and state, the so-called Lemon test; (2) whether an objective observer would think the government action was an “endorsement” of religion, thus departing from a “strict neutrality” approach toward religion; (3) whether the government action is “coercing or proselytizing” religion; and (4) whether the government action is an “unreasonable accommodation” of religion given our Nation’s “history and traditions.”

If such a law “respecting an establishment of religion” were found, the law would then be subjected to strict scrutiny review, rather than the current doctrine, where “establishment” is per se unconstitutional. Applying strict scrutiny to “an establishment of religion,” just as applying strict scrutiny to “the freedom of speech or of the press,” despite that text also being stated in literal absolutist terms, may make sense as a reasoned elaboration of the law. It is also consistent with Madison’s views, who remarked in a letter in 1822 on “the immunity of civil government from religion, in every case where it does not trespass upon private rights or the public peace.”23 While the exception for “private rights” suggests a Free Exercise concern, the exception for the “public peace” suggests that Madison did not view the Establishment Clause in absolutist terms, but was subject to a limited exception, which would be consistent with strict scrutiny.

Application of a strict scrutiny approach would be another way to resolve the examples typically given by formalist Justices concerning “customs and traditions” in American history which are used to reject the view that the framers and ratifiers shared a strict neutrality, endorsement understanding of the Establishment Clause, in addition to the discussion at § 12.2.2.2 nn.23-25. This issue is discussed at § 32.1.4 of CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW (2007) (E-Treatise on the Constitution) (http://libguides.stcl.edu/kelsomaterials).

Justice Scalia has attempted to avoid some of these problems posed by the current absolutist view of the Establishment Clause by characterizing almost any version of the Ten Commandments as consistent with Protestant, Catholic, Jewish, and Islamic beliefs, and thus congenial to all, and then concluding that the government can favor monotheistic religions, treating agnostics, atheists, non-monotheistic believers, or believers in “unconcerned deities [e.g., Deists]” as second-class citizens and “disregard” their views.24 Without regard to whether Protestants, Catholics, Jews, and Moslems would agree that any version of the Ten Commandments is equally congenial – and centuries of wars

23 Letter from James Madison to Edward Livingston (July 10, 1822), in 9 The Writings of James Madison 98, 100 (Gaillard Hunt ed., 1910).

24 McCreary, 125 S. Ct. at 1272-73 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).
and discrimination among various sects suggests it is more complicated than that – the attempt to exclude other individuals from the Establishment Clause has little textual or historical support.

For example, a number of the framers and ratifiers were Deists, believing in a Creator, but one who did not intervene in day-to-day matters of public or private life, but whose impact was felt in the "machine-like perfection of the natural order." This would include Jefferson, almost certainly; Benjamin Franklin, probably; and George Washington, possibly. It may well be true, as one author has noted, that many New England Baptists took vigorous exception to Jefferson's religious views and believed that Jews, Muslims, deists, atheists, and infidels should not hold office. That view was rejected in clear constitutional text, which states in Article VI, § 3, “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.” Even regarding non-believers, Justice Story noted, as quoted at § 12.1 n.3, that under the Establishment Clause, “The Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship.” The term “Infidel” referred here broadly to non-believers in a monotheistic God, and not to the followers of Islam, as Justice Story distinguished them, followers of “Mahometanism,” from “infidelity” earlier in the same quoted passage.

In thinking about issues such as the display of the religious symbols it is not just a matter of non-believers in those symbols “adverting their eyes.” That doctrine applies where the individual has a right to speak, as in Cohen v. California, discussed at § 6.3. n.46, involving wearing a jacket in a courthouse. That doctrine does apply to churches on their own property proclaiming “God is Great,” or to bumper stickers which read “Jesus is Lord” on the back of individual cars. But under a strict neutrality approach, the government has no right, as government, to speak on matters of religion. Non-believers do not have to advert their eyes; instead, the government should not speak.


CHAPTER 14: FREE EXERCISE CLAUSE DOCTRINE

§ 14.1 Traditional Free Exercise Clause Doctrine: 1789-1963 .............................. 713


§ 14.3 Cases Decided under Employment Division v. Smith: 1990-Today ................. 739

§ 14.4 Free Exercise Doctrine and Statutory Complements of RFRA and RLUIPA .... 748

§ 14.1 Traditional Free Exercise Clause Doctrine: 1789-1963

1. Introduction

The Free Exercise Clause applies to protect individuals’ “sincerely held religious beliefs” from regulation by the government. In terms of what counts as a “religious belief,” a formalist-era Court stated in 1890 in Davis v. Beason that “the term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.” This definition suggested a monotheistic view of religion.

During the instrumentalist era, the Court defined the term more broadly to include a range of monotheistic and non-monotheistic beliefs. For example, in 1965, United States v. Seeger, the Court interpreted the term “religious belief” in the Universal Military Training and Service Act to include any “given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.” Thus, an individual who sought a religious exemption from the draft, but denied any belief in a Supreme Being, was still held entitled to the exemption. Similarly, in 1970, in Welsh v. United States, the Court stated, “Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality – a God – who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by . . . God’ in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a ‘religious' conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.”

1 133 U.S. 333, 342 (1890).
Inferences from Justice Scalia’s dissent in 2005 in *McCreary*, joined by Chief Justice Rehnquist and Justice Thomas, discussed at § 13.4 n.24, suggests that this dissent would disagree with these views, and would grant Free Exercise Clause protection only to those who believe in monotheistic religions, treating agnostics, atheists, non-monotheistic believers, or believers in “unconcerned deities [e.g., Deists]” as outside the protection of the Free Exercise Clause. As discussed at § 13.4 nn.25-26 and in *Wallace v. Jaffree*, excerpted at § 12.1, as applied to Establishment Clause concerns, such a view has little textual or historical basis of support. Since the same term, “religion,” applies in the First Amendment to both the Establishment Clause and the Free Exercise Clause, its reach should be the same in both.

It is certainly true that the framers and ratifiers were overwhelming monotheistic – indeed, Christian and Protestant – in their beliefs. When they used the phrase “free exercise of religion,” they were no doubt predominantly thinking of monotheistic, and indeed Christian, beliefs. However, as the Court noted in 1970 in *Welsh v. United States*, an individual holding a non-monotheistic view may confront the same tension between following those views and contrary government laws that a traditional Christian may feel in terms of a conflict between government laws and the perceived will of God. Any argument that the “rights of conscience” in the two circumstances may be different, because the believer in God has to worry about punishment in an afterlife if God is not obeyed, while the believer in a non-monotheistic moral system may not have that concern, reduces morality to a question of punishment.

Any attempt to limit the free exercise of religion to only monotheistic views is reminiscent of the free speech views of John Milton, discussed at § 1.2.2 n.21, who was prepared to grant free speech to individuals, but not for speech he disagreed with — in his case, “popery, open superstition, impiety, or evil.” Similarly, in Locke’s *A Letter on Toleration*, “Locke justified placing restrictions on Catholics because of their mixed allegiance, and justified not extending tolerance to atheists because atheists do not have the moral scruples to be trusted in civil society where rights are viewed as having derived from God, and because the atheist has no fear of a future state of punishment.”

Such views are not consistent with a rational approach to “liberty of conscience.” A rational person would understand that individuals basing their respect for diversity and equal concern and respect for individuals on moral reasoning premises might be even more likely to be “trusted” than an individual whose only limitation on self-interested behavior is a fear of God’s punishment, with the

---


individual hoping for God’s grace. In any event, any limited view on what beliefs are protected by the Free Exercise Clause would likely be relatively futile in practice. Many Free Exercise Clause claims can be reformulated as “equal treatment” or “equal access” claims under the First Amendment freedom of speech or the Equal Protection Clause. For example, as noted at § 13.2, the access of religious groups to public school facilities and support in Lamb’s Chapel, Rosenberger, and Good News Club involves an interplay between freedom of speech and free exercise clause concerns. Indeed, the First Amendment freedoms of speech, of the press, and the free exercise of region all share a similar commitment to Madison’s concept of “liberty of conscience,” discussed at § 12.2.1 n.9. The Supreme Court noted as far back as 1944 in Prince v. Massachusetts,8 “If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article [Amendment] can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together.” As phrased by Justice Stevens in Wallace v. Jaffree,9 excerpted at § 12.1, “[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.”

While the Court’s Free Exercise Clause doctrine only applies to “sincerely held” religious beliefs,10 the Court has been quite willing to assume that a person’s statement that something is a religious belief is “sincerely held.” Indeed, the belief can be “sincere” even if it is not held by most believers of that person’s religious faith, as long the individual before the court sincerely holds the view.11 Further, the relevant question is whether the individual “sincerely holds” the belief, not whether a jury, or anyone else, would conclude that belief is true or false. As the Court stated in United States v. Ballard,12 “Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.”

---

8 321 U.S. 158, 164 (1944) (citations omitted).


11 See, e.g., Frazee v. Illinois Employ. Sec. Dep’t, 489 U.S. 829, 832-33 (1989) (“[n]ever did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed personal preference rather than religious belief”); Thomas v. Review Bd. of the Indiana Employ. Sec. Div., 450 U.S. 707, 713-16 (1981) (“the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect”); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 314 (5th Cir. 1977) (“[o]ur opinion today is not to be taken as requiring or suggesting that religious beliefs be institutionalized in order to be eligible for First Amendment protection. Indeed, they need not be.”).

12 322 U.S. 78, 86-87 (1944).
Just as the First Amendment freedom of speech became incorporated into the 14th Amendment Due Process Clause as a fundamental right during the 1920s, the First Amendment free exercise of religion also became applicable to the states during this time. Thus, in 1923, in Meyer v. Nebraska, the Court stated that one of the liberty rights protected by the 14th Amendment Due Process Clause was the right “to worship God according to the dictates of his own conscience.” However, during the formalist era, very little protection was given to the free exercise of religion, mirroring a rational basis kind of scrutiny, as discussed at § 14.1.2(B). The incorporation of the Free Exercise Clause into the 14th Amendment was confirmed during the Holmesian era in Cantwell v. Connecticut. As during the formalist era, little protection was granted to the free exercise of religion during the Holmesian era, mirroring a minimum rational review level of scrutiny, as discussed at § 14.1.2(C).

In 1963, the instrumentalist Court increased the level of protection to strict scrutiny if a law burdened the free exercise of religion, as discussed at § 14.2. However, in 1990, during the modern natural law era, under Employment Division v. Smith, the contemporary Court limited instrumentalist precedents on free exercise, and gave only minimum rational review, or perhaps no free exercise review at all, to a law of general applicability that incidentally burdened the free exercise of religion. Laws discriminating against religion continue to trigger strict scrutiny. This aspect of modern Free Exercise Clause doctrine is discussed at § 14.3.

This modern doctrine has set off a political fight in which Congress has tried to require the Court to use strict scrutiny for all governmental regulations substantially burdening religious beliefs. In 1997, the Court rejected Congress’ attempt to overrule Smith by statute in City of Boerne v. Flores. However, despite Boerne, Congress has been able by statute to require a strict scrutiny test to be applied to federal laws, as a matter of Congress’ power over federal laws, as discussed at § 14.4.

2. **Historical Development of Free Exercise Doctrine**

A. **The Original Natural Law Era: 1789-1873**

During the original natural law era, the Free Exercise Clause, like the rest of the Bill of Rights, applied only to federal government action. Because regulations touching upon religion were predominantly a matter of state law concern during this time, there were no Supreme Court cases dealing with the Free Exercise of religion during the original natural law era.

---

13 262 U.S. 390, 399 (1923).

14 310 U.S. 296, 303-10 (1940).


The first state case to raise a free exercise issue occurred in 1813 in *People v. Philips*.\(^{17}\) The case involved whether an Irish Catholic Priest could refuse to testify in court about matters that had been confided to the Priest during confession. At the time, the New York law did not recognize such a testimonial privilege. The court held that under § 38 of the New York State Constitution, which was similar to the First Amendment Free Exercise Clause, the refusal to testify was justified, as the state had not proven that the refusal to testify was inconsistent with the peace or safety of the state.

**B. The Formalist Era: 1873-1937**

In *Reynolds v. United States*,\(^ {18}\) decided in 1878, the Free Exercise Clause was interpreted to protect religious opinions from federal government interference, but the Court said that this protection does not carry over to actions the government seeks to control, such as banning bigamy. Based upon this distinction, the Court sustained the bigamy conviction of a Mormon based on a congressional statute regulating the then-territory of Utah. The Court said that the Free Exercise Clause deprived Congress of all legislative power over mere opinion, but left Congress free to reach actions that were in violation of social duties or subversive of good order, even if the defendant entertains a religious belief that the law is wrong. The Court explained that if an offense consists of a positive act knowingly done, it would be dangerous to hold that the offender might escape punishment merely because he religiously believed that the law which he had broken ought never to have been made.

The upshot of *Reynolds* appeared to be that only rational basis scrutiny under the Free Exercise Clause protected the exercise of religion from the incidental effects of laws aimed at certain actions, at least if those actions were not selected because of their religious significance. Of course, as with any social or economic regulation, there would be rational basis scrutiny anyway under the Equal Protection Clause and Due Process Clause.

**C. The Holmesian Era: 1937-1954**

In 1940, in *Cantwell v. Connecticut*,\(^ {19}\) the Court confirmed that the Free Exercise Clause was incorporated into the 14th Amendment, and thus made applicable against the states. The Court held in *Cantwell* that an invalid prior restraint was created by a state statute that banned the solicitation

---


\(^{18}\) 98 U.S. 145, 162-67 (1878). For an argument, not likely to be adopted, that *Reynolds* should be overturned, and polygamy constitutionally protected, on grounds that anti-polygamy statutes are not based on any rational concern with protecting individuals from exploitation, and polygamous relationships can foster women’s self-independence and children’s welfare, *see* Stephanie Forbes, “*Why Just Have One?*: *An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause*, 39 Houston L. Rev. 1517 (2003).

\(^{19}\) 310 U.S. 296, 303-10 (1940).
of money except where the cause had been approved in advance by a public official who had discretion to determine whether the applicant’s purpose was religious. The Court said that such a censorship of religion was a denial of liberty protected by the First Amendment as incorporated into the Due Process Clause of the 14th Amendment. The Court added in Cantwell that although a state could not unduly infringe the free exercise of religion, it could pass laws regulating its time, place, and manner by general and nondiscriminatory legislation. However, a state could not prosecute for common law breach of the peace without a clear and present menace to public peace. That was not shown where the defendant merely played a religious record to a consenting listener, who became irritated and felt like striking the defendant, but did not because the defendant peacefully went away.

