

# **First Amendment: Freedom of Expression (Spring 2019 edition)**

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## **About this casebook's approach:**

Students and other readers should be aware that this casebook is comprised almost entirely of court cases. Unlike many law school casebooks, this casebook contains relatively few interstitial summaries, notational materials, or secondary sources. That is by design. Inasmuch as this casebook was designed for teaching an upper-level law school survey course, I believed it to be important that the course materials reflect the fact that close reading and analysis of the actual case law and the ability to synthesize rules and doctrine from a line of cases are fundamental lawyering skills. These skills, in my opinion, can only be fully developed by doing it oneself rather than relying upon others' summaries and analyses. This is not at all to suggest that summaries, critiques, and analyses of the law in the form of law review articles, treatises, scholarly books, practice guides, etc., are unimportant or unenlightening (I've written plenty of them myself, so I certainly hope they add value). Nor do I suggest that practicing lawyers do not or should not turn to secondary sources as may be appropriate in order to supplement their understanding of the case law (I certainly did in practice). Rather, the fact that this casebook consists almost exclusively of cases reflects a deliberate pedagogical choice: that upper-level law students have sufficient foundation in legal reasoning and common-law methods to be expected to engage extensively and intensively with primary source material (*i.e.*, cases), while still benefitting from further skill building in the close reading of the facts and the law, case analysis, case synthesis, and the analogizing or distinguishing of precedent.

I have taken a fairly light hand in editing the cases. I have tried to remove clearly extraneous information (such as parallel and pinpoint citations) and have sometimes chosen not to include all dissents and concurrences in the cases. Beyond that, I have refrained from editing the cases stylistically except where absolutely necessary for the sake of clarity. Students and other readers may therefore find that the cases seem lengthier (or are lengthier) than is typical in casebooks. My reason for this approach was to preserve the cases as near as reasonably possible to the form in which students would encounter them in practice.

Last: this first edition consists primarily of Supreme Court cases, which I thought best for an introductory First Amendment course. I may reexamine this approach in future.

## **I. Introduction: History of the First Amendment and Rationales for Protecting Freedom of Expression**

This course focuses on the First Amendment’s Speech Clause, which states in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.”

The historical evidence indicates that the First Amendment’s Framers primarily intended it as a bulwark against the new American federal government adopting the kinds of laws suppressing speech that existed in England at the time. To provide two examples: until 1694, English law established a detailed system of licensing requiring that any publication must undergo government review and approval and have a government license issued prior to being published. Similarly, the English law of “seditious libel” made it a crime for anyone to criticize the government.

Beyond these two clear goals—prohibiting Congress from enacting prior restraints on publications and from punishing seditious libel—the historical record is hardly conclusive regarding what else the Framers thought the First Amendment’s Speech Clause would protect. Granted, there is additional evidence from the period of the “Second Framing”—i.e., the Congressional debates regarding the post-Civil War Amendments adopted during the Reconstruction Era—regarding what the Reconstruction Framers thought about freedom of speech under the Thirteenth and Fourteenth Amendments. But even that additional evidence is mixed. Hence, because courts unavoidably must decide whether a given type or form of speech is protected by the First Amendment, they have largely depended upon common-law doctrinal evolution rather than conclusive historical guidance.

Although an absolutist interpretation of the First Amendment is certainly possible—i.e., “‘no law’ means ‘no law’; therefore, any law abridging ‘speech’ to any degree is unconstitutional” —the Supreme Court has never accepted the premise that the First Amendment forbids any and all government regulation of speech whatsoever. (Justice Black and, on occasion, Justice Douglas, took a nominally absolutist position regarding the First Amendment, but their views never commanded a majority of the Court and were riddled with exceptions in any event). Hence, in interpreting the First Amendment, the courts have largely been guided by precedent; and when no precedent is on point, by resort to first principles.

Hence, perhaps the first “first principle” to consider is this: What constitutional values does the protection of freedom of speech promote? What constitutional values should it promote? Knowing how courts understand and are guided by these constitutional values is important, both because it will help you understand the courts’ reasoning in the cases presented but also because it can help you shape First Amendment arguments in practice.

## Traditional Rationales for Protecting Freedom of Speech

Justice Brandeis's concurring opinion in *Whitney v. California* encapsulates the four traditional rationales for protecting freedom of speech:

“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. They recognized the risks to which all human institutions are subject. But they knew that 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. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.” *Whitney*, 274 U.S. 357, 375 (1927).

Justice Brandeis's quote above captures what have been thought to be the four primary constitutional values that are advanced by protecting freedom of speech: *promoting democratic self-governance* by ensuring the greatest amount of information and the broadest range of views are permitted in the public domain; *promoting the search for truth* through the operation of the “marketplace of ideas” rather than government regulation; *advancing individual autonomy* by protecting our ability to express ideas—whether political, artistic, ideological, etc.—without fear of punishment; *providing a “safety valve”* for individuals to express their dissatisfaction or anger by speech rather than turning to other means because their speech is suppressed. A fifth rationale that has been offered is *promoting societal tolerance*—i.e., freedom of speech requires people to learn to tolerate ideas that they may not like, which builds habits of mind that in turn lead to greater tolerance of people whom they may not like. All of these rationales are subject to elaboration, examination, and criticism, and we will discuss them throughout the course.

## II. The Early "Subversive Advocacy" Cases and the Evolution of the *Brandenburg* Test for Incitement

The following pamphlet was at issue in *Schenck v. United States*, which is presented below.

### LONG LIVE THE CONSTITUTION OF THE UNITED STATES

#### Wake Up, America! Your Liberties Are in Danger!

The 13th Amendment, Section 1, of the Constitution of the United States says: "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."

The Constitution of the United States is one of the greatest bulwarks of political liberty. It was born after a long, stubborn battle between king-rule and democracy. (We see little or no difference between arbitrary power under the name of a king and under a few misnamed "representatives.") In this battle the people of the United States established the principle that freedom of the individual and personal liberty are the most sacred things in life. Without them we become slaves.

For this principle the fathers fought and died. The establishment of this principle they sealed with their own blood. Do you want to see this principle abolished? Do you want to see despotism substituted in its stead? Shall we prove degenerate sons of illustrious sires?

The Thirteenth Amendment to the Constitution of the United States, quoted above, embodies this sacred idea. The Socialist Party says that this idea is violated by the Conscription Act. When you conscript a man and compel him to go abroad to fight against his will, you violate the most sacred right of personal liberty, and substitute for it what Daniel Webster called "despotism in its worst form."

A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a free man. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.

Are you one who is opposed to war, and were you misled by the venal capitalist newspapers, or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?

In a democratic country each man must have the right to say whether he is willing to join the army. Only in countries where uncontrolled power rules can a despot force his subjects to fight. Such a man or men have no place in a democratic republic. This is tyrannical power in its worst form. It gives control over the life and death of the individual to a few men. There is no man good enough to be given such power.

Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the Conscription Act. Write to your congressman and tell him you want the law repealed. Do not submit to intimidation. You have a right to demand the repeal of any law. Exercise your rights of free speech, peaceful assemblage and petitioning the government for a redress of grievances. Come to the headquarters of the Socialist Party, 1326 Arch street, and sign a petition to congress for the repeal of the Conscription Act. Help us wipe out this stain upon the Constitution!

Help us re-establish democracy in America.

Remember, "eternal vigilance is the price of liberty."

Down with autocracy!

Long live the Constitution of the United States! Long live the Republic!

Books on Socialism for Sale at

SOCIALIST PARTY BOOK STORE AND HEADQUARTERS

1326 ARCH ST. Phone, Filbert 3121

(OVER)

## ASSERT YOUR RIGHTS!

Article 6, Section 2, of the Constitution of the United States says: "This Constitution shall be the *supreme law of the Land.*"

Article 1 (Amendment) says: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*"

Article 9 (Amendment) says: "The enumeration in the Constitution of certain rights, shall not be construed to deny or *disparage others retained by the people.*"

The Socialist Party says that any individual or officers of the law entrusted with the administration of conscription regulations, violate the provisions of the United States Constitution, the Supreme Law of the Land, when they refuse to recognize your right to assert your opposition to the draft.

If you are conscientiously opposed to war, if you believe in the commandment "thou shalt not kill," then that is your religion, and you shall not be prohibited from the free exercise thereof.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service, the examination boards have discriminated against you.

*If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.*

Here in this city of Philadelphia was signed the immortal Declaration of Independence. As a citizen of "the cradle of American Liberty" you are doubly charged with the duty of upholding the rights of the people.

Will you let cunning politicians and a mercenary capitalist press wrongly and untruthfully mould your thoughts? Do not forget your right to elect officials who are opposed to conscription.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. **You are a citizen, not a subject!** You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants. Not your masters. Their wages come from the expenses of government which you pay. Will you allow them to unjustly rule you? The fathers who fought and bled to establish a free and independent nation here in America were so opposed to the militarism of the old world from which they had escaped; so keenly alive to the dangers and hardships they had undergone in fleeing from political, religious and military oppression, that they handed down to us "certain rights which must be retained by the people."

They held the spirit of militarism in such abhorrence and hate, they were so apprehensive of the formation of a military machine that would insidiously and secretly advocate the invasion of other lands, that they limited the power of Congress over the militia in providing only for the calling forth of "the militia to execute laws of the Union, suppress insurrections and repel invasions." (See general powers of Congress, Article I, Section 8, Paragraph 15.)

No power was delegated to send our citizens away to foreign shores to shoot up the people of other lands, no matter what may be their internal or international disputes.

The people of this country did not vote in favor of war. At the last election they voted against war. To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazy nations, would be a crime the magnitude of which defies description. Words could not express the condemnation such cold-blooded ruthlessness deserves.

Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? Are you willing to submit to the degradation of having the Constitution of the United States treated as a "mere scrap of paper?"

Do you know that patriotism means a love for your country and not hate for others?

Will you be led astray by a propaganda of jingoism masquerading under the guise of patriotism?

No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy can not be shot into a nation. It must come spontaneously and purely from within.

Democracy must come through liberal education. Upholders of military ideas are unfit teachers. To advocate the persecution of other peoples through the prosecution of war is an insult to every good and wholesome American tradition.

"These are the times that try men's souls."

"Eternal vigilance is the price of liberty."

You are responsible. You must do your share to maintain, support and uphold the rights of the people of this country.

In this world crisis where do you stand? Are you with the forces of liberty and light or war and darkness?

(OVER)

39 S. Ct. 247.

Supreme Court of the United States.

SCHENCK

v.

UNITED STATES.

Decided March 3, 1919.

Justice HOLMES delivered the opinion of the Court.

This is an indictment in three counts. The first charges a conspiracy to violate the Espionage Act of June 15, 1917, causing and attempting to cause insubordination in the military and naval forces of the United States and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire: to wit, that the defendant willfully conspired to have printed and circulated to men who had been called and accepted for military service under [the Draft Act] a document alleged to be calculated to cause such insubordination and obstruction. The count alleges overt acts in pursuance of the conspiracy, ending in the distribution of the document set forth. The second count alleges a conspiracy to commit an offense against the United States, to wit, the above mentioned document. The third count charges an unlawful use of the mails for the transmission of the same matter and otherwise as above. The defendants were found guilty on all the counts. They set up the First Amendment to the Constitution forbidding Congress to make any law abridging the freedom of speech or of the press [as their defense].

The document in question upon its first printed side recited the first section of the Thirteenth Amendment [which prohibits slavery and involuntary servitude], said that the idea embodied in it was violated by the conscription act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, 'Do not submit to intimidation,' but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed 'Assert Your Rights.' It stated reasons for alleging that any one violated the Constitution when he refused to recognize 'your right to assert your opposition to the draft,' and went on, 'If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.' It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy. It denied the power to send our citizens away to foreign shores to shoot up the people of other lands, and added that words could not express the condemnation such cold-blooded ruthlessness deserves, etc., and winding up with 'You must do your share to maintain, support and uphold the rights of the people of this country.' Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out. The defendants do not deny that the jury might find against them on this point.

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment to the Constitution. Two of the strongest expressions are said to be quoted respectively from well-known public men. It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose. We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. 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 will not be endured so long as men fight and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in section 4 punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency, and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.

Judgments affirmed.

### **Notes and Questions:**

1. *Schenck* provides little direct guidance regarding the meaning of the “clear and present danger” test that it articulates. What can you glean from the opinion regarding how “clear” and “present” the danger presented by speech would have to be to meet this test?
2. Among the questions raised by the *Schenck* test, consider the following: Under what circumstances should the First Amendment allow the government to punish speakers for the actions of their listeners? When the danger is objectively obvious? When it is subjectively intended by the speaker? When it can be reasonably anticipated? And should the danger have to actually occur or is the likelihood that it will occur enough (and if the latter, how likely does it have to be)? Does context matter?
3. *Schenck*’s reasoning rests partly on the fact that the United States was engaged in fighting World War I at the time. What weight should exigencies such as war have on how courts assess restrictions on freedom of expression?
4. “The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” Why not? That’s a conclusion, not a reason. Although the answer may seem self-evident, it is worth examining, especially in light of later cases concerning incitement. After all, the speaker who shouts fire does not force the listeners to panic; moreover, the listeners may not in fact panic at all.

39 S. Ct. 249.

Supreme Court of the United States.

FROHWERK  
v.  
UNITED STATES.

No. 685.

Argued Jan. 27, 1919.  
Decided March 10, 1919.

Justice HOLMES delivered the opinion of the Court.

This is an indictment in thirteen counts. The first alleges a conspiracy between the plaintiff and one Carl Gleeser, they then being engaged in the preparation and publication of a newspaper, the Missouri Staats Zeitung, to violate the Espionage Act of June 15, 1917. It alleges as overt acts the preparation and circulation of twelve articles in the said newspaper at different dates from July 6, 1917, to December 7 of the same year. The other counts allege attempts to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States, by the same publications, each count being confined to the publication of a single date. Motion to dismiss and a demurrer on constitutional and other grounds, especially that of the First Amendment as to free speech, were overruled. Frohwerk was found guilty [at trial] on [twelve counts]. He was sentenced to a fine and to ten years imprisonment.

With regard to [the First Amendment] argument, we think it necessary to add to what has been said in *Schenck* only that the First Amendment, while prohibiting legislation against free speech as such, cannot have been, and obviously was not, intended to give immunity for every possible use of language. We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.

We decided in *Schenck* that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion. The Government argues that on the record the question is narrowed simply to the power of Congress to punish such a conspiracy to obstruct, but we shall take it in favor of the defendant that the publications set forth as overt acts were the only means and, when coupled with the joint activity in producing them, the only evidence of the conspiracy alleged. Taking it that way, however, so far as the language of the article goes, there is not much to choose between expressions to be found in them and those before us in *Schenck*.

The first [article stated that it is] a monumental and inexcusable mistake to send our soldiers to France, says that it comes no doubt from the great [corporations], and later that it appears to be outright murder without serving anything practical; speaks of the unconquerable spirit and undiminished strength of the German nation, and characterizes its own discourse as words of warning to the American people. Then comes a letter from one of the counsel who argued here,



stating that the present force is a part of the regular army raised illegally. Later, on August 3, came discussion of the causes of the war, laying it to the Administration and saying 'that a few men and corporations might amass unprecedented fortunes we sold our honor, our very soul' with the usual repetition that we went to war to protect the loans of Wall Street. Later, after more similar discourse, comes 'We say therefore, cease firing.'

Next, on August 10, after deploring 'the draft riots in Oklahoma and elsewhere' in language that might be taken to convey an innuendo of a different sort, it is said that the previous talk about legal remedies is all very well for those who are past the draft age and have no boys to be drafted, and the paper goes on to give a picture, made as moving as the writer was able to make it, of the sufferings of a drafted man, of his then recognizing that his country is not in danger and that he is being sent to a foreign land to fight in a cause that neither he nor anyone else knows anything of, and reaching the conviction that this is but a war to protect some rich men's money. On August 17, there is quoted and applied to our own situation a remark to the effect that when rulers scheme to use it for their own aggrandizement, loyalty serves to perpetuate wrong. On August 31, with more of the usual discourse, it is said that the sooner the public wakes up to the fact that we are led and ruled by England, the better; that our sons, our taxes and our sacrifices are only in the interest of England. Later follow some compliments to Germany and a statement that the Central powers are carrying on a defensive war. There is much more to the general effect that we are in the wrong and are giving false and hypocritical reasons for our course, but the foregoing is enough to indicate the kind of matter with which we have to deal.

It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the country is at war. It does not appear that there was any special effort to reach men who were subject to the draft. [But on the record presented,] it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.

Judgment affirmed.

39 S. Ct. 252.

Supreme Court of the United States.

DEBS  
v.  
UNITED STATES.

No. 714.

Decided March 10, 1919.

Justice HOLMES delivered the opinion of the Court.

This is an indictment under the Espionage Act of June 15, 1917. It has been cut down to two counts, originally the third and fourth. The former of these alleges that on or about June 16, 1918, at Canton, Ohio, the defendant caused and incited and attempted to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States and with intent so to do delivered, to an assembly of people, a public speech. The fourth count alleges that he obstructed and attempted to obstruct the recruiting and enlistment service of the United States and to that end and with that intent delivered the same speech. There was a demurrer to the indictment on the ground that the statute is unconstitutional as interfering with free speech, contrary to the First Amendment. The defendant was found guilty and was sentenced to ten years' imprisonment.

The main theme of the speech was Socialism, its growth, and a prophecy of its ultimate success. With that we have nothing to do, but if a part or the manifest intent of the more general utterances was to encourage those present to obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech. The speaker began by saying that he had just returned from a visit to the workhouse in the neighborhood where three of their most loyal comrades were paying the penalty for their devotion to the working class, who had been convicted of aiding and abetting another in failing to register for the draft. He said that he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more, but he did say that those persons were paying the penalty for standing erect and for seeking to pave the way to better conditions for all mankind. Later he added further eulogies and said that he was proud of them. He then expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States.

After considerable discourse that it is unnecessary to follow, he took up the case of Kate Richards O'Hare, convicted of obstructing the enlistment service, praised her for her loyalty to Socialism and otherwise, and said that she was convicted on false testimony, under a ruling that would seem incredible to him if he had not had some experience with a Federal Court. The defendant spoke of other cases, and then, after dealing with Russia, said that the master class has always declared the war and the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have

never yet had a voice in declaring war and never yet had a voice in declaring peace. 'You have your lives to lose; you certainly ought to have the right to declare war if you consider a war necessary.' The defendant next mentioned Rose Pastor Stokes, convicted of attempting to cause insubordination and refusal of duty in the military forces of the United States and obstructing the recruiting service. He said that she went out to render her service to the cause in this day of crises, and they sent her to the penitentiary for ten years; that she had said no more than the speaker had said that afternoon; that if she was guilty so was he, and that he would not be cowardly enough to plead his innocence; but that her message that opened the eyes of the people must be suppressed, and so after a mock trial before a packed jury and a corporation tool on the bench, she was sent to the penitentiary for ten years.

There followed personal experiences and illustrations of the growth of Socialism, a glorification of minorities, and a prophecy of the success of the international Socialist crusade, with the interjection that 'you need to know that you are fit for something better than slavery and cannon fodder.' The rest of the discourse had only the indirect though not necessarily ineffective bearing on the offences alleged that is to be found in the usual contrasts between capitalists and laboring men, sneers at the advice to cultivate war gardens, attribution to plutocrats of the high price of coal, with the implication running through it all that the working men are not concerned in the war, and a final exhortation, 'Don't worry about the charge of treason to your masters; but be concerned about the treason that involves yourselves.' The defendant addressed the jury himself, and while contending that his speech did not warrant the charges said, 'I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone.' The statement was not necessary to warrant the jury in finding that one purpose of the speech, whether incidental or not does not matter, was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program and expressions of a general and conscientious belief.

There was introduced also an 'Anti-War Proclamation and Program' adopted at St. Louis in April, 1917, coupled with testimony that about an hour before his speech the defendant had stated that he approved of that platform in spirit and in substance. This document contained the usual suggestion that capitalism was the cause of the war and that our entrance into it 'was instigated by the predatory capitalists in the United States.' It alleged that the war of the United States against Germany could not 'be justified even on the plea that it is a war in defence of American rights or American 'honor.' It said:

'We brand the declaration of war by our Governments as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage.'

Its first recommendation was, 'continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.' Evidence that the defendant accepted this view and this declaration of his duties at the time that he made his speech is evidence that if in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect. The principle is too well established and too manifestly good sense to need

citation of the books. We should add that the jury were most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service and unless the defendant had the specific intent to do so in his mind.

The chief defense [upon which defendant relied] was the First Amendment, [an argument that we] disposed of in *Schenck*. Without going into further particulars we are of opinion that the verdict on the fourth count, for obstructing and attempting to obstruct the recruiting service of the United States, must be sustained.

Judgment affirmed.

### **Notes and Questions:**

1. *Frohwerk* and *Debs* were decided approximately one week after *Schenck*. Do these cases simply apply *Schenck* or do they go further?
2. What can you glean from *Frohwerk* and *Debs* regarding the meaning of the “clear and present danger” test first that was articulated in *Schenck*?
3. After *Debs* but before *Abrams* (the next case), Congress revised and expanded the Espionage Act. The revised Act provided that it was a federal crime while the United States was at war to:

“Willfully utter, print, write or publish any language intended to incite, provoke, or encourage resistance to the United States or to promote the cause of its enemies . . . . Or to willfully by utterance, writing, printing, publication, or language spoken urge, incite, or advocate any curtailment of production in this country of any [thing or product] necessary or essential to the prosecution of the war in which the United States may be engaged, with the intent by such curtailment to cripple or hinder the United States in the prosecution of the war.”

The Act as revised was the basis for the prosecution in *Abrams*, which is presented below.

40 S. Ct. 17.

Supreme Court of the United States.

ABRAMS et al.

v.

UNITED STATES.

No. 316.

Decided Nov. 10, 1919.

Justice CLARKE delivered the opinion of the Court.

[The defendants] were convicted of conspiring to violate provisions of the Espionage Act.

It was charged in each count of the indictment that it was a part of the conspiracy that the defendants would attempt to accomplish their unlawful purpose by printing, writing and distributing in the city of New York many copies of a leaflet or circular, printed in the English language, and of another printed in the Yiddish language, copies of which, properly identified, were attached to the indictment.

All of the five defendants were born in Russia. They were intelligent, had considerable schooling, and at the time they were arrested they had lived in the United States terms varying from five to ten years, but none of them had applied for naturalization. Four of them testified as witnesses in their own behalf, and of these three frankly avowed that they were 'rebels,' 'revolutionists,' 'anarchists,' that they did not believe in government in any form, and they declared that they had no interest whatever in the government of the United States. The fourth defendant testified that he was a 'Socialist' and believed in 'a proper kind of government, not capitalistic,' but in his classification the government of the United States was 'capitalistic.'

It was admitted on the trial that the defendants had united to print and distribute the described circulars and that 5,000 of them had been printed and distributed about the 22d day of August, 1918. The group had a meeting place in New York City, in rooms rented by defendant Abrams, under an assumed name, and there the subject of printing the circulars was discussed about two weeks before the defendants were arrested. The defendant Abrams, although not a printer, on July 27, 1918, purchased the printing outfit with which the circulars were printed, and installed it in a basement room where the work was done at night. The circulars were distributed, some by throwing them from a window of a building where one of the defendants was employed and others secretly, in New York City.

The defendants pleaded 'not guilty,' and the case of the government consisted in showing the facts we have stated, and in introducing in evidence copies of the two printed circulars attached to the indictment, a sheet entitled 'Revolutionists Unite for Action,' written by the defendant Lipman, and found on him when he was arrested, and another paper, found at the headquarters of the group,

and for which Abrams assumed responsibility. Thus the conspiracy and the doing of the overt acts charged were largely admitted and were fully established.

The first of the two articles attached to the indictment is conspicuously headed, 'The Hypocrisy of the United States and her Allies.' After denouncing President Wilson as a hypocrite and a coward because troops were sent into Russia, it proceeds to assail our government in general, saying: 'His [the President's] shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.' It continues:

'He [the President] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.'"

Growing more inflammatory as it proceeds, the circular culminates in: 'The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine!'

'Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM.'

This is clearly an appeal to the 'workers' of this country to arise and put down by force the government of the United States which they characterize as their 'hypocritical,' 'cowardly' and 'capitalistic' enemy.

It concludes:

'Awake! Awake, you Workers of the World!

REVOLUTIONISTS.'

The second of the articles was printed in the Yiddish language and in the translation is headed, 'Workers-Wake Up.' After referring to 'his Majesty, Mr. Wilson, and the rest of the gang, dogs of all colors!' it continues:

'Workers, Russian emigrants, you who had the least belief in the honesty of *our* government, (which defendants admitted referred to the United States government) must now throw away all confidence, must spit in the face of the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war.'

The purpose of this obviously was to persuade the persons to whom it was addressed to turn a deaf ear to patriotic appeals in behalf of the government of the United States, and to cease to render it assistance in the prosecution of the war.

It goes on:

‘With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.*’

It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories, where their work would produce ‘bullets, bayonets, cannon’ and other munitions of war, the use of which would cause the ‘murder’ of Germans and Russians.

Again, the spirit becomes more bitter as it proceeds to declare that—

‘America and her Allies have betrayed [the Workers]. Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia.

*‘Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the government know that not only the Russian Worker fights for freedom, but also here in America lives the spirit of Revolution.’*

This is not an attempt to bring about a change of administration by candid discussion, for no matter what may have incited the outbreak on the part of the defendant anarchists, the manifest purpose of such a publication was to create an attempt to defeat the war plans of the government of the United States, by bringing upon the country the paralysis of a general strike, thereby arresting the production of all munitions and other things essential to the conduct of the war.

This purpose is emphasized in the next paragraph, which reads:

‘Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight.*’

After more of the same kind, the circular concludes:

‘Woe unto those who will be in the way of progress. Let solidarity live!’

It is signed, ‘The Rebels.’

That the interpretation we have put upon these articles, circulated in the greatest port of our land, from which great numbers of soldiers were at the time taking ship daily, and in which great quantities of war supplies of every kind were at the time being manufactured for transportation overseas, is not only the fair interpretation of them, but that it is the meaning which their authors consciously intended should be conveyed by them to others is further shown by the additional writings found in the meeting place of the defendant group and on the person of one of them. One of these circulars is headed: 'Revolutionists! Unite for Action!'

The remaining article, after denouncing the President for what is characterized as hostility to the Russian revolution, continues:

*'We, the toilers of America, who believe in real liberty, shall pledge ourselves, in case the United States will participate in that bloody conspiracy against Russia, to create so great a disturbance that the autocrats of America shall be compelled to keep their armies at home, and not be able to spare any for Russia.'*

It concludes with this definite threat of armed rebellion:

*'If they will use arms against the Russian people to enforce their standard of order, so will we use arms, and they shall never see the ruin of the Russian Revolution.'*

These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the government in Europe. A technical distinction may perhaps be taken between disloyal and abusive language applied to the form of our government or language intended to bring the form of our government into contempt and disrepute, and language of like character and intended to produce like results directed against the President and Congress, the agencies through which that form of government must function in time of war. But it is not necessary to a decision of this case to consider whether such distinction is vital or merely formal, for the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war and the defendants plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war as is charged in the fourth count. Thus it is clear not only that some evidence but that much persuasive evidence was before the jury tending to prove that the defendants were guilty as charged in both the third and fourth counts of the indictment.