One example of a neutral law of general applicability occurred in Cox v. New Hampshire. For a unanimous Court, Chief Justice Hughes held that an individual could be convicted for not obtaining a permit to conduct a parade or procession on a public street. The Court noted, “The argument as to freedom of worship is . . . beside the point. No interference with religious worship or the practice of religion in any proper sense is shown, but only the exercise of local control over the use of streets for parades and processions.” Another example occurred in Prince v. Massachusetts, where the Court upheld application of child labor laws to prevent a nine-year-old girl from being permitted to sell religious literature of the Jehovah’s Witnesses on the street. Four Justices dissented in the case: moderate formalist Justice Roberts, liberal Holmesian Justice Frankfurter, centrist Holmesian Justice Jackson, and liberal instrumentalist Justice Murphy.

D. The Instrumentalist Era: 1954-1963

In the 1961 case of Braunfeld v. Brown, the Court refused to require an exception to a Sunday closing law for a Jewish merchant, whose faith required him to close on Saturday. Braunfeld said there was a strong state interest in one uniform day of rest for all workers.

Braunfeld v. Brown
366 U.S. 599 (1961)

Chief Justice WARREN announced the judgment of the Court and an opinion in which Justice BLACK, Justice CLARK, and Justice WHITTAKER concur.

This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities. Among the questions presented are whether the statute is a law respecting an establishment of religion and whether the statute violates equal protection. Since both of these questions, in reference to this very statute, have already been answered in the negative, Two Guys

---

20 312 U.S. 569, 576-78 (1941).
21 321 U.S. 158, 159-61, 165-70 (1944); id. at 176-78 (Jackson, J., joined by Roberts & Frankfurter, JJ., dissenting); id. at 175-76 (Murphy, J., dissenting).
from Harrison-Allentown, Inc., v. McGinley, 366 U.S. 582, 592-98 [(1961)] (statute does not have a purpose or primary effect to advance religion, and thus is constitutional under the Establishment Clause, and, under the Equal Protection Clause, is rationally related to a legitimate interest because “‘to the well-being of society, periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed, may enjoy a respite from labour at the same time.’”) (citing Specht v. The Commonwealth, 8 Pa. 312, 323 (Pa. 1848)), and since appellants present nothing new regarding them, they need not be considered here. Thus the only question for consideration is whether the statute interferes with the free exercise of appellants' religion.

Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute in issue. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They instituted a suit in the court below seeking a permanent injunction against the enforcement of the 1959 statute. Their complaint, as amended, alleged that appellants had previously kept their places of business open on Sunday; that each of appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday; that Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment; that the statute is unconstitutional for the reasons stated above.

Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. Cantwell v. State of Connecticut, 310 U.S. 296, 303 [(1940)]. Thus, in West Virginia State Board of Education v. Barnette, 319 U.S. 624 [(1943)], this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

Thus, in Reynolds v. United States, [98 U.S. 145 (1878),] this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the duty to practice polygamy. And, in Prince v. Commonwealth of Massachusetts, 321 U.S. 158 [(1944)] this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious duty to perform this work.

It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, id., at 165, because resolution in favor of
the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

But, again, this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated – retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor – may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

As we pointed out in *McGowan v. Maryland*, supra, 366 U.S. [420,] 444-445 [(1961)], we cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility – a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself. This is particularly true in this day and age of increasing state concern with public welfare legislation.

However, appellants advance yet another means at the State's disposal which they would find unobjectionable. They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday. By such regulation, appellants contend, the economic disadvantages imposed by the present system would be removed and the State's interest in having all people rest one day would be satisfied.

A number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and
activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.

Additional problems might also be presented by a regulation of this sort. To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs, a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees. Finally, in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring. For all of these reasons, we cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied.

Separate opinion of Justice FRANKFURTER, whom Justice HARLAN joins.

So deeply do the issues raised by these cases cut that it is not surprising that no one opinion can wholly express the views even of all the members of the Court who join in its result. Individual opinions in constitutional controversies have been the practice throughout the Court's history. Such expression of differences in view or even in emphasis converging toward the same result makes for the clarity of candor and thereby enhances the authority of the judicial process.

For me considerations are determinative here which call for separate statement. The long history of Sunday legislation, so decisive if we are to view the statutes now attacked in a perspective wider than that which is furnished by our own necessarily limited outlook, cannot be conveyed by a partial recital of isolated instances or events. The importance of that history derives from its continuity and fullness – from the massive testimony which it bears to the evolution of statutes controlling Sunday labor and to the forces which have, during three hundred years of Anglo-American history at the least, changed those laws, transmuted them, made them the vehicle of mixed and complicated aspirations. Since I find in the history of these statutes insights controllingly relevant to the constitutional issues before us, I am constrained to set that history forth in detail. [Ed.: Those interested in such detail can read the rest of this long opinion at 366 U.S. 459 (1961).]

Justice BRENNAN, concurring and dissenting.

I agree with the Chief Justice that there is no merit in appellants' establishment and equal-protection claims. I dissent, however, as to the claim that Pennsylvania has prohibited the free exercise of appellants' religion.
The Court has demonstrated the public need for a weekly surcease from worldly labor, and set forth the considerations of convenience which have led the Commonwealth of Pennsylvania to fix Sunday as the time for that respite. I would approach this case differently, from the point of view of the individuals whose liberty is – concededly – curtailed by these enactments. For the values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.

The first question to be resolved, however, is somewhat broader than the facts of this case. That question concerns the appropriate standard of constitutional adjudication in cases in which a statute is assertedly in conflict with the First Amendment, whether that limitation applies of its own force, or as absorbed through the less definite words of the Fourteenth Amendment. The Court in such cases is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end. Nor is the case decided by a finding that the State's interest is substantial and important, as well as rationally justifiable. This canon of adjudication was clearly stated by Mr. Justice Jackson, speaking for the Court in *West Virginia State Board of Education v. Barnette*, 1943, 319 U.S. 624, 639 [(1943)]: “The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.” [Ed.: By “grave and immediate” danger, this approach reflects the “compelling interest” approach of strict scrutiny.]

What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in *Reynolds*, for the custom of resting one day a week is universally honored, as the Court has amply shown. Nor is it the State's traditional protection of children, as in *Prince v. Commonwealth of Massachusetts*, 1944, 321 U.S. 158, for appellants are reasoning and fully autonomous adults. It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

It is true, I suppose, that the granting of such an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority – 21 – of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's. Even England, not under the compulsion of a written constitution, but simply influenced by considerations of fairness, has such an exemption for some activities. The Court conjures up several difficulties with such a system which seem to me more fanciful than real. Non-Sunday observers might get an unfair advantage, it is said. A similar contention against the draft exemption for conscientious objectors (another example of the exemption technique) was
rejected with the observation that “its unsoundness is too apparent to require” discussion. Selective Draft Law Cases (Arver v. United States) 1918, 245 U.S. 366, 390. However widespread the complaint, it is legally baseless, and the State's reliance upon it cannot withstand a First Amendment claim. We are told that an official inquiry into the good faith with which religious beliefs are held might be itself unconstitutional. But this Court indicated otherwise in United States v. Ballard, 1944, 322 U.S. 78. Such an inquiry is no more an infringement of religious freedom than the requirement imposed by the Court itself in McGowan v. State of Maryland, 366 U.S. 420, that a plaintiff show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause of the First Amendment.

Justice STEWART, dissenting.

I agree with substantially all that Justice Brennan has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.

Justice DOUGLAS, dissenting.

If the “free exercise” of religion were subject to reasonable regulations, as it is under some constitutions, or if all laws “respecting the establishment of religion” were not proscribed, I could understand how rational men, representing a predominantly Christian civilization, might think these Sunday laws did not unreasonably interfere with anyone's free exercise of religion and took no step toward a burdensome establishment of any religion.

The State can, of course, require one day of rest a week: one day when every shop or factory is closed. Quite a few States make that requirement. Then the “day of rest” becomes purely and simply a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the “‘weaker brethren,” to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?

There is an “establishment” of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the “free exercise” of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community.

A change in the level of protection given to the free exercise of religion occurred in 1963. In that year, writing for the Court in Sherbert v. Verner, Justice Brennan said that strict scrutiny should be used if application of a law imposes a burden on the free exercise of religion.

Sherbert v. Verner
374 U.S. 398 (1963)

Justice BRENNAN delivered the opinion of the Court.

Appellant, a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. When she was unable to obtain other employment because from conscientious scruples she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. That law provides that, to be eligible for benefits, a claimant must be “able to work and . . . is available for work”; and, further, that a claimant is ineligible for benefits “[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . .” The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept “suitable work when offered . . . by the employment office or the employer . . . .” The Commission's finding was sustained by the Court of Common Pleas for Spartanburg County. That court's judgment was in turn affirmed by the South Carolina Supreme Court, which rejected appellant's contention that, as applied to her, the disqualifying provisions of the South Carolina statute abridged her right to the free exercise of her religion secured under the Free Exercise Clause of the First Amendment through the Fourteenth Amendment.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such, Cantwell v. Connecticut, 310 U.S. 296, 303 [(1940)]. Government may neither compel affirmation of a repugnant belief, Torcaso v. Watkins, 367 U.S. 488 [(1961)]; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, Fowler v. Rhode Island, 345 U.S. 67 [(1953)]; nor employ the taxing power to inhibit the dissemination of particular religious views, Murdock v. Pennsylvania, 319 U.S. 105 [(1943)]. On the other hand, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for “even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.” Braunfeld v. Brown, 366 U.S. 599, 603 [(1961)]. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., Jacobson v. Massachusetts, 197 U.S. 11 [compulsory vaccination]; Prince v. Massachusetts, 321 U.S. 158 [child labor]; Cleveland v. United States, 329 U.S. 14 [polygamy, citing Reynolds, 98 U.S. 145.].

Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the
decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ." NAACP v. Button, 371 U.S. 415, 438 [(1963) (freedom of association in the context of litigation, excerpted at § 11.4.1)].

We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." Braunfeld v. Brown, supra, 366 U.S., at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation," Thomas v. Collins, 323 U.S. 516, 530 [(1945) (freedom of speech and assembly case)]. No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, United States v. Ballard, 322 U.S. 78 – a question as to which we intimate no view since it is not before us – it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights. Cf. Shelton v. Tucker, 364 U.S. 479, 487-490 [(1960) (least restrictive alternative test of strict scrutiny, applied in compelled speech case)].
In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown*, supra. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served “to make the practice of (the Orthodox Jewish merchants’) religious beliefs more expensive,” 366 U.S., at 605. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case – a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.

In holding as we do, plainly we are not fostering the “establishment” of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. See School District of Abington Township v. Schempp, 374 U.S. 203 [(1963) (unconstitutional to begin each day of public school class with readings from the Bible)]. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties. Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society. Finally, nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may “exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” *Everson v. Board of Education*, 330 U.S. 1, 16 [(1947)].

Justice STEWART, concurring in the result.

I cannot agree that today's decision can stand consistently with *Braunfeld v. Brown*, supra. The Court says that there was a “less direct burden upon religious practices” in that case than in this. With all respect, I think the Court is mistaken, simply as a matter of fact. The *Braunfeld* case involved a state criminal statute. The undisputed effect of that statute, as pointed out by Justice Brennan in his dissenting opinion in that case, was that “‘Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment.’” *Braunfeld* case, supra, at 611. In other words, the issue in this case – and we do not understand either appellees or the Court to contend otherwise – is whether a State may put an individual to a choice between his business and his religion.” 366 U.S., at 611.
The impact upon the appellant's religious freedom in the present case is considerably less onerous. We deal here not with a criminal statute, but with the particularized administration of South Carolina's Unemployment Compensation Act. Even upon the unlikely assumption that the appellant could not find suitable non-Saturday employment, the appellant at the worst would be denied a maximum of 22 weeks of compensation payments. I agree with the Court that the possibility of that denial is enough to infringe upon the appellant's constitutional right to the free exercise of her religion. But it is clear to me that in order to reach this conclusion the court must explicitly reject the reasoning of *Braunfeld v. Brown*. I think the *Braunfeld* case was wrongly decided and should be overruled, and accordingly I concur in the result reached by the Court in the case before us.

Justice HARLAN, whom Justice WHITE joins, dissenting.

Today's decision is disturbing both in its rejection of existing precedent and in its implications for the future. The significance of the decision can best be understood after an examination of the state law applied in this case.

First, despite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*, 366 U.S. 599, which held that it did not offend the “Free Exercise” Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday. The secular purpose of the statute before us today is even clearer than that involved in *Braunfeld*. And just as in *Braunfeld* – where exceptions to the Sunday closing laws for Sabbatarians would have been inconsistent with the purpose to achieve a uniform day of rest and would have required case-by-case inquiry into religious beliefs – so here, an exception to the rules of eligibility based on religious convictions would necessitate judicial examination of those convictions and would be at odds with the limited purpose of the statute to smooth out the economy during periods of industrial instability. Finally, the indirect financial burden of the present law is far less than that involved in *Braunfeld*. Forcing a store owner to close his business on Sunday may well have the effect of depriving him of a satisfactory livelihood if his religious convictions require him to close on Saturday as well. Here we are dealing only with temporary benefits, amounting to a fraction of regular weekly wages and running for not more than 22 weeks. See §§ 68-104, 68-105. Clearly, any differences between this case and *Braunfeld* cut against the present appellant.

Second, the implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. The meaning of today's holding, as already noted, is that the State must furnish unemployment benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. The State, in other words, must single out for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work no Saturdays) is not religiously motivated.

It has been suggested that such singling out of religious conduct for special treatment may violate the constitutional limitations on state action. See Kurland. Of Church and State and The Supreme Court, 29 U. of Chi. L. Rev. 1 [(1961)]; cf. *Cammarano v. United States*, 358 U.S. 498, 515 [(1959) (Douglas, J., concurring)]. My own view, however, is that at least under the circumstances of this
case it would be a permissible accommodation of religion for the State, if it chose to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of “neutrality,” see School District of Abington Township v. Schempp, 374 U.S. [203, 222 (1963)], is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. The State violates its obligation of neutrality when, for example, it mandates a daily religious exercise in its public schools, with all the attendant pressures on the school children that such an exercise entails. See Engel v. Vitale, 370 U.S. 421 [(1962) (school prayer case)]; Schempp, supra [(bible reading case)]. But there is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

For very much the same reasons, however, I cannot subscribe to the conclusion that the State is constitutionally compelled to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area. See, e.g., Braunfeld v. Brown, supra; Prince v. Massachusetts, 321 U.S. 158; Jacobson v. Massachusetts, 197 U.S. 11; Reynolds v. United States, 98 U.S. 145. Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires.

A similar conclusion to Sherbert v. Verner was reached in 1981 in Thomas v. Review Board of the Indiana Employment Security Division. In Thomas, the Court held that unemployment compensation benefits could not be denied to a claimant who terminated his job because his religious beliefs forbade participation in production of armaments.