On the record thus described it is argued, somewhat faintly, that the acts charged against the defendants were not unlawful because within the protection of that freedom of speech and of the press which is guaranteed by the First Amendment to the Constitution of the United States, and that the entire Espionage Act is unconstitutional because in conflict with that Amendment. This contention is sufficiently discussed and is definitely negated in *Schenck v. United States*.



Affirmed.

Justice HOLMES, dissenting.

This indictment is founded wholly upon the publication of two leaflets which I shall describe in a moment. The first count charges a conspiracy pending the war with Germany to publish abusive language about the form of government of the United States, laying the preparation and publishing of the first leaflet as overt acts. The second count charges a conspiracy pending the war to publish language intended to bring the form of government into contempt, laying the preparation and publishing of the two leaflets as overt acts. The third count alleges a conspiracy to encourage resistance to the United States in the same war and to attempt to effectuate the purpose by publishing the same leaflets. The fourth count lays a conspiracy to incite curtailment of production of things necessary to the prosecution of the war and to attempt to accomplish it by publishing the second leaflet to which I have referred.

The first of these leaflets says that the President's cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington. It intimates that 'German militarism combined with allied capitalism to crush the Russian revolution'; goes on that the tyrants of the world fight each other until they see a common enemy-working class enlightenment, when they combine to crush it; and that now militarism and capitalism combined, though not openly, to crush the Russian revolution. It says that there is only one enemy of the workers of the world and that is capitalism; that it is a crime for workers of America, etc., to fight the workers' republic of Russia, and ends 'Awake! Awake, you workers of the world! Revolutionists.' A note adds 'It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reason for denouncing German militarism than has the coward of the White House.'

The other leaflet, headed 'Workers-Wake Up,' with abusive language says that America together with the Allies will march for Russia to help the Czecko-Slovaks in their struggle against the Bolsheviki, and that this time the hypocrites shall not fool the Russian emigrants and friends of Russia in America. It tells the Russian emigrants that they now must spit in the face of the false military propoganda by which their sympathy and help to the prosecution of the war have been called forth and says that with the money they have lent or are going to lend 'they will make bullets not only for the Germans but also for the Workers Soviets of Russia,' and further, 'Workers in the ammunition factories, you are producing bullets, bayonets, cannon to murder not only the Germans, but also your dearest, best, who are in Russia fighting for freedom.' It then appeals to the same Russian emigrants at some length not to consent to the 'inquisitionary expedition in Russia,' and says that the destruction of the Russian revolution is 'the politics of the march on Russia.' The leaflet winds up by saying 'Workers, our reply to this barbaric intervention has to be a general strike!' and after a few words on the spirit of revolution, exhortations not to be afraid, and some usual tall talk ends 'Woe unto those who will be in the way of progress. Let solidarity live! The Rebels.'

With regard to [the fourth count of the indictment], it seems too plain to be denied that the suggestion to workers in the ammunition factories that they are producing bullets to murder their dearest, and the further advocacy of a general strike, both in the second leaflet, do urge curtailment of production of things necessary to the prosecution of the war within the meaning of the Act. But

to make the conduct criminal that statute requires that it should be 'with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.' It seems to me that no such intent is proved.

I am aware of course that the word 'intent' as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. I admit that my illustration does not answer all that might be said but it is enough to show what I think and to let me pass to a more important aspect of the case. I refer to the First Amendment to the Constitution that Congress shall make no law abridging the freedom of speech.

I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk*, and *Debs* were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt. So I assume that the second leaflet if published for the purposes alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. [Here,] an intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged.

I do not see how anyone can find the intent required by the statute in any of the defendant's words. The second leaflet is the only one that affords even a foundation for the charge, and there, without invoking the hatred of German militarism expressed in the former one, it is evident from the beginning to the end that the only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. To say that two phrases taken literally might import a suggestion of conduct that would have interference with the war as an indirect and probably undesired effect seems to me by no means enough to show an attempt to produce that effect.

In this case, sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; even if what I think the necessary intent were shown; the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to doubt that it was held here but which no one has a right even to consider in dealing with the charges before the Court.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men 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. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.' Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.

### **Notes and Questions:**

1. Does the *Abrams* majority actually find that the defendants' speech constituted a "clear and present danger" under *Schenck*?
2. What to make of the fact that Justice Holmes dissented in *Abrams* but wrote the majority opinions in *Schenck*, *Frohwerk* and *Debs*? Are there differences between the cases (beyond Justice Holmes perhaps simply changing his position regarding the scope of the First Amendment) that would justify his seemingly different positions in the cases?

47 S. Ct. 641.

Supreme Court of the United States.

WHITNEY

v.

PEOPLE OF STATE OF CALIFORNIA.

No. 3.

Decided May 16, 1927.

Justice SANFORD delivered the opinion of the Court.

[The defendant was convicted under the California Criminal Syndicalism Act.] The pertinent provisions of the Act are:

‘Section 1. The term ‘criminal syndicalism’ as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning willful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

‘Sec. 2. Any person who . . . organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . . is guilty of a felony punishable by imprisonment.’

The following facts, among many others, were established on the trial by undisputed evidence: The defendant, a resident of Oakland, in Alameda County, California, had been a member of the Local Oakland branch of the Socialist Party. This Local sent delegates to the national convention of the Socialist Party held in Chicago in 1919, which resulted in a split between the ‘radical’ group and the old-wing Socialists. The ‘radicals’ (to whom the Oakland delegates adhered) being ejected, went to another hall, and formed the Communist Labor Party of America. Its Constitution provided for the membership of persons subscribing to the principles of the Party and pledging themselves to be guided by its Platform, and for the formation of state organizations conforming to its Platform as the supreme declaration of the Party. In its ‘Platform and Program,’ the Party declared that it was in full harmony with ‘the revolutionary working class parties of all countries’ and adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was ‘to create a unified revolutionary working class movement in America,’ organizing the workers as a class, in a revolutionary class struggle to conquer the capitalist state, for the overthrow of capitalist rule, the conquest of political power and the establishment of a working class government, the Dictatorship of the Proletariat, in place of the state machinery of the capitalists, which should make and enforce the laws, reorganize society on the basis of Communism and bring about the Communist Commonwealth; advocated, as the most important

means of capturing state power, the action of the masses, proceeding from the shops and factories, the use of the political machinery of the capitalist state being only secondary; the organization of the workers into 'revolutionary industrial unions'; propaganda pointing out their revolutionary nature and possibilities; and great industrial battles showing the value of the strike as a political weapon; commended the propaganda and example of the Industrial Workers of the World and their struggles and sacrifices in the class war; [and] pledged support and co-operation to 'the revolutionary industrial proletariat of America' in their struggles against the capitalist class.

Shortly thereafter, the Local Oakland withdrew from the Socialist Party and sent accredited delegates, including the defendant, to a convention held in Oakland in November 1919, for the purpose of organizing a California branch of the Communist Labor Party. The defendant, after taking out a temporary membership in the Communist Labor Party, attended this convention as a delegate and took an active part in its proceedings. [Defendant] testified [at trial] that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law. [She also challenged her conviction on First Amendment grounds.]

While it is not denied that the evidence warranted the jury in finding that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism as defined by the Act, it is urged that the Act, as here construed and applied, deprived the defendant of her liberty without due process of law in that it has made her action in attending the Oakland convention unlawful by reason of 'a subsequent event brought about against her will, by the agency of others,' with no showing of a specific intent on her part to join in the forbidden purpose of the association, and merely because, by reason of a lack of 'prophetic' understanding, she failed to foresee the quality that others would give to the convention. This contention, while advanced in the form of a constitutional objection to the Act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury, is one of fact which is not open to review in this Court, involving as it does no constitutional question whatever.

Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association. That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.

By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the

public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest.

The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.

[Judgment affirmed]

Justice BRANDEIS (concurring)

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. The necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent. See *Schenck v. United States*.

It is said to be the function of the Legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the Legislature of California determined that question in the affirmative. The Legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain condition exist, the enactment of the statute cannot alone establish the facts which are essential to its validity.

This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

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. They recognized the risks to which all human institutions are subject. But they knew that 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. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. No danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. 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. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.



Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes, and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances, the judgment of the State court cannot be disturbed.

89 S. Ct. 1827.

Supreme Court of the United States.

Clarence BRANDENBURG, Appellant,

v.

State of OHIO.

No. 492.

Argued Feb. 27, 1969.

Decided June 9, 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.’ 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. We reverse.

The record shows that a man, identified at trial as the appellant, telephoned a reporter [at] 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. [Various speakers repeatedly used racial epithets and spoke of “burying” blacks and sending Jews “back to Israel,” among other similar remarks]. 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 [racial epithet omitted] should be returned to Africa [and Jews] 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. In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, 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. But *Whitney* has been thoroughly discredited by later decisions. 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. 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 steeling it to such action. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

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* cannot be supported, and that decision is therefore overruled.

## **Notes and Questions:**

1. *Brandenburg* was a *per curiam* opinion. *Per curiam* means “by the court” rather than on behalf of any individual judge or judges. In general, *per curiam* opinions tend to be used when the case involves relatively non-controversial issues or where time is of the essence, although that isn’t always true. (By way of example: *Bush v. Gore* was issued *per curiam* even though it was an extraordinarily important and lengthy case containing several dissenting opinions. By contrast, *Brown v. Bd. of Ed.* was a unanimous decision with no dissents, but was not issued *per curiam*.) The decision to designate an opinion as *per curiam* is an administrative mechanism that an appellate court may use in circumstances where it believes it is unnecessary to or simply does not wish to issue an opinion in the name of an individual judge or judges. In *Brandenburg*, the decision was issued *per curiam* due to a historical quirk: the majority opinion was originally written by Justice Fortas, who resigned before the decision was issued. After his resignation, the Court decided to issue the decision *per curiam* rather than under Justice Fortas’s name. For more, see here: <http://www.scotusblog.com/2016/03/scotus-for-law-students-lessons-from-history-for-rulings-after-justice-scalias-death/>.

2. Can you articulate precisely how the *Brandenburg* test differs from *Schenck*’s “clear and present danger” test?

3. As an exercise to sharpen your understanding of the difference: try to construct a factual scenario wherein the “clear and present danger” test would lead to a different result than if the *Brandenburg* test were applied. (I will also present hypotheticals to this effect in class.)

The U.S. Court of Appeals for the Sixth Circuit recently applied the *Brandenburg* test in *Nwanguma*, below. Please come to class prepared with arguments for and against the *Nwanguma* court’s reasoning.

903 F.3d 604.

United States Court of Appeals, Sixth Circuit.

Kashiya NWANGUMA; Molly Shah; Henry Brousseau, Plaintiffs-Appellees,  
v.  
Donald J. TRUMP; Donald J. Trump for President, Inc., Defendants-Appellants.

No. 17–6290.

Argued: June 6, 2018.  
Decided and Filed: September 11, 2018.

## OPINION

McKEAGUE, Circuit Judge.

Plaintiffs participated in a Trump for President campaign rally in Louisville in March 2016 . . . with the purpose of protesting. Perceived to be disruptive, they were unceremoniously ushered out after then-candidate Donald J. Trump said, “Get ‘em out of here.” Plaintiffs were pushed and shoved by members of the audience as they made their exit and now seek damages from Trump alleging his actions amounted to “inciting to riot,” a misdemeanor under Kentucky law. The district court denied Trump’s motion to dismiss the claim but certified its order for immediate interlocutory appeal. The court identified a two-part question for review: whether plaintiffs have stated a valid claim under Kentucky law and, if so, whether the First Amendment immunizes Trump from punishment under state law. We answer “no” to the first part, because plaintiffs’ allegations do not satisfy the required elements of “incitement to riot.” As to the second part, we hold “yes,” Trump’s speech enjoys First Amendment protection, because he did not specifically advocate imminent lawless action. The district court’s denial of Trump’s motion to dismiss the claim must therefore be reversed.

### I. BACKGROUND<sup>1</sup>

On March 1, 2016, a campaign rally was conducted at the Kentucky International Convention Center in Louisville. The rally was organized by defendant Donald J. Trump for President, Inc. (“the Trump campaign”), a Virginia corporation. During the rally, then-presidential candidate Donald J. Trump, a resident of New York, spoke for approximately 35 minutes. Plaintiffs in this action, Kashiya Nwanguma, Molly Shah and Henry Brousseau, all residents of Kentucky, attended the rally with the intention of peacefully protesting. Protesters’ actions during Mr. Trump’s address precipitated directions from Trump on five different occasions to “get ‘em out of here.” In

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<sup>1</sup> This fact summary is drawn from the allegations of the complaint, R. 1-1, Complaint, Page ID 5, accepted as true for purposes of this appeal. Plaintiffs have noted that Trump’s speech at the Louisville rally was video-recorded and the recording may be viewed online at [www.youtube.com](http://www.youtube.com). The Trump defendants object to consideration of the youtube video, arguing that it’s not part of the record and was not before the district court when it made its ruling. We agree. The video is given no consideration in our analysis.

response, members of the audience assaulted, pushed and shoved plaintiffs, and Brousseau was punched in the stomach. Defendants Matthew Heimbach and Alvin Bamberger, Ohio residents and Trump supporters, were in the audience during the rally. They participated in the assaults on plaintiffs.

Less than two months later, plaintiffs filed their complaint in the Jefferson Circuit Court in Louisville, naming Trump, the Trump campaign, Heimbach, Bamberger, and an unknown woman who punched Brousseau as defendants. The complaint sets forth state law tort claims for battery, assault, incitement to riot, as well as negligence, gross negligence and recklessness. The Trump defendants immediately removed the action to federal court based on the parties' diversity of citizenship. They then moved to dismiss the claims against them for failure to state claims upon which relief can be granted.

The district court granted the motion in part and denied it in part. *Nwanguma v. Trump*, 273 F. Supp. 3d 719 (W.D. Ky. 2017). The court dismissed claims against the Trump defendants alleging they were vicariously liable for the assaultive actions of Heimbach, Bamberger and the unknown woman. The court reasoned that plaintiffs' allegations were insufficient to state a plausible claim that these individual defendants acted as agents of the Trump defendants. The court refused to dismiss the incitement-to-riot and negligence claims. In a later decision, however, the district court revisited and reversed its decision on the negligence claim against the Trump defendants. The court concluded that plaintiffs' negligent-speech theory was "incompatible with the First Amendment." In the same order, the court also certified its order denying dismissal of the incitement-to-riot claim as appropriate for immediate appeal under 28 U.S.C. § 1292(b). A panel of this court granted the Trump defendants' ensuing petition for leave to appeal. *In re Donald J. Trump*, 874 F.3d 948 (6th Cir. 2017). Hence, the viability of the incitement-to-riot claim is the sole focus of this interlocutory appeal.

## II. ANALYSIS

### A. Standard of Review

The order denying Trump's motion to dismiss is reviewed de novo. Under Rule 12(b)(6), the complaint is viewed in the light most favorable to plaintiffs, the allegations in the complaint are accepted as true, and all reasonable inferences are drawn in favor of plaintiffs. However, "a legal conclusion couched as a factual allegation" need not be accepted as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The factual allegations must "raise a right to relief above the speculative level." *Id.* The complaint must state a claim that is plausible on its face, i.e., the court must be able to draw a "reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This "plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955).

## B. Incitement to Riot

Plaintiffs' Count III claim alleges that defendant Trump incited a riot, a misdemeanor under the Kentucky Penal Code, Ky. Rev. Stat. § 525.040, actionable in damages under Ky. Rev. Stat. § 446.070. "A person is guilty of inciting to riot when he incites or urges five (5) or more persons to create or engage in a riot." Ky. Rev. Stat. § 525.040(1). "Riot," in relevant part, is defined as "a public disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons. . . ." Ky. Rev. Stat. § 525.010(5).

These statutory definitions implicate five elements: (1) incitement (2) of five or more persons (3) to engage in a public disturbance (4) involving tumultuous and violent conduct (5) creating grave danger of personal injury or property damage. The district court reasoned that the allegation that Trump directed his supporters to "get 'em out of here" satisfied the first two elements. Inasmuch as Trump's directive was nonspecific, it could plausibly have been directed to five or more persons. Insofar as "incites" appears in the statute alongside "urges," Trump's repeated express directive to "get 'em out of here" amounts to the requisite urging to action. Yet, as the district court recognized, where, as here, "incitement" is used in a criminal law, it refers to "[t]he act of persuading another to commit a crime." *Nwanguma*, 273 F. Supp. 3d at 726 (quoting *Black's Law Dictionary* (10th ed. 2014)). Here, of course, the crime Trump allegedly incited is a riot, which, by statutory definition, implicates the latter three elements. Hence, without incitement to riot, specifically, there is no "incitement."

The district court's analysis of the latter three elements, however, is decidedly thin. The court characterized the factual allegations of the complaint as describing "a chaotic and violent scene in which a crowd of people turned on three individuals, and those individuals were injured as a result." This, the district court held, is sufficient. The court correctly held that it was not necessary that a riot have actually ensued. Still, it stopped short of identifying what allegations supported a plausible finding that Trump, by words or actions, incited tumultuous and violent conduct posing grave danger of personal injury. In fact, the plausibility of such a finding is directly negated by plaintiffs' own allegation that Trump's "get 'em out of here" statement was closely followed by his admonition, "Don't hurt 'em." Defendants argue these words cannot possibly be interpreted as advocating a riot or the use of any violence.

The district court rejected this argument as an attempt to replace the *Twombly/Iqbal* plausibility standard with a probability standard. The court observed that "the plausibility of the Trump Defendants' explanation for Trump's statement 'does not render all other [explanations] implausible.'" But here, the Trump defendants are not merely proffering a plausible non-riot-inciting *explanation* for Trump's "get 'em out of here" statement. They are quoting Trump's own contemporaneous words, "don't hurt 'em," to negate the very *possibility* that the former statement could be reasonably construed as inciting "tumultuous and violent conduct." Yet, these two short

statements represent the entire universe of Trump’s actions that are alleged to substantiate plaintiffs’ claim for inciting to riot.<sup>2</sup>

Focusing on the former statement, the district court held that it “implicitly” encouraged the use of violence. Yet, even if “get ‘em out of here,” standing alone, might be reasonably construed as implicitly encouraging unwanted physical touching, the charge here is “inciting to riot.” The notion that Trump’s direction to remove a handful of disruptive protesters from among hundreds or thousands in attendance could be deemed to implicitly incite a riot is simply not plausible—especially where any implication of incitement to riotous violence is explicitly negated by the accompanying words, “don’t hurt ‘em.” If words have meaning, the admonition “don’t hurt ‘em” cannot be reasonably construed as an urging to “hurt ‘em.”

Although the *Twombly/Iqbal* “plausibility standard is not akin to a ‘probability requirement,’ . . . it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. Here, the district court’s construction of Trump’s statements depends on a reading flatly contradicted by the words’ plain meaning. The suggestion that “don’t hurt ‘em” could reasonably be understood as encouraging violence poses a sheer possibility that “stops short of the line between possibility and plausibility of entitlement to relief.” *Id.*

Accordingly, we hold that plaintiffs’ allegations fail to make out a valid incitement-to-riot claim under Kentucky law. The words allegedly uttered by presidential candidate Donald Trump during his speech do not make out a plausible claim for incitement to engage in tumultuous and violent conduct creating grave danger of personal injury or property damage. Plaintiffs have thus failed to state a viable claim for incitement to riot. Moreover, any doubt about this conclusion is wholly dispelled by consideration of the constitutional protection Trump’s speech enjoys under the First Amendment.

### C. First Amendment Protection

In *Brandenburg v. Ohio*, the Court recognized “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.” The *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech.

Under the *Brandenburg* test, only speech that explicitly or implicitly encourages the imminent use of violence or lawless action is outside the protection of the First Amendment. This looks like a

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<sup>2</sup> Plaintiffs argue, and the district court accepted, that their allegations of similar occurrences at other Trump for President rallies are properly considered as indicating Trump’s intent to incite a riot in Louisville, notwithstanding the facially innocuous nature of his words. But here, as we assess the sufficiency of the pleadings, Trump’s intent is not at issue. What is at issue is whether plaintiffs’ allegations of Trump’s words and actions at the Louisville rally (i.e., two short statements, the first of which was repeated several times) make out a plausible claim for incitement to riot.



close analogue for the kind of speech required to make out the charge of inciting to riot under Kentucky law. It follows that if we were to hold that plaintiffs' allegations *do* state a plausible incitement-to-riot claim under Kentucky law, the claim might be expected to fall outside the protection of the First Amendment under the *Brandenburg* test. What comes with the constitutional standard, however, is an illustrative body of case law. And what this case law makes clear is that, even if plaintiffs' allegations could be deemed to make out a plausible claim for incitement to riot under Kentucky law, the First Amendment would not permit prosecution of the claim.

For instance, in *Bible Believers*, our court, sitting *en banc*, recently addressed offensive and grossly intolerant speech of self-described Christian evangelists preaching hate and denigration of Islam to a crowd of Muslims at the Arab International Festival in Dearborn, Michigan. The court held the speech did not amount to incitement to riot under the *Brandenburg* test, despite the obviously explosive context, because it did not include “a single word” that could be perceived as encouraging, explicitly or implicitly, violence or lawlessness. *Id.* at 246. The same can be said of Trump's speech in this case: not a single word encouraged violence or lawlessness, explicitly or implicitly. Moreover, the *Bible Believers* court observed that “[t]he hostile reaction of a crowd does not transform protected speech into incitement.” *Id.* Even though the Bible Believers' speech actually triggered a predictably violent reaction, it was their speech that the court scrutinized. And their speech was held to be protected, despite its blatantly offensive and even provocative nature and despite the crowd's reaction. It follows that if Trump's speech is protected—because it, like that of the Bible Believers, did not include a single word encouraging violence—then the fact that audience members reacted by using force does not transform Trump's protected speech into unprotected speech. The reaction of listeners does not alter the otherwise protected nature of speech.

Nor is the mere tendency of speech to encourage unlawful acts sufficient reason for banning it. What is required [under *Brandenburg*] to forfeit constitutional protection is speech that specifically advocates for listeners to take unlawful action. Trump's words may *arguably* have had a tendency to encourage unlawful use of force, but they did not specifically advocate for listeners to take unlawful action and are therefore protected. As the *Bible Believers* court further observed, “[i]t is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot.” *Id.* at 244. The words alleged in this case, much less offensive than those of the Bible Believers, are not up to the task demanded by *Brandenburg*.

The district court here considered our *Bible Believers* ruling and authorities cited in it and reached a different conclusion: “Based on the allegations of the complaint, which the Court must accept as true, Trump's statement at least ‘implicitly encouraged the use of violence or lawless action.’” But the district court did not identify “a single word” in Trump's speech that could be perceived as encouraging violence or lawlessness, thereby ignoring the fundamental teaching of *Bible Believers*. Instead, the district court conclusorily stated, “it is plausible that Trump's direction to ‘get ‘em out of here’ advocated the use of force.” Finding little support for the first *Brandenburg* factor—*specific* advocacy of violence—the court ostensibly placed heavy reliance on the allegations addressed to the latter two *Brandenburg* factors. That is, the court relied on plaintiffs' allegations that Trump intended violence to occur and knew that his words were likely to result in violence.

This very approach was rejected in *Hess v. Indiana*. The Supreme Court noted in *Hess* that the state court had placed primary reliance on evidence that the speaker's statement was *intended* to incite further lawless action and was *likely* to produce such action. This was not enough. The *Hess* Court focused on the words, on the language, that comprised the subject speech, i.e., the first *Brandenburg* factor. "It hardly needs repeating," the Court stated, "that the constitutional guarantees of freedom of speech forbid the States to punish the use of *words* or *language* not within narrowly limited classes of speech." And in applying this wisdom, the Court likewise tied its conclusion to the words of the subject speech: "And since there was no evidence or rational inference from the import of the *language*, that his *words* were intended to produce, and likely to produce, imminent disorder, those *words* could not be punished by the State on the ground that they had a tendency to lead to violence."

In other words, *Hess* teaches that the speaker's intent to encourage violence (second factor) and the tendency of his statement to result in violence (third factor) are not enough to forfeit First Amendment protection unless the words used specifically advocated the use of violence, whether explicitly or implicitly (first factor). Here, too, the district court, like the Indiana Supreme Court in *Hess*, placed too much weight on the second and third *Brandenburg* factors while slighting the key role of the first. Yet, it is undisputed that the speech plaintiffs would punish under Kentucky law must meet all three factors to avoid First Amendment free speech protection.

Plaintiffs maintain that assessment of Trump's words cannot be limited to their facial import; they must be evaluated in context. Their argument is not without support. In *Snyder v. Phelps*, the Supreme Court observed:

[T]he court is obligated to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression. In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.

So, yes, in addition to the content and form of the words, we are obliged to consider the context, based on the whole record. Here, of course, the "whole record" consists of the complaint. And while we accept well-pled factual allegations as true, we are not required to accept legal conclusions masquerading as factual allegations. *Twombly*, 550 U.S. at 555. Further, under the above teaching from *Snyder*, the court's examination is focused on the content, form, and context of the *speech*: "what was *said*, where it was *said*, and how it was *said*."

Of course, what is here alleged to constitute incitement to riot is just a few words, "get 'em out of here," repeated several times. The words were said at a campaign rally by the main speaker in response to disturbances caused by protesters. The words were self-evidently said in order to quell the disturbances by removing the protesters. The words were directed to unidentified listeners in the Convention Center, among whom most were Trump supporters who were not sympathetic with the protesters. In the ears of some supporters, Trump's words may have had a tendency to elicit a physical response, in the event a disruptive protester refused to leave, but they did not specifically advocate such a response. As to how the offensive words were said, we know, most relevantly, by

plaintiffs' own allegations, that the words were accompanied by the admonition, "don't hurt 'em." That this undercuts the alleged violence-inciting sense of Trump's words can hardly be denied.

In its examination of context, the *Snyder* Court addressed offensive speech—opposition to homosexuality in the military—communicated by picketing signs in close proximity to a military funeral for a Marine killed on active duty in Iraq. Despite the sensitive context and the pain inflicted by the picketers' speech on the family of the fallen Marine, the Court held the speech was protected by the First Amendment. Because the speech was protected, its setting, or context, could not render it unprotected. *Snyder*, 562 U.S. at 454–55. In order to provide adequate breathing space for public debate, the Court observed, the First Amendment requires government tolerance of insulting and even outrageous speech.

Accordingly, our review of the content, form, and context of Trump's alleged words as a whole, per *Snyder*, reveals that his speech does not come within one of the narrowly limited classes of speech that do not enjoy First Amendment protection.

Finally, we note that the parties have devoted no little energy to the question whether the subject speech should be evaluated "objectively"—the Trump defendants arguing that it must, per *Bible Believers*, and plaintiffs insisting that's not what *Bible Believers* holds. The source of the controversy is a footnote:

Incitement requires, in the view of some constitutional scholars, that "the words used by the speaker *objectively encouraged* and urged and provoked imminent action." *Brandenburg's* plain language (reinforced by *Hess*) requires that the words must, at minimum, implicitly encourage the use of force or lawlessness, or the undertaking of some violent "act"; therefore, we say so explicitly today with little fanfare.

*Bible Believers*, 805 F.3d at 246 n.11 (emphasis in original). The import of the footnote is not eminently clear. It is appended to the statement that the first factor of "[t]he *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless [ ] the speech explicitly or implicitly encouraged the use of violence or lawless action. . . ." The footnote suggestion that a speaker's words be assessed "objectively" is identified as the view of some scholars. The court neither adopted nor approved the objective standard and it forms no explicit part of the court's holding. Instead, the court fell back, "with little fanfare," on "*Brandenburg's* plain language (reinforced by *Hess*)" in focusing the inquiry on the words used by the speaker and whether they specifically advocated imminent violence or lawless action, either explicitly or implicitly.

The Trump defendants may have thus overstated the significance of the footnote in arguing that the proper test is whether the speech objectively urged imminent action. On the other hand, the analysis in the *Bible Believers* ruling *does* reflect objective scrutiny of the subject speech. Insofar as the court reasoned that "[t]he hostile reaction of a crowd does not transform protected speech into incitement," the court made clear that the subjective reaction of any particular listener cannot dictate whether the speaker's words enjoy constitutional protection. It is the words used by the speaker that must be at the focus of the incitement inquiry, not how they may be heard by a listener. This, of course, is sensible and plaintiffs have not rebutted this understanding by reference to any contrary authority.

The bottom line is that the analysis employed in *Brandenburg*, *Hess*, *Snyder*, and *Bible Believers* evidences an unmistakable and consistent focus on the actual words used by the speaker in determining whether speech was protected. Following these authorities, we hold that Trump’s speech, too, is protected and therefore not actionable as an incitement to riot.

### III. CONCLUSION

“Speech is powerful.” Yet, as a nation, we have chosen to protect unrefined, disagreeable, and even hurtful speech to ensure that we do not stifle public debate. The First Amendment demands governmental tolerance of speech, in the name of freedom, subject to a limited number of categorical exclusions. The speech that forms the premise for plaintiffs’ incitement-to-riot claim does not come within any of these limited exclusions. It follows that, even if the allegations were deemed to state a plausible claim under Kentucky law—a proposition we do not accept—prosecution of the claim would be barred by the First Amendment.

Accordingly, the district court’s denial of the Trump defendants’ motion to dismiss this claim is reversed and the case is remanded for entry of an order dismissing the Count III claim against the Trump defendants.

### III. Prior Restraints

As noted in the Introduction, one of the original purposes of the First Amendment was to prevent the government from imposing the kind of prior restraints on speech that existed under the law of England at the time. *Near v. Minnesota* was one of the Supreme Court's earliest in-depth examinations of a prior restraint on speech.

51 S. Ct. 625.

Supreme Court of the United States.

NEAR

v.

STATE OF MINNESOTA ex rel. OLSON, Co. Atty.

No. 91.

Argued Jan. 30, 1930.

Decided June 1, 1931.

Chief Justice HUGHES delivered the opinion of the Court.

Chapter 285 of the Session Laws of Minnesota for the year 1925 provides for the abatement, as a public nuisance, of a 'malicious, scandalous and defamatory newspaper, magazine or other periodical.' Under this statute, the county attorney of Hennepin county brought this action to enjoin the publication of what was described as a 'malicious, scandalous and defamatory newspaper, magazine or other periodical,' known as The Saturday Press, published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates in October and November, 1927, published and circulated editions of that periodical which were 'largely devoted to malicious, scandalous and defamatory articles' concerning Charles G. Davis, Frank W. Brunskill, the Minneapolis Tribune, the Minneapolis Journal, Melvin C. Passolt, George E. Leach, the Jewish Race, the members of the grand jury of Hennepin county impaneled in November, 1927, and other persons. [Charles G. Davis was a special law enforcement officer employed by a civic organization, George E. Leach was mayor of Minneapolis, Frank W. Brunskill was its chief of police, and Floyd B. Olson was county attorney.]

[T]he articles charged, in substance, that a gangster was in control of gambling, bootlegging, and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the chief of police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The county attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. There is no question but that the articles made serious accusations against the public officers named and others in connection with the prevalence of crimes and the failure to expose and punish them.

At the beginning of the action on November 22, 1927, an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate, or have in their possession any editions of the periodical from September 24, 1927, to November 19, 1927, inclusive, and from publishing, circulating or having in their possession, 'any future editions of said The Saturday Press' and 'any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise.'

The defendants challenged the constitutionality of the statute. The district court certified the question of constitutionality to the Supreme Court of the state. The Supreme Court sustained the statute.

Thereupon the defendant Near, the present appellant, answered the complaint. He admitted the publication of the articles in the issues described in the complaint, but denied that they were malicious, scandalous, or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. The case then came on for trial. The plaintiff offered in evidence the verified complaint, together with the issues of the publication in question, which were attached to the complaint as exhibits. The defendant objected to the introduction of the evidence, invoking the constitutional provisions to which his answer referred. The objection was overruled, no further evidence was presented, and the plaintiff rested. The defendant then rested, without offering evidence. The plaintiff moved that the court direct the issue of a permanent injunction, and this was done.

The district court made findings of fact, which followed the allegations of the complaint and found in general terms that the editions in question were 'chiefly devoted to malicious, scandalous and defamatory articles' concerning the individuals named. The court further found that the defendants through these publications 'did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper,' and that 'the said publication' 'under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the State.' Judgment was thereupon entered adjudging that 'the newspaper, magazine and periodical known as The Saturday Press,' as a public nuisance, 'be and is hereby abated.' The judgment perpetually enjoined the defendants 'from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law,' and also 'from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title.'

The defendant Near appealed from this judgment to the Supreme Court of the State, again asserting his right under the Federal Constitution, and the judgment was affirmed upon the authority of the former decision. With respect to the contention that the judgment went too far, and prevented the defendants from publishing any kind of a newspaper, the court added that it saw no reason 'for defendants to construe the judgment as restraining them from operating a newspaper in harmony with the public welfare, to which all must yield,' and that the allegations of the complaint had been found to be true. From the judgment as thus affirmed, the defendant Near appeals to this Court.

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. In maintaining this guaranty, the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Liberty of speech and of the press is not an absolute right, and the state may punish its abuse. *Whitney v. California*. Liberty, in each of its phases, has its history and connotation, and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter-in particular that the matter consists of charges against public officers of official dereliction-and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.' The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, 'the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also.' This Court said, in *Patterson v. Colorado*, 205 U.S. 454: '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. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false.'

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that

immunity cannot be deemed to exhaust the conception of the liberty guaranteed by State and Federal Constitutions. The point of criticism has been ‘that the mere exemption from restraints cannot be all that is secured by the constitutional provisions,’ and that ‘the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.’ But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions.

In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court’s order, but for suppression and injunction—that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. ‘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 will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.’ *Schenck v. United States*. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not protect a man from an injunction against uttering words that may have all the effect of force. [But] these limitations are not applicable here.

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in State Constitutions:

‘In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.’



The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the Legislature to provide that at any time the publisher of any newspaper could be brought before a court and required to produce proof of the truth of his publication, or of what he intended to publish and of his motives, or stand enjoined. If this can be done, the Legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly.

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restrain upon publication. As was said in *New Yorker Staats-Zeitung v. Nolan*, 105 A. 72: ‘If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and [so] resent its circulation [that they] resort to physical violence, there is no limit to what may be prohibited.’

For these reasons we hold the statute to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment.

Judgment reversed.

### **Notes and Questions:**

1. The First Amendment restrains *Congress* from abridging the freedom of speech. *Near* (like many other cases), however, involved an abridgment of speech by a *state* government. Why and how exactly does the First Amendment apply to the actions of state and local governments?
2. The very strong presumption that prior restraints are unconstitutional seems to be premised on the belief that *ex ante* suppression of speech is worse from a constitutional perspective than *post hoc* punishment or liability for speech. Why would that be the case? *Near* as well as the cases that follow offer some insights on this question.

3. *New York Times v. United States* (also known as The Pentagon Papers case) was an epochal Supreme Court decision. Some brief background about the case is first presented below, then the case itself.

### ***Behind the Race to Publish the Top-Secret Pentagon Papers***

by Niraj Chokshi, New York Times, Dec. 20, 2017

In 1971, Neil Sheehan, a New York Times reporter in Washington, scored the scoop of a lifetime. Daniel Ellsberg, a former military analyst, had become disillusioned with the Vietnam War and decided to leak a top-secret history of the decision-making behind the conflict. Frustrated by his attempts to have lawmakers draw attention to the cache, now known as the Pentagon Papers, Mr. Ellsberg turned to The Times and, later, almost 20 other newspapers.

The saga, which had dramatic consequences for press freedom and the presidency, is the subject of the movie “The Post,” which will be released in some theaters on Friday. Directed by Steven Spielberg and starring Meryl Streep and Tom Hanks, the film depicts the race at The Washington Post to catch up to Mr. Sheehan’s exclusive.

The Pentagon Papers had been commissioned in 1967 by Robert McNamara, the Defense Secretary at the time. The study, written by multiple authors, including Mr. Ellsberg, offered a detailed history of the decision-making behind the United States’ involvement in Southeast Asia. It also revealed the Johnson administration’s lies about that involvement.

Here’s how Mr. Ellsberg got the Pentagon Papers to the public, first through The Times and later The Post and others.

Mr. Ellsberg’s disillusionment with the conflict had simmered for years before boiling over in the summer of 1969, at a conference on resisting the war, according to his 2002 book, “Secrets: A Memoir of Vietnam and the Pentagon Papers.” There, a man named Randy Kehler gave a stirring talk about resisting and preparing to be jailed. Devastated by the speech, Mr. Ellsberg escaped to a men’s room where he remained, crying, for more than an hour. “Then it was as though an ax had split my head, and my heart broke open,” he wrote. “But what had really happened was that my life had split in two.” The phrase “we are eating our young” kept entering Mr. Ellsberg’s mind, according to the memoir. That evening, he realized that he had the power to do something.

A few weeks later, on the night of Oct. 1, he opened the safe in his office at the RAND Corporation, a nonprofit research institution, and began sneaking out portions of the 7,000-page, top-secret report, which he photocopied page by page, night after night. Mr. Ellsberg spent much of 1970 trying to get sympathetic lawmakers to publicize the report, but by early 1971, he had decided that the news media was a better option. At the suggestion of the lawmakers and others, Mr. Ellsberg turned to The Times. “Only The Times might publish the entire study, and it had the prestige to carry it through,” he wrote in his memoir.

Mr. Ellsberg said he had worked with Mr. Sheehan before, having leaked top-secret news to him in 1968. So, late on March 2, 1971, Mr. Ellsberg called Mr. Sheehan at his home in Washington and asked for a place to stay. When Mr. Ellsberg arrived, Mr. Sheehan showed him to the den, and

the two men talked through the night about the war and the Pentagon Papers, according to the memoir. After a few weeks of discussions, the pair arranged to transport copies of the documents to New York. They were first stored in the Manhattan apartment of the paper's foreign editor, James L. Greenfield, who described the episode in the foreword to the book "The Pentagon Papers: The Secret History of the Vietnam War."

Gerald Gold, an assistant foreign editor at the time, got the team a suite at the New York Hilton Hotel on Avenue of the Americas to use as a makeshift office. There, he, Mr. Sheehan and Allan M. Siegal, also an assistant foreign editor, got to work. The adjoining rooms were rented for the staff to sleep in, and other writers joined the effort, including the veteran Vietnam reporters Hedrick Smith, E. W. (Ned) Kenworthy and Fox Butterfield, according to Mr. Greenfield. "Together they made sure that every sentence written corresponded to a reference in one of the documents," he wrote. "Adding one's own reporting was unacceptable."

When the newspaper's outside law firm, Lord Day & Lord, learned that all 7,000 pages were classified, it warned The Times against publishing them, refused to represent the paper, and nearly told the Justice Department of what was coming, according to Mr. Greenfield.

On June 13, 1971, after weeks of diligent preparation, Mr. Sheehan introduced readers to what the documents revealed. The story appeared atop the front page of The Times that Sunday, though it was sandwiched among three other pieces: one on the wedding of President Richard M. Nixon's daughter, another on the New York City budget, and one on tensions between India and Pakistan.

Here is how readers learned about the top-secret documents:

"A massive study of how the United States went to war in Indochina, conducted by the Pentagon three years ago, demonstrates that four administrations progressively developed a sense of commitment to a non-Communist Vietnam, a readiness to fight the North to protect the South, and an ultimate frustration with this effort—to a much greater extent than their public statements acknowledged at the time."

The Times is widely praised for revealing what the Pentagon Papers contained, but it was not the first to report on their existence. Months earlier, Thomas Oliphant of The Boston Globe had reported that the few men who had read the report in full all supported withdrawing from the war.

The next day, The Times published its second article on the documents—and heard from an angry Nixon administration. In a telegram that night, John N. Mitchell, the United States attorney general, asked The Times to stop publishing information from the top-secret report, arguing that the newspaper was in violation of a law prohibiting disclosure of government secrets. "Further publication of information of this character will cause irreparable injury to the defense interests of the United States," he said, according to a contemporaneous Times report on his letter. The Times refused and the federal government sued the paper. A federal judge then issued a temporary restraining order barring the paper from publishing anything further. The Times complied, but fought to continue the series.

When The Times published its first story that Sunday, The Washington Post found itself with the unenviable task of writing a story sourced completely to a competitor, according to Ben Bradlee, the editor of The Post at the time. “The Post did not have a copy, and we found ourselves in the humiliating position of having to rewrite the competition. Every other paragraph of the Post story had to include some form of the words ‘according to The New York Times,’ blood—visible only to us—on every word,” Mr. Bradlee later wrote of the episode. But Mr. Bradlee’s frustration with what he described as The Times’s “blockbuster” exclusive would be short-lived.

On Wednesday, Mr. Ellsberg reached out through an intermediary to Ben H. Bagdikian, The Post’s national editor and a former RAND Corporation colleague, according to Mr. Ellsberg’s memoir. That night, Mr. Bagdikian flew to Boston. On Thursday morning, Mr. Bagdikian flew back with a pair of first-class seats, one for himself and another for a copy of the Pentagon Papers, according to Mr. Bradlee.

“With The Times silenced by the federal court in New York, we decided almost immediately that we would publish a story the next morning, Friday, June 18,” Mr. Bradlee wrote, adding that he had had to overcome the objections of The Post’s lawyers. On Friday afternoon, Mr. Bradlee got a call from William H. Rehnquist, the assistant attorney general and future chief justice of the Supreme Court. Mr. Rehnquist asked The Post to stop publishing information from the documents. Mr. Bradlee refused and The Post, too, was dragged into a legal battle. As The Post and The Times waged their legal war against the administration, Mr. Ellsberg continued to leak the documents to newspapers across the country, according to his memoir. In the end, he gave copies to nearly two dozen newspapers.

On Friday, June 25, 1971, the Supreme Court agreed to hear the case. It was argued the next day and, on June 30, less than three weeks after The Times published its first story on the Pentagon Papers, the court ruled in favor of The Times and The Post, allowing them to continue publishing the material.

“In revealing the workings of government that led to the Vietnam War, the newspapers nobly did that which the Founders hoped and trusted they would do,” Hugo L. Black, one of the justices, wrote in an opinion supporting the publications. The ruling was a landmark decision for press freedom. It appeared to restrict the government’s use of the legal concept “prior restraint” to censor stories before publication. The decision did not, however, prevent federal officials from continuing to try to limit speech in such ways.

The consequences of Mr. Ellsberg’s leak reverberated well beyond the court, too. Furious about the publication of the Pentagon Papers, Mr. Nixon created a team of “plumbers” to prevent similar leaks in the future. The next year, the team broke into the Watergate offices of the Democratic Party, setting off a scandal that would end with the president’s resignation.

91 S. Ct. 2140.

Supreme Court of the United States.

NEW YORK TIMES COMPANY, Petitioner,

v.

UNITED STATES.

UNITED STATES, Petitioner,

v.

The WASHINGTON POST COMPANY et al.

Nos. 1873, 1885.

Argued June 26, 1971.

Decided June 30, 1971.

PER CURIAM.

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled ‘History of U.S. Decision-Making Process on Viet Nam Policy.’

Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. *See Near v. Minnesota*, 283 U.S. 697 (1931). The Government thus carries a heavy burden of showing justification for the imposition of such a restraint. The District Court for the Southern District of New York in the New York Times case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the Washington Post case held that the Government had not met that burden. We agree.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed, 444 F.2d 544, and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

*So ordered.*

Justice BLACK, with whom Justice DOUGLAS joins, concurring.

I adhere to the view that the Government’s case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and

reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms. They especially feared that the new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed: 'The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.' The amendments were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: 'Congress shall make no law . . . abridging the freedom . . . of the press . . . .' Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so

clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The Government argues in its brief that in spite of the First Amendment, '(t)he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief.'

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of 'national security.' The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to 'make' a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law. To find that the President has 'inherent power' to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make 'secure.' No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

Justice DOUGLAS, with whom Justice BLACK joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully.

There is no statute [at issue here] barring the publication by the press of the material which the Times and the Post seek to use. So, any power that the Government possesses must come from its 'inherent power.'

The power to wage war is 'the power to wage war successfully.' See *Hirabayashi v. United States*, 320 U.S. 81 (1943). But the war power stems from a declaration of war. The Constitution by Art. I, s 8, gives Congress, not the President, power '(t)o declare War.' Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures<sup>3</sup> may have a serious impact. But that is no basis for sanctioning a previous restraint on the press. As stated by Chief Justice Hughes in *Near v. Minnesota*:

‘While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct.’

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be ‘uninhibited, robust, and wide-open’ debate. *New York Times Co. v. Sullivan*.

Justice BRENNAN, concurring.

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government’s claim throughout these cases has been that publication of the material sought to be enjoined ‘could,’ or ‘might,’ or ‘may’ prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.\* Our cases, it is true, have indicated that there is a single, extremely

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<sup>3</sup> There are numerous sets of this material in existence and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start then with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the in camera brief of the United States. It is all history, not future events. None of it is more recent than 1968.

\* *Freedman v. Maryland*, 380 U.S. 51 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not on point. For those cases rest upon the proposition that ‘obscenity is not protected by the freedoms of speech and press.’ *Roth v. United States*, 354 U.S. 476 (1957).



narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war,' *Schenck v. United States*, during which times '(n)o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.' *Near v. Minnesota*. Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. '(T)he chief purpose of (the First Amendment's) guaranty (is) to prevent previous restraints upon publication.' *Near v. Minnesota*. Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

Justice WHITE, with whom Justice STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations. Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens 'grave and irreparable' injury to the public interest; and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information.

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the 'grave and irreparable danger' standard suggested by the

United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. Indeed, even today where we hold that the United States has not met its burden, the material remains sealed in court records and it is properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials. To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction.

Terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

Justice BLACKMUN, dissenting

Almost 70 years ago Justice Holmes, dissenting in a celebrated case, observed:

'Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure.'

The present cases, if not great, are at least unusual in their posture and implications, and the Holmes observation certainly has pertinent application.

The New York Times clandestinely devoted a period of three months to examining the 47 volumes that came into its unauthorized possession. Once it had begun publication of material from those volumes, the New York case now before us emerged. It immediately assumed, and ever since has maintained, a frenetic pace and character. Seemingly once publication started, the material could not be made public fast enough. Seemingly, from then on, every deferral or delay, by restraint or otherwise, was abhorrent and was to be deemed violative of the First Amendment and of the public's 'right immediately to know.'

Two federal district courts, two United States courts of appeals, and this Court—within a period of less than three weeks from inception until today—have been pressed into hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without the careful deliberation that, one would hope, should characterize the American judicial process.

With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a lawsuit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate,

and to be required to adjudicate, issues that allegedly concern the Nation's vital welfare. The country would be none the worse off were the cases tried quickly, to be sure, but in the customary and properly deliberative manner. The most recent of the material, it is said, dates no later than 1968, already about three years ago, and the Times itself took three months to formulate its plan of procedure and, thus, deprived its public for that period.

\* \* \* \*

The First Amendment is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. See, for example, *Near v. Minnesota* and *Schenck v. United States*. What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. Justice Holmes gave us a suggestion when he said in *Schenck*:

‘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 will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.’

I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and with the preparation of briefs, oral argument, and court opinions of a quality better than has been seen to this point. In making this last statement, I criticize no lawyer or judge. I know from past personal experience the agony of time pressure in the preparation of litigation. But these cases and the issues involved and the courts, including this one, deserve better than has been produced thus far.

I add one final comment:

I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Columbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that, if published, ‘could clearly result in great harm to the nation,’ and he defined ‘harm’ to mean ‘the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate . . . .’ I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share his concern. I hope that damage has not already been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed

to publish the critical documents and there results therefrom ‘the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate,’ to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation’s people will know where the responsibility for these sad consequences rests.

### **Notes and Questions:**

1. The Court’s brief *per curiam* opinion in *The Pentagon Papers* case offers no substantive analysis. Hence, it is from the individual Justices’ concurring opinions that we must seek to draw the rule of the case. What is the legal standard regarding prior restraints that we should draw from *The Pentagon Papers*?

2. In balancing the various interests at stake, even the Justices in the majority seem to admit that publication of the material might cause some harm. They differ with the government (and among themselves) about the magnitude of the harm, the likelihood of the harm actually occurring, whether the government has sufficiently proven that the harm is likely to actually manifest, etc., but none of the Justices seems to deny that some harm might occur. Justice White’s concurrence suggests one way to address such harm: “[F]ailure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.” So, to be clear: it is entirely possible for a prior restraint on speech to be unconstitutional but for a subsequent prosecution for that same speech to be constitutional. Phrased differently: prior restraints are so constitutionally suspect that even speech that may subsequently be punished consistent with the First Amendment cannot be prevented from occurring in the first place via a prior restraint.

3. How much of a difference should the magnitude of the potential harm make in the courts’ analysis of whether a prior restraint is permissible? Is there any magnitude of potential harm that, standing alone (and if adequately proven by the government), would justify a prior restraint even if the feared harm is not likely to be immediate? Consider these questions both with regard to the *Pentagon Papers* case above as well as the *Defense Distributed* and “H-Bomb” cases presented immediately below.

838 F.3d 451.

United States Court of Appeals, Fifth Circuit.

DEFENSE DISTRIBUTED

v.

UNITED STATES DEPARTMENT OF STATE.

No. 15–50759.

Filed September 20, 2016.

Opinion

W. EUGENE DAVIS, Circuit Judge:

Plaintiffs-Appellants Defense Distributed and Second Amendment Foundation, Inc. have sued [the State Department], seeking to enjoin enforcement of certain laws governing the export of unclassified technical data relating to prohibited munitions. Because the district court concluded that the public interest in national security outweighs Plaintiffs-Appellants’ interest in protecting their constitutional rights, it denied a preliminary injunction, and they timely appealed. We conclude the district court did not abuse its discretion and therefore affirm.

### I. Background

Defense Distributed is a nonprofit organization operated, in its own words, “for the purpose of promoting popular access to arms guaranteed by the United States Constitution” by “facilitating global access to, and the collaborative production of, information and knowledge related to the 3D printing of arms; and by publishing and distributing such information and knowledge on the Internet at no cost to the public.” Second Amendment Foundation, Inc. is a nonprofit devoted more generally to promoting Second Amendment rights.

Defense Distributed furthers its goals by creating computer files used to create weapons and weapon parts, including lower receivers for AR-15 rifles. The lower receiver is the part of the firearm to which the other parts are attached. It is the only part of the rifle that is legally considered a firearm under federal law, and it ordinarily contains the serial number, which in part allows law enforcement to trace the weapon. Because the other gun parts, such as the barrel and magazine, are not legally considered firearms, they are not regulated as such. Consequently, the purchase of a lower receiver is restricted and may require a background check or registration, while the other parts ordinarily may be purchased anonymously.

The law provides a loophole, however: anyone may make his or her own unserialized, untraceable lower receiver for personal use, though it is illegal to transfer such weapons in any way. Typically, this involves starting with an “80% lower receiver,” which is simply an unfinished piece of metal that looks quite a bit like a lower receiver but is not legally considered one and may therefore be bought and sold freely. It requires additional milling and other work to turn into a functional lower

receiver. Typically this would involve using jigs (milling patterns), a drill press, other tools, and some degree of machining expertise to carefully complete the lower receiver. The result, combined with the other, unregulated gun parts, is an unserialized, untraceable rifle.

Defense Distributed's innovation was to create computer files to allow people to easily produce their own weapons and weapon parts using relatively affordable and readily available equipment. Defense Distributed has explained the technologies as follows:

Three-dimensional ("3D") printing technology allows a computer to "print" a physical object (as opposed to a two-dimensional image on paper). Today, 3D printers are sold at stores such as Home Depot and Best Buy, and the instructions for printing everything from jewelry to toys to car parts are shared and exchanged freely online. Computer numeric control ("CNC") milling, an older industrial technology, involves a computer directing the operation of a drill upon an object. 3D printing is "additive;" using raw materials, the printer constructs a new object. CNC milling is "subtractive," carving something (more) useful from an existing object.

Both technologies require some instruction set or "recipe"—in the case of 3D printers, computer aided design ("CAD") files, typically in .stl format; for CNC machines, text files setting out coordinates and functions to direct a drill.

Defense Distributed's files allow virtually anyone with access to a 3D printer to produce, among other things, Defense Distributed's single-shot plastic pistol called the Liberator and a fully functional plastic AR-15 lower receiver. In addition to 3D printing files, Defense Distributed also sells its own desktop CNC mill marketed as the Ghost Gunner, as well as metal 80% lower receivers. With CNC milling files supplied by Defense Distributed, Ghost Gunner operators are able to produce fully functional, unserialized, and untraceable metal AR-15 lower receivers in a largely automated fashion.

Everything discussed above is legal for United States citizens and will remain legal for United States citizens regardless of the outcome of this case. This case concerns Defense Distributed's desire to share all of its 3D printing and CNC milling files online, available without cost to anyone located anywhere in the world, free of regulatory restrictions.

Beginning in 2012, Defense Distributed posted online, for free download by anyone in the world, a number of computer files, including those for the Liberator pistol (the "Published Files"). On May 8, 2013, the State Department sent a letter to Defense Distributed requesting that it remove the files from the internet on the ground that sharing them in that manner violates certain laws. The district court summarized the relevant statutory and regulatory framework as follows:

Under the Arms Export Control Act ("AECA"), "the President is authorized to control the import and the export of defense articles and defense services" and to "promulgate regulations for the import and export of such articles and services." The AECA imposes both civil and criminal penalties for violation of its provisions and implementing regulations, including monetary fines and imprisonment. The President has delegated his authority to promulgate implementing regulations to the Secretary of State. Those

regulations, the International Traffic in Arms Regulation (“ITAR”), are in turn administered by the DDTC [Directorate of Defense Trade Controls] and its employees.

The AECA directs that the “defense articles” designated under its terms constitute the United States “Munitions List.” The Munitions List “is not a compendium of specific controlled items,” rather it is a “series of categories describing the kinds of items” qualifying as “defense articles.” Put another way, the Munitions List contains “attributes rather than names.” The term “defense articles” also specifically includes “technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated in” the Munitions List.

A party unsure about whether a particular item is a “defense article” covered by the Munitions List may file a “commodity jurisdiction” request with the DDTC. The regulations state the DDTC “will provide a preliminary response within 10 working days of receipt of a complete request for commodity jurisdiction.” If a final determination is not provided after 45 days, “the applicant may request in writing to the Director, Office of Defense Trade Controls Policy that this determination be given expedited processing.”