A strict scrutiny approach for a burden on religious beliefs was also applied in 1972 in Wisconsin v. Yoder. In Yoder, the Court held that it would violate the free exercise rights of Amish parents to require their children to attend public high school. For the Court, Chief Justice Burger said that the state did not have an interest of sufficient magnitude to overbalance the Amish claims to free exercise of religion, considering testimony that compulsory formal education after the eighth grade would gravely endanger, if not destroy, the free exercise of Amish religious beliefs. There was also evidence that additional years of formal high school for Amish children would do little to serve the state’s interests in education, especially since most Amish children plan to live in Amish society and, with respect to those who might leave, there is nothing to suggest that Amish qualities of reliability, self-reliance, and dedication to work would fail to find ready markets in today’s society.

---


Despite the application of strict scrutiny during the instrumentalist era, courts upheld a number of cases of government actions burdening religious beliefs as satisfying a compelling government interest, least restrictive alternative analysis. For example, in *United States v. Lee*, the Court held that Congress could require all employers, including Amish employers, to pay social security taxes, even if such payments would violate the Amish’s religious beliefs. Congress had granted self-employed Amish an exception from participation in the Social Security program, but the choice not to extend that exception to Amish employers was for Congress to make.

**United States v. Lee**

455 U.S. 252 (1982)

Chief Justice BURGER delivered the opinion of the Court.

We noted probable jurisdiction to determine whether imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. The District Court, 497 F. Supp. 180 [(1980)], concluded that the Free Exercise Clause prohibits forced payment of social security taxes when payment of taxes and receipt of benefits violate the taxpayer's religion. We reverse.

Appellee, a member of the Old Order Amish, is a farmer and carpenter. From 1970 to 1977, appellee employed several other Amish to work on his farm and in his carpentry shop. He failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees, or pay the employer's share of social security taxes.

In 1978, the Internal Revenue Service assessed appellee in excess of $27,000 for unpaid employment taxes; he paid $91—the amount owed for the first quarter of 1973—and then sued in the United States District Court for the Western District of Pennsylvania for a refund, claiming that imposition of the social security taxes violated his First Amendment free exercise rights and those of his Amish employees.

The District Court held the statutes requiring appellee to pay social security and unemployment insurance taxes unconstitutional as applied. 497 F. Supp. 180 (1980). The court noted that the Amish believe it sinful not to provide for their own elderly and needy and therefore are religiously opposed to the national social security system. The court also accepted appellee's contention that the Amish religion not only prohibits the acceptance of social security benefits, but also bars all contributions by Amish to the social security system. The District Court observed that in light of their beliefs, Congress has accommodated self-employed Amish and self-employed members of other religious groups with similar beliefs by providing exemptions from social security taxes. 26 U.S.C. § 1402(g). The court's holding was based on both the exemption statute for the self-employed and the First Amendment; appellee and others “who fall within the carefully circumscribed definition provided in 1402(g) are relieved from paying the employer's share of [social security taxes] as it is an unconstitutional infringement upon the free exercise of their religion.” 497 F. Supp., at 184.

Direct appeal from the judgment of the District Court was taken pursuant to 28 U.S.C. § 1252.
The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional. See, e.g., Prince v. Massachusetts, 321 U.S. 158 (1944); Reynolds v. United States, 98 U.S. 145 (1879). The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963).

Because the social security system is nationwide, the governmental interest is apparent. The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees. The social security system is by far the largest domestic governmental program in the United States today, distributing approximately $11 billion monthly to 36 million Americans. The design of the system requires support by mandatory contributions from covered employers and employees. This mandatory participation is indispensable to the fiscal vitality of the social security system. “[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program.” S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965), U.S. Code Cong. & Admin. News (1965), pp. 1943, 2056. Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer. Thus, the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high.

The remaining inquiry is whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest. In Braunfeld v. Brown, 366 U.S. 599, 605 (1961), this Court noted that “to make accommodation between the religious action and an exercise of state authority is a particularly delicate task . . . because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing . . . prosecution.” The difficulty in attempting to accommodate religious beliefs in the area of taxation is that “we are a cosmopolitan nation made up of people of almost every conceivable religious preference.” Braunfeld, supra, at 606. The Court has long recognized that balance must be struck between the values of the comprehensive social security system, which rests on a complex of actuarial factors, and the consequences of allowing religiously based exemptions. To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, see, e.g., Thomas, supra; Sherbert, supra, but there is a point at which accommodation would “radically restrict the operating latitude of the legislature.” Braunfeld, supra, at 606.

Unlike the situation presented in Wisconsin v. Yoder, supra, it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs. The obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes; the difference – in theory at least – is that the social security tax revenues are segregated for use only in furtherance of the statutory program. There is
no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. See, e.g., Lull v. Commissioner, 602 F.2d 1166 (CA4 1979), cert. denied, 444 U.S. 1014 (1980); Autenrieth v. Cullen, 418 F.2d 586 (CA9 1969), cert. denied, 397 U.S. 1036 (1970). Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. In § 1402(g) Congress granted an exemption, on religious grounds, to self-employed Amish and others. Confining the § 1402(g) exemption to the self-employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own “welfare” system are distinguishable from the generality of wage earners employed by others.

Justice STEVENS, concurring in the judgment.

The Court's analysis supports a holding that there is virtually no room for a “constitutionally required exemption” on religious grounds from a valid tax law that is entirely neutral in its general application. [FN 3: Today's holding is limited to a claim to a tax exemption. I believe, however, that a standard that places an almost insurmountable burden on any individual who objects to a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) better explains most of this Court's holdings than does the standard articulated by the Court today. See, e.g., Gillette v. United States, 401 U.S. 437 (selective service laws); Braunfeld v. Brown, 366 U.S. 599 (Sunday closing laws); Prince v. Massachusetts, 321 U.S. 158 (child labor laws); Jacobson v. Massachusetts, 197 U.S. 11 (compulsory vaccination laws); Reynolds v. United States, 98 U.S. 45 (polygamy law). The principal exception is Wisconsin v. Yoder, 406 U.S. 205, in which the Court granted the Amish an exemption from Wisconsin's compulsory school-attendance law by actually applying the subjective balancing approach it purports to apply today. The Court's attempt to distinguish Yoder is unconvincing because precisely the same religious interest is implicated in both cases, and Wisconsin's interest in requiring its children to attend school until they reach the age of 16 is surely not inferior to the federal interest in collecting these social security taxes. There is also tension between this standard and the reasoning in Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, and Sherbert v. Verner, 374 U.S. 398. Arguably, however, laws intended to provide a benefit to a limited class of otherwise disadvantaged persons should be judged by a different standard than that appropriate for the enforcement of neutral laws of general applicability. Cf. Harris v. McRae, 448 U.S. 297, 349-357 (Stevens, J., dissenting). A tax exemption entails no cost to the claimant; if tax exemptions were dispensed on religious grounds, every citizen would have an economic motivation to join the favored sects. No comparable economic motivation could explain the conduct of the employees in Sherbert and Thomas. In both of those cases changes in work requirements dictated
by the employer forced the employees to surrender jobs that they would have preferred to retain rather than accept unemployment compensation. In each case the treatment of the religious objection to the new job requirements as though it were tantamount to a physical impairment that made it impossible for the employee to continue to work under changed circumstances could be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect. In all events, the decision in *Thomas* was clearly compelled by *Sherbert*. Because I agree with that holding, I concur in the judgment.

Under the *Sherbert v. Verner* strict scrutiny approach, the Supreme Court, and lower federal courts, upheld against free exercise challenges other aspects of economic regulations, such as application of the Fair Labor Standards Act requirements on minimum wages and record keeping requirements to religious organizations conducting “ordinary commercial activities,” or application of other aspects of the tax code. For example, in *Hernandez v. Commissioner of the IRS*, the Court held that requiring income taxes to be paid on what the challenger alleged was a charitable contribution to the Church of Scientology, but the government characterized as a fee for “auditing” and “training” session, was not an impermissible burden on the free exercise of religion because the government could satisfy a strict scrutiny approach, as in *United States v. Lee*.

The Court also noted during the instrumentalist era that a strict scrutiny standard was not appropriate if the challenge was to how the government was conducting its own affairs, rather than regulating the affairs of private citizens. In *Bowen v. Roy*, the challenger complained that the federal government’s requirement that his daughter have a Social Security number in order for him to collect AFDC welfare benefits violated his religious belief that assigning her a number would tend to “rob the spirit” of his daughter. The Court responded, “Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.” Similarly, the Court held in *Goldman v. Weinberger* that it was reasonable for the United States military to apply its uniform dress regulations to deny an Orthodox Jewish service member the right to wear a yarmulke while on duty.

In *Lyng v. Northwest Indian Cemetery Protective Association*, the Court concluded under a similar rational basis approach that the government could permit harvesting of timber, and construction of a road, on federal government land, despite objections from three Native American tribes that such activities interfered with a portion of that land they had traditionally used for religious purposes.

---


26 475 U.S. 503, 505-10 (1986).
Justice O'CONNOR delivered the opinion of the Court.

This case requires us to consider whether the First Amendment's Free Exercise Clause prohibits the Government from permitting timber harvesting in, or constructing a road through, a portion of a National Forest that has traditionally been used for religious purposes by members of three American Indian tribes in northwestern California. We conclude that it does not.

As part of a project to create a paved 75-mile road linking two California towns, Gasquet and Orleans, the United States Forest Service has upgraded 49 miles of previously unpaved roads on federal land. In order to complete this project (the G-O road), the Forest Service must build a 6-mile paved segment through the Chimney Rock section of the Six Rivers National Forest. That section of the forest is situated between two other portions of the road that are already complete.

In 1977, the Forest Service issued a draft environmental impact statement that discussed proposals for upgrading an existing unpaved road that runs through the Chimney Rock area. In response to comments on the draft statement, the Forest Service commissioned a study of American Indian cultural and religious sites in the area. The Hoopa Valley Indian Reservation adjoins the Six Rivers National Forest, and the Chimney Rock area has historically been used for religious purposes by Yurok, Karok, and Tolowa Indians. The commissioned study, which was completed in 1979, found that the entire area “is significant as an integral and indispensable part of Indian religious conceptualization and practice.” App. 181. Specific sites are used for certain rituals, and “successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting.” Ibid. (footnote omitted). The study concluded that constructing a road along any of the available routes “would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples.” Id., at 182. Accordingly, the report recommended that the G-O road not be completed.

In 1982, the Forest Service decided not to adopt this recommendation, and it prepared a final environmental impact statement for construction of the road. The Regional Forester selected a route that avoided archeological sites and was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities. Alternative routes that would have avoided the Chimney Rock area altogether were rejected because they would have required the acquisition of private land, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians. See id., at 217-218. At about the same time, the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber in this area of the forest. The management plan provided for one-half mile protective zones around all the religious sites identified in the report that had been commissioned in connection with the G-O road.

After exhausting their administrative remedies, respondents – an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the State of

In *Bowen v. Roy*, 476 U.S. 693 (1986), we considered a challenge to a federal statute that required the States to use Social Security numbers in administering certain welfare programs. Two applicants for benefits under these programs contended that their religious beliefs prevented them from acceding to the use of a Social Security number for their 2-year-old daughter because the use of a numerical identifier would “‘rob the spirit’ of [their] daughter and prevent her from attaining greater spiritual power.” Id., at 696. Similarly, in this case, it is said that disruption of the natural environment caused by the G-O road will diminish the sacredness of the area in question and create distractions that will interfere with “training and ongoing religious experience of individuals using [sites within] the area for personal medicine and growth...and as integrated parts of a system of religious belief and practice which correlates ascending degrees of personal power with a geographic hierarchy of power.” App. 181. Cf. id., at 178 (“Scarred hills and mountains, and disturbed rocks destroy the purity of the sacred areas, and [Indian] consultants repeatedly stressed the need of a training doctor to be undistracted by such disturbance”). The Court rejected this kind of challenge in *Roy*: “The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that [the Roys] engage in any set form of religious observance, so [they] may not demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter. ... The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.” 476 U.S., at 699-700.

The building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*. In both cases, the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs. In neither case, however, would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.

We are asked to distinguish this case from *Roy* on the ground that the infringement on religious liberty here is “significantly greater,” or on the ground that the Government practice in *Roy* was “purely mechanical” whereas this case involves “a case-by-case substantive determination as to how a particular unit of land will be managed.” Brief for Indian Respondents 33-34. Similarly, we are told that this case can be distinguished from *Roy* because “the government action is not at some physically removed location where it places no restriction on what a practitioner may do.” Brief for Respondent State of California 18. The State suggests that the Social Security number in *Roy* “could
be characterized as interfering with Roy's religious tenets from a subjective point of view, where the
government's conduct of ‘its own internal affairs’ was known to him only secondhand and did not
interfere with his ability to practice his religion.” Id., at 19 (footnote omitted; internal citation
omitted). In this case, however, it is said that the proposed road will “physically destro[y] the
environmental conditions and the privacy without which the [religious] practices cannot be
conducted.” Ibid.

These efforts to distinguish Roy are unavailing. This Court cannot determine the truth of the
underlying beliefs that led to the religious objections here or in Roy, see Hobbie v. Unemployment
Appeals Comm'n of Fla., 480 U.S. 136, 144, n.9 (1987), and accordingly cannot weigh the adverse
effects on the appellees in Roy and compare them with the adverse effects on the Indian respondents.
Without the ability to make such comparisons, we cannot say that the one form of incidental
interference with an individual's spiritual activities should be subjected to a different constitutional
analysis than the other.

. . . . It is true that this Court has repeatedly held that indirect coercion or penalties on the free
exercise of religion, not just outright prohibitions, are subject to scrutiny under the First
Amendment. Thus, for example, ineligibility for unemployment benefits, based solely on a refusal
to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship. Sherbert, supra,
374 U.S., at 404. This does not and cannot imply that incidental effects of government programs,
which may make it more difficult to practice certain religions but which have no tendency to coerce
individuals into acting contrary to their religious beliefs, require government to bring forward a
compelling justification for its otherwise lawful actions. The crucial word in the constitutional text
is “prohibit”: “For the 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.” Sherbert,
supra, at 412 (Douglas, J., concurring).

The dissent proposes an approach to the First Amendment that is fundamentally inconsistent with
the principles on which our decision rests. Notwithstanding the sympathy that we all must feel for
the plight of the Indian respondents, . . . the approach taken by the dissent cannot withstand analysis.
On the contrary, the path towards which it points us is incompatible with the text of the Constitution,
with the precedents of this Court, and with a responsible sense of our own institutional role.
The dissent begins by asserting that the “constitutional guarantee we interpret today . . . is directed
against any form of government action that frustrates or inhibits religious practice.” Post, at 1330
(emphasis added). The Constitution, however, says no such thing. Rather, it states: “Congress shall
make no law . . . prohibiting the free exercise [of religion].” U.S. Const., Amdt. 1 (emphasis added).