In short, the State Department contended: (1) the Published Files were potentially related to ITAR-controlled “technical data” relating to items on the USML; (2) posting ITAR-controlled files on the internet for foreign nationals to download constitutes “export”; and (3) Defense Distributed therefore must obtain prior approval from the State Department before “exporting” those files. Defense Distributed complied with the State Department’s request by taking down the Published Files and seeking commodity jurisdiction requests for them. It did eventually obtain approval to post some of the non-regulated files, but *all* of the Published Files continue to be shared online on third party sites like The Pirate Bay.

Since then, Defense Distributed has not posted any new files online. Instead, it is seeking prior approval from the State Department and/or DDTC before doing so, and it has not obtained such approval. The new files Defense Distributed seeks to share online include the CNC milling files required to produce an AR-15 lower receiver with the Ghost Gunner and various other 3D printed weapons or weapon parts.

#### District Court Proceedings

In the meantime, Defense Distributed and Second Amendment Foundation, Inc., sued the State Department, seeking to enjoin them from enforcing the regulations discussed above. Plaintiffs-Appellants argue that the State Department’s interpretation of the AECA, through the ITAR regulations, constitutes an unconstitutional prior restraint on protected First Amendment speech, to wit, the 3D printing and CNC milling files they seek to place online.

Plaintiffs-Appellants sought a preliminary injunction against the State Department, essentially seeking to have the district court suspend enforcement of ITAR’s prepublication approval requirement pending final resolution of this case. The district court denied the preliminary

injunction, and Plaintiffs-Appellants timely filed this appeal. We review the denial of a preliminary injunction for abuse of discretion, but we review any questions of law de novo.

To obtain a preliminary injunction, the applicant must show (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) that his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and (4) that granting the preliminary injunction will not disserve the public interest. “We have cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has ‘clearly carried the burden of persuasion’ on all four requirements.”

The district court concluded that the preliminary injunction should be denied because Plaintiffs-Appellants failed to satisfy the balance of harm and public interest requirements, which do not concern the merits. (Assuming without deciding that Plaintiffs-Appellants have suffered the loss of First and Second Amendment freedoms, they have satisfied the irreparable harm requirement because any such loss, however intangible or limited in time, constitutes irreparable injury.) In extensive dicta comprising nearly two-thirds of its memorandum opinion, the district court also concluded that Plaintiffs-Appellants failed to show a likelihood of success on the merits. Plaintiffs-Appellants timely appealed, asserting essentially the same arguments on appeal. Plaintiffs-Appellants continue to bear the burden of persuasion on appeal.

#### Analysis

The crux of the district court’s decision is essentially its finding that the government’s exceptionally strong interest in national defense and national security outweighs Plaintiffs-Appellants’ very strong constitutional rights under these circumstances. Before the district court, as on appeal, Plaintiffs-Appellants failed to give *any* weight to the public interest in national defense and national security, summarily asserting that the balance of interests tilts in their favor because “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” Ordinarily, of course, the protection of constitutional rights *would* be the highest public interest at issue in a case. That is not necessarily true here, however, because the State Department has asserted a very strong public interest in national defense and national security. Indeed, the State Department’s stated interest in preventing foreign nationals—including all manner of enemies of this country—from obtaining technical data on how to produce weapons and weapon parts is not merely tangentially related to national defense and national security; it lies squarely within that interest.

Plaintiffs-Appellants suggest the district court disregarded their paramount interest in protecting their constitutional rights. That is not so. The district court’s decision was based not on discounting Plaintiffs-Appellants’ interest but rather on finding that the public interest in national defense and national security is stronger here, and the harm to the government is greater than the harm to Plaintiffs-Appellants. We cannot say the district court abused its discretion on these facts.

Because both public interests asserted here are strong, we find it most helpful to focus on the balance of harm requirement, which looks to the relative harm to both parties if the injunction is granted or denied. If we affirm the district court’s denial, but Plaintiffs-Appellants eventually



prove they are entitled to a permanent injunction, their constitutional rights will have been violated in the meantime, but only temporarily. Plaintiffs-Appellants argue that this result is absurd because the Published Files are already available through third party websites such as the Pirate Bay. But granting the preliminary injunction sought by Plaintiffs-Appellants would allow them to share online not only the Published Files but also any new, previously unpublished files. That leads us to the other side of the balance of harm inquiry.

If we reverse the district court's denial and instead grant the preliminary injunction, Plaintiffs-Appellants would legally be permitted to post on the internet as many 3D printing and CNC milling files as they wish, including the Ghost Gunner CNC milling files for producing AR-15 lower receivers and additional 3D-printed weapons and weapon parts. Even if Plaintiffs-Appellants eventually fail to obtain a permanent injunction, the files posted in the interim would remain online essentially forever, hosted by foreign websites such as the Pirate Bay and freely available worldwide. That is not a far-fetched hypothetical: the initial Published Files are still available on such sites, and Plaintiffs-Appellants have indicated they will share additional, previously unreleased files as soon as they are permitted to do so. Because those files would never go away, a preliminary injunction would function, in effect, as a permanent injunction as to all files released in the interim. Thus, the national defense and national security interest would be harmed forever. The fact that national security might be permanently harmed while Plaintiffs-Appellants' constitutional rights might be temporarily harmed strongly supports our conclusion that the district court did not abuse its discretion in weighing the balance in favor of national defense and national security.

In sum, we conclude that the district court did not abuse its discretion in denying Plaintiffs-Appellants' preliminary injunction based on their failure to carry their burden of persuasion on two of the three non-merits requirements for preliminary injunctive relief, namely the balance of harm and the public interest. We therefore affirm the district court's denial and decline to reach the question of whether Plaintiffs-Appellants have demonstrated a substantial likelihood of success on the merits.<sup>12</sup>

We are mindful of the fact that the parties and the amici curiae in this case focused on the merits, and understandably so. This case presents a number of novel legal questions, including whether the 3D printing and/or CNC milling files at issue here may constitute protected speech under the First Amendment, the level of scrutiny applicable to the statutory and regulatory scheme here, whether posting files online for unrestricted download may constitute "export," and whether the ITAR regulations establish an impermissible prior restraint scheme. These are difficult questions, and we take no position on the ultimate outcome other than to agree with the district court that it is not yet time to address the merits. On remand, the district court eventually will have to address the merits, and it will be able to do so with the benefit of a more fully developed record.

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<sup>12</sup> As to the dissent's extensive discussion of Plaintiffs-Appellants' likelihood of success on the merits of the First Amendment issue, we take no position. Even a First Amendment violation does not necessarily trump the government's interest in national defense. We simply hold that Plaintiffs-Appellants have not carried their burden on two of the four requirements for a preliminary injunction: the balance of harm and the public interest.

## Conclusion

For the reasons set out above, we conclude that the district court did not abuse its discretion by denying the preliminary injunction on the non-merits requirements. AFFIRMED.

JONES, Circuit Judge, dissenting:

This case poses starkly the question of the national government's power to impose a prior restraint on the publication of lawful, unclassified, not-otherwise-restricted technical data to the Internet under the guise of regulating the "export" of "defense articles." I dissent from this court's failure to treat the issues raised before us with the seriousness that direct abridgements of free speech demand.

### I.

From late 2012 to early 2013, plaintiff Defense Distributed posted on the Internet, free of charge, technical information including computer assisted design files (CAD files) about gun-related items including a trigger guard, two receivers, an ArmaLite Rifle-15 magazine, and a handgun named "The Liberator." None of the published information was illegal, classified for national security purposes, or subject to contractual or other distribution restrictions. In these respects the information was no different from technical data available through multiple Internet sources from widely diverse publishers. From scientific discussions to popular mechanical publications to personal blog sites, information about lethal devices of all sorts, or modifications to commercially manufactured firearms and explosives, is readily available on the Internet.

What distinguished Defense Distributed's information at that time, however, was its computer files designed for 3D printer technology that could be used to "print" parts and manufacture, with the proper equipment and know-how, a largely plastic single-shot handgun. The Liberator technology drew considerable press attention and the relevant files were downloaded "hundreds of thousands of times." In May 2013, Defense Distributed received a warning letter from the U.S. State Department. The letter then advised Defense Distributed that it must "remove [its information] from public access" immediately, pending its prompt request for and receipt of approval from DDTC.

In a nearly forty-year history of munitions "export" controls, the State Department had never sought enforcement against the posting of any kind of files on the Internet. Because violations of the cited regulations carry severe civil and criminal penalties, Defense Distributed had no practical choice but to remove the information and seek approval to publish from DDTC. It took the government entities two years to refuse to exempt most of the files from the licensing regime.

Defense Distributed filed suit in federal court to vindicate, inter alia, its First Amendment right to publish without prior restraint and sought the customary relief of a temporary injunction to renew publication. This appeal stems from the district court's denial of relief. Undoubtedly, the denial of a temporary injunction in this case will encourage the State Department to threaten and harass publishers of similar non-classified information. There is also little certainty that the government will confine its censorship to Internet publication. Yet my colleagues in the majority seem deaf to

this imminent threat to protected speech. More precisely, they are willing to overlook it with a rote incantation of national security, an incantation belied by the facts here and nearly forty years of contrary Executive Branch pronouncements.

This preliminary injunction request deserved our utmost care and attention. Interference with First Amendment rights for any period of time, even for short periods, constitutes irreparable injury. *New York Times Co. v. United States*, 403 U.S. 713 (1971). Defense Distributed has been denied publication rights for over three years. The district court, moreover, clearly erred in gauging the level of constitutional protection to which this speech is entitled: intermediate scrutiny is inappropriate for the content-based restriction at issue here. (Why the majority is unwilling to correct this obvious error for the sake of the lower court’s getting it right on remand is a mystery).

The district court’s mischaracterization of the standard of scrutiny fatally affected its approach to the remaining prongs of the test for preliminary injunctive relief. Without a proper assessment of plaintiff’s likelihood of success on the merits—arguably the most important of the four factors necessary to grant a preliminary injunction, the district court’s balancing of harms went awry.

Since the majority are close to missing in action, and for the benefit of the district court on remand, I will explain why I conclude that the State Department’s application of its “export” control regulations to this domestic Internet posting appears to violate the First Amendment as a content-based regulation and a prior restraint.

## II.

### A. Regulatory Framework

Under the ITAR it is unlawful to “export or attempt to export from the United States any defense article or technical data” without first obtaining a license or written approval from the Directorate of Defense Trade Controls (“DDTC”), a division of the State Department. When Defense Distributed published technical data on the Internet, the State Department defined “export” broadly, as, *inter alia*, “[d]isclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.” Should the DDTC determine, as here, that technical data are subject to the ITAR, an “export” license is required before the information may be posted online. But the license may be denied whenever the State Department “deems such action to be in furtherance of world peace, the national security of the United States, or is otherwise advisable.”

I would hardly deny that the Department of Justice has good grounds for prosecuting attempts to export weapons and military technology illegally to foreign actors. Previous prosecutions have targeted defendants, *e.g.*, who attempted to deliver WMD materials to North Korea, who sought to distribute drone and missile schematics to China, and who attempted to license chemical purchasing software to companies owned by the Iranian government. Defense Distributed agrees, moreover, that the Government may prosecute individuals who email classified technical data to foreign individuals or directly assist foreign actors with technical military advice. Yet, as plaintiff points out, at the time that DDTC stifled Defense Distributed’s online posting, there were no publicly known enforcement actions in which the State Department purported to require export

licenses or prior approval for the domestic posting of lawful, unclassified, not-otherwise-restricted information on the Internet.

While Defense Distributed has been mired in this thicket of regulation, the CAD files that it published continue to be available to the international public to this day on websites such as the Pirate Bay. Moreover, technology has not stood still: design files are now available on the Internet for six- and eight-shot handguns that can be produced with 3D printing largely out of plastic materials.

## B. Discussion

As applied to Defense Distributed's publication of technical data, the State Department's prepublication approval and license scheme invades the plaintiff's First Amendment rights because it is both a content-based regulation that fails strict scrutiny and an unconstitutional prior restraint on protected speech.

### 1. The First Amendment—Content-based speech restriction.

[The Supreme Court has held that] content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests. [The Supreme Court has explained that] a government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed. A speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter: consequently, even a viewpoint-neutral law can be content-based. Strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based.

The prepublication review scheme at issue here would require government approval and/or licensing of any domestic publication on the Internet of lawful, non-classified “technical information” related to “firearms” solely because a foreign national might view the posting. As applied to the publication of Defense Distributed's files, this process is a content-based restriction on the petitioners' domestic speech because of the topic discussed.

The State Department barely disputes that computer-related files and other technical data are speech protected by the First Amendment. There are CAD files on the Internet and designs, drawings, and technical information about myriad items—jewelry, kitchen supplies, model airplanes, or clothing, for example—that are of no interest to the State Department. Only because Defense Distributed posted technical data referring to firearms covered generically by the USML does the government purport to require prepublication approval or licensing. This is pure content-based regulation.

The Government's argument that its regulatory scheme is content-neutral because it is focused on curbing harmful secondary effects rather than Defense Distributed's primary speech is unpersuasive. The Supreme Court explained this distinction in *Boos v. Barry*, which overturned an ordinance restricting criticism of foreign governments near their embassies because it

“focus[es] on the direct impact of speech on its audience.” Secondary effects of speech, as the Court understood, include “congestion, interference with ingress or egress, visual clutter, or the need to protect the security of embassies.” Similarly, the regulation of speech here is focused on the “direct impact of speech on its audience” because the government seeks to prevent certain listeners—foreign nationals—from using the speech about firearms to create guns.

Because the regulation of Defense Distributed’s speech is content-based, it is necessary to apply strict scrutiny. The district court erred in applying the lower intermediate scrutiny standard. I would not dispute that the government has a compelling interest in enforcing the AECA to regulate the export of arms and technical data governed by the USML. The critical issue is instead whether the government’s prepublication approval scheme is narrowly tailored to achieve that end. A regulation is not narrowly tailored if it is “significantly overinclusive.”

“[S]ignificantly overinclusive,” however, aptly describes the Government’s breathtaking assertion of prepublication review and licensing authority as applied in this case. To prevent foreign nationals from accessing technical data relating to USML-covered firearms, the government seeks to require all domestic posting on the Internet of “technical data” to be pre-approved or licensed by the DDTC. No matter that citizens have no intention of assisting foreign enemies directly, communications about firearms on webpages or blogs must be subject to prior approval on the theory that a foreign national *might* come across the speech. The State Department’s ITAR regulations, as sought to be applied here, plainly sweep in and would control a vast amount of perfectly lawful speech.

The State Department also asserts that, somehow, the information published by Defense Distributed would have survived regulatory scrutiny (query before or after submission to DDTC?) if the company had “verified the citizenship of those interested in the files, or by any other means adequate to ensure that the files are not disseminated to foreign nationals.” Whatever this means, it is a ludicrous attempt to narrow the ambit of its regulation of Internet publications. Everyone knows that personally identifying information can be fabricated on electronic media. Equally troubling, if the State Department truly means what it says in brief about screening out foreign nationals, then the “public domain” exception becomes useless when applied to media like print publications and TV or to gatherings open to the public.

In sum, it is not at all clear that the State Department has *any* concern for the First Amendment rights of the American public and press. Indeed, the State Department turns freedom of speech on its head by asserting, “The possibility that an Internet site could also be used to distribute the technical data domestically does not alter the analysis. . . .” The Government bears the burden to show that its regulation is narrowly tailored to suit a compelling interest. It is not the public’s burden to prove their right to discuss lawful, non-classified, non-restricted technical data. As applied to Defense Distributed’s online publication, these overinclusive regulations cannot be narrowly tailored and fail strict scrutiny.

## 2. The First Amendment—Prior Restraint.

The Government’s prepublication approval and licensing scheme also fails to pass constitutional muster because it effects a prior restraint on speech. The classic description of a prior restraint is an “administrative [or] judicial order forbidding certain communications when issued in advance of the time that such communications are to occur.” The State Department’s prepublication review scheme easily fits the mold.

Though not unconstitutional *per se*, any system of prior restraint bears a heavy presumption of unconstitutionality. Generally, speech licensing schemes must avoid two pitfalls. First the licensors must not exercise excessive discretion. Narrowly drawn, reasonable and definite standards should guide the licensor in order to avoid unbridled discretion that might permit the official to encourage some views and discourage others through the arbitrary application of the regulation.

Second, content-based prior restraints must contain adequate procedural protections. The Supreme Court has required three procedural safeguards against suppression of protected speech by a censorship board: (1) any restraint before judicial review occurs can be imposed for only a specified brief period of time during which the status quo is maintained; (2) prompt judicial review of a decision must be available; and (3) the censor must bear the burdens of going to court and providing the basis to suppress the speech. In sum, a court reviewing a system of prior restraint should examine both the law’s procedural guarantees and the discretion given to law enforcement officials.

To the extent it embraces publication of non-classified, non-transactional, lawful technical data on the Internet, the Government’s scheme vests broad, unbridled discretion to make licensing decisions and lacks the requisite procedural protections. First, as explained above, the “export” regulations’ virtually unbounded coverage of USML-related technical data posted to the Internet, combined with the State Department’s deliberate ambiguity in what constitutes the “public domain,” renders application of ITAR regulations anything but “narrow, objective, and definite.” The stated standards do not guide the licensors to prevent unconstitutional prior restraints.

In *City of Lakewood v. Plain Dealer Publishing Co.*, for example, the Supreme Court held that a city ordinance [giving] the Mayor discretion to issue newspaper rack permits was insufficiently tailored because “the ordinance itself contains no explicit limits on the mayor’s discretion” and “nothing in the law as written requires the mayor to do more than make the statement ‘it is not in the public interest’ when denying a permit application.” Like the “illusory constraints” in *Lakewood*, the ITAR prepublication review scheme offers nothing but regulatory (or prosecutorial) discretion, as applied to the technical data at issue here, in lieu of objective standards. Reliance on the censor’s good faith alone, however, “is the very presumption that the doctrine forbidding unbridled discretion disallows.” *Id.* at 770.

Just as troubling is the stark lack of the three required procedural protections in prior restraint cases. Where a commodity jurisdiction application is necessary, the alleged 45-day regulatory deadline for such determinations seems to be disregarded in practice; nearly two years elapsed

between Defense Distributed's initial request and a response from the DDTC. Further, the prescribed time limit on licensing decisions, 60 days, is not particularly brief.

More fundamentally, Congress has withheld judicial review of the State Department's designation of items as defense articles or services. The withholding of judicial review alone should be fatal to the constitutionality of this prior restraint scheme insofar as it involves the publication of unclassified, lawful technical data to the Internet. And where judicial review is thwarted, it can hardly be said that DDTC, as the would-be censor, can bear its burden to go to court and support its actions.

### C. The Government's Interest, Balancing the Interests

A brief discussion is necessary on the balancing of interests as it should have been done in light of the facts of this case. No one doubts the federal government's paramount duty to protect the security of our nation or the Executive Branch's expertise in matters of foreign relations. Yet the Executive's mere incantation of "national security" and "foreign affairs" interests do not suffice to override constitutional rights. The Supreme Court has long declined to permit the unsupported invocation of "national security" to cloud the First Amendment implications of prior restraints. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (reversing the grant of an injunction precluding the *New York Times* and the *Washington Post* from publishing the Pentagon Papers, a classified study of United States involvement in Vietnam from 1945–1967); *id.* at 730 (Stewart, J., concurring) (noting that because he cannot say that disclosure of the Pentagon Papers "will surely result in direct, immediate, and irreparable damage to our Nation or its people," publication may not be enjoined consonant with the First Amendment). Indeed, only the most exceptional and immediate of national security concerns allow a prior restraint on speech to remain in place:

"The protection as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. . . . [n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of sailing dates of transports or the number and location of troops. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government." *Near v. Minnesota*.

No such exceptional circumstances have been presented in this case. Indeed, all that the majority can muster to support the government's position here is that

the State Department's stated interest in preventing foreign nationals—including all manner of enemies of this country—from obtaining technical data on how to produce weapons and weapon parts is not merely tangentially related to national defense and national security; it lies squarely within that interest.

Neither the district court nor the State Department offers anything else.<sup>16</sup>

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<sup>16</sup> The State Department [does note] the fear that a single-shot pistol undetectable by metal-sensitive devices could be used by terrorists. The Liberator, however, requires a metal firing pin.

Without any evidence to the contrary, the court should have held that the domestic Internet publication of CAD files and other technical data for a 3D printer-enabled making of gun parts and the Liberator pistol presents no immediate danger to national security, especially in light of the fact that many of these files are now widely available over the Internet and that the world is awash with small arms.

Further, the government's pro-censorship position in this case contradicts the express position held within the Executive Branch for the nearly forty-year existence of the AECA. The State Department's sudden turnabout severely undercuts its argument that prepublication review and licensing for the publication of unclassified technical data is justified by pressing national security concerns. Indeed, in the late 1970s and early 1980s, at the height of the Cold War, the Department of Justice's Office of Legal Counsel repeatedly offered written advice that a prepublication review process would raise significant constitutional questions and would likely constitute an impermissible prior restraint, particularly when applied to unclassified technical data disseminated by individuals who do not possess specific intent to deliver it to particular foreign nationals. Further, in a 1997 "Report on the Availability of Bombmaking Information," the Department of Justice observed the widespread availability of bombmaking instructions on the Internet, in libraries, and in magazines. The Department of Justice then argued against government censorship, concluding that despite the distinct possibility that third parties can use bombmaking instructions to engage in illegal conduct, a statute "proscrib[ing] indiscriminately the dissemination of bombmaking information" would face First Amendment problems because the government may rarely prevent the dissemination of truthful information.

\* \* \*

By refusing to address the plaintiffs' likelihood of success on the merits and relying solely on the Government's vague invocation of national security interests, the majority leave in place a preliminary injunction that degrades First Amendment protections and implicitly sanctions the State Department's tenuous and aggressive invasion of citizens' rights. The majority's non-decision here encourages case-by-case adjudication of prepublication review "requests" by the State Department that will chill the free exchange of ideas about whatever USML-related technical data the government chooses to call "novel," "functional," or "not within the public domain." It will foster further standardless exercises of discretion by DDTC censors.

Today's target is unclassified, lawful technical data about guns, which will impair discussion about a large swath of unclassified information about firearms and inhibit amateur gunsmiths as well as journalists. Tomorrow's targets may be drones, cybersecurity, or robotic devices, technical data for all of which may be implicated on the USML. This abdication of our decisionmaking responsibility toward the First Freedom is highly regrettable. I earnestly hope that the district court, on remand, will take the foregoing discussion to heart and relieve Defense Distributed of this censorship.



### **Notes and Questions:**

In *U.S. v. The Progressive Inc.* 467 F.Supp 990 (W.D. Wisc. 1979), the federal government sought an injunction prohibiting The Progressive Magazine from publishing an article entitled *The H-Bomb Secret; How We Got It, Why We're Telling It*. The government contended that the article contained sufficient technical information regarding how nuclear weapons worked that it could enable other countries to build nuclear weapons. Despite acknowledging that “any prior restraint on publication comes into court under a heavy presumption against its constitutional validity” (citing *The Pentagon Papers*), the district court nonetheless granted the injunction prohibiting the article’s publication. The district court distinguished this case on its facts of the *Pentagon Papers*, noting that history had shown that what was at issue in that case was generalized government concerns that publication would cause “some embarrassment to the United States,” whereas in this case:

“A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot. What is involved here is information dealing with the most destructive weapon in the history of mankind, information of sufficient destructive potential to nullify the right to free speech and to endanger the right to life itself.” The court continued: “While it may be true in the long-run, as Patrick Henry instructs us, that one would prefer death to life without liberty, nonetheless, in the short-run, one cannot enjoy [freedom of speech] unless one first enjoys the freedom to live.”

Was the district court’s ruling in *The Progressive* consistent with *Near* and *The Pentagon Papers*?

## IV. Free Speech Methodology

### A. The Distinction Between Content-Based vs. Content-Neutral Laws

As you will see throughout this course, one of the most important doctrines in the Supreme Court's freedom of expression jurisprudence is the distinction between content-based and content-neutral restrictions upon speech. Content-based and content-neutral restrictions are both subject to First Amendment scrutiny, but the test to be applied differs and a strong (but not absolute) presumption of unconstitutionality applies to content-based restrictions on speech. The rationale for the strong presumption that content-based restrictions on speech are unconstitutional—as explained by *Turner* below—is the principle that the government may not regulate speech based upon the government's hostility or favoritism towards the underlying message expressed. In other words, the First Amendment presumptively bars the government from restricting private individuals' speech based upon the government's agreement or disagreement with the content of the speech (subject to various limitations and exceptions).

114 S. Ct. 2445.

Supreme Court of the United States.

TURNER BROADCASTING SYSTEM, INC., et al., Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION et al.

No. 93–44.

Argued Jan. 12, 1994.

Decided June 27, 1994.

Justice KENNEDY announced the judgment of the Court and delivered the opinion of the Court, except as to Part III-B.

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations. This case presents the question whether these provisions abridge the freedom of speech or of the press, in violation of the First Amendment.

The United States District Court for the District of Columbia granted summary judgment for the United States, holding that the challenged provisions are consistent with the First Amendment. Because issues of material fact remain unresolved in the record as developed thus far, we vacate the District Court's judgment and remand the case for further proceedings.

## I

### A

The role of cable television in the Nation's communications system has undergone dramatic change over the past 45 years. Given the pace of technological advancement and the increasing convergence between cable and other electronic media, the cable industry today stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources.

Broadcast and cable television are distinguished by the different technologies through which they reach viewers. Broadcast stations radiate electromagnetic signals from a central transmitting antenna. These signals can be captured, in turn, by any television set within the antenna's range. Cable systems, by contrast, rely upon a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers. Cable systems make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers. The construction of this physical infrastructure entails the use of public rights-of-way and easements and often results in the disruption of traffic on streets and other public property. As a result, the cable medium may depend for its very existence upon express permission from local governing authorities.

The cable television industry includes both cable operators (those who own the physical cable network and transmit the cable signal to the viewer) and cable programmers (those who produce television programs and sell or license them to cable operators). In some cases, cable operators have acquired ownership of cable programmers, and vice versa. Although cable operators may create some of their own programming, most of their programming is drawn from outside sources. Once the cable operator has selected the programming sources, the cable system functions, in essence, as a conduit for the speech of others, transmitting it on a continuous and unedited basis to subscribers.

### B

On October 5, 1992, Congress overrode a Presidential veto to enact the Cable Television Consumer Protection and Competition Act of 1992. (1992 Cable Act or Act). At issue in this case is the constitutionality of the so-called must-carry provisions, contained in §§ 4 and 5 of the Act, which require cable operators to carry the signals of a specified number of local broadcast television stations.

Section 4 requires carriage of "local commercial television stations," defined to include all full power television broadcasters, other than those qualifying as "noncommercial educational" stations under § 5, that operate within the same television market as the cable system. Cable systems with more than 12 active channels, and more than 300 subscribers, are required to set aside up to one-third of their channels for commercial broadcast stations that request carriage. Cable systems with more than 300 subscribers, but only 12 or fewer active channels, must carry the signals of three commercial broadcast stations.

Section 5 of the Act imposes similar requirements regarding the carriage of local public broadcast television stations, referred to in the Act as local “noncommercial educational television stations.” A cable system with 12 or fewer channels must carry one of these stations; a system of between 13 and 36 channels must carry between one and three; and a system with more than 36 channels must carry each local public broadcast station requesting carriage. As with commercial broadcast stations, § 5 requires cable system operators to carry the program schedule of the public broadcast station in its entirety and at its same over-the-air channel position.

Taken together, therefore, §§ 4 and 5 subject all but the smallest cable systems nationwide to must-carry obligations, and confer must-carry privileges on all full power broadcasters operating within the same television market as a qualified cable system.

## C

Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable television industry. Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues. Congress determined that regulation of the market for video programming was necessary to correct this competitive imbalance.

In particular, Congress found that over 60 percent of the households with television sets subscribe to cable, and for these households cable has replaced over-the-air broadcast television as the primary provider of video programming. In addition, Congress concluded that due to “local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area,” the overwhelming majority of cable operators exercise a monopoly over cable service. “The result,” Congress determined, “is undue market power for the cable operator as compared to that of consumers and video programmers.”

According to Congress, this market position gives cable operators the power and the incentive to harm broadcast competitors. The power derives from the cable operator’s ability, as owner of the transmission facility, to “terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position.” The incentive derives from the economic reality that “[c]able television systems and broadcast television stations increasingly compete for television advertising revenues.” By refusing carriage of broadcasters’ signals, cable operators, as a practical matter, can reduce the number of households that have access to the broadcasters’ programming, and thereby capture advertising dollars that would otherwise go to broadcast stations.

Congress found, in addition, that increased vertical integration in the cable industry is making it even harder for broadcasters to secure carriage on cable systems, because cable operators have a financial incentive to favor their affiliated programmers. Congress also determined that the cable industry is characterized by horizontal concentration, with many cable operators sharing common ownership. This has resulted in greater barriers to entry for new programmers and a reduction in the number of media voices available to consumers.

In light of these technological and economic conditions, Congress concluded that unless cable operators are required to carry local broadcast stations, “[t]here is a substantial likelihood that . . . additional local broadcast signals will be deleted, repositioned, or not carried;” the “marked shift in market share” from broadcast to cable will continue to erode the advertising revenue base which sustains free local broadcast television; and that, as a consequence, “the economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.”

## D

Soon after the Act became law, appellants filed these five consolidated actions in the United States District Court for the District of Columbia against the United States and the Federal Communications Commission (hereinafter referred to collectively as the Government), challenging the constitutionality of the must-carry provisions. Appellants, plaintiffs below, are numerous cable programmers and cable operators. The [district] court found that in enacting the must-carry provisions, Congress employed “its regulatory powers over the economy to impose order upon a market in dysfunction.” The court proceeded to sustain the must-carry provisions under the intermediate standard of scrutiny set forth in *United States v. O’Brien*, concluding that the preservation of local broadcasting is an important governmental interest, and that the must-carry provisions are sufficiently tailored to serve that interest.

## II

There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. By requiring cable systems to set aside a portion of their channels for local broadcasters, the must-carry rules regulate cable speech in two respects: The rules reduce the number of channels over which cable operators exercise unfettered control, and they render it more difficult for cable programmers to compete for carriage on the limited channels remaining. Nevertheless, because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable to the must-carry provisions.

## A

We address first the Government’s contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television. It is true that our cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media. But the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.

The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium. As a general matter, there are more would-be broadcasters than frequencies available in the electromagnetic spectrum. And if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one

another's signals, so that neither could be heard at all. The scarcity of broadcast frequencies thus required the establishment of some regulatory mechanism to divide the electromagnetic spectrum and assign specific frequencies to particular broadcasters. In addition, the inherent physical limitation on the number of speakers who may use the broadcast medium has been thought to require some adjustment in traditional First Amendment analysis to permit the Government to place limited content restraints, and impose certain affirmative obligations, on broadcast licensees. As we said in *Red Lion*, "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."

Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here. The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium. Indeed, given the rapid advances in fiber optics and digital compression technology, soon there may be no practical limitation on the number of speakers who may use the cable medium. Nor is there any danger of physical interference between two cable speakers attempting to share the same channel. In light of these fundamental technological differences between broadcast and cable transmission, application of the more relaxed standard of scrutiny adopted in *Red Lion* and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation.

## B

At the heart of the First Amendment lies the principle that each 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. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.

For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals. Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content. Laws that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny. In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny, because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.

Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the "principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." *Ward v. Rock Against Racism*. The purpose, or justification, of a regulation will often be evident on its face. But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in

all cases. Cf. *Simon & Schuster* (“[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment”). Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. See, e.g., *Members of City Council of Los Angeles v. Taxpayers for Vincent* (ordinance prohibiting the posting of signs on public property “is neutral—indeed it is silent—concerning any speaker’s point of view”); *Heffron v. International Soc. for Krishna Consciousness, Inc.* (State Fair regulation requiring that sales and solicitations take place at designated locations “applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds”).

## C

Insofar as they pertain to the carriage of full-power broadcasters, the must-carry rules, on their face, impose burdens and confer benefits without reference to the content of speech. Although the provisions interfere with cable operators’ editorial discretion by compelling them to offer carriage to a certain minimum number of broadcast stations, the extent of the interference does not depend upon the content of the cable operators’ programming. The rules impose obligations upon all operators, save those with fewer than 300 subscribers, regardless of the programs or stations they now offer or have offered in the past. Nothing in the Act imposes a restriction, penalty, or burden by reason of the views, programs, or stations the cable operator has selected or will select.

The must-carry provisions also burden cable programmers by reducing the number of channels for which they can compete. But, again, this burden is unrelated to content, for it extends to all cable programmers irrespective of the programming they choose to offer viewers. And finally, the privileges conferred by the must-carry provisions are also unrelated to content. The rules benefit all full power broadcasters who request carriage—be they commercial or noncommercial, independent or network affiliated, English or Spanish language, religious or secular. The aggregate effect of the rules is thus to make every full power commercial and noncommercial broadcaster eligible for must-carry, provided only that the broadcaster operates within the same television market as a cable system.

It is true that the must-carry provisions distinguish between speakers in the television programming market. But they do so based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry: Broadcasters, which transmit over the airwaves, are favored, while cable programmers, which do not, are disfavored. Cable operators, too, are burdened by the carriage obligations, but only because they control access to the cable conduit. So long as they are not a subtle means of exercising a content preference, speaker distinctions of this nature are not presumed invalid under the First Amendment.

That the must-carry provisions, on their face, do not burden or benefit speech of a particular content does not end the inquiry. Our cases have recognized that even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys.

Appellants contend in this regard that the must-carry regulations are content based because Congress' purpose in enacting them was to promote speech of a favored content. We do not agree. Our review of the Act and its various findings persuades us that Congress' overriding objective in enacting must-carry was not to favor programming of a particular subject matter, viewpoint, or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable.

Congress explained that because cable systems and broadcast stations compete for local advertising revenue and because cable operators have a vested financial interest in favoring their affiliated programmers over broadcast stations, cable operators have a built-in "economic incentive . . . to delete, reposition, or not carry local broadcast signals." Congress concluded that absent a requirement that cable systems carry the signals of local broadcast stations, the continued availability of free local broadcast television would be threatened. Congress sought to avoid the elimination of broadcast television because, in its words, "[s]uch programming is . . . free to those who own television sets and do not require cable transmission to receive broadcast television signals" and because "[t]here is a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."

By preventing cable operators from refusing carriage to broadcast television stations, the must-carry rules ensure that broadcast television stations will retain a large enough potential audience to earn necessary advertising revenue—or, in the case of noncommercial broadcasters, sufficient viewer contributions—to maintain their continued operation. In so doing, the provisions are designed to guarantee the survival of a medium that has become a vital part of the Nation's communication system, and to ensure that every individual with a television set can obtain access to free television programming.

The design and operation of the challenged provisions confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech. The rules, as mentioned, confer must-carry rights on all full power broadcasters, irrespective of the content of their programming. They do not require or prohibit the carriage of particular ideas or points of view. They do not penalize cable operators or programmers because of the content of their programming. They do not compel cable operators to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements.

Appellants and Justice O'Connor make much of the fact that, in the course of describing the purposes behind the Act, Congress referred to the value of broadcast programming. In particular, Congress noted that broadcast television is "an important source of local news[,] public affairs programming and other local broadcast services critical to an informed electorate"), and that noncommercial television "provides educational and informational programming to the Nation's citizens." We do not think, however, that such references cast any material doubt on the content-neutral character of must-carry. That Congress acknowledged the local orientation of broadcast programming and the role that noncommercial stations have played in educating the public does not indicate that Congress regarded broadcast programming as *more* valuable than cable



programming. Rather, it reflects nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable.

The operation of the Act further undermines the suggestion that Congress' purpose in enacting must-carry was to force programming of a "local" or "educational" content on cable subscribers. The provisions, as we have stated, benefit all full power broadcasters irrespective of the nature of their programming. In fact, if a cable system were required to bump a cable programmer to make room for a broadcast station, nothing would stop a cable operator from displacing a cable station that provides all local- or education-oriented programming with a broadcaster that provides very little.

In short, Congress' acknowledgment that broadcast television stations make a valuable contribution to the Nation's communications system does not render the must-carry scheme content based. The scope and operation of the challenged provisions make clear, in our view, that Congress designed the must-carry provisions not to promote speech of a particular content, but to prevent cable operators from exploiting their economic power to the detriment of broadcasters, and thereby to ensure that all Americans, especially those unable to subscribe to cable, have access to free television programming—whatever its content.

In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be unfair competition by cable systems. In enacting the provisions, Congress sought to preserve the existing structure of the Nation's broadcast television medium while permitting the concomitant expansion and development of cable television, and, in particular, to ensure that broadcast television remains available as a source of video programming for those without cable. Appellants' ability to hypothesize a content-based purpose for these provisions rests on little more than speculation and does not cast doubt upon the content-neutral character of must-carry.

### III

#### A

In sum, the must-carry provisions do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny. We agree with the District Court that the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.

Under *O'Brien*, a content-neutral regulation will be sustained 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. To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. 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. Narrow tailoring

in this context requires, in other words, that the means chosen do not “burden substantially more speech than is necessary to further the government’s legitimate interests.”

[The Court’s application of intermediate scrutiny to the fact is omitted for two reasons: first, because the primary point of this case for our purposes is the Court’s discussion of how to distinguish between content-based and content-neutral regulations and which test applies to each; and second, because the Court ultimately concluded that sufficient genuine issues of material fact were presented such that the case should be remanded to the lower court for resolution of those facts and then the application of intermediate scrutiny.]

The judgment below is vacated, and the case is remanded for further proceedings consistent with this opinion.

Justice O’CONNOR, with whom Justice SCALIA and Justice GINSBURG join, and with whom Justice THOMAS joins as to Parts I and III, concurring in part and dissenting in part.

There are only so many channels that any cable system can carry. If there are fewer channels than programmers who want to use the system, some programmers will have to be dropped. In the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992, Congress made a choice: By reserving a little over one-third of the channels on a cable system for broadcasters, it ensured that in most cases it will be a cable programmer who is dropped and a broadcaster who is retained. The question presented in this case is whether this choice comports with the commands of the First Amendment.

## I

### A

The 1992 Cable Act implicates the First Amendment rights of two classes of speakers. First, it tells cable operators which programmers they must carry, and keeps cable operators from carrying others that they might prefer. Though cable operators do not actually originate most of the programming they show, the Court correctly holds that they are, for First Amendment purposes, speakers. Selecting which speech to retransmit is, as we know from the example of publishing houses, movie theaters, bookstores, and Reader’s Digest, no less communication than is creating the speech in the first place.

Second, the Act deprives a certain class of video programmers—those who operate cable channels rather than broadcast stations—of access to over one-third of an entire medium. Cable programmers may compete only for those channels that are not set aside by the must-carry provisions. A cable programmer that might otherwise have been carried may well be denied access in favor of a broadcaster that is less appealing to the viewers but is favored by the must-carry rules. It is as if the Government ordered all movie theaters to reserve at least one-third of their screening for films made by American production companies, or required all bookstores to devote one-third of their shelf space to nonprofit publishers.

Under the First Amendment, it is normally not within the government’s power to decide who may speak and who may not, at least on private property or in traditional public fora. The government does have the power to impose content-neutral time, place, and manner restrictions, but this is in large part precisely because such restrictions apply to all speakers. Laws that treat all speakers equally are relatively poor tools for controlling public debate, and their very generality creates a substantial political check that prevents them from being unduly burdensome. Laws that single out particular speakers are substantially more dangerous, even when they do not draw explicit content distinctions.

I agree with the Court that some speaker-based restrictions—those genuinely justified without reference to content—need not be subject to strict scrutiny. But looking at the statute at issue, I cannot avoid the conclusion that its preference for broadcasters over cable programmers is justified with reference to content. The findings, enacted by Congress as § 2 of the Act, make this clear. “There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media.” “[P]ublic television provides educational and informational programming to the Nation’s citizens, thereby advancing the Government’s compelling interest in educating its citizens.” “A primary objective and benefit of our Nation’s system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.” “Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.”

Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications. The First Amendment does more than just bar government from intentionally suppressing speech of which it disapproves. It also generally prohibits the government from excepting certain kinds of speech from regulation because it thinks the speech is especially valuable. See, *e.g.*, *R.A.V. v. St. Paul* (“The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed”).

This is why the Court is mistaken in concluding that the interest in diversity—in “access to a multiplicity” of “diverse and antagonistic sources”—is content neutral. [It is true that] the interest is not “related to the *suppression* of free expression,” but that is not enough for content neutrality. The interest in ensuring access to a multiplicity of diverse and antagonistic sources of information, no matter how praiseworthy, is directly tied to the content of what the speakers will likely say.

## B

The Court dismisses the findings quoted above by speculating that they do not reveal a preference for certain kinds of content; rather, the Court suggests, the findings show “nothing more than the recognition that the services provided by broadcast television have some intrinsic value and, thus, are worth preserving against the threats posed by cable.” I cannot agree. It is rare enough that Congress states, in the body of the statute itself, the findings underlying its decision. When it does,

it is fair to assume that those findings reflect the basis for the legislative decision, especially when the thrust of the findings is further reflected in the rest of the statute.

Moreover, it does not seem likely that Congress would make extensive findings merely to show that broadcast television is valuable. The controversial judgment at the heart of the statute is not that broadcast television has some value—obviously it does—but that broadcasters should be preferred over cable programmers. The best explanation for the findings, it seems to me, is that they represent Congress’ reasons for adopting this preference; and, according to the findings, these reasons rest in part on the content of broadcasters’ speech. To say in the face of the findings that the must-carry rules “impose burdens and confer benefits without reference to the content of speech,” cannot be correct, especially in light of the care with which we must normally approach speaker-based restrictions.

It may well be that Congress also had other, content-neutral, purposes in mind when enacting the statute. But we have never held that the presence of a permissible justification lessens the impropriety of relying in part on an impermissible justification. In fact, we have often struck down statutes as being impermissibly content based even though their primary purpose was indubitably content neutral. Of course, the mere possibility that a statute might be justified with reference to content is not enough to make the statute content based, and neither is evidence that some legislators voted for the statute for content-based reasons. But when a content-based justification appears on the statute’s face, we cannot ignore it because another, content-neutral justification is present.

## C

Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest. This is an exacting test. It is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy. There must be some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal.

The interest in localism, either in the dissemination of opinions held by the listeners’ neighbors or in the reporting of events that have to do with the local community, cannot be described as “compelling” for the purposes of the compelling state interest test. It is a legitimate interest, perhaps even an important one—certainly the government can foster it by, for instance, providing subsidies from the public fisc—but it does not rise to the level necessary to justify content-based speech restrictions. It is for private speakers and listeners, not for the government, to decide what fraction of their news and entertainment ought to be of a local character and what fraction ought to be of a national (or international) one. And the same is true of the interest in diversity of viewpoints: While the government may subsidize speakers that it thinks provide novel points of view, it may not restrict other speakers on the theory that what they say is more conventional.

The interests in public affairs programming and educational programming seem somewhat weightier, though it is a difficult question whether they are compelling enough to justify restricting other sorts of speech. We have never held that the Government could impose educational content requirements on, say, newsstands, bookstores, or movie theaters; and it is not clear that such

requirements would in any event appreciably further the goals of public education. But even assuming, *arguendo*, that the Government could set some channels aside for educational or news programming, the Act is insufficiently tailored to this goal. To benefit the educational broadcasters, the Act burdens more than just the cable entertainment programmers. It equally burdens CNN, C-SPAN, the Discovery Channel, the New Inspirational Network, and other channels with as much claim as PBS to being educational or related to public affairs.

### III

Having said all this, it is important to acknowledge one basic fact: The question is not whether there will be control over who gets to speak over cable—the question is who will have this control. Under the FCC’s view, the answer is Congress, acting within relatively broad limits. Under my view, the answer is the cable operator. I have no doubt that there is danger in having a single cable operator decide what millions of subscribers can or cannot watch. And I have no doubt that Congress can act to relieve this danger. Congress can encourage the creation of new media, such as inexpensive satellite broadcasting, or fiber-optic networks with virtually unlimited channels, or even simple devices that would let people easily switch from cable to over-the-air broadcasting. And, of course, Congress can subsidize broadcasters that it thinks provide especially valuable programming.

But the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression; and as a consequence, the Amendment imposes substantial limitations on the Government even when it is trying to serve concededly praiseworthy goals. Accordingly, I would reverse the judgment below.

#### **Notes and Questions:**

1. The majority and the concurring opinions in *Turner* differ significantly in their analysis of whether the law at issue is content-based. Which analysis is more persuasive?
2. It is important to distinguish the requirement of *content*-neutrality from the separate requirement of *viewpoint*-neutrality. This issue is discussed at length in *R.A.V. v. St. Paul*, which is presented later in the course packet. A government restriction on speech is content-based if it derives from the government’s favoritism toward or disapproval of the substance of the speaker’s message. By contrast, a government restriction on speech is viewpoint-based if it derives from the government’s favoritism toward or disapproval of the speaker’s perspective on a given issue.

(Side note: if the restriction on speech arises from the government’s approval or disapproval of the speaker’s *identity*—e.g., race, gender, etc.—there would be an Equal Protection Clause issue as well as a First Amendment issue).

Understanding the difference between content and viewpoint restrictions is important to being able to assess which First Amendment issues may be raised by a given set of facts. Moreover, as discussed in more detail in *R.A.V.*: viewpoint-based restrictions on speech are subject to an even stronger presumption of unconstitutionality than are content-based restrictions. (A restriction on speech can, of course, be both content-based and viewpoint-based).

## B. Facial Challenges vs. As-Applied Challenges

120 S. Ct. 483.

Supreme Court of the United States.

LOS ANGELES POLICE DEPARTMENT, Petitioner  
v.  
UNITED REPORTING PUBLISHING CORPORATION.

No. 98–678.

Argued Oct. 13, 1999.

Decided Dec. 7, 1999.

Chief Justice REHNQUIST delivered the opinion of the Court.

California Govt. Code Ann. § 6254(f)(3) places two conditions on public access to arrestees' addresses—that the person requesting an address declare that the request is being made for one of five prescribed purposes, and that the requester also declare that the address will not be used directly or indirectly to sell a product or service.

The District Court permanently enjoined enforcement of the statute, and the Court of Appeals affirmed, holding that the statute was facially invalid because it unduly burdens commercial speech. We hold that the statutory section in question was not subject to a “facial” challenge.

Petitioner, the Los Angeles Police Department, maintains records relating to arrestees. Respondent, United Reporting Publishing Corporation, is a private publishing service that provides the names and addresses of recently arrested individuals to its customers, who include attorneys, insurance companies, drug and alcohol counselors, and driving schools.

Before July 1, 1996, respondent received arrestees' names and addresses under the old version of § 6254, which generally required state and local law enforcement agencies to make public the name, address, and occupation of every individual arrested by the agency. Effective July 1, 1996, the state legislature amended § 6254(f) to limit the public's access to arrestees' and victims' current addresses. The amended statute provides that state and local law enforcement agencies shall make public:

“[T]he current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.”

Sections 6254(f)(1) and (2) require that state and local law enforcement agencies make public, *inter alia*, the name, occupation, and physical description, including date of birth, of every individual arrested by the agency, as well as the circumstances of the arrest. Thus, amended § 6254(f) limits access only to the arrestees' addresses.

Before the effective date of the amendment, respondent sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 to hold the amendment unconstitutional under the First and Fourteenth Amendments to the United States Constitution. On the effective date of the statute, petitioner and other law enforcement agencies denied respondent access to the address information because, according to respondent, "[respondent's] employees could not sign section 6254(f)(3) declarations." Respondent did not allege, and nothing in the record before this Court indicates, that it ever "declar[ed] under penalty of perjury" that it was requesting information for one of the prescribed purposes and that it would not use the address information to "directly or indirectly . . . sell a product or service," as would have been required by the statute. See § 6254(f)(3).

Respondent then amended its complaint and sought a temporary restraining order. The District Court issued a temporary restraining order, and, a few days later, issued a preliminary injunction. Respondent then filed a motion for summary judgment, which was granted. In granting the motion, the District Court construed respondent's claim as presenting a facial challenge to amended § 6254(f). The court held that the statute was facially invalid under the First Amendment.

The Court of Appeals affirmed the District Court's facial invalidation. The court concluded that the statute restricted commercial speech, and, as such, was entitled to "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." The court applied the test set out in *Central Hudson* and found that the asserted governmental interest in protecting arrestees' privacy was substantial. But, the court held that "the numerous exceptions to § 6254(f)(3) for journalistic, scholarly, political, governmental, and investigative purposes render the statute unconstitutional under the First Amendment." The court noted that "[h]aving one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome his present difficulties (for a fee, naturally)," and thus that the exceptions "undermine and counteract" the asserted governmental interest in preserving arrestees' privacy. Thus, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of respondent and upheld the injunction against enforcement of § 6254(f)(3). We granted certiorari. We hold that respondent was not, under our cases, entitled to prevail on a "facial attack" on § 6254(f)(3).

Respondent's primary argument in the District Court and the Court of Appeals was that § 6254(f)(3) was invalid on its face, and respondent maintains that position here. But we believe that our cases hold otherwise.

The traditional rule is that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747 (1982). Prototypical exceptions to this traditional rule are First Amendment challenges to statutes based on First Amendment overbreadth. At least when statutes regulate or proscribe speech, the 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. *Gooding v. Wilson*, 405 U.S. 518 (1972). This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression. In *Gooding*, for example, the defendant was one of a group that picketed an Army headquarters building carrying signs opposing the Vietnam war. A confrontation with the police occurred, as a result of which Gooding was charged with “using opprobrious words and abusive language . . . tending to cause a breach of the peace.”

This is not to say that the threat of criminal prosecution is a necessary condition for the entertainment of a facial challenge. We have permitted such attacks on statutes in appropriate circumstances where no such threat was present. See, e.g., *National Endowment for Arts v. Finley* (entertaining a facial challenge to a public funding scheme). But the allowance of a facial overbreadth challenge to a statute is an exception to the traditional rule that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. This general rule reflects two “cardinal principles” of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudication. By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule, we face ‘flesh and blood’ legal problems with data relevant and adequate to an informed judgment.

Even though the challenge be based on the First Amendment, the overbreadth doctrine is not casually employed. 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. Facial overbreadth adjudication is an exception to our traditional rules of practice and its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from “pure speech” toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws.

The Court of Appeals held that § 6254(f)(3) was facially invalid under the First Amendment. Petitioner contends that the section in question is not an abridgment of anyone’s right to engage in speech, be it commercial or otherwise, but simply a law regulating access to information in the hands of the police department.

We believe that, at least for purposes of facial invalidation, petitioner’s view is correct. This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment.



To the extent that respondent's "facial challenge" seeks to rely on the effect of the statute on parties not before the Court -- its potential customers, for example -- its claim does not fit within the case law allowing courts to entertain facial challenges. No threat of prosecution, for example, see *Gooding*, or cutoff of funds, see *NEA*, hangs over their heads. They may seek access under the statute on their own just as respondent did, without incurring any burden other than the prospect that their request will be denied. Resort to a facial challenge here is not warranted because there is no possibility that protected speech will be muted.

The Court of Appeals was therefore wrong to facially invalidate § 6254(f)(3). The judgment of the Court of Appeals is accordingly reversed.

### **Notes and Questions:**

1. A person making an as-applied First Amendment challenge is essentially saying "Applying this law to *my* speech is unconstitutional because the specific speech that *I* engaged in is protected by the First Amendment." A person making a First Amendment facial challenge is essentially saying "Even assuming *arguendo* that the specific speech I engaged in can be punished without violating the First Amendment, this law is unconstitutional because it applies to too much other speech that *is* protected (overbreadth) or because the terms of the statute are so vague that they are not understandable or are inherently subject a discriminatory application (vagueness)." Hence, in the First Amendment context, the concept of facial challenges generally overlaps with overbreadth or vagueness doctrine. Indeed, as noted in *United Reporting*, the Court has characterized overbreadth doctrine as an exception to the presumption that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. Prototypical exceptions to this traditional rule are First Amendment challenges to statutes based on First Amendment overbreadth."

There are two primary reasons why facial overbreadth or vagueness challenges are permitted, even by persons whose *own* speech can be punished without violating the First Amendment. First is concern about the potential chilling effect of overbroad or vague laws on other persons whose speech is protected: "[P]ersons whose expression is constitutionally protected may well refrain from exercising their right[s] [at all] for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *United Reporting, supra*. Second is concern that overbroad or vague laws are highly susceptible to being used to engage in content-, viewpoint-, or speaker-based censorship or discrimination: "Standards of permissible statutory vagueness are [especially] strict in the area of free expression. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button* (presented below in the unit on Vagueness and Overbreadth).

## C. Vagueness and Overbreadth

60 S. Ct. 900.

Supreme Court of the United States.

CANTWELL et al.

v.

STATE OF CONNECTICUT.

No. 632.

Argued March 29, 1940.

Decided May 20, 1940.

Justice ROBERTS delivered the opinion of the Court.

[The appellants—Newton Cantwell and his two sons, Jesse and Russell—were Jehovah's Witnesses. On the day of their arrest, they were engaged in going from house to house on Cassius Street in New Haven. They were carrying a bag containing books and pamphlets on religious subjects, a portable phonograph, and a set of records, each of which, when played, was a description of one of the books. Each appellant asked the person who responded to his call for permission to play one of the records. If permission was granted, he asked the person to buy the book described on the record.]

Cassius Street is in a thickly populated neighborhood, where about ninety per cent of the residents are Roman Catholics. A phonograph record, describing a book entitled 'Enemies', included an attack on the Catholic religion. None of the persons interviewed were members of Jehovah's Witnesses.

[Jesse Cantwell had approached two men in the street, and asked for and received permission to play a record. He played the record 'Enemies'. Both men were Catholic. They were incensed by the contents of the record and were tempted to strike Cantwell unless he went away. On being told to be on his way, he left their presence. There was no evidence that he was personally offensive or entered into any argument with those he interviewed. The court held that the charge was not assault or breach of the peace or threats on Cantwell's part, but invoking or inciting others to breach of the peace.

Jesse Cantwell was charged with common law incitement of a breach of the peace.]

We hold that, in the circumstances disclosed, the conviction of Jesse Cantwell must be set aside. Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest

has been pressed in this instance to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

[Cantwell's conviction] was not pursuant to a statute evincing a legislative judgment that street discussion of religious affairs, because of its tendency to provoke disorder, should be regulated, or a judgment that the playing of a phonograph on the streets should in the interest of comfort or privacy be limited or prevented. Violation of an Act exhibiting such a legislative judgment and narrowly drawn to prevent the supposed evil, would pose a question differing from that we must here answer. Such a declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations. Here, however, the judgment is based on a common law concept of the most general and undefined nature.