Perceiving a “stress point in the longstanding conflict between two disparate cultures,” the dissent
attacks us for declining to “balanc[e] these competing and potentially irreconcilable interests,
choosing instead to turn this difficult task over to the Federal Legislature.” Post, at 1337. Seeing the
Court as the arbiter, the dissent proposes a legal test under which it would decide which public lands
are “central” or “indispensable” to which religions, and by implication which are “dispensable” or
“peripheral,” and would then decide which government programs are “compelling” enough to justify
“infringement of those practices.” Post, at 1338. We would accordingly be required to weigh the
value of every religious belief and practice that is said to be threatened by any government program. Unless a “showing of ‘centrality,’” post, at 1338, is nothing but an assertion of centrality, see post, at 1339, the dissent thus offers us the prospect of this Court’s holding that some sincerely held religious beliefs and practices are not “central” to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit. In other words, the dissent’s approach would require us to rule that some religious adherents misunderstand their own religious beliefs. We think such an approach cannot be squared with the Constitution or with our precedents, and that it would cast the Judiciary in a role that we were never intended to play.

Justice KENNEDY took no part in the consideration or decision of this case.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, dissenting.

“‘[T]he Free Exercise Clause,’” the Court explains today, “‘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.’” Ante, at 1326 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)). Pledging fidelity to this unremarkable constitutional principle, the Court nevertheless concludes that even where the Government uses federal land in a manner that threatens the very existence of a Native American religion, the Government is simply not “doing” anything to the practitioners of that faith. Instead, the Court believes that Native Americans who request that the Government refrain from destroying their religion effectively seek to exact from the Government de facto beneficial ownership of federal property. These two astonishing conclusions follow naturally from the Court’s determination that federal land-use decisions that render the practice of a given religion impossible do not burden that religion in a manner cognizable under the Free Exercise Clause, because such decisions neither coerce conduct inconsistent with religious belief nor penalize religious activity. The constitutional guarantee we interpret today, however, draws no such fine distinctions between types of restraints on religious exercise, but rather is directed against any form of governmental action that frustrates or inhibits religious practice. Because the Court today refuses even to acknowledge the constitutional injury respondents will suffer, and because this refusal essentially leaves Native Americans with absolutely no constitutional protection against perhaps the gravest threat to their religious practices, I dissent.

The Court ostensibly finds support for its narrow formulation of religious burdens in our decisions in Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136 (1987), Thomas v. Review Bd., Indiana Employment Security Division, 450 U.S. 707 (1981), and Sherbert v. Verner, 374 U.S. 398 (1963). In those cases, the laws at issue forced individuals to choose between adhering to specific religious tenets and forfeiting unemployment benefits on the one hand, and accepting work repugnant to their religious beliefs on the other. The religions involved, therefore, lent themselves to the coercion analysis the Court espouses today, for they proscribed certain conduct such as munitions work (Thomas) or working on Saturdays (Sherbert, Hobbie) that the unemployment benefits laws effectively compelled. In sustaining the challenges to these laws, however, we nowhere suggested that such coercive compulsion exhausted the range of religious burdens recognized under the Free Exercise Clause.
Indeed, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), we struck down a state compulsory school attendance law on free exercise grounds not so much because of the affirmative coercion the law exerted on individual religious practitioners, but because of “the impact that compulsory high school attendance could have on the continued survival of Amish communities.” Id., at 209 (emphasis added). Like respondents here, the Amish view life as pervasively religious and their faith accordingly dictates their entire lifestyle. See id., at 210.

Nor can I agree with the Court's assertion that respondents' constitutional claim is foreclosed by our decision in *Bowen v. Roy*, 476 U.S. 693 (1986). There, applicants for certain welfare benefits objected to the use of a Social Security number in connection with the administration of their 2-year-old daughter's application for benefits, contending that such use would “rob the [child's] spirit” and thus interfere with her spiritual development. In rejecting that challenge, we stated that “[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.” Id., at 699 (emphasis added); see also id., at 716-717 (Stevens, J., concurring in part) (“[T]he Free Exercise Clause does not give an individual the right to dictate the Government's method of recordkeeping”). We explained that Roy could “no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.” Id., at 700 (emphasis added).

Today the Court professes an inability to differentiate *Roy* from the present case, suggesting that “[t]he building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number.” *Ante*, at 1325. I find this inability altogether remarkable. In *Roy*, we repeatedly stressed the “internal” nature of the Government practice at issue: noting that Roy objected to “the widespread use of the social security number by the federal or state governments in their computer systems,” 476 U.S., at 697 (citation omitted; internal quotation marks omitted; emphasis added), we likened the use of such recordkeeping numbers to decisions concerning the purchase of office equipment. When the Government processes information, of course, it acts in a purely internal manner, and any free exercise challenge to such internal recordkeeping in effect seeks to dictate how the Government conducts its own affairs. Federal land-use decisions, by contrast, are likely to have substantial external effects that government decisions concerning office furniture and information storage obviously will not, and they are correspondingly subject to public scrutiny and public challenge in a host of ways that office equipment purchases are not. Indeed, in the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996, Congress expressly recognized the adverse impact land-use decisions and other governmental actions frequently have on the site-specific religious practices of Native Americans, and the Act accordingly directs agencies to consult with Native American religious leaders before taking actions that might impair those practices. Although I agree that the Act does not create any judicially enforceable rights, see *ante*, at 1327-1328, the absence of any private right of action in no way undermines the statute's significance as an express congressional determination that federal land management decisions are not “internal” Government “procedures,” but are instead governmental actions that can and indeed are likely to burden Native American religious practices. That such
decisions should be subject to constitutional challenge, and potential constitutional limitations, should hardly come as a surprise.

The Court today, however, ignores Roy’s emphasis on the internal nature of the Government practice at issue there, and instead construes that case as further support for the proposition that governmental action that does not coerce conduct inconsistent with religious faith simply does not implicate the concerns of the Free Exercise Clause. That such a reading is wholly untenable, however, is demonstrated by the cruelly surreal result it produces here: governmental action that will virtually destroy a religion is nevertheless deemed not to “burden” that religion.

Prior to today's decision, several Courts of Appeals had attempted to fashion a test that accommodates the competing “demands” placed on federal property by the two cultures. Recognizing that the Government normally enjoys plenary authority over federal lands, the Courts of Appeals required Native Americans to demonstrate that any land-use decisions they challenged involved lands that were “central” or “indispensable” to their religious practices. See, e.g., Northwest Indian Cemetery Protective Assn. v. Peterson, 795 F.2d 688 (CA9 1986) (case below); Wilson v. Block, 708 F.2d 735, cert. denied, 464 U.S. 956 (1983); Badoni v. Higginson, 638 F.2d 172 (CA10 1980), cert. denied, 452 U.S. 954 (1981); Sequoyah v. TVA, 620 F.2d 1159 (CA6), cert. denied, 449 U.S. 953 (1980); Crow v. Gullet, 541 F. Supp. 785 (SD 1982), aff’d, 706 F.2d 856 (CA8), cert. denied, 464 U.S. 977 (1983). Although this requirement limits the potential number of free exercise claims that might be brought to federal land management decisions, and thus forestalls the possibility that the Government will find itself ensnared in a host of Lilliputian lawsuits, it has been criticized as inherently ethnocentric, for it incorrectly assumes that Native American belief systems ascribe religious significance to land in a traditionally Western hierarchical manner. See Michaelsen, American Indian Religious Freedom Litigation: Promise and Perils, 3 J. Law & Rel. 47 (1985); Pepper, Conundrum of the Free Exercise Clause – Some Reflections on Recent Cases, 9 N. Ky. L. Rev. 265, 283-284 (1982). It is frequently the case in constitutional litigation, however, that courts are called upon to balance interests that are not readily translated into rough equivalents. At their most absolute, the competing claims that both the Government and Native Americans assert in federal land are fundamentally incompatible, and unless they are tempered by compromise, mutual accommodation will remain impossible.

I believe it appropriate, therefore, to require some showing of “centrality” before the Government can be required either to come forward with a compelling justification for its proposed use of federal land or to forego that use altogether. “Centrality,” however, should not be equated with the survival or extinction of the religion itself. In Yoder, for example, we treated the objection to the compulsory school attendance of adolescents as “central” to the Amish faith even though such attendance did not prevent or otherwise render the practice of that religion impossible, and instead simply threatened to “undermine” that faith. Because of their perceptions of and relationship with the natural world, Native Americans consider all land sacred. Nevertheless, the Theodoratus Report reveals that respondents here deemed certain lands more powerful and more directly related to their religious practices than others. Thus, in my view, while Native Americans need not demonstrate, as respondents did here, that the Government's land-use decision will assuredly eradicate their faith, I do not think it is enough to allege simply that the land in question is held sacred. Rather, adherents
challenging a proposed use of federal land should be required to show that the decision poses a substantial and realistic threat of frustrating their religious practices. Once such a showing is made, the burden should shift to the Government to come forward with a compelling state interest sufficient to justify the infringement of those practices.

The Court today suggests that such an approach would place courts in the untenable position of deciding which practices and beliefs are “central” to a given faith and which are not, and invites the prospect of judges advising some religious adherents that they “misunderstand their own religious beliefs.” Ante, at 1330. In fact, however, courts need not undertake any such inquiries: like all other religious adherents, Native Americans would be the arbiters of which practices are central to their faith, subject only to the normal requirement that their claims be genuine and sincere. The question for the courts, then, is not whether the Native American claimants understand their own religion, but rather whether they have discharged their burden of demonstrating, as the Amish did with respect to the compulsory school law in Yoder, that the land-use decision poses a substantial and realistic threat of undermining or frustrating their religious practices. [T]he Court's apparent solicitude for the integrity of religious belief and its desire to forestall the possibility that courts might second-guess the claims of religious adherents leads to far greater inequities than those the Court postulates: today's ruling sacrifices a religion at least as old as the Nation itself, along with the spiritual well-being of its approximately 5,000 adherents, so that the Forest Service can build a 6-mile segment of road that two lower courts found had only the most marginal and speculative utility, both to the Government itself and to the private lumber interests that might conceivably use it.

§ 14.3 Cases Decided Under Employment Division v. Smith: 1990-Today

In 1990, a majority of the Court in Employment Division v. Smith changed Free Exercise doctrine from the instrumentalist-era precedents. In Smith, the facts involved persons dismissed from their jobs because of their religious use of peyote, made illegal by state law, and the resulting denial of unemployment compensation. Justice Scalia, joined by Justices Stevens, Rehnquist, White, and Kennedy, wrote that the use of strict scrutiny in Free Exercise cases did not extend beyond: (1) unemployment compensation cases involving denial for refusing to work for religious reasons, such as working on one’s sabbath, as in Sherbert v. Verner, based on that precedent being “settled law”; (2) cases involving “hybrid” claims, i.e., claims based on a conjunction of free exercise claims combined with other constitutional protections, such as freedom of speech, or, as in Wisconsin v. Yoder, the right of parents to direct the education of their children, where the related right would trigger strict scrutiny on its own; or (3) cases involving discrimination against religion, such as in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, discussed following the Smith case. This was done in Smith without any briefing and argumentation on the issue, as noted in Hialeah. 508 U.S. 520, 571-74 (1993) (Souter, J., concurring in part and concurring in the judgment). The parties in the case had briefed the case assuming that Sherbert’s strict scrutiny standard would apply.

Employment Division v. Smith
494 U.S. 872 (1990)

Justice SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

Respondents' claim for relief rests on our decisions in Sherbert v. Verner, Thomas v. Review Bd. of Indiana Employment Security Div., and Hobbie v. Unemployment Appeals Comm'n of Florida, in which we held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in Employment Division v. Smith (Smith I), 485 U.S. 660 (1988), however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for “if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon,” and “the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation.” 485 U.S., at 672. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

The right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring in judgment). In Prince v. Massachusetts, 321 U.S. 158 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in “excluding [these children] from doing there what no other children may do.” Id., at 171. In Braunfeld v. Brown, 366 U.S. 599 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In Gillette v. United States, 401 U.S. 437, 461 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was United States v. Lee, 455 U.S., at 258-261. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. Cf. Hernandez v. Commissioner, 490 U.S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).
The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see Cantwell v. Connecticut, 310 U.S., at 304-307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); Follett v. McCormick, 321 U.S. 573 (1944) (same), or the right of parents, acknowledged in Pierce v. Society of Sisters, 268 U.S. 510 (1925), to direct the education of their children, see Wisconsin v. Yoder, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. Woolery v. Maynard, 430 U.S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); West Virginia Bd. of Education v. Barnette, 319 U.S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (“An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed”).

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since Reynolds plainly controls. “Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government.” Gillette v. United States, supra, 401 U.S., at 461.

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in Sherbert v. Verner, 374 U.S. 398 (1963). Under the Sherbert test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. See id., at 402-403; see also Hernandez v. Commissioner, 490 U.S., at 699. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. See Sherbert v. Verner, supra; Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987). We have never invalidated any governmental action on the basis of the Sherbert test except the denial of unemployment benefits to an objector whose religious beliefs prevent him from working in the sex trade.
compensation. Although we have sometimes purported to apply the Sherbert test in contexts other than that, we have always found the test satisfied, see United States v. Lee, 455 U.S. 252 (1982); Gillette v. United States, 401 U.S. 437 (1971). In recent years we have abstained from applying the Sherbert test (outside the unemployment compensation field) at all. In Bowen v. Roy, 476 U.S. 693 (1986), we declined to apply Sherbert analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. See 476 U.S., at 699-701. In Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439 (1988), we declined to apply Sherbert analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities “could have devastating effects on traditional Indian religious practices,” 485 U.S., at 451. In Goldman v. Weinberger, 475 U.S. 503 (1986), we rejected application of the Sherbert test to military dress regulations that forbade the wearing of yarmulkes. In O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), we sustained, without mentioning the Sherbert test, a prison's refusal to excuse inmates from work requirements to attend worship services.

The “compelling government interest” requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, see, e.g., Palmore v. Sidoti, 466 U.S. 429, 432 (1984), or before the government may regulate the content of speech, see, e.g., Sable Communications of California v. FCC, 492 U.S. 115, 126 (1989), is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields – equality of treatment and an unrestricted flow of contending speech – are constitutional norms; what it would produce here – a private right to ignore generally applicable laws – is a constitutional anomaly.