The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious. Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions. Here we have a situation analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application.

Having these considerations in mind, we note that Jesse Cantwell was upon a public street where he had a right to be and where he had a right peacefully to impart his views to others. There is no showing that his deportment was noisy, truculent, overbearing or offensive. He requested of two pedestrians permission to play to them a phonograph record. The permission was granted. It is not claimed that he intended to insult or affront the hearers by playing the record. It is plain that he wished only to interest them in his propaganda. The sound of the phonograph is not shown to have disturbed residents of the street, to have drawn a crowd, or to have impeded traffic. Thus far he had invaded no right or interest of the public or of the men accosted.

The record played by Cantwell embodies a general attack on all organized religious systems as instruments of Satan and injurious to man; it then singles out the Roman Catholic Church for strictures couched in terms which naturally would offend not only persons of that persuasion, but all others who respect the honestly held religious faith of their fellows. The hearers were in fact highly offended. One of them said he felt like hitting Cantwell and the other that he was tempted to throw Cantwell off the street. The one who testified he felt like hitting Cantwell said, in answer to the question 'Did you do anything else or have any other reaction?' 'No, sir, because he said he would take the victrola and he went.' The other witness testified that he told Cantwell he had better get off the street before something happened to him and that was the end of the matter as Cantwell picked up his books and walked up the street.

Cantwell's conduct, in the view of the court below, considered apart from the effect of his communication upon his hearers, did not amount to a breach of the peace. One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. 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.

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.

In the realm of religious faith and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader may at times resort to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The essential characteristic of these liberties is that under their shield, many types of life, character, opinion, and belief can develop unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds. There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

Although the contents of the record not unnaturally aroused animosity, we think that, in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.

Reversed and remanded.

83 S. Ct. 328.

Supreme Court of the United States.

NATIONAL ASSOCIATION FOR the ADVANCEMENT OF COLORED  
PEOPLE, etc., Petitioner,

v.

Robert Y. BUTTON, Attorney General of Virginia, et al.

No. 5.

Reargued Oct. 9, 1962.

Decided Jan. 14, 1963.

Justice BRENNAN delivered the opinion of the Court.

This case originated in companion suits by the NAACP and the NAACP Legal Defense and Education Fund, Inc. (Defense Fund). There is no substantial dispute as to the facts. The dispute centers about the constitutionality under the Fourteenth Amendment of Chapter 33 [of Virginia law], 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 NAACP was formed in 1909 and incorporated under New York law as a nonprofit membership corporation in 1911. It maintains its headquarters in New York and presently has some 1,000 active unincorporated branches throughout the Nation. The corporation is licensed to do business in Virginia, and has 89 branches there. The Virginia branches are organized into the Virginia State Conference of NAACP Branches (the Conference), an unincorporated association, which in 1957 had some 13,500 members. The activities of the Conference are financed jointly by the national organization and the local branches from contributions and membership dues. NAACP policy, binding upon local branches and conferences, is set by the annual national convention.

The basic aims and purposes of NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. To this end, the Association engages in extensive educational and lobbying activities. It also devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes. For more than 10 years, the Virginia Conference has concentrated upon financing litigation aimed at ending racial segregation in the public schools of the Commonwealth.

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.

The members of the legal staff of the Virginia Conference and other NAACP or Defense Fund lawyers called in by the staff to assist are drawn into litigation in various ways. One is for an aggrieved Negro to apply directly to the Conference or the legal staff for assistance. His application is referred to the Chairman of the legal staff. The Chairman, with the concurrence of the President of the Conference, is authorized to agree to give legal assistance in an appropriate case. In litigation involving public school segregation, the procedure tends to be different. Typically, a local NAACP branch will invite a member of the legal staff to explain to a meeting of parents and children the legal steps necessary to achieve desegregation. The staff member will bring printed forms to the meeting authorizing him, and other NAACP or Defense Fund attorneys of his designation, to represent the signers in legal proceedings to achieve desegregation. On occasion, blank forms have been signed by litigants, upon the understanding that a member or members of the legal staff, with or without assistance from other NAACP lawyers, or from the Defense Fund, would handle the case. It is usual, after obtaining authorizations, for the staff lawyer to bring into the case the other staff members in the area where suit is to be brought, and sometimes to bring in lawyers from the national organization or the Defense Fund.<sup>5</sup> In effect, then, the prospective litigant retains not so much a particular attorney as the 'firm' of NAACP and Defense Fund lawyers, which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation.

These meetings are sometimes prompted by letters and bulletins from the Conference urging active steps to fight segregation. The Conference has on occasion distributed to the local branches petitions for desegregation to be signed by parents and filed with local school boards, and advised branch officials to obtain, as petitioners, persons willing to 'go all the way' in any possible litigation that may ensue. While the Conference in these ways encourages the bringing of lawsuits, the plaintiffs in particular actions, so far as appears, make their own decisions to become such.

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<sup>5</sup> The Defense Fund, which is not involved in the present phase of the litigation, is a companion body to the NAACP. It is also a nonprofit New York corporation licensed to do business in Virginia, and has the same general purposes and policies as the NAACP. The Fund maintains a legal staff in New York City and retains regional counsel elsewhere, one of whom is in Virginia. Social scientists, law professors and law students throughout the country donate their services to the Fund without compensation. When requested by the NAACP, the Defense Fund provides assistance in the form of legal research and counsel.

Statutory regulation of unethical and nonprofessional conduct by attorneys has been in force in Virginia since 1849. These provisions outlaw, inter alia, solicitation of legal business in the form of ‘running’ or ‘capping.’ Prior to 1956, however, no attempt was made to proscribe under such regulations the activities of the NAACP, which had been carried on openly for many years in substantially the manner described. In 1956, however, the legislature amended, by the addition of Chapter 33, the provisions of the Virginia Code forbidding solicitation of legal business by a ‘runner’ or ‘capper’ to include, in the definition of ‘runner’ or ‘capper,’ an agent for an individual or organization which retains a lawyer in connection with an action to which it is not a party and in which it has no pecuniary right or liability. The [Virginia Supreme Court] held that the [amended law’s] purpose “was to strengthen the existing statutes to further control the evils of solicitation of legal business.” The court held that the activities of NAACP, the Virginia Conference, the Defense Fund, and the lawyers furnished by them fell within, and could constitutionally be proscribed by, the chapter’s expanded definition of improper solicitation of legal business, and also violated Canons 35 and 47 of the American Bar Association’s Canons of Professional Ethics, which the court had adopted in 1938.<sup>8</sup> Specifically the court held that, under the expanded definition, such activities on the part of NAACP, the Virginia Conference, and the Defense Fund constituted “fomenting and soliciting legal business in which they are not parties and have no pecuniary right or liability, and which they channel to the enrichment of certain lawyers employed by them, at no cost to the litigants and over which the litigants have no control.”

[I.]

Petitioner challenges the decision of the [Virginia Supreme Court] on many grounds. But we reach only one: that Chapter 33 as construed and applied abridges the freedoms of the First Amendment, protected against state action by the Fourteenth. More specifically, petitioner claims that the [law] infringes the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. We think petitioner may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail.

We reverse the judgment of the Virginia Supreme Court. We hold that the activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business violative of Chapter 33 and the Canons of Professional Ethics.

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<sup>8</sup> 171 Val., pp. xxxii—xxxiii, xxxv (1938). Canon 35 reads in part as follows:

‘Intermediaries.—The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes, between client and lawyer. A lawyer’s responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary.

Canon 47 reads as follows:

‘Aiding the Unauthorized Practice of Law.—No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.’

A.

We meet at the outset the contention that ‘solicitation’ is wholly outside the area of freedoms protected by the First Amendment. To this contention there are two answers. The first is that a State cannot foreclose the exercise of constitutional rights by mere labels. The second is that abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.

We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record, whereby Negroes seek through lawful means to achieve legitimate political ends, subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right to engage in association for the advancement of beliefs and ideas. We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers. We have also said that the Sherman Act does not apply to certain concerted activities of railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws because such a construction of the Sherman Act would raise important constitutional questions, specifically, First Amendment questions. *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.* And we have refused to countenance compelled disclosure of a person’s political associations in language closely applicable to the instant case:

“Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups.” *Sweezy v. New Hampshire*.

The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.



## B.

But it does not follow that this Court now has only a clear-cut task to decide whether the activities of the petitioner deemed unlawful by the Virginia Supreme Court are constitutionally privileged. If the line drawn by the Virginia Supreme Court between the permitted and prohibited activities of the NAACP, its members, and its lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible, for the standards of permissible statutory vagueness are strict in the area of free expression. Furthermore, the [judgment below] may be invalid if it prohibits privileged exercises of First Amendment rights, whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

We read the [judgment] of the Virginia Supreme Court in the instant case as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys. No narrower reading is plausible. We cannot accept the reading suggested on behalf of the Attorney General of Virginia [at oral argument] that the Virginia Supreme Court construed Chapter 33 as proscribing control only of the actual litigation by the NAACP after it is instituted. In the first place, upon a record devoid of any evidence of interference by the NAACP in the actual conduct of litigation or neglect or harassment of clients, the court nevertheless held that petitioner, its members, agents and staff attorneys had practiced criminal solicitation. Thus, simple referral to or recommendation of a lawyer may be solicitation within the meaning of Chapter 33 [as interpreted by the court below]. In the second place, the [judgment below] does not seem to rest on the fact that the attorneys were organized as a staff and paid by petitioner. The decree expressly forbids solicitation on behalf of 'any particular attorneys' in addition to attorneys retained or compensated by the NAACP. In the third place, although Chapter 33 purports to prohibit only solicitation by attorneys or their 'agents,' it defines agent broadly as anyone who 'represents' another in his dealings with a third person. Since the statute appears to depart from the common-law concept of the agency relationship and since the Virginia court did not clarify the statutory definition, we cannot say that it will not be applied with the broad sweep which the statutory language imports.

We conclude that under Chapter 33, as authoritatively construed by the Virginia Supreme Court, a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys (for example, to the Virginia Conference's legal staff) for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances. There thus inheres in the statute the gravest danger of smothering all discussion

looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority. Lawyers on the legal staff or even mere NAACP members or sympathizers would understandably hesitate, at an NAACP meeting or on any other occasion, to do what the judgment below purports to still allow, namely, “to acquaint persons with what they believe to be their legal rights and advise them to assert their rights by commencing or further prosecuting a suit.” For if the lawyers, members, or sympathizers also appeared in or had any connection with any litigation supported with NAACP funds, they plainly would risk (if lawyers) disbarment proceedings and, lawyers and nonlawyers alike, criminal prosecution for the offense of ‘solicitation,’ to which the Virginia court gave so broad and uncertain a meaning. It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.

It is apparent, therefore, that Chapter 33 as construed limits First Amendment freedoms. Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts. 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. 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 has guaranteed free expression by expressly confirming petitioner’s right to continue its advocacy of civil-rights litigation. But in light of the whole judgment 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*. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

The second contention [that we reject] is that Virginia has a sufficiently [overriding] interest in the regulation of the legal profession, embodied in Chapter 33, which justifies [subordinating] petitioner’s First Amendment rights. Specifically, Virginia contends that the NAACP’s activities in furtherance of litigation, being ‘improper solicitation’ under the state statute, fall within the traditional purview of state regulation of professional conduct. However, the State’s attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment worked by

Chapter 33 upon protected freedoms of expression. The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. Thus it is no answer to the constitutional claims asserted by petitioner to say, as the Virginia Supreme Court [did], that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights. In *NAACP v. Alabama ex rel. Patterson* we said, "In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action."

However valid may be Virginia's interest in regulating the traditionally illegal practices of barratry, maintenance and champerty, that interest does not justify the prohibition of the NAACP activities disclosed by this record. Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. [Litigation] to enforce constitutional rights cannot be deemed malicious as a matter of law.

[Moreover,] there has been no showing [in this specific case] of a serious danger of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor. And the aims and interests of NAACP have not been shown to conflict with those of its members and nonmember Negro litigants. The NAACP and its members are in every practical sense identical. The Association, which provides in its constitution that "(a)ny person who is in accordance with (its) principles and policies" may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.

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.

We conclude that the petitioner has amply shown that its activities fall within the First Amendment's protections and the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed. Nothing that this record shows as to the nature and purpose of NAACP activities permits an inference of any injurious intervention in or control of litigation which would constitutionally authorize the application of Chapter 33 to those activities.

Reversed.

130 S. Ct. 1577.

Supreme Court of the United States.

UNITED STATES, Petitioner,

v.

Robert J. STEVENS.

No. 08–769.

Argued Oct. 6, 2009.

Decided Apr. 20, 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.

## I

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. 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.” 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.”

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. The acts depicted in crush videos are typically prohibited by the animal cruelty laws enacted by all 50 States and the District of Columbia.

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, and has been restricted by federal law since 1976. 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. On the basis of these videos, Stevens was indicted on three counts of violating § 48.

Stevens moved to dismiss the indictment, arguing that § 48 is facially invalid under the First Amendment. The District Court denied the motion. It held that the depictions subject to § 48, like obscenity or child pornography, are categorically unprotected by the First Amendment. It went on to hold that § 48 is not substantially overbroad, because the exceptions clause sufficiently narrows the statute to constitutional applications. The jury convicted Stevens on all counts, and the District Court sentenced him to three concurrent sentences of 37 months' imprisonment, followed by three years of supervised release.

The en banc Third Circuit, over a three-judge dissent, declared § 48 facially unconstitutional and vacated Stevens's conviction. The Court of Appeals first held that § 48 regulates speech that is protected by the First Amendment. The Court declined to recognize a new category of unprotected speech for depictions of animal cruelty. The Court of Appeals then held that § 48 could not survive strict scrutiny as a content-based regulation of protected speech. It found that the statute lacked a compelling government interest and was neither narrowly tailored to preventing animal cruelty nor the least restrictive means of doing so. It therefore held § 48 facially invalid.

In an extended footnote, the Third Circuit noted that § 48 "might also be unconstitutionally overbroad," because it "potentially covers a great deal of constitutionally protected speech" and "sweeps [too] widely" to be limited only by prosecutorial discretion. But the Court of Appeals declined to rest its analysis on this ground.

We granted certiorari.

## II

The Government's primary submission is that § 48 necessarily complies with the Constitution because the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment. We disagree.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Section 48 explicitly regulates expression based on content: The statute restricts "visual [and] auditory depiction[s]," such as photographs, videos, or sound recordings, depending on whether they depict conduct in which a living animal is intentionally harmed. As such, § 48 is presumptively invalid, and the Government bears the burden to rebut that presumption.

From 1791 to the present, however, the First Amendment has permitted restrictions upon the content of speech in a few limited areas. These historic and traditional categories—including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct—are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*.

The Government argues that depictions of animal cruelty should be added to the list. It contends that depictions of illegal acts of animal cruelty that are made, sold, or possessed for commercial

gain necessarily lack expressive value, and may accordingly be regulated as unprotected speech. The claim is not just that Congress may regulate depictions of animal cruelty subject to the First Amendment, but that these depictions are outside the reach of that Amendment altogether.

As the Government notes, the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. But we are unaware of any similar tradition excluding *depictions* of animal cruelty from “the freedom of speech” codified in the First Amendment, and the Government points us to none.

The Government contends that historical evidence about the reach of the First Amendment is not “a necessary prerequisite for regulation [of speech] today,” and that categories of speech may be exempted from the First Amendment’s protection without any long-settled tradition of subjecting that speech to regulation. Instead, the Government points to Congress’s legislative judgment that depictions of animals being intentionally tortured and killed are of such minimal redeeming value as to render them unworthy of First Amendment protection, and asks the Court to uphold the ban on the same basis. The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: “Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.”

As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. 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. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document both “prescribing limits, and [then] declaring that those limits may be passed at pleasure.” *Marbury v. Madison* (1803).

To be fair to the Government, its view did not emerge from a vacuum. As the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being “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.” *Chaplinsky v. New Hampshire*. In *New York v. Ferber*, we noted that within these categories of unprotected speech, “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,” because “the balance of competing interests is clearly struck.” The Government derives its proposed test from these descriptions in our precedents.

But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor.

When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis. In *Ferber*, for example, we classified child pornography as such a category. We noted that the State of New York had a compelling interest in protecting children from abuse, and that the value of using children in these

works (as opposed to simulated conduct or adult actors) was *de minimis*. But our decision did not rest on this balance of competing interests alone. We made clear that *Ferber* presented a special case: The market for child pornography was “intrinsically related” to the underlying abuse, and was therefore an integral part of the production of such materials, an activity illegal throughout the Nation.” As we noted, “[i]t 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.” *Ferber* thus grounded its analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.

Our decisions in *Ferber* and other cases cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. But if so, there is no evidence that “depictions of animal cruelty” is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.

### III

Because we decline to carve out from the First Amendment any novel exception for § 48, we review Stevens’s First Amendment challenge under our existing doctrine.

#### A

Stevens challenged § 48 on its face, arguing that any conviction secured under the statute would be unconstitutional. To succeed in a typical facial attack [under constitutional doctrine generally], Stevens would have to establish that “no set of circumstances exists under which [§ 48] would be valid” or that the statute lacks any “plainly legitimate sweep.” Which standard applies in a typical case is a matter of dispute that we need not and do not address. 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.” 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. 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. 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.

## B

The 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. 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." "[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." The Government bases this argument on the [statutory] definiendum, "depiction of animal cruelty" and on "the commonsense canon of *noscitur a sociis*." As that canon recognizes, an ambiguous term may be "given more precise content by the neighboring words with which it is associated." Likewise, an unclear definitional phrase may take meaning from the term to be defined.

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. 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 animals. 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, 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.



In the District of Columbia, for example, all hunting is unlawful. Other jurisdictions permit or encourage hunting, and there is an enormous national market for hunting-related depictions in which a living animal is intentionally killed. Hunting periodicals have circulations in the hundreds of thousands or millions, and hunting television programs, videos, and Web sites are equally popular. The demand for hunting depictions exceeds the estimated demand for crush videos or animal fighting depictions by several orders of magnitude. Nonetheless, because the statute allows each jurisdiction to export its laws to the rest of the country, § 48(a) extends to *any* magazine or video depicting lawful hunting, so long as that depiction is sold within the Nation’s Capital.

Those seeking to comply with the law thus face a bewildering maze of regulations from at least 56 separate jurisdictions. [For example]: some States permit hunting with crossbows, while others forbid it or restrict it only to the disabled. Missouri allows the “canned” hunting of ungulates held in captivity, but Montana restricts such hunting to certain bird species. The sharp-tailed grouse may be hunted in Idaho, but not in Washington.

The disagreements among the States extend well beyond hunting. State agricultural regulations permit different methods of livestock slaughter in different places or as applied to different animals. California has recently banned cutting or “docking” the tails of dairy cattle, which other States permit. Even cockfighting, long considered immoral in much of America, is legal in Puerto Rico and was legal in Louisiana until 2008. An otherwise-lawful image of any of these practices, if sold or possessed for commercial gain within a State that happens to forbid the practice, falls within the prohibition of § 48(a).

## C

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. Thus, the Government argues, § 48 reaches only crush videos, depictions of animal fighting (other than Spanish bullfighting), and perhaps other depictions of “extreme acts of animal cruelty.”

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,” “at least some minimal value,” or anything more than “scant social value,” 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.” 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,” and the Government defended these instructions as properly relying on “a commonly accepted meaning of the word ‘serious.’”

Quite apart from the requirement of “serious” value in § 48(b), the excepted speech must also fall within one of the enumerated categories. Much speech does not. Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson. According to Safari Club International and the Congressional Sportsmen’s Foundation, many popular videos “have primarily entertainment value” and are designed to “entertain the viewer, market hunting equipment, or increase the hunting community.” The National Rifle Association agrees that “much of the content of hunting media . . . is merely *recreational* in nature.” The Government offers no principled explanation why these depictions of hunting or depictions of Spanish bullfights would be *inherently* valuable while those of Japanese dogfights are not. The dissent contends that hunting depictions must have serious value because hunting has serious value, in a way that dogfights presumably do not. But § 48(b) addresses the value of the *depictions*, not of the underlying activity. There is simply no adequate reading of the exceptions clause that results in the statute’s banning only the depictions the Government would like to ban.

The Government explains that the language of § 48(b) was largely drawn from our opinion in *Miller v. California*, which excepted from its definition of obscenity any material with “serious literary, artistic, political, or scientific value.” According to the Government, this incorporation of the *Miller* standard into § 48 is therefore surely enough to answer any First Amendment objection.

In *Miller*, we held that “serious” value shields depictions of sex from regulation as obscenity. Limiting *Miller*’s exception to “serious” value ensured that “[a] quotation from Voltaire in the flyleaf of a book [would] not constitutionally redeem an otherwise obscene publication.” We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place. *Most* of what we say to one another lacks “religious, political, scientific, educational, journalistic, historical, or artistic value” (let alone serious value), but it is still sheltered from government regulation. Even “wholly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.” *Cohen v. California*.

Thus, the protection of the First Amendment presumptively extends to many forms of speech that do not qualify for the serious-value exception of § 48(b), but nonetheless fall within the broad reach of § 48(c).

## D

Not to worry, the Government says: The Executive Branch construes § 48 to reach only “extreme” cruelty, and it “neither has brought nor will bring a prosecution for anything less.” The Government hits this theme hard, invoking its prosecutorial discretion several times. 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.

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.” 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 here rely upon the canon of construction that ambiguous statutory language should be construed to avoid serious constitutional doubts. “[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*. We will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish Congress’s incentive to draft a narrowly tailored law in the first place. To read § 48 as the Government desires requires rewriting, not just reinterpretation.

\* \* \*

Our construction of § 48 decides the constitutional question; the Government makes no effort to defend the constitutionality of § 48 as applied beyond crush videos and depictions of animal fighting. It argues that those particular depictions are intrinsically related to criminal conduct or are analogous to obscenity (if not themselves obscene), and that the ban on such speech is narrowly tailored to reinforce restrictions on the underlying conduct, prevent additional crime arising from the depictions, or safeguard public mores. But the Government nowhere attempts to extend these arguments to depictions of any other activities—depictions that are presumptively protected by the First Amendment but that remain subject to the criminal sanctions of § 48.

Nor does the Government seriously contest that the presumptively impermissible applications of § 48 (properly construed) far outnumber any permissible ones. However “growing” and “lucrative” the markets for crush videos and dogfighting depictions might be, they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of § 48. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that § 48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment.

The judgment of the United States Court of Appeals for the Third Circuit is affirmed.

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.

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.

## I

A party seeking to challenge the constitutionality of a statute generally must show that the statute violates the party's own rights. The First Amendment overbreadth doctrine carves out a narrow exception to that general rule. Because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others.

The “strong medicine” of overbreadth invalidation need not and generally should not be administered when the statute under attack is unconstitutional as applied to the challenger before the court. As we said in *Fox*, “[i]t is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.”

I see no reason to depart here from the generally preferred procedure of considering the question of overbreadth only as a last resort. Because the Court has addressed the overbreadth question, however, I will explain why I do not think that the record supports the conclusion that § 48, when properly interpreted, is overly broad.

## II

The overbreadth doctrine strikes a balance between competing social costs. Specifically, the doctrine seeks to balance the harmful effects of invalidating a law that in some of its applications is perfectly constitutional against the possibility that the threat of enforcement of an overbroad law will deter people from engaging in constitutionally protected speech. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.

In determining whether a statute's overbreadth is substantial, we consider a statute's application to real-world conduct, not fanciful hypotheticals. 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. 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.

## III

In holding that § 48 violates the overbreadth rule, the Court declines to decide whether, as the Government maintains, § 48 is constitutional as applied to two broad categories of depictions that exist in the real world: crush videos and depictions of deadly animal fights. Instead, the Court tacitly assumes for the sake of argument that § 48 is valid as applied to these depictions, but the Court concludes that § 48 reaches too much protected speech to survive. The Court relies primarily on depictions of hunters killing or wounding game and depictions of animals being slaughtered for food. I address the Court's examples below.

## A

I turn first to depictions of hunting. As the Court notes, photographs and videos of hunters shooting game are common. But hunting is legal in all 50 States, and § 48 applies only to a depiction of conduct that is illegal in the jurisdiction in which the depiction is created, sold, or possessed. Therefore, in all 50 States, the creation, sale, or possession for sale of the vast majority of hunting depictions indisputably falls outside § 48's reach.

Straining to find overbreadth, the Court suggests that § 48 prohibits the sale or possession in the District of Columbia of any depiction of hunting because the District—undoubtedly because of its urban character—does not permit hunting within its boundaries. The Court also suggests that, because some States prohibit a particular type of hunting (*e.g.*, hunting with a crossbow or “canned” hunting) or the hunting of a particular animal (*e.g.*, the “sharp-tailed grouse”), § 48 makes it illegal for persons in such States to sell or possess for sale a depiction of hunting that was perfectly legal in the State in which the hunting took place.

The Court's interpretation is seriously flawed. “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.” 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. 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”<sup>1</sup>) 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, Presidents have regularly issued proclamations extolling the values served by hunting. 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. And if hunting itself is widely thought to serve these values, then it takes but a small additional step to conclude that depictions of hunting make a non-trivial contribution to the exchange of ideas. Accordingly, I would hold that hunting depictions fall comfortably within the exception set out in § 48(b).

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<sup>1</sup> Webster's Third New International Dictionary 2073 (1976); Random House Dictionary of the English Language 1303 (1966). While the term “serious” may also mean “weighty” or “important,” we should adopt the former definition if necessary to avoid unconstitutionality.

I do not have the slightest doubt that Congress, in enacting § 48, had no intention of restricting the creation, sale, or possession of depictions of hunting. Proponents of the law made this point clearly. See H.R. Rep. No. 106–397, p. 8 (1999) (“[D]epictions of ordinary hunting and fishing activities do not fall within the scope of the statute”); 145 Cong. Rec. 25894 (Oct. 19, 1999) (Rep. McCollum) (“[T]he sale of depictions of legal activities, such as hunting and fishing, would not be illegal under this bill”); (Rep. Smith) (“[L]et us be clear as to what this legislation will not do. It will in no way prohibit hunting, fishing, or wildlife videos”). Indeed, even *opponents* acknowledged that § 48 was not intended to reach ordinary hunting depictions.

For these reasons, I am convinced that § 48 has no application to depictions of hunting. But even if § 48 did impermissibly reach the sale or possession of depictions of hunting in a few unusual situations (for example, the sale in Oregon of a depiction of hunting with a crossbow in Virginia or the sale in Washington State of the hunting of a sharp-tailed grouse in Idaho), those isolated applications would hardly show that § 48 bans a substantial amount of protected speech.

## B

In sum, we have a duty to interpret § 48 so as to avoid serious constitutional concerns, and § 48 may reasonably be construed not to reach almost all, if not all, of the depictions that the Court finds constitutionally protected. Thus, § 48 does not appear to have a large number of unconstitutional applications. Invalidation for overbreadth is appropriate only if the challenged statute suffers from *substantial* overbreadth—judged not just in absolute terms, but in relation to the statute’s “plainly legitimate sweep.”