Nor is it possible to limit the impact of respondents' proposal by requiring a “compelling state interest” only when the conduct prohibited is “central” to the individual's religion. Cf. Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S., at 474-476 (Brennan, J., dissenting). It is no more appropriate for judges to determine the “centrality” of religious beliefs before applying a “compelling interest” test in the free exercise field, than it would be for them to determine the “importance” of ideas before applying the “compelling interest” test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is “central” to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable “business of evaluating the relative merits of differing religious claims.” United States v. Lee, 455 U.S., at 263 n.2 (Stevens, J., concurring). As we reaffirmed only last Term, “[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.” Hernandez v. Commissioner, 490 U.S., at 699. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. See, e.g., Thomas[, supra], 450 U.S., at 716; Jones v. Wolf, 443 U.S. 595, 602-606 (1979); United States v. Ballard, 322 U.S. 78, 85-87 (1944).
Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. See, e.g., Ariz. Rev. Stat. Ann. §§ 13-3402(B)(1)-(3) (1989); Colo. Rev. Stat. § 12-22-317(3) (1985); N.M. Stat. Ann. § 30-31-6(D) (Supp.1989). But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Justice O'CONNOR, with whom Justice BRENNAN, Justice MARSHALL, and Justice BLACKMUN join as to Parts I and II, concurring in the judgment.

The Court today extracts from our long history of free exercise precedents the single categorical rule that “if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” Ante, at 1600 (citations omitted). Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. Ante, at 1603.

. . . . Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, “[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides.” Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 141-142 (1987) (quoting Bowen v. Roy, 476 U.S. 693, 727 (1986) (O'Connor, J., concurring in part and dissenting in part)).

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. See, e.g., Cantwell, supra, 310 U.S., at 304; Reynolds v. United States, 98 U.S. 145, 161-167 (1878). Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. See Hernandez v. Commissioner, 490 U.S. 680, 699 (1989); Hobbie, supra, 480 U.S., at 141; United States v. Lee, 455 U.S. 252, 257-258 (1982); Yoder, supra, 406 U.S., at 215; Gillette v. United States, 401 U.S. 437, 462 (1971); Sherbert v. Verner, 374 U.S. 398, 403
(1963); West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 639 (1943). The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests “of the highest order,” Yoder, supra, 406 U.S., at 215. “Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.” Roy, supra, 476 U.S., at 728.

The Court attempts to support its narrow reading of the Clause by claiming that “[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” Ante, at 1600. But as the Court later notes, as it must, in cases such as Cantwell and Yoder we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. See Cantwell, 310 U.S., at 304-307; Yoder, 406 U.S., at 214-234. Indeed, in Yoder we expressly rejected the interpretation the Court now adopts: “[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability. . . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion.” Id., at 219-220 (emphasis added; citations omitted).

The Court endeavors to escape from our decisions in Cantwell and Yoder by labeling them “hybrid” decisions, ante, at 1607, but there is no denying that both cases expressly relied on the Free Exercise Clause, see Cantwell, 310 U.S., at 303-307; Yoder, supra, 406 U.S., at 219-229, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, ante, at 1600-1601, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. See Prince v. Massachusetts, 321 U.S. 158, 168-170 (1944) (state interest in regulating children's activities justifies denial of religious exemption from child labor laws); Braunfeld v. Brown, 366 U.S. 599, 608-609 (1961) (plurality opinion) (state interest in uniform day of rest justifies denial of religious exemption from Sunday closing law); Gillette, supra, 401 U.S., at 462 (state interest in military affairs justifies denial of religious exemption from conscription laws); Lee, supra, 455 U.S., at 258-259 (state interest in comprehensive Social Security system justifies denial of religious exemption from mandatory participation requirement). That we rejected the free exercise claims in those cases hardly calls into question the applicability of [free exercise] doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.
Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases. See, e.g., Lee, 455 U.S., at 257-260 (applying *Sherbert* to uphold Social Security tax liability); Gillette, 401 U.S., at 462 (applying *Sherbert* to uphold military conscription requirement); Yoder, 406 U.S., at 215-234 (applying *Sherbert* to strike down criminal convictions for violation of compulsory school attendance law). As I noted in *Bowen v. Roy*: “The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution. . . .” 476 U.S., at 731-732 (opinion concurring in part and dissenting in part). See also Hobbie, supra, 480 U.S., at 141-142; Sherbert, 374 U.S., at 404.

Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector “is essential to accomplish an overriding governmental interest,” Lee, supra, 455 U.S., at 257-258, or represents “the least restrictive means of achieving some compelling state interest,” Thomas, supra, 450 U.S., at 718. See, e.g., Braunfeld, supra, 366 U.S. at 607; Sherbert, supra, 374 U.S., at 406; Yoder, supra, 406 U.S., at 214-215; Roy, 476 U.S., at 728-732 (opinion concurring in part and dissenting in part). . . .

Moreover, we have not “rejected” or “declined to apply” the compelling interest test in our recent cases. *Ante*, at 1602-1603 . . . . In both *Bowen v. Roy*, supra, and *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not “require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development. . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.” Roy, supra, 476 U.S., at 699; see *Lyng*, supra, 485 U.S., at 449. This distinction makes sense because “the 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.” Sherbert, supra, 374 U.S., at 412 (Douglas, J., concurring). . . .

Similarly, the other cases cited by the Court for the proposition that we have rejected application of the *Sherbert* test outside the unemployment compensation field, *ante*, at 1603, are distinguishable because they arose in the narrow, specialized contexts in which we have not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest. See Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (“Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society”); O’Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (“[P]rison regulations alleged to infringe constitutional rights are judged under a ‘reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights”) (citation omitted).

Subsequent to *Employment Division v. Smith*, the state of Oregon created a religious exemption for peyote use, but that was a matter of legislative choice, not constitutional mandate.
The Court’s focus in Smith on “neutral, generally applicable law” underscores that if a law targets religion for discrimination, that law is tested under strict scrutiny review. An example of this kind of case is Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah. In Lukumi, the city adopted a special rule regarding the ritual slaughtering of animals, which was different, and more burdensome, than the rules regarding slaughtering of animals for secular food purposes. The Court applied a strict scrutiny approach, and held the ordinance unconstitutional.

There is a question under Smith of whether a “neutral, generally applicable law” triggers minimum rationality review or no Free Exercise review at all. Of course, even if no minimum rationality review were done under the Free Exercise Clause, there could still be a minimum rationality review challenge under Equal Protection or Due Process doctrines, as Justice O’Connor noted in her concurrence in the judgment in Smith. Thus, it makes little difference in practice. Most lower courts have applied a minimum rationality review test after Smith. Perhaps a better view would be that

---

28 508 U.S. 520, 530-47 (1993). See also Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, New Jersey, 170 F.3d 359, 364-66 (3rd Cir. 1999) (police department's decision to provide medical exemptions to its no-beard requirement, while refusing religious exemptions from same requirement, subject to heightened scrutiny based on religious discrimination); Central Rabbinical Congress of the United States and Canada, v. New York City Dept. of Health and Mental Hygiene, 763 F.3d 183 (2nd Cir. 2014) (city ordinance prohibiting any person from performing direct oral suction as part of circumcision without written signed consent triggers strict scrutiny as singling out religious practice, but remanded for trial on whether ordinance is constitutional given state interest in preventing spread of herpes simplex virus to male infants, which can be fatal due to their undeveloped immune systems); Craig v. Masterpiece Cakeshop, Inc., 138 S. Ct. 1719 (2018), (7-2 Supreme Court decision holding that while on its face an anti-discrimination law looked neutral, in this case it was applied with religious discriminatory intent; thus, in this case strict scrutiny was appropriately triggered and application to baker who refused to bake a wedding cake for a same-sex couple based on his religious objections to same-sex marriage was unconstitutional). But see Valov v. Department of Motor Vehicles, 34 Cal. Rptr.3d 174, 178-83 (Cal. App. 2nd Dist. 2005) (California statute requiring full-face photograph on driver's licenses, with no exemptions, either on secular grounds or for persons whose religious beliefs bar such personal photographs, constitutional as a neutral law promoting expeditious identification of persons during traffic stops and at accident scenes, deterring identity theft, and preventing fraud).

29 See, e.g., State v. Arlene’s Flowers, Inc., 389 P.3d 543 (Wash. 2017) (flower shop owner violated Washington Law Against Discrimination (WLAD) by refusing to provide flowers for same-sex wedding; because law is generally applicable neutral law it triggers only minimum rationality review), vacated on other grounds, 2018 WL 3096308 (2018) (consider whether law was applied with discriminatory intent, in light of Masterpiece Cakeshop, cited above); Levitan v. Ashcroft, 281 F. 3d 1313 (D.C. Cir. 2002) (discussing how to apply Smith in context of prisons: some courts say no free exercise review for neutral laws; some apply minimum rationality review; many courts, as
such a neutral, generally applicable law does not trigger Free Exercise review at all. That would preserve the notion that any constitutional burden on a fundamental right triggers something higher than minimum rationality review.  Cf. District of Columbia v. Heller, 554 U.S. 670, 628 & n.27 (2008) (review for Second Amendment right has to be higher than minimum rationality review because, like freedom of speech, a fundamental right is involved). Either doctrine is consistent with Madison’s view, discussed at § 13.4 n.23, that religious behavior can be regulated consistent with a concern for the “public peace.” See § 32.1.2.1 nn.14-20 of CHARLES D. KELSO & R. RANDALL KELSO, THE PATH OF CONSTITUTIONAL LAW (2007) (http://libguides.stcl.edu/kelsomaterials).

Free Exercise and Establishment Clause issues can also arise in the context of government regulation of home-schooling with a religious perspective. Typically courts do not find such home-schooling regulations burden the fundamental right of parents to rear their children, as discussed at § 25.4.3 n.36 of CHARLES D. KELSO & R. RANDALL KELSO, AMERICAN CONSTITUTIONAL LAW: AN E-COURSEBOOK VOLUMES 1 & 2 (2018 ORIG. ED. 2014) (http://libguides.stcl.edu/kelsomaterials). Thus, under Smith, such regulations would trigger at most only minimum rationality review, unless discrimination against religious home-schooling were shown. In practice, states have been relatively sensitive to parental concerns in this area.30

§ 14.4 Free Exercise Doctrine and Statutory Complements of RFRA and RLUIPA

1. The Religious Freedom Restoration Act

Reacting to the Smith case, Congress passed the Religious Freedom Restoration Act of 1993. It called for courts to use strict scrutiny whenever any government substantially burdens a person’s exercise of religion, even if the burden results from a law of general applicability.31 RFRA prohibits the “Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application

in Levitan, hold Smith is not relevant and apply Turner v. Safely’s second-order reasonableness balancing approach, which is used for prisoners’ rights even if for non-prisoners a higher standard of review would be applied, as noted at § 3.3.1. Under any approach, the prison rule allowing only chaplain to consume wine during communion was constitutional). Cf. Fields v. City of Tulsa, 753 F.3d 1000 (10th Cir. 2014) (police department did not violate officer’s freedom of religion by requiring him either to attend the Islamic Society of Tulsa’s “Law Enforcement Appreciation Day” or order subordinate to do so; he made no claim ordering another to do so would violate his religious beliefs, and so no burden on religion existed); Nikolao v. Lyon, 875 F.3d 310 (6th Cir. 2017) (no Free Exercise burden by requiring parent to explain religious reasons for not wanting child to be vaccinated prior to attending public school when waiver granted).


of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. §§ 2000bb-1(a), (b) (emphasis added). In passing this Act, Congress intended to reinstate the Sherbert v. Verner doctrine, which as phrased in O’Connor’s concurrence in Smith did apply strict scrutiny only to “substantial burdens” on religious beliefs. The original opinion in Sherbert applied strict scrutiny to “any” burden, whether substantial or not, but problems with broad use of strict scrutiny suggested to Brennan dissenting in Lyng, and O’Connor, such a “central” or “substantial” limitation.

In City of Boerne v. Flores, the Court declared the law invalid as applied to state laws. Congress had sought justify the law as an exercise of power under § 5 of the 14th Amendment. Justice Kennedy said that there must be congruence and proportionality between the injury to be prevented or modified and the means adopted to that end. Here, the legislative record lacked examples of modern instances of generally applicable laws passed because of religious bigotry. The RFRA, said Justice Kennedy, is so out of proportion to a supposed remedial or preventing object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. Justice O’Connor said that Smith was wrong and should be re-examined, as did justices Breyer and Souter.

In Hankins v. Lyght, the Second Circuit upheld on Commerce Clause grounds the Religious Freedom Restoration Act as applied to federal laws, rather than state laws struck down in Boerne v. Flores. In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, the Supreme Court similarly applied the RFRA’s compelling interest test to strike down the failure under the federal Controlled Substance Act to grant an exception for sacramental use of hallucinogenic tea. See also Tanvir v. Tanzin, 889 F.3d 72 (2nd Cir. 2018) (Muslim men state colorable claim of RFRA violation when federal officials retaliated against them for refusing to serve as informants by placing or retaining them on “No-Fly” list). But see New Doe Child #1 v. Congress of the United States, 891 F.3d 578 (6th Cir. 2018) (2-1 panel decision) (being forced to use money bearing phrase “In God We Trust” not a substantial burden under RFRA) (dissent would let parties go to trial on that issue).

One aspect of the Affordable Care Act of 2010 (Obamacare) is a mandate that employers’ health insurance plans provide contraceptive coverage free of cost. Catholic-based institutions, such as universities and hospitals, and secular corporations, whose CEOs have religious objections to contraception, particularly contraceptives that work after fertilization, such as morning-after pills, which they view as abortifacients, sued claiming the mandate is unlawful. See, e.g., Conestoga Wood Specialties Corp. v. Secretary of U.S. Dep’t of Health and Human Services, 724 F.3d 377 (3rd Cir. 2013) (2-1 panel decision) (secular for-profit corporations cannot engage in religious exercise and thus have no viable claim); id. at 389 (Jordan, J., dissenting) (corporations can engage in religious exercise, and contraceptive mandate likely violates both RFRA and Free Exercise Clause).

---

32 521 U.S. 507, 516-36 (1997); id. at 544 (O’Connor, J., joined by Breyer, J., except as to the first paragraph of Part I, dissenting); id. at 565 (Souter, J., dissenting).

33 441 F.3d 96, 107-09 (2nd Cir. 2006).

Commentators also took sides on whether such a contraceptive mandate was constitutional. See generally Caroline Mala Corbin, The Contraceptive Mandate, 107 Nw. U.L. Rev. 1469 (2013) (mandate lawful); Katherine Lepard, Standing Their Ground: Corporations’ Fight for Religious Rights in Light of the Enactment of the Patient Protection and Affordable Care Act Contraceptive Coverage Mandate, 45 Tex. Tech L. Rev. 1041 (2013) (mandate unlawful). In Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), a 5-4 Court ruled that closely-held for-profit corporations do have religious rights under RFRA, and that the contraceptive mandate was a substantial burden on their rights which could not survive RFRA’s version of strict scrutiny review.