§ 48 may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. [Justice Alito’s lengthy discussion of why these two categories of expression may legitimately be prohibited is omitted because the majority apparently agrees, at least *arguendo* for purposes of this case, that these two categories could legitimately be prohibited under a more narrowly-drawn statute.] Thus, the statute has a substantial core of constitutionally permissible applications. Moreover, for the reasons set forth above, the record does not show that § 48, properly interpreted, bans a substantial amount of protected speech in absolute terms. *A fortiori*, respondent has not met his burden of demonstrating that any impermissible applications of the statute are “substantial” in relation to its “plainly legitimate sweep.” Accordingly, I would reject respondent’s claim that § 48 is facially unconstitutional under the overbreadth doctrine.

For these reasons, I respectfully dissent.

## D. The Public Forum Doctrine

The Supreme Court has held that the test applicable to government restrictions upon speech differs depending upon the nature of the forum where the speech occurs. This is known as the “public forum doctrine” and is discussed in *Perry* below.

103 S. Ct. 948.

Supreme Court of the United States.

PERRY EDUCATION ASSN., Appellant  
v.  
PERRY LOCAL EDUCATORS’ ASSN., et al.

No. 81–896.

Argued Oct. 13, 1982.  
Decided Feb. 23, 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.

### I

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 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.

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.” 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. While a representation contest is in progress, unions must be afforded equal access to such communication facilities.

PLEA and two of its members filed this action under 42 U.S.C. § 1983 (1976) against PEA and individual members of the Perry Township School Board. Plaintiffs contended that PEA’s preferential access to the internal mail system violates the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. They sought injunctive and declaratory relief and damages. Upon cross-motions for summary judgment, the district court entered judgment for the defendants.

The Court of Appeals for the Seventh Circuit reversed. The court held that once the school district “opens its internal mail system to PEA but denies it to PLEA, it violates both the Equal Protection Clause and the First Amendment.” It acknowledged that PEA had “legal duties to the teachers that PLEA does not have” but reasoned that “without an independent reason why equal access for other labor groups and individual teachers is undesirable, the special duties of the incumbent do not justify opening the system to the incumbent alone.”

## [II]

The primary question presented is whether the First Amendment, applicable to the states by virtue of the Fourteenth Amendment, is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to certain means of communication, while such access is denied to a rival union. There is no question that constitutional interests are implicated by denying PLEA use of the interschool mail system. “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). The First Amendment’s guarantee of free speech applies to teachers’ mailboxes as surely as it does elsewhere within the school and on sidewalks outside. But this is not to say that the First



Amendment requires equivalent access to all parts of a school building in which some form of communicative activity occurs. Nowhere have we suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for unlimited expressive purposes. The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.

## A

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. 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. 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.

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. *See, e.g., Widmar v. Vincent* (university meeting facilities); *City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n* (school board meeting); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theater).<sup>7</sup> 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.

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. 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. 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.

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:

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<sup>7</sup> A public forum may be created for a limited purpose such as use by certain groups, *e.g., Widmar v. Vincent* (student groups), or for the discussion of certain subjects, *e.g., City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n* (school board business).

“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.” 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.” 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*, 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*, 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. 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.

## B

The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the district's legitimate interest in preserving the property for the use to which it is lawfully dedicated. *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." 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.

The Court of Appeals accorded little or no weight to PEA's special responsibilities. In its view these responsibilities, while justifying PEA's access, did not justify denying equal access to PLEA. The Court of Appeals would have been correct if a public forum were involved here. But the internal mail system is not a public forum. As we have already stressed, when 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.<sup>13</sup>

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<sup>13</sup> The Court of Appeals was also mistaken in finding that the exclusive access policy was not closely tailored to the official responsibilities of PEA. The Court of Appeals thought the policy overinclusive because the collective bargaining agreement does not limit PEA's use of the mail system to messages related to its special legal duties. The record, however, does not establish that PEA enjoyed or claimed unlimited access by usage or otherwise; indeed, the collective bargaining agreement indicates that the right of access was accorded to PEA "acting as the representative of the teachers . . . ."

Finally, the reasonableness of the limitations on PLEA's access to the school mail system is also supported by the substantial alternative channels that remain open for union-teacher communication to take place. These means range from bulletin boards to meeting facilities to the United States mail. During election periods, PLEA is assured of equal access to all modes of communication. There is no showing here that PLEA's ability to communicate with teachers is seriously impinged by the restricted access to the internal mail system. The variety and type of alternative modes of access present here compare favorably with those in other non-public forum cases where we have upheld restrictions on access. See, e.g. *Greer v. Spock* (servicemen free to attend political rallies off-base); *Pell v. Procunier* (prison inmates may communicate with media by mail and through visitors).

### [III]

The Court of Appeals invalidated the limited privileges PEA negotiated as the bargaining voice of the Perry Township teachers by misapplying our cases that have dealt with the rights of free expression on streets, parks and other fora generally open for assembly and debate. Virtually every other court to consider this type of exclusive access policy has upheld it as constitutional, and today, so do we. The judgment of the Court of Appeals is reversed.

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

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.

### I

The Court properly acknowledges that teachers have protected First Amendment rights within the school context. See *Tinker v. Des Moines School District*. In particular, we have held that teachers may not 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. . . ." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). We also have recognized in the school context the First Amendment right of "individuals to associate to further their personal beliefs" and have acknowledged the First Amendment rights of dissident teachers in matters involving labor relations. Against this background it is clear that the exclusive access policy in this case implicated the respondents' First Amendment rights by restricting their freedom of expression on issues important to the operation of the school system.

From this point of departure, the Court veers sharply off course. Based on a finding that the interschool mail system is not a "public forum," the Court states that the respondents have no right of access to the system, and that the school board is free "to make distinctions in access on the basis of subject matter and speaker identity" if the distinctions are "reasonable in light of the purpose which the forum at issue serves." According to the Court, the petitioner's status as the exclusive bargaining representative provides a reasonable basis for the exclusive access policy.

The Court fundamentally misperceives the essence of the respondents' claims and misunderstands the thrust of the Court of Appeals' well-reasoned opinion. This case does not involve an "absolute access" claim. It involves an "equal access" claim. As such it does not turn on whether the internal school mail system is a "public forum." In focusing on the public forum issue, the Court disregards the First Amendment's central proscription against censorship, in the form of viewpoint discrimination, in any forum, public or nonpublic.

## A

The First Amendment's prohibition against government discrimination among viewpoints on particular issues falling within the realm of protected speech has been noted extensively in the opinions of this Court. In *Niemotko v. Maryland*, two Jehovah's Witnesses were denied access to a public park to give Bible talks. Members of other religious organizations had been granted access to the park for purposes related to religion. The Court found that the denial of access was based on public officials' disagreement with the Jehovah's Witnesses' views. During the course of its opinion, the Court stated: "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." In a concurring opinion, Justice Frankfurter stated that "to allow expression of religious views by some and deny the same privilege to others merely because they or their views are unpopular, even deeply so, is a denial of equal protection of the law forbidden by the Fourteenth Amendment."

In *Tinker*, we held unconstitutional a decision by school officials to suspend students for wearing black armbands in protest of the war in Vietnam. The record disclosed that school officials had permitted students to wear other symbols relating to politically significant issues. The black armbands, however, as symbols of opposition to the Vietnam War, had been singled out for prohibition. We stated: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."

*City of Madison Joint School District* considered the question of whether a state may constitutionally require a board of education to prohibit teachers other than union representatives from speaking at public meetings about matters relating to pending collective bargaining negotiations. The board had been found guilty of a prohibited labor practice for permitting a teacher to speak who opposed one of the proposals advanced by the union in contract negotiations. The board was ordered to cease and desist from permitting employees, other than union representatives, to appear and to speak at board meetings on matters subject to collective bargaining. We held this order invalid. During the course of our opinion we stated: "Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech."<sup>2</sup>

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<sup>2</sup> See also *Widmar v. Vincent* (STEVENS, J., concurring in judgment) ("[T]he university . . . may not allow its agreement or disagreement with the viewpoint of a particular speaker to determine whether access to a forum will be granted. If a state university is to deny recognition to a student organization—or is to give it a lesser right to use school facilities than other student groups—it must have a valid reason for doing so").

There is another line of cases, closely related to those implicating the prohibition against viewpoint discrimination, that have addressed the First Amendment principle of subject matter, or content, neutrality. Generally, the concept of content neutrality prohibits the government from choosing the subjects that are appropriate for public discussion. The content neutrality cases frequently refer to the prohibition against viewpoint discrimination and both concepts have their roots in the First Amendment's bar against censorship. But unlike the viewpoint discrimination concept, which is used to strike down government restrictions on speech by particular speakers, the content neutrality principle is invoked when the government has imposed restrictions on speech related to an entire subject area. The content neutrality principle can be seen as an outgrowth of the core First Amendment prohibition against viewpoint discrimination.

Admittedly, this Court has not always required content neutrality in restrictions on access to government property. We upheld content-based exclusions in *Lehman v. City of Shaker Heights*, in *Greer v. Spock*, and in *Jones v. North Carolina Prisoners' Union*. All three cases involved an unusual forum, which was found to be nonpublic, and the speech was determined for a variety of reasons to be incompatible with the forum. These cases provide some support for the notion that the government is permitted to exclude certain subjects from discussion in nonpublic forums.<sup>3</sup> They provide no support, however, for the notion that government, once it has opened up government property for discussion of specific subjects, may discriminate among viewpoints on those topics. Although *Greer*, *Lehman*, and *Jones* permitted content-based restrictions, none of the cases involved viewpoint discrimination. All of the restrictions were viewpoint-neutral. We expressly noted in *Greer* that the exclusion was “objectively and evenhandedly applied.”

Once the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not. We have never held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may entirely exclude discussion of the subject from the forum. In this context, the greater power does not include the lesser because for First Amendment purposes exercise of the lesser power is more threatening to core values. Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of “free speech.”

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<sup>3</sup> There are several factors suggesting that these decisions are narrow and of limited importance. First, the forums involved were unusual. A military base was involved in *Greer*, advertising space on a city transit system in *Lehman*, and a prison in *Jones v. North Carolina Prisoners' Union*. Moreover, the speech involved was arguably incompatible with each forum, especially in *Greer*, which involved speeches and demonstrations of a partisan political nature on a military base, and in *Jones*, which involved labor union organizational activities in a prison.

## B

Against this background, it is clear that the Court's approach to this case is flawed. By focusing on whether the interschool mail system is a public forum, the Court disregards the independent First Amendment protection afforded by the prohibition against viewpoint discrimination. This case does not involve a claim of an absolute right of access to the forum to discuss any subject whatever. If it did, public forum analysis might be relevant. This case involves a claim of equal access to discuss a subject that the board has approved for discussion in the forum. In essence, the respondents are not asserting a right of access at all; they are asserting a right to be free from discrimination. The critical inquiry, therefore, is whether the board's grant of exclusive access to the petitioner amounts to prohibited viewpoint discrimination.

## II

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." 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."

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.

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 relations 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]." 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, 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.

[The dissent then applies strict scrutiny and finds that this policy fails strict scrutiny]

### **Notes and Questions:**

1. *Perry* identifies the different types of potential speech forums: traditional public forums, designated public forums, limited public forums, and non-public forums. Be sure that you can identify the characteristics of each and what test applies to each.
2. Did the *Perry* Court, as suggested by the dissent, give unduly short shrift to the issue of viewpoint discrimination? On the other hand, would the dissent's viewpoint discrimination approach create problems if applied to a case like *Perry*? *E.g.*, would it require not only that the school board give equal access to PLEA but also to any and every other group sharing PLEA's viewpoint (and opposing PEA's viewpoint)?



## E. Time, Place, and Manner Restrictions in Public Forums

104 S. Ct. 3065.

Supreme Court of the United States.

William P. CLARK, Secretary of the Interior, et al., Petitioners

v.

COMMUNITY FOR CREATIVE NON-VIOLENCE et al.

No. 82–1998.

Argued March 21, 1984.

Decided June 29, 1984.

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.

### I

The Interior Department, through the National Park Service, is charged with responsibility for the management and maintenance of the National Parks and is authorized to promulgate rules and regulations for the use of the parks in accordance with the purposes for which they were established. The network of National Parks includes Lafayette Park and the National Mall, which are set in the heart of Washington, D.C., and which are unique resources that the Federal Government holds in trust for the American people. Lafayette Park is a roughly 7-acre square located across Pennsylvania Avenue from the White House. Although originally part of the White House grounds, President Jefferson set it aside as a park for the use of residents and visitors. It is a garden park with a formal landscaping of flowers and trees, with fountains, walks and benches. The Mall is a stretch of land running westward from the Capitol to the Lincoln Memorial some two miles away. It includes the Washington Monument, a series of reflecting pools, trees, lawns, and other greenery. It is bordered by, inter alia, the Smithsonian Institution and the National Gallery of Art. Both the Park and the Mall were included in Major Pierre L'Enfant's original plan for the Capital. Both are visited by vast numbers of visitors from around the country, as well as by large numbers of residents of the Washington metropolitan area.

Under the regulations involved in this case, camping in National Parks is permitted only in campgrounds designated for that purpose. No such campgrounds have ever been designated in Lafayette Park or the Mall. Camping is defined as:

“the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or . . . other structure . . . for sleeping or doing any digging or earth breaking or carrying on cooking activities.”

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. Temporary structures may be erected for demonstration purposes but may not be used for camping.

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.

CCNV and several individuals then filed an action to prevent the application of the no-camping regulations to the proposed demonstration, which, it was claimed, was not covered by the regulation. It was also submitted that the regulations were unconstitutionally vague, had been discriminatorily applied, and could not be applied to prevent sleeping in the tents without violating the First Amendment. The District Court granted summary judgment in favor of the Park Service. The Court of Appeals, sitting en banc, reversed. We granted the Government’s petition for certiorari.

## II

We assume for present purposes, but do not decide, that overnight sleeping in connection with the demonstration is expressive conduct, cf. *United States v. O’Brien*, 391 U.S. 367 (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.

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. 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. 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.

It is urged by respondents, and the Court of Appeals was of this view, that if the symbolic city of tents was to be permitted and if the demonstrators did not intend to cook, dig, or engage in aspects of camping other than sleeping, the incremental benefit to the parks could not justify the ban on sleeping, which was here an expressive activity said to enhance the message concerning the plight of the poor and homeless. We cannot agree. In the first place, we seriously doubt that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people. Furthermore, although we have assumed for present purposes that the sleeping banned in this case would have an expressive element, it is evident that its major value to this demonstration would be facilitative. Without a permit to sleep, it would be difficult to get the poor and homeless to participate or to be present at all. This much is apparent from the permit application filed by respondents: "Without the incentive of sleeping space or a hot meal, the homeless would not come to the site." The sleeping ban, if enforced, would thus effectively limit the nature, extent, and duration of the demonstration and to that extent ease the pressure on the parks.

Beyond this, however, it is evident from our cases that the validity of this regulation need not be judged solely by reference to the demonstration at hand. Absent the prohibition on sleeping, there would be other groups who would demand permission to deliver an asserted message by camping in Lafayette Park. Some of them would surely have as credible a claim in this regard as does CCNV, and the denial of permits to still others would present difficult problems for the Park Service. With the prohibition, however, as is evident in the case before us, at least some around-the-clock demonstrations lasting for days on end will not materialize, others will be limited in size and duration, and the purposes of the regulation will thus be materially served. Perhaps these purposes would be more effectively and not so clumsily achieved by preventing tents and 24-hour vigils entirely in the core areas. But the Park Service's decision to permit nonsleeping demonstrations does not, in our view, impugn the camping prohibition as a valuable, but perhaps imperfect, protection to the parks. If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.

We have difficulty, therefore, in understanding why the prohibition against camping, with its ban on sleeping overnight, is not a reasonable time, place, or manner regulation that withstands constitutional scrutiny. Surely the regulation is not unconstitutional on its face. None of its provisions appears unrelated to the ends that it was designed to serve. Nor is it any less valid when applied to prevent camping in Memorial parks by those who wish to demonstrate and deliver a message to the public and the central Government. Damage to the parks as well as their partial inaccessibility to other members of the public can as easily result from camping by demonstrators as by non-demonstrators. In neither case must the Government tolerate it. All those who would resort to the parks must abide by otherwise valid rules for their use, just as they must observe the traffic laws, sanitation regulations, and laws to preserve the public peace. This is no more than a reaffirmation that reasonable time, place, or manner restrictions on expression are constitutionally acceptable.

Contrary to the conclusion of the Court of Appeals, the foregoing analysis demonstrates that the Park Service regulation is sustainable under the four-factor standard of *O'Brien* for validating a regulation of expressive conduct, which, in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.<sup>8</sup> No one contends that aside from its impact on speech a rule against camping or overnight sleeping in public parks is beyond the constitutional power of the Government to enforce. And for the reasons we have discussed above, there is a substantial Government interest in conserving park property, an interest that is plainly served by,

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<sup>8</sup> Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression. It would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech. Thus, if the time, place, or manner restriction on expressive sleeping, if that is what is involved in this case, sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served.

and requires for its implementation, measures such as the proscription of sleeping that are designed to limit the wear and tear on park properties. That interest is unrelated to suppression of expression.

We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands. There is no gainsaying that preventing overnight sleeping will avoid a measure of actual or threatened damage to Lafayette Park and the Mall. The Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage, whether by sleeping or otherwise, and these suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either *O'Brien* or our time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Accordingly, the judgment of the Court of Appeals is reversed.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

The Court's disposition of this case is marked by two related failings. First, the majority is either unwilling or unable to take seriously the First Amendment claims advanced by respondents. Contrary to the impression given by the majority, respondents are not supplicants seeking to wheedle an undeserved favor from the Government. They are citizens raising issues of profound public importance who have properly turned to the courts for the vindication of their constitutional rights. Second, the majority misapplies the test for ascertaining whether a restraint on speech qualifies as a reasonable time, place, and manner regulation. In determining what constitutes a sustainable regulation, the majority fails to subject the alleged interests of the Government to the degree of scrutiny required to ensure that expressive activity protected by the First Amendment remains free of unnecessary limitations.

## I

The proper starting point for analysis of this case is a recognition that the activity in which respondents seek to engage—sleeping in a highly public place, outside, in the winter for the purpose of protesting homelessness—is symbolic speech protected by the First Amendment. The majority assumes, without deciding, that the respondents' conduct is entitled to constitutional protection. The problem with this assumption is that the Court thereby avoids examining closely the reality of respondents' planned expression. The majority's approach denatures respondents' asserted right and thus makes all too easy identification of a Government interest sufficient to warrant its abridgment. A realistic appraisal of the competing interests at stake in this case requires a closer look at the nature of the expressive conduct at issue and the context in which that conduct would be displayed.

In late autumn of 1982, respondents sought permission to conduct a round-the-clock demonstration in Lafayette Park and on the Mall. Part of the demonstration would include homeless persons sleeping outside in tents without any other amenities. Respondents sought to begin their demonstration on a date full of ominous meaning to any homeless person: the first day of winter. Respondents were similarly purposeful in choosing demonstration sites. The Court portrays these sites—the Mall and Lafayette Park—in a peculiar fashion. Missing from the majority’s description is any inkling that Lafayette Park and the Mall have served as the sites for some of the most rousing political demonstrations in the Nation’s history. It is interesting to learn, I suppose, that Lafayette Park and the Mall were both part of Major Pierre L’Enfant’s original plan for the capital. Far more pertinent, however, is that these areas constitute, in the Government’s words, “a fitting and powerful forum for political expression and political protest.”

The primary purpose for making sleep an integral part of the demonstration was “to re-enact the central reality of homelessness,” and to impress upon public consciousness, in as dramatic a way as possible, that homelessness is a widespread problem, often ignored, that confronts its victims with life-threatening deprivations. As one of the homeless men seeking to demonstrate explained: “Sleeping in Lafayette Park or on the Mall, for me, is to show people that conditions are so poor for the homeless and poor in this city that we would actually sleep outside in the winter to get the point across.”

In a long line of cases, this Court has afforded First Amendment protection to expressive conduct that qualifies as symbolic speech. In light of the surrounding context, respondents’ proposed activity meets the qualifications. The Court has previously acknowledged the importance of context in determining whether an act can properly be denominated as “speech” for First Amendment purposes and has provided guidance concerning the way in which courts should “read” a context in making this determination. The leading case is *Spence v. Washington*, where this Court held that displaying a United States flag with a peace symbol attached to it was conduct protected by the First Amendment. The Court looked first to the intent of the speaker—whether there was an “intent to convey a particularized message”—and second to the perception of the audience—whether “the likelihood was great that the message would be understood by those who viewed it.” Here respondents clearly intended to protest the reality of homelessness by sleeping outdoors in the winter in the near vicinity of the magisterial residence of the President of the United States.

Nor can there be any doubt that in the surrounding circumstances the likelihood was great that the political significance of sleeping in the parks would be understood by those who viewed it. Certainly the news media understood the significance of respondents’ proposed activity; newspapers and magazines from around the Nation reported their previous sleep-in and their planned display. Ordinary citizens, too, would likely understand the political message intended by respondents. This likelihood stems from the remarkably apt fit between the activity in which respondents seek to engage and the social problem they seek to highlight. By using sleep as an integral part of their mode of protest, respondents can express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match.

It is true that we all go to sleep as part of our daily regimen and that, for the most part, sleep represents a physical necessity and not a vehicle for expression. But these characteristics need not prevent an activity that is normally devoid of expressive purpose from being used as a novel mode of communication. Sitting or standing in a library is a commonplace activity necessary to facilitate ends usually having nothing to do with making a statement. Moreover, sitting or standing is not conduct that an observer would normally construe as expressive conduct. However, for Negroes to stand or sit in a “whites only” library in Louisiana in 1965 was powerfully expressive; in that particular context, those acts became “monuments of protest” against segregation. *Brown v. Louisiana*.

## II

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.”<sup>6</sup> 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.” 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 majority’s attempted explanation begins with the curious statement that it seriously doubts that the First Amendment requires the Park Service to permit a demonstration in Lafayette Park and the Mall involving a 24-hour vigil and the erection of tents to accommodate 150 people. I cannot perceive why the Court should have “serious doubts” regarding this matter and it provides no explanation for its uncertainty. Furthermore, even if the majority’s doubts were well founded, I cannot see how such doubts relate to the problem at hand. The issue posed by this case is not whether the Government is constitutionally compelled to permit the erection of tents and the staging of a continuous 24-hour vigil; rather, the issue is whether any substantial Government interest is served by banning sleep that is part of a political demonstration.

What the Court may be suggesting is that if the tents and the 24-hour vigil are permitted, but not constitutionally required to be permitted, then respondents have no constitutional right to engage in expressive conduct that supplements these activities. Put in arithmetical terms, the Court appears to contend that if X is permitted by grace rather than by constitutional compulsion, X + 1 can be denied without regard to the requirements the Government must normally satisfy in order to restrain protected activity. This notion, however, represents a misguided conception of the First

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<sup>6</sup> I also agree with the majority that no substantial difference distinguishes the test applicable to time, place, and manner restrictions and the test articulated in *United States v. O’Brien*.

Amendment. The First Amendment requires the Government to justify every instance of abridgment. Moreover, the stringency of that requirement is not diminished simply because the activity the Government seeks to restrain is supplemental to other activity that the Government may have permitted out of grace but was not constitutionally compelled to allow. If the Government cannot adequately justify abridgment of protected expression, there is no reason why citizens should be prevented from exercising the first of the rights safeguarded by our Bill of Rights.

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." However, 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.

In short, there are no substantial Government interests advanced by the Government's regulations as applied to respondents. All that the Court's decision advances are the prerogatives of a bureaucracy that over the years has shown an implacable hostility toward citizens' exercise of First Amendment rights.

For the foregoing reasons, I respectfully dissent.



109 S. Ct. 2746.

Supreme Court of the United States.

Benjamin R. WARD, et al., Petitioners

v.

ROCK AGAINST RACISM.

No. 88–226.

Argued Feb. 27, 1989.

Decided June 22, 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.

## I

Rock Against Racism (“RAR”) is an unincorporated association which, in its own words, is “dedicated to the espousal and promotion of antiracist views.” Each year from 1979 through 1986, RAR has sponsored a program of speeches and rock music at the bandshell. RAR has furnished the sound equipment and sound technician used by the various performing groups at these annual events.

Over the years, the city received numerous complaints about excessive sound amplification at respondent’s concerts from park users and residents of areas adjacent to the park. On some occasions RAR was less than cooperative when city officials asked that the volume be reduced; at one concert, police felt compelled to cut off the power to the sound system, an action that caused the audience to become unruly and hostile.

Before the 1984 concert, city officials met with RAR representatives to discuss the problem of excessive noise. It was decided that the city would monitor sound levels at the edge of the concert ground, and would revoke respondent's event permit if specific volume limits were exceeded. Sound levels at the concert did exceed acceptable levels for sustained periods of time, despite repeated warnings and requests that the volume be lowered. Two citations for excessive volume were issued to respondent during the concert. When the power was eventually shut off, the audience became abusive and disruptive.

The following year, when respondent sought permission to hold its upcoming concert at the bandshell, the city declined to grant an event permit, citing its problems with noise and crowd control at RAR's previous concerts. The city suggested some other city-owned facilities as alternative sites for the concert. RAR declined the invitation and filed suit against the city, its mayor, and various police and parks department officials, seeking an injunction directing issuance of an event permit. After respondent agreed to abide by all applicable regulations, the parties reached agreement and a permit was issued.

The city then undertook to develop comprehensive New York City Parks Department Use Guidelines for the Naumberg Bandshell. A principal problem to be addressed by the guidelines was controlling the volume of amplified sound at bandshell events. A major concern was that at some bandshell performances the event sponsors had been unable to "provide the amplification levels required and crowds unhappy with the sound became disappointed or unruly." The city found that this problem had several causes, including inadequate sound equipment, sound technicians who were either unskilled at mixing sound outdoors or unfamiliar with the acoustics of the bandshell and its surroundings, and the like. Because some performers compensated for poor sound mix by raising volume, these factors tended to exacerbate the problem of excess noise.

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. 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. 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.

The Use Guidelines were promulgated on March 21, 1986. After learning that it would be expected to comply with the guidelines at its upcoming annual concert in May 1986, respondent returned to the District Court and filed a motion for an injunction against the enforcement of certain aspects of the guidelines. The District Court preliminarily enjoined enforcement of the sound-amplification rule. Under the protection of the injunction, and alone among users of the bandshell in the 1986 season, RAR was permitted to use its own sound equipment and technician, just as it

had done in prior years. RAR's 1986 concert again generated complaints about excessive noise from park users and nearby residents.

After the concert, respondent amended its complaint to seek damages and a declaratory judgment striking down the guidelines as facially invalid. After hearing five days of testimony about various aspects of the guidelines, the District Court issued its decision upholding the sound-amplification guideline. The court found that the city had been "motivated by a desire to obtain top-flight sound equipment and experienced operators" in selecting an independent contractor to provide the equipment and technician for bandshell events, and that the performers who did use the city's sound system in the 1986 season, in performances "which ran the full cultural gamut from grand opera to salsa to reggae," were uniformly pleased with the quality of the sound provided.

Although the city's sound technician controlled both sound volume and sound mix by virtue of his position at the mixing board, the court found that "[t]he City's practice for events at the Bandshell is to give the sponsor autonomy with respect to the sound mix: balancing treble with bass, highlighting a particular instrument or voice, and the like," and that the city's sound technician "does all he can to accommodate the sponsor's desires in those regards." Even with respect to volume control, the city's practice was to confer with the sponsor before making any decision to turn the volume down. In some instances, as with a New York Grand Opera performance, the sound technician accommodated the performers' unique needs by integrating special microphones with the city's equipment. The court specifically found that "[t]he City's implementation of the Bandshell guidelines provides for a sound amplification system capable of meeting RAR's technical needs and leaves control of the sound 'mix' in the hands of RAR." Applying this Court's three-part test for judging the constitutionality of government regulation of the time, place, or manner of protected speech, the court found the city's regulation valid.