**Burwell v. Hobby Lobby Stores, Inc.**

134 S. Ct. 2751 (2014)

Justice ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb et seq., permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

RFRA applies to “a person's” exercise of religion, 42 U.S.C. §§ 2000bb-1(a), (b), and RFRA itself does not define the term “person.” We therefore look to the Dictionary Act, which we must consult “in determining the meaning of any Act of Congress, unless the context indicates otherwise.” 1 U.S.C. § 1. Under the Dictionary Act, “the wor[d] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Ibid.; see FCC v. AT & T Inc., 131 S. Ct. 1177, 1182-1183 (2011) (“We have no doubt that ‘person,’ in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear”). Thus, unless there is something about the RFRA context that “indicates otherwise,” the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies . . . may be heard.

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term “person,” but on the phrase “exercise of religion.” According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious “autonomy . . . often furthers individual religious freedom as well.” Post, at 2794 (quoting Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in judgment)). But this principle applies equally to for-profit corporations:

Page 749
If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, 366 U.S. 599, we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims. As the Court explained in a later case, the “exercise of religion” involves “not only belief and profession but the performance of (or abstention from) physical acts” that are “engaged in for religious reasons.” *Smith*, 494 U.S., at 877. . . . If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim, why can't Hobby Lobby, Conestoga, and Mardel do the same?

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate “substantially burden[s]” the exercise of religion. 42 U.S.C. § 2000bb-1(a). We have little trouble concluding that it does.

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, see Brief for HHS in No. 13-354, at 9, n.4, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

[Ed.: The majority then concluded that under RFRA’s strict scrutiny standard there were less restrictive effective alternatives to advance the government’s compelling interest in making contraceptive coverage available to women. Among other alternatives, the Court noted that government could “assume the cost” of providing the contraceptive coverage, or extend the current exemption for “non-profit organizations with religious objections” where the non-profit can certify that it opposes providing the coverage, and then the insurance company must arrange independently with the plan participants to provide the contraceptive coverage to those participants without imposing “any cost-sharing requirements” on them.”]

Justice KENNEDY, concurring.

At the outset it should be said that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent. The Court and the dissent disagree on the proper interpretation of the Religious Freedom and Restoration Act of 1993 (RFRA), but do agree on the purpose of that statute. 42 U.S.C. § 2000bb *et seq.* It is to ensure that interests in religious freedom are protected. *Ante*, at 2760–2761; *post*, at 2790–2791 (Ginsburg, J., dissenting).

[The American community is today, as it long has been, a rich mosaic of religious faiths.” *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1849 (2014) (Kagan, J., dissenting). Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those}
presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, and with whom Justice BREYER and Justice KAGAN join as to all but Part III-C-1, dissenting.

III-C-1

Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA. The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of law.” Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819). Corporations, Justice Stevens more recently reminded, “have no consciences, no beliefs, no feelings, no thoughts, no desires.” Citizens United v. Federal Election Comm'n, 558 U.S. 310, 466 (2010) (opinion concurring in part and dissenting in part).

The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations. “For many individuals, religious activity derives meaning in large measure from participation in a larger religious community,” and “furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.” Corporation of Presiding Bishop of Church of Jesus Christ of Latter–Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring in judgment). The Court's “special solicitude to the rights of religious organizations,” Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694, 706 (2012), however, is just that. No such solicitude is traditional for commercial organizations. Indeed, until today, religious exemptions had never been extended to any entity operating in “the commercial, profit-making world.” Amos, 483 U.S., at 337.

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the work force of for-profit corporations. See 42 U.S.C. §§ 2000e(b), 2000e-1(a), 2000e-2(a); cf. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 80-81 (1977) (Title VII requires reasonable accommodation of an employee's religious exercise, but such accommodation must not come “at the expense of other [employees].”). The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention. One can only wonder why the Court shuts this key difference from sight.
The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens' and Hahns' "belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." Ante, at 2778. I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held. See Thomas, 450 U.S., at 715 (courts are not to question where an individual "dr[aws] the line" in defining which practices run afoul of her religious beliefs). See also 42 U.S.C. §§ 2000bb-1(a), 2000bb-2(4), 2000cc-5(7)(A). But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs'] beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake. Kaemmerling v. Lappin, 553 F.3d 669, 679 (C.A.D.C.2008).

. . . . I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The requirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, see supra, at 2788-2790, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But "[n]o individual decision by an employee and her physician – be it to use contraception, treat an infection, or have a hip replaced – is in any meaningful sense [her employer's] decision or action." Grote v. Sebelius, 708 F.3d 850, 865 (C.A.7 2013) (Rovner, J., dissenting). It is doubtful that Congress, when it specified that burdens must be “substantial[,]” had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed.

[T]he Government has shown that the contraceptive coverage for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. . . . The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. See Brief for American College of Obstetricians and Gynecologists et al. as Amici Curiae 14-15. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain. Brief for Ovarian Cancer National Alliance et al. as Amici Curiae 4, 6-7, 15-16; 78 Fed. Reg. 39872 (2013); IOM Report 107.
Whether certification must be made by the company to the insurance company, or whether to avoid any implication of complicity in contraceptive use the certification can go to the federal government to notify the insurance company, remained undecided. See Wheaton College v. Burwell, 134 S. Ct. 2806 (2014) (religious college not required to give notice to insurance company pending appeal); id. at 2806 (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting). The government has since changed the regulation to permit certification to the government. That option has been upheld by eight of nine Courts of Appeals as not being a substantial burden on religious freedom. See Eternal Word Tel. Network v. HHS, 818 F.3d 1122, 1141-42 (11th Cir. 2016). Cf. Sharpe Holdings, Inc. v. HHS, 801 F.3d 927 (8th Cir. 2015) (still substantial burden), decision vacated, Zubik v. Burwell, 136 S. Ct. 1557 (2016) (following oral argument, at Court’s request, both parties confirmed that it is “feasible” to provide coverage through regular insurance company without any formal notice).

Not litigated before the Court was the question of whether RFRA applied at all to the contraceptive coverage under the Affordable Care Act (ACA). RFRA provided that its terms apply not only existing legislation in 1993, but to all future legislation unless the later Congress “explicitly excludes such application by reference to this Act.” 42 U.S.C. § 2000bb-3. Such an attempt by a past Congress to limit what a later Congress can do violates norms of constitutional democracy and the Article I, § 7 bicameralism and presentment clauses, which provide the constitutional means by which legislation is enacted, free from any additional requirements imposed by earlier Congresses. See generally Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L.J. 491, 505-07 (1997). Thus, the real question in Hobby Lobby is whether the Congress that passed the ACA in 2010 intended to incorporate by reference RFRA protections for religious exercise enacted in 1993. The 2010 Congress provided in the ACA their own set of religious opt-out provisions, limiting them to non-profit institutions. When a legislature addresses something in a statute, the normal rule of statutory interpretation is that Congress did not intend other, unstated, exceptions to be incorporated by reference. See, e.g., Silvers v. Sony Pictures Entertainment, Inc., 402 F.3d 881, 885 (9th Cir. 2004) (en banc) (“The doctrine of expresio unius est exclusio alterius ‘as applied to statutory interpretation creates a presumption that when a statute designates certain person, things, or manners of operation, all omissions should be understood as exclusions.’ Boudette v Barnette, 823 F.3d 754, 756-57 (9th Cir. 1991).”). The oft-cited Dictionary Act, 1 U.S.C. § 1, is different, since it can reasonably be assumed that an existing Congress in passing legislation enacted provisions consistent with standard definitions listed in the Dictionary Act. However, where the ACA was passed with no Republican votes, for the majority in Burwell v. Hobby Lobby to conclude that the Nancy Pelosi-led House of Representatives, and Harry Reed-led Senate, intended in passing the Act to give for-profit corporations a means to make it harder for women to get the contraceptive coverage mandated by the ACA strains credulity as a matter of unbiased statutory interpretation.
2. Religious Land Use and Institutionalized Persons Act

Congress has also passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). That Act requires strict scrutiny of laws regarding any land use regulation that imposes a substantial burden on religion if: (1) that burden affects, or removal of that burden would itself affect, interstate commerce; or (2) the burden is imposed in a program or activity receiving federal financial aid; or (3) the burden is imposed in any regulation that permits individual assessments of proposed property use. The Act also requires strict scrutiny for a substantial burden on religious exercise of a person residing in or confined to an institution that received federal financial assistance or affects commerce with foreign Nations, among the several states, or with the Indian tribes.

The validity of this legislation was considered in Cutter v. Wilkinson. In Cutter, the Court ruled unanimously that the statute was an attempt to respect the free exercise rights of prisoners, and did not violate the Establishment Clause if the statute did not “elevate accommodation of religious observances over the institution’s need to maintain order and safety.” In Garner v. Kennedy, 713 F.3d 237, 240-48 (5th Cir. 2013), the Fifth Circuit noted that a district court had upheld a ban on Muslim prisoners wearing a white head covering (a “Kufi”) while in transit in prison on safety grounds, since weapons, like a knife, could be hidden in the covering, but overturned the prison’s ban on prisoners wearing a quarter-inch beard, since no compelling safety interest was demonstrated, given the prison’s policy of allowing inmates with “skin conditions” to wear short beards. Cf. Holt v. Hobbs, 135 S. Ct. 853, 859-60 (2015) (prison regulation banning one-half inch beard invalid under RLUIPA); Ali v. Stephens, 822 F.3d 776 (5th Cir. 2016) (ban on growing a 4-inch beard invalid). But see Knight v. Thompson, 796 F.3d 1289 (11th Cir. 2015) (“short hair policy” for prisoners applied to Native American valid). See also Haight v. Thompson, 763 F.3d 554 (6th Cir. 2014) (Native Americans raise colorable claim to purchase buffalo meat for faith-based, once-a-year “powwow” ceremony); Jehovah v. Clarke, 798 F.3d 169 (4th Cir. 2015) (inmate can press claim being harassed by non-Christian cellmate “chilled” religious practices); Fuqua v. Ryan. 890 F.3d 838 (9th Cir. 2018) (prisoner raises colorable claim that being disciplined after refusing to work in prison kitchen on his sabbath violates RLUIPA). But see Cavanaugh v. Bartelt, 178 F. Supp. 3d 819 (D. Neb. 2016) (prisoner worship of Flying Spaghetti Monster parody, not religion); Kemp v. Liebel, 877 F.3d 346 (7th Cir. 2017) (qualified immunity applies because no clearly established right to have prison immediately provide Jewish volunteers to lead worship services when there was reasonable delay after prisoners were transferred to new facility to maintain a kosher diet).

In their opinion in Garner, the Fifth Circuit quoted language from Cutter, which noted that, when passing RLUIPA, Congress intended courts to give “due deference” to prison regulations to maintain “good order, security and discipline, consistent with consideration of costs and limited resources.” 713 F.3d at 745 n.26. While usually cost considerations are not viewed as important or compelling interests to justify regulation under intermediate review or strict scrutiny, as discussed at § 20.1 n.14

of Charles D. Kelso & R. Randall Kelso, American Constitutional Law: An E-Coursebook Volumes 1 & 2 (2018 Orig. Ed. 2014) (http://libguides.stcl.edu/kelsomaterials), since the question here is how to interpret a statute, it is appropriate to take Congress’ intent into account in doing the statutory “strict scrutiny” analysis required by RLUIPA.

It seems likely the other aspects of RLUIPA, in addition to prison regulations, are valid under Congress’ Commerce Clause and Spending Clause powers. Part of the law might be struck down if the law were applied to affect private individual homes not up for sale or rental, although the affect of nationwide supply and demand for homes would be affected by those homes not currently up for sale or rental, and thus an affect on interstate commerce might be found. Lower courts are currently split on whether various kinds of zoning laws affecting church expansion, change of location, or demolition are substantial burdens triggering the strict scrutiny approach of RLUIPA.37

3. Accommodation Between Free Exercise and Establishment Clause Doctrines

In considering free exercise issues, the Court has been clear that while sometimes the government can grant a religious exemption, or provide for a compelling government interest analysis in statutes otherwise constitutional, the government is under no necessary obligation to do so.

Locke v. Davey

Chief Justice REHNQUIST delivered the opinion of the Court.

The State of Washington established the Promise Scholarship Program to assist academically gifted students with postsecondary education expenses. In accordance with the State Constitution, students

37 See generally Marci A. Hamilton, RLUIPA is a Bridge Too Far: Inconvenience is Not Discrimination, 39 Fordham Urb. L.J. 959 (2012) (discussing cases on both sides), citing, inter alia, Vision Church v. Village of Long Grove, 468 F.3d 975 (7th Cir. 2006) (denial of special use permit to build a church, which otherwise would have violated zoning law on size and capacity of buildings, not a substantial burden); Wesleyan Methodist Church of Canisteo v. Village of Canisteo, 792 F. Supp. 2d 667, 673-74 (W.D.N.Y. 2011) (no substantial burden when zoning law prevented building church in “light industrial zone”); Helen Greek Orthodox Church v. City of New Berlin, 396 F.3d 895, 901 (7th Cir. 2005) (zoning ordinance preventing building of a church in residential area with insufficient provisions for exemptions a substantial burden); Douglas Laycock & Luke W. Goodrich, RLUIPA: Necessary, Modest, and Under-Enforced, 39 Fordham Urb. L.J. 1021 (2012). See also Tree of Life Christian Schs. v. City of Upper Arlington, 823 F.3d 365 (6th Cir. 2016) (whether city’s refusal to rezone office building for use as religious school treated religion differently a fact question; court left open whether comparison should be only as to schools, as government argued, or any non-religious institution, such as day-care centers, as church argued); Andon, LLC v. City of Newport News, 813 F.3d 510 (4th Cir. 2016) (congregation that knew it could not meet zoning requirement, but signed lease anyway, cannot claim substantial burden).
may not use the scholarship at an institution where they are pursuing a degree in devotional theology. We hold that such an exclusion from an otherwise inclusive aid program does not violate the Free Exercise Clause of the First Amendment.

The Religion Clauses of the First Amendment provide: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” These two Clauses, the Establishment Clause and the Free Exercise Clause, are frequently in tension. See Norwood v. Harrison, 413 U.S. 455, 469 (1973) (citing Tilton v. Richardson, 403 U.S. 672, 677 (1971)). Yet we have long said that “there is room for play in the joints” between them. Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970). In other words, there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.

This case involves that “play in the joints” described above. Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients. See Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, 13-14 (1993). As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, see Witters, supra, at 489, and the State does not contend otherwise. The question before us, however, is whether Washington, pursuant to its own constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, see Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1122 (Wash. 1989) (en banc); cf. Witters v. State Comm'n for the Blind, 689 P.2d 53, 56 (Wash. 1984) (en banc) (“It is not the role of the State to pay for the religious education of future ministers”), rev'd, 474 U.S. 481 (1986), can deny them such funding without violating the Free Exercise Clause.

Davey urges us to answer that question in the negative. He contends that under the rule we enunciated in Church of Lukumi Babalu Aye, Inc. v. Hialeah, supra, the program is presumptively unconstitutional because it is not facially neutral with respect to religion. We reject his claim of presumptive unconstitutionality, however; to do otherwise would extend the Lukumi line of cases well beyond not only their facts but their reasoning. In Lukumi, the city of Hialeah made it a crime to engage in certain kinds of animal sacrifices. We found that the law sought to suppress ritualistic animal sacrifices of the Santeria religion. 508 U.S., at 535. In the present case, the State's disfavor of religion (if it can be called that) is of a far milder kind. It imposes neither criminal nor civil sanctions on any type of religious service or rite. It does not deny to ministers the right to participate in the political affairs of the community. See McDaniel v. Paty, 435 U.S. 618 (1978). And it does not require students to choose between their religious beliefs and receiving a government benefit. See ibid.; Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). The State has merely chosen not to fund a distinct category of instruction.

Justice Scalia argues, however, that generally available benefits are part of the “baseline against which burdens on religion are measured.” Post, at 1316 (dissenting opinion). Because the Promise Scholarship Program funds training for all secular professions, Justice Scalia contends the State must also fund training for religious professions. See ibid. But training for religious professions and
training for secular professions are not fungible. Training someone to lead a congregation is an essentially religious endeavor. Indeed, majoring in devotional theology is akin to a religious calling as well as an academic pursuit. See Calvary Bible Presbyterian Church v. Board of Regents, 436 P.2d 189, 193 (Wash. 1967) (en banc) (holding public funds may not be expended for “that category of instruction that resembles worship and manifests a devotion to religion and religious principles in thought, feeling, belief, and conduct”); App. 40 (Davey stating his “religious beliefs [were] the only reason for [him] to seek a college degree”). And the subject of religion is one in which both the United States and state constitutions embody distinct views – in favor of free exercise, but opposed to establishment – that find no counterpart with respect to other callings or professions. That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion.

Most States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry. E.g., Ga. Const., Art. IV, § 5 (1789), reprinted in 2 Federal and State Constitutions, Colonial Charters, and Other Organic Laws 789 (F. Thorpe ed.1909) (reprinted 1993) (“All persons shall have the free exercise of religion, without being obliged to contribute to the support of any religious profession but their own”); Pa. Const., Art. II (1776), in 5 id., at 3082 (“[N]o man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent”); N.J. Const., Art. XVIII (1776), in id., at 2597 (similar); Del. Const., Art. I, § 1 (1792), in 1 id., at 568 (similar); Ky. Const., Art. XII, § 3 (1792), in 3 id., at 1274 (similar); Vt. Const., Ch. I, Art. 3 (1793), in 6 id., at 3762 (similar); Tenn. Const., Art. XI, § 3 (1796), in id., at 3422 (similar); Ohio Const., Art. VIII, § 3 (1802), in 5 id., at 2910 (similar). The plain text of these constitutional provisions prohibited any tax dollars from supporting the clergy. We have found nothing to indicate, as Justice Scalia contends, post, at 1317, n.1, that these provisions would not have applied so long as the State equally supported other professions or if the amount at stake was de minimis. That early state constitutions saw no problem in explicitly excluding only the ministry from receiving state dollars reinforces our conclusion that religious instruction is of a different ilk.

Far from evincing the hostility toward religion which was manifest in Lukumi, we believe that the entirety of the Promise Scholarship Program goes a long way toward including religion in its benefits. The program permits students to attend pervasively religious schools, so long as they are accredited. As Northwest advertises, its “concept of education is distinctly Christian in the evangelical sense.” App. 168. It prepares all of its students, “through instruction, through modeling, [and] through [its] classes, to use . . . the Bible as their guide, as the truth,” no matter their chosen profession. Id., at 169. And under the Promise Scholarship Program's current guidelines, students are still eligible to take devotional theology courses. Davey notes all students at Northwest are required to take at least four devotional courses, “Exploring the Bible,” “Principles of Spiritual Development,” “Evangelism in the Christian Life,” and “Christian Doctrine,” Brief for Respondent 11, n.5; see also App. 151, and some students may have additional religious requirements as part of their majors. Brief for Respondent 11, n.5; see also App. 150–151.
The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here. We need not venture further into this difficult area in order to uphold the Promise Scholarship Program as currently operated by the State of Washington.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

In Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993), the majority opinion held that “[a] law burdening religious practice that is not neutral . . . must undergo the most rigorous of scrutiny,” id., at 546, and that “the minimum requirement of neutrality is that a law not discriminate on its face,” id., at 533. . . .

When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.

That is precisely what the State of Washington has done here. It has created a generally available public benefit, whose receipt is conditioned only on academic performance, income, and attendance at an accredited school. It has then carved out a solitary course of study for exclusion: theology. Wash. Rev. Code Ann. § 28B.119.010(8) (West Supp.2004); Wash. Admin. Code § 250-80-020(12)(g) (2003). No field of study but religion is singled out for disfavor in this fashion. Davey is not asking for a special benefit to which others are not entitled. Cf. Lyng v. Northwest Indian Cemetery Protective Assn., 485 U.S. 439, 453 (1988). He seeks only equal treatment – the right to direct his scholarship to his chosen course of study, a right every other Promise Scholar enjoys.

The Court's reference to historical “popular uprisings against procuring taxpayer funds to support church leaders,” ante, at 1313, is therefore quite misplaced. That history involved not the inclusion of religious ministers in public benefits programs like the one at issue here, but laws that singled them out for financial aid. . . . One can concede the Framers' hostility to funding the clergy specifically, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all. No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church.

The Court does not dispute that the Free Exercise Clause places some constraints on public benefits programs, but finds none here, based on a principle of “‘play in the joints.’” Ante, at 1311. I use the term “principle” loosely, for that is not so much a legal principle as a refusal to apply any principle when faced with competing constitutional directives. There is nothing anomalous about constitutional commands that abut. A municipality hiring public contractors may not discriminate against blacks or in favor of them; it cannot discriminate a little bit each way and then plead “play in the joints” when haled into court. If the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones.
In *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), the Tenth Circuit distinguished *Locke* and held that a statute excluding students at “pervasively sectarian” colleges from generally available state scholarships was unconstitutional. In *Locke*, the state of Washington excluded all theology majors from its funding program. In *Weaver*, Colorado only excluded “pervasively sectarian” colleges, not all “sectarian” colleges. The court noted the statute thus entangled the state in “trolling through a person’s or institution’s religious beliefs,” which supported concluding the statute discriminated against religion, triggering strict scrutiny under *Smith/Lukumi*.

In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Court held that a state program excluding churches from a program providing grants to non-profit organizations to purchase rubber playground surfaces made from recycled tires constituted discrimination against religion, triggering strict scrutiny under *Lukumi*. The Court distinguished *Locke* by noting the program there went “a long way toward including religion in its benefits” and only prevented using the funds to get a religious degree, a case raising greater Establishment Clause concerns than use of recycled tires. Four Justices noted in footnote 3, “This case involves express discrimination based on religious identity with respect to playground funding. We do not address religious uses of funding or other forms of discrimination.” *Id.* at 2024 n.3 (Roberts, C.J., joined by Kennedy, Alito & Kagan, JJ.); *id.* at 2026 (Gorsuch, J., joined by Thomas, J., concurring in part) (refusing to join footnote 3 and indicating strict scrutiny should be applied broadly); *id.* at 2027 (Breyer, J., concurring in the judgment) (case should be viewed, like police and fire protection, as neutral provision of “public benefit”); *id.* at 2028 (Sotomayor, J., joined by Ginsburg, J., dissenting) (requiring state to provide public funds directly to the church, even if for a playground, violates the Establishment Clause). *See also* Caplan v. Town of Acton, 92 N.E.3d 691 (Mass. 2018) (state can deny grant to church to fix stained glass window with religious imagery given greater Establishment Clause concern here as opposed to that in *Trinity*); Illinois Bible Colleges Ass’n v. Anderson, 870 F.3d 631 (7th Cir. 2017) (state law requiring all higher education institutions to get approval before offering degrees applies equally to secular and religious institutions, and thus triggers rational review under *Smith*, not strict scrutiny under *Trinity*; the law does not necessarily create excessive entanglement under Establishment Clause; schools here did not seek certification before suing).

4. **The Ministerial Exception to Government Regulatory Laws**

The Supreme Court has held that there must be a “ministerial exception” to the operation of some government regulations out of respect for Free Exercise and Establishment Clause concerns.

**Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC**

132 S. Ct. 694 (2012)

Chief Justice ROBERTS delivered the opinion of the Court.

Certain employment discrimination laws authorize employees who have been wrongfully terminated to sue their employers for reinstatement and damages. The question presented is whether the Establishment and Free Exercise Clauses of the First Amendment bar such an action when the employer is a religious group and the employee is one of the group's ministers.
Petitioner Hosanna-Tabor Evangelical Lutheran Church and School is a member congregation of the Lutheran Church-Missouri Synod, the second largest Lutheran denomination in America. Hosanna-Tabor operated a small school in Redford, Michigan, offering a “Christ-centered education” to students in kindergarten through eighth grade. 582 F. Supp. 2d 881, 884 (E.D. Mich.2008) (internal quotation marks omitted).

The Synod classifies teachers into two categories: “called” and “lay.” “Called” teachers are regarded as having been called to their vocation by God through a congregation. To be eligible to receive a call from a congregation, a teacher must satisfy certain academic requirements. One way of doing so is by completing a “colloquy” program at a Lutheran college or university. The program requires candidates to take eight courses of theological study, obtain the endorsement of their local Synod district, and pass an oral examination by a faculty committee. A teacher who meets these requirements may be called by a congregation. Once called, a teacher receives the formal title “Minister of Religion, Commissioned.” App. 42, 48. A commissioned minister serves for an open-ended term; at Hosanna-Tabor, a call could be rescinded only for cause and by a supermajority vote of the congregation.

“Lay” or “contract” teachers, by contrast, are not required to be trained by the Synod or even to be Lutheran. At Hosanna-Tabor, they were appointed by the school board, without a vote of the congregation, to one-year renewable terms. Although teachers at the school generally performed the same duties regardless of whether they were lay or called, lay teachers were hired only when called teachers were unavailable.

Respondent Cheryl Perich was first employed by Hosanna-Tabor as a lay teacher in 1999. After Perich completed her colloquy later that school year, Hosanna-Tabor asked her to become a called teacher. Perich accepted the call and received a “diploma of vocation” designating her a commissioned minister. Id., at 42.

Perich taught kindergarten during her first four years at Hosanna-Tabor and fourth grade during the 2003-2004 school year. She taught math, language arts, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and devotional exercises each day, and attended a weekly school-wide chapel service. Perich led the chapel service herself about twice a year.

Perich became ill in June 2004 with what was eventually diagnosed as narcolepsy. Symptoms included sudden and deep sleeps from which she could not be roused. Because of her illness, Perich began the 2004-2005 school year on disability leave. On January 27, 2005, however, Perich notified the school principal, Stacey Hoeft, that she would be able to report to work the following month. Hoeft responded that the school had already contracted with a lay teacher to fill Perich's position for the remainder of the school year.

On January 30, Hosanna-Tabor held a meeting of its congregation at which school administrators stated that Perich was unlikely to be physically capable of returning to work that school year or the next. The congregation voted to offer Perich a “peaceful release” from her call, whereby the
congregation would pay a portion of her health insurance premiums in exchange for her resignation as a called teacher. Id., at 178, 186. Perich refused to resign and produced a note from her doctor stating that she would be able to return to work on February 22. The school board urged Perich to reconsider, informing her that the school no longer had a position for her, but Perich stood by her decision not to resign.

On the morning of February 22 – the first day she was medically cleared to return to work – Perich presented herself at the school. Hoeft asked her to leave but she would not do so until she obtained written documentation that she had reported to work. Later that afternoon, Hoeft called Perich at home and told her that she would likely be fired. Perich responded that she had spoken with an attorney and intended to assert her legal rights.

Perich filed a charge with the Equal Employment Opportunity Commission, alleging that her employment had been terminated in violation of the Americans with Disabilities Act, 104 Stat. 327, 42 U.S.C. § 12101 et seq. (1990). The ADA prohibits an employer from discriminating against a qualified individual on the basis of disability. § 12112(a). It also prohibits an employer from retaliating “against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].” § 12203(a).

. . . . Invoking what is known as the “ministerial exception,” the Church argued that the suit was barred by the First Amendment because the claims at issue concerned the employment relationship between a religious institution and one of its ministers. According to the Church, Perich was a minister, and she had been fired for a religious reason – namely, that her threat to sue the Church violated the Synod's belief that Christians should resolve their disputes internally.

Until today, we have not had occasion to consider whether this freedom of a religious organization to select its ministers is implicated by a suit alleging discrimination in employment. The Courts of Appeals, in contrast, have had extensive experience with this issue. Since the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and other employment discrimination laws, the Courts of Appeals have uniformly recognized the existence of a “ministerial exception,” grounded in the First Amendment, that precludes application of such legislation to claims concerning the employment relationship between a religious institution and its ministers.

We agree that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.
The EEOC and Perich acknowledge that employment discrimination laws would be unconstitutional as applied to religious groups in certain circumstances. They grant, for example, that it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary. Brief for Federal Respondent 31; Brief for Respondent Perich 35-36. According to the EEOC and Perich, religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association – a right “implicit” in the First Amendment. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984). The EEOC and Perich thus see no need – and no basis – for a special rule for ministers grounded in the Religion Clauses themselves.

We find this position untenable. The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club. See Perich Brief 31; Tr. of Oral Arg. 28. That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

The EEOC and Perich also contend that our decision in Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990), precludes recognition of a ministerial exception. In Smith, two members of the Native American Church were denied state unemployment benefits after it was determined that they had been fired from their jobs for ingesting peyote, a crime under Oregon law. We held that this did not violate the Free Exercise Clause, even though the peyote had been ingested for sacramental purposes, because the “right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” Id., at 879 (internal quotation marks omitted).

It is true that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability. But a church's selection of its ministers is unlike an individual's ingestion of peyote. Smith involved government regulation of only outward physical acts. The present case, in contrast, concerns government interference with an internal church decision that affects the faith and mission of the church itself. . . . The contention that Smith forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit.

Every Court of Appeals to have considered the question has concluded that the ministerial exception is not limited to the head of a religious congregation, and we agree. We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.

To begin with, Hosanna-Tabor held Perich out as a minister, with a role distinct from that of most of its members. When Hosanna-Tabor extended her a call, it issued her a “diploma of vocation” according her the title “Minister of Religion, Commissioned.” App. 42. She was tasked with
performing that office “according to the Word of God and the confessional standards of the Evangelical Lutheran Church as drawn from the Sacred Scriptures.” Ibid. The congregation prayed that God “bless [her] ministrations to the glory of His holy name, [and] the building of His church.” Id., at 43. In a supplement to the diploma, the congregation undertook to periodically review Perich's “skills of ministry” and “ministerial responsibilities,” and to provide for her “continuing education as a professional person in the ministry of the Gospel.” Id., at 49.

Perich's title as a minister reflected a significant degree of religious training followed by a formal process of commissioning. To be eligible to become a commissioned minister, Perich had to complete eight college-level courses in subjects including biblical interpretation, church doctrine, and the ministry of the Lutheran teacher. She also had to obtain the endorsement of her local Synod district by submitting a petition that contained her academic transcripts, letters of recommendation, personal statement, and written answers to various ministry-related questions. Finally, she had to pass an oral examination by a faculty committee at a Lutheran college. It took Perich six years to fulfill these requirements. And when she eventually did, she was commissioned as a minister only upon election by the congregation, which recognized God's call to her to teach. At that point, her call could be rescinded only upon a supermajority vote of the congregation – a protection designed to allow her to “preach the Word of God boldly.” Brief for Lutheran Church-Missouri Synod as Amicus Curiae 15.

Perich held herself out as a minister of the Church by accepting the formal call to religious service, according to its terms. She did so in other ways as well. For example, she claimed a special housing allowance on her taxes that was available only to employees earning their compensation “in the exercise of the ministry.”” App. 220 (“If you are not conducting activities ‘in the exercise of the ministry,’ you cannot take advantage of the parsonage or housing allowance exclusion” (quoting Lutheran Church-Missouri Synod Brochure on Whether the IRS Considers Employees as a Minister (2007)). In a form she submitted to the Synod following her termination, Perich again indicated that she regarded herself as a minister at Hosanna-Tabor, stating: “I feel that God is leading me to serve in the teaching ministry. . . . I am anxious to be in the teaching ministry again soon.” App. 53.

Perich's job duties reflected a role in conveying the Church's message and carrying out its mission. Hosanna-Tabor expressly charged her with “lead[ing] others toward Christian maturity” and “teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church.” Id., at 48. In fulfilling these responsibilities, Perich taught her students religion four days a week, and led them in prayer three times a day. Once a week, she took her students to a school-wide chapel service, and – about twice a year – she took her turn leading it, choosing the liturgy, selecting the hymns, and delivering a short message based on verses from the Bible.

In light of these considerations – the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church – we conclude that Perich was a minister covered by the ministerial exception.
In reaching a contrary conclusion, the Court of Appeals committed three errors. First, the Sixth Circuit failed to see any relevance in the fact that Perich was a commissioned minister. Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee's position. It was wrong for the Court of Appeals – and Perich, who has adopted the court's view, see Perich Brief 45 – to say that an employee's title does not matter.

Second, the Sixth Circuit gave too much weight to the fact that lay teachers at the school performed the same religious duties as Perich. We express no view on whether someone with Perich's duties would be covered by the ministerial exception in the absence of the other considerations we have discussed. But though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions – particularly when, as here, they did so only because commissioned ministers were unavailable.

Third, the Sixth Circuit placed too much emphasis on Perich's performance of secular duties. It is true that her religious duties consumed only 45 minutes of each workday, and that the rest of her day was devoted to teaching secular subjects. The EEOC regards that as conclusive, contending that any ministerial exception “should be limited to those employees who perform exclusively religious functions.” Brief for Federal Respondent 51. We cannot accept that view. Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.

Although the Sixth Circuit did not adopt the extreme position pressed here by the EEOC, it did regard the relative amount of time Perich spent performing religious functions as largely determinative. The issue before us, however, is not one that can be resolved by a stopwatch. The amount of time an employee spends on particular activities is relevant in assessing that employee's status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.

Because Perich was a minister within the meaning of the exception, the First Amendment requires dismissal of this employment discrimination suit against her religious employer. The EEOC and Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers.

The EEOC and Perich foresee a parade of horribles that will follow our recognition of a ministerial exception to employment discrimination suits. According to the EEOC and Perich, such an exception could protect religious organizations from liability for retaliating against employees for reporting criminal misconduct or for testifying before a grand jury or in a criminal trial. What is more, the EEOC contends, the logic of the exception would confer on religious employers “unfettered discretion” to violate employment laws by, for example, hiring children or aliens not authorized to work in the United States. Brief for Federal Respondent 29.
Hosanna-Tabor responds that the ministerial exception would not in any way bar criminal prosecutions for interfering with law enforcement investigations or other proceedings. Nor, according to the Church, would the exception bar government enforcement of general laws restricting eligibility for employment, because the exception applies only to suits by or on behalf of ministers themselves. Hosanna-Tabor also notes that the ministerial exception has been around in the lower courts for 40 years, see McClure v. Salvation Army, 460 F.2d 553, 558 (C.A.5 1972), and has not given rise to the dire consequences predicted by the EEOC and Perich.

Justice THOMAS, concurring.

I join the Court's opinion. I write separately to note that, in my view, the Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its minister. As the Court explains, the Religion Clauses guarantee religious organizations autonomy in matters of internal governance, including the selection of those who will minister the faith. A religious organization's right to choose its ministers would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is a “minister” under the organization's theological tenets. . . . Judicial attempts to fashion a civil definition of “minister” through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the “mainstream” or unpalatable to some.

[T]he evidence demonstrates that Hosanna-Tabor sincerely considered Perich a minister. That would be sufficient for me to conclude that Perich's suit is properly barred . . . .

Justice ALITO, with whom Justice KAGAN joins, concurring.

I join the Court's opinion, but I write separately to clarify my understanding of the significance of formal ordination and designation as a “minister” in determining whether an “employee” of a religious group falls within the so-called “ministerial” exception. The term “minister” is commonly used by many Protestant denominations to refer to members of their clergy, but the term is rarely if ever used in this way by Catholics, Jews, Muslims, Hindus, or Buddhists. In addition, the concept of ordination as understood by most Christian churches and by Judaism has no clear counterpart in some Christian denominations and some other religions. Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term “minister” or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies.

The “ministerial” exception . . . should apply to any “employee” who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position.

__________________________________
Similar to *Hosanna-Tabor*, a range of civil rights statutes have been required to provide for a “ministerial exception” out of respect for Free Exercise and Establishment Clause concerns. For example, the Seventh Circuit held in *Tomic v. Catholic Diocese of Peoria*\(^{38}\) that the ministerial exception bars an Age Discrimination in Employment Act lawsuit by a 50-year-old church music director who was fired after a dispute with the bishop’s assistant over music to be played for Easter services. The church then hired a “much younger person” as a replacement. The court noted that “if the suit were permitted to go forward, the diocese would argue that he was dismissed for a religious reason – his opinion concerning the suitability of particular music for Easter services – and . . . Tomic would argue that the church's criticism of his musical choices was a pretext for firing him, that the real reason was his age. . . . The court would be asked to resolve a theological dispute.”

Similarly, in *Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*,\(^{39}\) the Third Circuit held that a teacher at a private Catholic school could not sue the school for retaliation for protected speech and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, where she was terminated after signing a pro-choice advertisement in a local newspaper. The court held that her claims were not cognizable, since it would necessitate the court’s assessment of the relative severity of violations of church doctrine. The Court noted, “Were we . . . to require Ursuline [Academy] to treat Jewish males or males who oppose the war in Iraq the same as a Catholic female who publicly advocates pro-choice positions, we would be meddling in matters related to a religious organization's ability to define the parameters of what constitutes orthodoxy.” *See also* *Penn v. New York Methodist Hospital*, 884 F.3d 416 (2nd Cir. 2018) (hospital’s department of pastoral care triggers ministerial exception to complaint of race and religious discrimination under Title VII); *Grussgott v. Milwaukee Jewish Day School*, 882 F.3d 655 (7th Cir. 2018) (ministerial exception bars Hebrew teacher at Jewish Day School from bringing Americans With Disability Act complaint that she was terminated because of cognitive issues resulting from her brain tumor).

On the other hand, the Ninth Circuit held in *Elvig v. Calvin Presbyterian Church*,\(^{40}\) that a Presbyterian minister could sue her former church under Title VII for sexual harassment and retaliation that occurred prior to her discharge that do not implicate the church’s protected employment decisions. In her complaint, she alleged that shortly after she was hired as the Associate Pastor of Calvin Presbyterian Church, the Church's Pastor engaged in sexually harassing and intimidating conduct toward her, creating a hostile working environment. The Court noted that as part of this lawsuit, the Church could “assert as an affirmative defense that they ‘exercised reasonable care to prevent and correct the harassment, and that [the plaintiff] failed to take

---

\(^{38}\) 442 F.3d 1036, 1037-42 (7th Cir. 2006).

\(^{39}\) 450 F.3d 130, 138-42 (3rd Cir. 2006). *See also* *Pfeil v. St. Matthews Evangelical Lutheran Church of the Unaltered Augsburg Confession of Worthington*, 877 N.W.2d 528 (Minn. 2016) (3-2 decision, with two Justices not participating: pastors and church cannot be held liable for alleged defamatory statements made during course of formal church discipline proceedings).

\(^{40}\) 375 F.3d 951,955-60 (9th Cir. 2004), *rehearing en banc denied*, 397 F.3d 790 (9th Cir. 2005).
advantage of these opportunities to avoid or limit harm.’ . . . Nothing in the character of this defense will require a jury to evaluate religious doctrine or the ‘reasonableness’ of . . . religious practices . . . . Instead, the jury must make secular judgments about the nature and severity of the harassment and what measures, if any, were taken by the [Church] to prevent or correct it.” The court noted that while the decision to terminate her ministry was “clearly within the scope of the ministerial exception,” she may “nonetheless hold the Church vicariously liable for the sexual harassment itself.” A federal district court held in Redhead v. Conference of Seventh-Day Adventists that the "ministerial exception" did not apply to Title VII sex and pregnancy discrimination claims by a teacher who was terminated from a Seventh-day Adventist school for being pregnant and unmarried, as her teaching duties were primarily secular. Her religious duties were limited to only one hour of Bible instruction per day and attending religious ceremonies with students only once per year.

Churches have also been held liable in cases of sex abuse of children by church personnel, including priests or ministers, although it is a matter of debate whether various laws limiting damages against charitable institutions should be invoked to limit liability in such cases. See also State v. Wenthe, 839 N.W.2d 83 (Minn. 2013) (Minnesota statute criminalizing sexual activity between clergy and parishioners does not violate Establishment Clause).

One avenue of increased litigation touching on free exercise concerns involves suits by employees who seek to require businesses to accommodate to their religious practices. In a recent case involving a private business, an employee sued under Title VII of the 1964 Civil Rights Act claiming her civil rights were violated when the employer refused to permit her to exercise her religious beliefs by saying to each customer who was leaving, “Have a Blessed Day.” In another case involving a government employer, an employee claimed her First Amendment rights were violated by a state agency’s interests in avoiding the disruptive effect of employees’ religious proselytizing of agency clientele. Under current doctrine most of these claims fail. Under Title VII, an employer’s obligation of reasonable accommodation has been held to require that the employer only take steps which do not impose an “undue hardship” on the employer, and “undue hardship” has been defined as any accommodation which imposes “more than a de minimis cost” on the employer. With respect to the First Amendment, the government must only show that the government’s interest in controlling the work environment and providing effective services outweigh the employee’s right of free speech under the Pickering test, excerpted at § 8.3.

41 440 F. Supp. 2d 211, 220-24 (E.D.N.Y., 2006). Similar cases protecting pregnant teachers in church-run schools are cited at § 11.3 n.34.


43 Anderson v. U.S.F. Logistics (IMC), Inc., 274 F.3d 470, 475-78 (7th Cir. 2001).

44 Knight v. Connecticut Dep’t of Public Health, 275 F.3d 156, 163-68 (2nd Cir. 2001).

An different statutory approach would be to amend Title VII to apply the reasonable accommodation standard used under the Americans with Disabilities Act. The ADA imposes a much higher burden of reasonable accommodation on businesses than under Title VII, given the clear congressional intent that the two standards ought to be different. Indeed, the two situations seem quite different. The ADA applies to individuals afflicted with “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” Faced with this involuntary impairment of a major life activity, the ADA requires businesses to make serious efforts to permit these workers to become, or for existing workers to continue to be, productive employees. In contrast, Title VII cases involve individuals asking employers to adjust the employers’ employment rules to fit those individuals’ desire to practice their religion with minimal consequences. Analyzed objectively, there is little connection between the burden suffered by someone whose employer refuses to adjust the employment rules to accommodate that individual’s chosen religious practice with the burden suffered by an individual who has been involuntarily afflicted with a physical or mental disability which has substantially impaired for that person a major life activity.

Adoption of a higher standard of reasonable accommodation would likely yield counterproductive results. The complexity of the issue, along with the diversity of religions, is immense. It has been estimated there are “‘more than 1500 religious organizations [in America], including more than 900 Christian denominations, 100 Hindu denominations, and some [seventy-five] forms of Buddhism. With [six] million to [seven] million adherents, Islam is expected to soon pass Judaism as the second-most commonly practiced religion in the U.S.’ Even for larger employers, the demands of implementing a program of religious accommodation are immense. For smaller businesses, a robust, required, and reasonable accommodation policy would be even more burdensome.”

---

46 See, e.g., Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1120 n.10 (9th Cir. 2000), cert. granted on other grounds, 532 U.S. 970 (2001) (“We note that the 'undue hardship' standard in the ADA is substantially more demanding than the hardship standard in Title VII in the context of 'reasonable accommodation' for the religion of employees.”).


48 R. Randall Kelso, Narcissism, Generation X, The Corporate Elite, and the Religious Right Within the Modern Republican Party: A Set of “Friendly” Observations for President Bush, 24 Cardozo L. Rev. 1971, 2014-15 (2003) (citations omitted) (key issues include: “Be fair and equitable . . . Don’t exclude new or nontraditional belief systems”; “… Learn about the religious beliefs and practices of employees [including those] that command adherents to fast, change diets, pray, or . . . affect their life during working hours”; “Seek individualized solutions . . . – a worthy investment considering the high costs of defending a discrimination charge”; “Don’t forget the nonreligious. Craft guidelines so they apply equally to nonreligious employees. For example, rather than granting employees time off or flexibility solely for religious holidays, offer such policies for any personal need.”). See generally Stormans, Inc. v. Wiesman, 794 F.3d 1064 (9th Cir. 2015) (Washington law requiring pharmacist with objections to filling a prescription to find another pharmacist in same store to so fill, valid as neutral law of general applicability under Employment Division v. Smith), cert. denied, 136 S. Ct. 2433 (2016) (Alito, J., joined by Roberts, C.J., and Thomas, J., dissenting).