The Court of Appeals reversed. After recognizing that "[c]ontent neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression," the court added the proviso that "the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." Applying this test, the court determined that the city's guideline was valid only to the extent necessary to achieve the city's legitimate interest in controlling excessive volume, but found there were various alternative means of controlling volume without also intruding on respondent's ability to control the sound mix. For example, the city could have directed respondent's sound technician to keep the volume below specified levels. Alternatively, a volume-limiting device could have been installed; and as a "last resort," the court suggested, "the plug can be pulled on the sound to enforce the volume limit." In view of the potential availability of these seemingly less restrictive alternatives, the Court of Appeals concluded that the sound-amplification guideline was invalid because the city had failed to prove that its regulation "was the least intrusive means of regulating the volume."

We granted certiorari to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech. Because the Court of Appeals erred in requiring the city to prove that its regulation was the least intrusive means of furthering its legitimate governmental interests, and because the ordinance is valid on its face, we now reverse.

## II

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. 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. In the case before us the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment. The parties do not appear to dispute that proposition.

We need not here discuss whether a municipality which owns a bandstand or stage facility may exercise, in some circumstances, a proprietary right to select performances and control their quality. Though it did demonstrate its own interest in the effort to insure high quality performances by providing the equipment in question, the city justifies its guideline as a regulatory measure to limit and control noise. 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. 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*. We consider these requirements in turn.

### A

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*. 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. 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* (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 has nothing to do with content and it satisfies the requirement that time, place, or manner regulations be content neutral.

The only other justification offered below was the city's interest in "ensuring the quality of sound at Bandshell events." Respondent urges that this justification is not content neutral because it is

based upon the quality, and thus the content, of the speech being regulated. In respondent's view, the city is seeking to assert artistic control over performers at the bandshell by enforcing a bureaucratically determined, value-laden conception of good sound. That all performers who have used the city's sound equipment have been completely satisfied is of no moment, respondent argues, because "[t]he First Amendment does not permit and cannot tolerate state control of artistic expression merely because the State claims that [its] efforts will lead to 'top-quality' results."

While respondent's arguments that the government may not interfere with artistic judgment may have much force in other contexts, they are inapplicable to the facts of this case. The city has disclaimed in express terms any interest in imposing its own view of appropriate sound mix on performers. To the contrary, as the District Court found, the city requires its sound technician to defer to the wishes of event sponsors concerning sound mix. On this record, the city's concern with sound quality extends only to the clearly content-neutral goals of ensuring adequate sound amplification and avoiding the volume problems associated with inadequate sound mix.<sup>4</sup> Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns, but this case provides us with no opportunity to address those questions. As related above, the District Court found that the city's equipment and its sound technician could meet all of the standards requested by the performers, including RAR.

Respondent argues further that the guideline, even if not content based in explicit terms, is nonetheless invalid on its face because it places unbridled discretion in the hands of city officials charged with enforcing it. According to respondent, there is nothing in the language of the guideline to prevent city officials from selecting wholly inadequate sound equipment or technicians, or even from varying the volume and quality of sound based on the message being conveyed by the performers.

Respondent's facial challenge fails on its merits. The city's guideline states that its goals are to "provide the best sound for all events" and to "insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of [the] Sheep Meadow." While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. By its own terms the city's sound-amplification guideline must be interpreted to forbid city officials purposely to select inadequate sound systems or to vary the sound quality or volume based on the message being delivered by performers. The guideline is not vulnerable to respondent's facial challenge.<sup>5</sup>

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<sup>4</sup> Volume control and sound mix are interrelated to a degree, in that performers unfamiliar with the acoustics of the bandshell sometimes attempt to compensate for poor sound mix by increasing volume. By providing adequate sound equipment and professional sound mixing, the city avoids this problem.

<sup>5</sup> The dissent's suggestion that the guideline constitutes a prior restraint is not consistent with our cases. As we said in *Southeastern Promotions, Ltd. v. Conrad*, the regulations we have found invalid as prior restraints have "had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." The sound-amplification guideline, by contrast, grants no authority to forbid speech, but merely permits the city to regulate volume to the extent necessary to avoid excessive noise. It is true that the city's sound technician theoretically possesses the power to shut off the volume for any particular

## B

The city's regulation is also narrowly tailored to serve a significant governmental interest. Despite respondent's protestations to the contrary, it can no longer be doubted that government has a substantial interest in protecting its citizens from unwelcome noise. This interest is perhaps at its greatest when government seeks to protect the well-being, tranquility, and privacy of the home, 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. *See Community for Creative Non-Violence* (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.

The Court of Appeals recognized the city's substantial interest in limiting the sound emanating from the bandshell. 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." (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. 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.

The Court of Appeals apparently drew its least-intrusive-means requirement from *United States v. O'Brien*, the case in which we established the standard for judging the validity of restrictions on expressive conduct. [Note: *O'Brien* is presented in this course packet in the unit on expressive conduct]. 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*.

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performer, but that hardly distinguishes this regulatory scheme from any other; government will *always* possess the raw power to suppress speech through force, and indeed it was in part to avoid the necessity of exercising its power to "pull the plug" on the volume that the city adopted the sound-amplification guideline. The relevant question is whether the challenged regulation *authorizes* suppression of speech in advance of its expression, and the sound-amplification guideline does not.

Indeed, in *Community for Creative Non-Violence*, we squarely rejected reasoning identical to that of the court below:

“We are unmoved by the Court of Appeals’ view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands. . . . We do not believe . . . that either *United States v. O’Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the [parks department] as the manager of the [city’s] parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.”

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. 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. 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.

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. 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.”

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." 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." 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, and thus it satisfies the requirement of narrow tailoring.

### C

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. 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.

### III

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 as a reasonable regulation of the place and manner of expression. The judgment of the Court of Appeals is reversed.

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

The majority's conclusion that the city's exclusive control of sound equipment is constitutional is deeply troubling. It places the Court's *imprimatur* on a quintessential prior restraint, incompatible with fundamental First Amendment values. See *Near v. Minnesota*. Indeed, just as "[m]usic is one of the oldest forms of human expression," the city's regulation is one of the oldest forms of speech repression. In 16th- and 17th-century England, government controlled speech through its monopoly on printing presses. Here, the city controls the volume and mix of sound through its monopoly on sound equipment. In both situations, government's exclusive control of the means of communication enables public officials to censor speech in advance of its expression. Under more familiar prior restraints, government officials censored speech by a simple stroke of the pen. Here, it is done by a single turn of a knob.



The majority's implication that government control of sound equipment is not a prior restraint because city officials do not "enjoy unguided discretion to deny the right to speak altogether" is startling. In the majority's view, this case involves a question of "different and lesser" magnitude—the discretion to provide inadequate sound for performers. But whether the city denies a performer a bandshell permit or grants the permit and then silences or distorts the performer's music, the result is the same: the city censors speech.

As a system of prior restraint, the Guidelines are presumptively invalid. They may be constitutional only if accompanied by the procedural safeguards necessary to obviate the dangers of a censorship system. The city must establish neutral criteria embodied in "narrowly drawn, reasonable and definite standards," in order to ensure that discretion is not exercised based on the content of speech. Moreover, there must be "an almost immediate judicial determination" that the restricted material was unprotected by the First Amendment.

The Guidelines contain neither of these procedural safeguards. First, there are no "narrowly drawn, reasonable and definite standards" guiding the hands of the city's sound technician as he mixes the sound. The Guidelines state that the goals are "to provide the best sound for all events" and to "insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone." But the city never defines "best sound" or "appropriate sound quality." The bandshell program director-manager testified that quality of sound refers to tone and to sound mix. Yet questions of tone and mix cannot be separated from musical expression as a whole. See *The New Grove Dictionary of Music and Musicians* (tonality involves relationship between pitches and harmony); F. Everest, *Successful Sound System Operation* ("The mixing console . . . must be considered as a creative tool"). Because judgments that sounds are too loud, noiselike, or discordant can mask disapproval of the music itself,<sup>7</sup> government control of the sound-mixing equipment necessitates detailed and neutral standards.

Second, even if there were narrowly drawn guidelines limiting the city's discretion, the Guidelines would be fundamentally flawed. For the requirement that there be detailed standards is of value only so far as there is a judicial mechanism to enforce them. Here, that necessary safeguard is absent. The city's sound technician consults with the performers for several minutes before the performance and then decides how to present each song or piece of music. During the performance itself, the technician makes hundreds of decisions affecting the mix and volume of sound. The music is played immediately after each decision. There is, of course, no time for appeal in the middle of a song. As a result, no court ever determines that a particular restraint on speech is necessary. With neither prompt judicial review nor detailed and neutral standards fettering the city's discretion to restrict protected speech, the Guidelines constitute a quintessential, and unconstitutional, prior restraint.

Today's decision has significance far beyond the world of rock music. Government no longer need balance the effectiveness of regulation with the burdens on free speech. After today, government

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<sup>7</sup> "New music always sounds loud to old ears. Beethoven seemed to make more noise than Mozart; Liszt was noisier than Beethoven; Schoenberg and Stravinsky, noisier than any of their predecessors." N. Slonimsky, *Lexicon of Musical Invective*.

need only assert that it is most effective to control speech in advance of its expression. Because such a result eviscerates the First Amendment, I dissent.

134 S. Ct. 2518.

Supreme Court of the United States.

Eleanor McCULLEN, et al., Petitioners

v.

Martha COAKLEY, Attorney General of Massachusetts, et al.

No. 12–1168.

Argued Jan. 15, 2014.

Decided June 26, 2014.

Chief Justice ROBERTS delivered the opinion of the Court.

A Massachusetts statute makes it a crime to knowingly stand on a “public way or sidewalk” within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Petitioners are individuals who approach and talk to women outside such facilities, attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities’ entrances. The question presented is whether the statute violates the First Amendment.

I

A

In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act. The law was designed to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed. The Act established a defined area with an 18-foot radius around the entrances and driveways of such facilities. Anyone could enter that area, but once within it, no one (other than certain exempt individuals) could knowingly approach within six feet of another person—unless that person consented—“for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.” A separate provision subjected to criminal punishment anyone who “knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.”

The statute was modeled on a similar Colorado law that this Court had upheld in *Hill v. Colorado* (2000). Relying on *Hill*, the United States Court of Appeals for the First Circuit sustained the Massachusetts statute against a First Amendment challenge.

By 2007, some Massachusetts legislators and law enforcement officials had come to regard the 2000 statute as inadequate. At legislative hearings, multiple witnesses recounted apparent violations of the law. Massachusetts Attorney General Martha Coakley, for example, testified that protestors violated the statute “on a routine basis.” To illustrate this claim, she played a video depicting protestors approaching patients and clinic staff within the buffer zones, ostensibly without the latter individuals’ consent. Clinic employees and volunteers also testified that protestors congregated near the doors and in the driveways of the clinics, with the result that prospective patients occasionally retreated from the clinics rather than try to make their way to the clinic entrances or parking lots.

Captain William B. Evans of the Boston Police Department, however, testified that his officers had made “no more than five or so arrests” at the Planned Parenthood clinic in Boston and that what few prosecutions had been brought were unsuccessful. Witnesses attributed the dearth of enforcement to the difficulty of policing the six-foot no-approach zones. Captain Evans testified that the 18-foot zones were so crowded with protestors that they resembled “a goalie’s crease,” making it hard to determine whether a protestor had deliberately approached a patient or, if so, whether the patient had consented. For similar reasons, Attorney General Coakley concluded that the six-foot no-approach zones were “unenforceable.” What the police needed, she said, was a fixed buffer zone around clinics that protestors could not enter. Captain Evans agreed, explaining that such a zone would “make our job so much easier.”

To address these concerns, the Massachusetts Legislature amended the statute in 2007, replacing the six-foot no-approach zones (within the 18-foot area) with a 35-foot fixed buffer zone from which individuals are categorically excluded. The statute now provides:

“No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway.”

A “reproductive health care facility,” in turn, is defined as “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.”

The 35-foot buffer zone applies only “during a facility’s business hours,” and the area must be “clearly marked and posted.” In practice, facilities typically mark the zones with painted arcs and posted signs on adjacent sidewalks and streets. A first violation of the statute is punishable by a fine of up to \$500, up to three months in prison, or both, while a subsequent offense is punishable by a fine of between \$500 and \$5,000, up to two and a half years in prison, or both.

The Act exempts four classes of individuals: (1) “persons entering or leaving such facility”; (2) “employees or agents of such facility acting within the scope of their employment”; (3) “law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment”; and (4) “persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other

than such facility.” The legislature also retained the separate provision from the 2000 version that proscribes the knowing obstruction of access to a facility.

## B

Some of the individuals who stand outside Massachusetts abortion clinics are fairly described as protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation. Petitioners take a different tack. They attempt to engage women approaching the clinics in what they call “sidewalk counseling,” which involves offering information about alternatives to abortion and help pursuing those options. Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: “Good morning, may I give you my literature? Is there anything I can do for you? I’m available if you have any questions.” If the woman seems receptive, McCullen will provide additional information. McCullen and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which in petitioners’ view tend only to antagonize their intended audience. In unrefuted testimony, petitioners say they have collectively persuaded hundreds of women to forgo abortions.

The buffer zones have displaced petitioners from their previous positions outside the clinics. McCullen offers counseling outside a Planned Parenthood clinic in Boston, as do petitioners Jean Zarrella and Eric Cadin. Petitioner Gregory Smith prays the rosary there. The clinic occupies its own building on a street corner. Its main door is recessed into an open foyer, approximately 12 feet back from the public sidewalk. Before the Act was amended to create the buffer zones, petitioners stood near the entryway to the foyer. Now a buffer zone—marked by a painted arc and a sign—surrounds the entrance. This zone extends 23 feet down the sidewalk in one direction, 26 feet in the other, and outward just one foot short of the curb. The clinic’s entrance adds another seven feet to the width of the zone. The upshot is that petitioners are effectively excluded from a 56-foot-wide expanse of the public sidewalk in front of the clinic.

Petitioners Mark Bashour and Nancy Clark offer counseling and information outside a Planned Parenthood clinic in Worcester. Unlike the Boston clinic, the Worcester clinic sits well back from the public street and sidewalks. Patients enter the clinic in one of two ways. Those arriving on foot turn off the public sidewalk and walk down a nearly 54-foot-long private walkway to the main entrance. More than 85% of patients, however, arrive by car, turning onto the clinic’s driveway from the street, parking in a private lot, and walking to the main entrance on a private walkway.

Bashour and Clark would like to stand where the private walkway or driveway intersects the sidewalk and offer leaflets to patients as they walk or drive by. But a painted arc extends from the private walkway 35 feet down the sidewalk in either direction and outward nearly to the curb on the opposite side of the street. Another arc surrounds the driveway’s entrance, covering more than 93 feet of the sidewalk (including the width of the driveway) and extending across the street and nearly six feet onto the sidewalk on the opposite side. Bashour and Clark must now stand either some distance down the sidewalk from the private walkway and driveway or across the street.

Petitioner Cyril Shea stands outside a Planned Parenthood clinic in Springfield, which, like the Worcester clinic, is set back from the public streets. Approximately 90% of patients arrive by car and park in the private lots surrounding the clinic. Shea used to position himself at an entrance to one of the five driveways leading to the parking lots. Painted arcs now surround the entrances, each spanning approximately 100 feet of the sidewalk parallel to the street (again, including the width of the driveways) and extending outward well into the street. Like petitioners at the Worcester clinic, Shea now stands far down the sidewalk from the driveway entrances.

Petitioners at all three clinics claim that the buffer zones have considerably hampered their counseling efforts. Although they have managed to conduct some counseling and to distribute some literature outside the buffer zones—particularly at the Boston clinic—they say they have had many fewer conversations and distributed many fewer leaflets since the zones went into effect.

The second statutory exemption allows clinic employees and agents acting within the scope of their employment to enter the buffer zones. Relying on this exemption, the Boston clinic uses “escorts” to greet women as they approach the clinic, accompanying them through the zones to the clinic entrance. Petitioners claim that the escorts sometimes thwart petitioners’ attempts to communicate with patients by blocking petitioners from handing literature to patients, telling patients not to “pay any attention” or “listen to” petitioners, and disparaging petitioners as “crazy.”

## C

[Petitioners] sought to enjoin enforcement of the Act, alleging that it violates the First and Fourteenth Amendments. The District Court denied petitioners’ facial challenge. The Court of Appeals for the First Circuit affirmed. Relying extensively on its previous decisions upholding the 2000 version of the Act, the court upheld the 2007 version as a reasonable “time, place, and manner” regulation.

## II

By its very terms, the Massachusetts Act regulates access to “public way[s]” and “sidewalk[s].” Such areas occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate. These places—which we have labeled “traditional public fora”—“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.” *Pleasant Grove City v. Summum* (quoting *Perry*).

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment’s purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, this aspect of traditional public fora is a virtue, not a vice.

In short, traditional public fora are areas that have historically been open to the public for speech activities. Thus, even though the Act says nothing about speech on its face, there is no doubt—and respondents do not dispute—that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny.

Consistent with the traditionally open character of public streets and sidewalks, we have held that the government’s ability to restrict speech in such locations is very limited. In particular, the guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum. As a general rule, in such a forum the government may not selectively shield the public from some kinds of speech on the ground that they are more offensive than others.

We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. “[E]ven 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*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence* (1984)).<sup>2</sup>

### III

Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest.

#### A

The Act applies only at a “reproductive health care facility,” defined as “a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.” Given this definition, petitioners argue, “virtually all speech affected by the Act is speech concerning abortion,” thus rendering the Act content based.

We disagree. To begin, the Act does not draw content-based distinctions on its face. The Act would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred. But it does not. Whether petitioners violate the Act depends not on what they say, but simply on where they say it. Indeed, petitioners

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<sup>2</sup> A different analysis would of course be required if the government property at issue were not a traditional public forum but instead “a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Pleasant Grove City v. Summum*.

can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the “inevitable effect” of restricting abortion-related speech more than speech on other subjects. But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, “[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.” *Ward, supra*, at 791. The question in such a case is whether the law is “justified without reference to the content of the regulated speech.”

The Massachusetts Act’s stated purpose is to “increase forthwith public safety at reproductive health care facilities.” Respondents have articulated similar purposes before this Court—namely, “public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways.” It is not the case that “[e]very objective indication shows that the provision’s primary purpose is to restrict speech that opposes abortion,” [as claimed by Justice Scalia’s concurrence].

We have previously deemed the foregoing concerns to be content neutral. Obstructed access and congested sidewalks are problems no matter what caused them. A group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients.

To be clear, the Act would not be content neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners’ reactions to speech. If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener’s reactions. Whether or not a single person reacts to abortion protestors’ chants or petitioners’ counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

Petitioners do not really dispute that the Commonwealth’s interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests apply outside every building in the State that hosts any activity that might occasion protest or comment, not just abortion clinics. By choosing to pursue these interests only at abortion clinics, petitioners argue, the Massachusetts Legislature evinced a purpose to “single[ ] out for regulation speech about one particular topic: abortion.”

We cannot infer such a purpose from the Act’s limited scope. States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist. The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with every building in the State that hosts any activity that might occasion protest or comment. In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution.

When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

Justice SCALIA objects that the statute does restrict more speech than necessary, because “only one [Massachusetts abortion clinic] is known to have been beset by the problems that the statute supposedly addresses.” But there are no grounds for inferring content-based discrimination here simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis. On these facts, the poor fit noted by Justice SCALIA goes to the question of narrow tailoring, which we consider below.

## B

Petitioners also argue that the Act is content based because it exempts four classes of individuals, one of which comprises “employees or agents of [a reproductive healthcare] facility acting within the scope of their employment.” This exemption, petitioners say, favors one side in the abortion debate and thus constitutes viewpoint discrimination—an “egregious form of content discrimination,” *Rosenberger v. Univ. of Virginia*. In particular, petitioners argue that the exemption allows clinic employees and agents—including the volunteers who “escort” patients arriving at the Boston clinic—to speak inside the buffer zones.

It is of course true that an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people. At least on the record before us, however, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance.

Given the need for an exemption for clinic employees, the “scope of their employment” qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. It performs the same function as the identical “scope of their employment” restriction on the exemption for “law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents.” The limitation instead makes clear—with respect to both clinic employees and municipal agents—that exempted individuals are allowed inside the zones only to perform those acts authorized by their employers. There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones. The “scope of their employment” limitation thus seems designed to protect against exactly the sort of conduct that petitioners and Justice SCALIA fear.

Petitioners did testify in this litigation about instances in which escorts at the Boston clinic had expressed views about abortion to the women they were accompanying, thwarted petitioners’ attempts to speak and hand literature to the women, and disparaged petitioners in various ways. It



is unclear from petitioners' testimony whether these alleged incidents occurred within the buffer zones. There is no viewpoint discrimination problem if the incidents occurred outside the zones because petitioners are equally free to say whatever they would like in that area.

Even assuming the incidents occurred inside the zones, the record does not suggest that they involved speech within the scope of the escorts' employment. If the speech was beyond the scope of their employment, then each of the alleged incidents would violate the Act's express terms. Petitioners' complaint would then be that the police were failing to *enforce* the Act equally against clinic escorts. While such allegations might state a claim of official viewpoint discrimination, that would not go to the validity of the Act. In any event, petitioners nowhere allege selective enforcement.

It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. In that case, the escorts would not seem to be violating the Act because the speech would be within the scope of their employment.<sup>3</sup> The Act's exemption for clinic employees would then facilitate speech on only one side of the abortion debate—a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. But the record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones.

We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.

#### IV

Even though the Act is content neutral, it still must be narrowly tailored to serve a significant governmental interest. The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency.

For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate interests. Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of serving the government's interests. But the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

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<sup>3</sup> Less than two weeks after the instant litigation was initiated, the Massachusetts Attorney General's Office issued a guidance letter clarifying the application of the four exemptions. The letter interpreted the exemptions as not permitting clinic employees or agents, municipal employees or agents, or individuals passing by clinics "to express their views about abortion or to engage in any other partisan speech within the buffer zone."

## A

As noted, respondents claim that the Act promotes public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways. Petitioners do not dispute the significance of these interests. We have, moreover, previously recognized the legitimacy of the government's interests in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services. The buffer zones clearly serve these interests.

At the same time, the buffer zones impose serious burdens on petitioners' speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways. The zones thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to "sidewalk counseling."

For example, in uncontradicted testimony, McCullen explained that she often cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. And even when she does manage to begin a discussion outside the zone, she must stop abruptly at its painted border, which she believes causes her to appear "untrustworthy" or "suspicious." Given these limitations, McCullen is often reduced to raising her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishes to convey. Clark gave similar testimony about her experience at the Worcester clinic.

These burdens on petitioners' speech have clearly taken their toll. Although McCullen claims that she has persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, she also says that she reaches "far fewer people" than she did before the amendment. Zarrella reports an even more precipitous decline in her success rate: She estimated having about 100 successful interactions over the years before the 2007 amendment, but not a single one since. And as for the Worcester clinic, Clark testified that "only one woman out of 100 will make the effort to walk across [the street] to speak with [her]."

The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. As explained, because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands—the most effective means of getting the patients to accept it. In Worcester and Springfield, the zones have pushed petitioners so far back from the clinics' driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots. In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients.

The Court of Appeals and respondents are wrong to downplay these burdens on petitioners' speech. As the Court of Appeals saw it, the Constitution does not accord "special protection" to close conversations or "handbilling." But while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others.

In the context of petition campaigns, we have observed that one-on-one communication is the most effective, fundamental, and perhaps economical avenue of political discourse. And “handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression; no form of speech is entitled to greater constitutional protection.” *McIntyre v. Ohio Elections Comm’n*. See also *Schenck* (“Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment”). When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden.<sup>5</sup>

Respondents also emphasize that the Act does not prevent petitioners from engaging in various forms of “protest”—such as chanting slogans and displaying signs—outside the buffer zones. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm. While the record indicates that petitioners have been able to have a number of quiet conversations outside the buffer zones, respondents have not refuted petitioners’ testimony that the conversations have been far less frequent and far less successful since the buffer zones were instituted. It is thus no answer to say that petitioners can still be seen and heard by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners’ message.

## B

### 1

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth’s asserted interests. At the outset, we note that the Act is truly exceptional: Respondents and their *amici* identify no other State with a law that creates fixed buffer zones around abortion clinics. That of course does not mean that the law is invalid. It does, however, raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage.

That is the case here. The Commonwealth’s interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, subsection (e)—unchallenged by petitioners—that prohibits much of this conduct. That provision subjects to

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<sup>5</sup> As a leading historian has noted:

“It was in this form—as pamphlets—that much of the most important and characteristic writing of the American Revolution appeared. For the Revolutionary generation, as for its predecessors back to the early sixteenth century, the pamphlet had peculiar virtues as a medium of communication. Then, as now, it was seen that the pamphlet allowed one to do things that were not possible in any other form.” B. Bailyn, *The Ideological Origins of the American Revolution*.

criminal punishment “any person who knowingly obstructs, detains, hinders, impedes or blocks another person’s entry to or exit from a reproductive health care facility.” If Massachusetts determines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), which subjects to both criminal and civil penalties anyone who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.” Some dozen other States have done so. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime “to follow and harass another person within 15 feet of the premises of a reproductive health care facility.”<sup>8</sup>

The Commonwealth also asserts an interest in preventing congestion in front of abortion clinics. According to respondents, even when individuals do not deliberately obstruct access to clinics, they can inadvertently do so simply by gathering in large numbers. But the Commonwealth could address that problem through more targeted means. Some localities, for example, have ordinances that require crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid the individuals to reassemble within a certain distance of the clinic for a certain period. We upheld a similar law forbidding three or more people to congregate within 500 feet of a foreign embassy, and refuse to disperse after having been ordered so to do by the police, an order the police could give only when they reasonably believed that a threat to the security or peace of the embassy was present.

And to the extent the Commonwealth argues that even these types of laws are ineffective, it has another problem. The portions of the record that respondents cite to support the anticongestion interest pertain mainly to one place at one time: the Boston Planned Parenthood clinic on Saturday mornings. Respondents point us to no evidence that individuals regularly gather at other clinics, or at other times in Boston, in sufficiently large groups to obstruct access. For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.

The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.

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<sup>8</sup> We do not give our approval to this or any of the other alternatives we discuss. We merely suggest that a law like the New York City ordinance could in principle constitute a permissible alternative. Whether such a law would pass constitutional muster would depend on a number of other factors, such as whether the term “harassment” had been authoritatively construed to avoid vagueness and overbreadth problems of the sort noted by Justice SCALIA.

Respondents have but one reply: “We have tried other approaches, but they do not work.” Respondents emphasize the history in Massachusetts of obstruction at abortion clinics, and the Commonwealth’s allegedly failed attempts to combat such obstruction with injunctions and individual prosecutions. They also point to the Commonwealth’s experience under the 2000 version of the Act, during which the police found it difficult to enforce the six-foot no-approach zones given the “frenetic” activity in front of clinic entrances. According to respondents, this history shows that Massachusetts has tried less restrictive alternatives to the buffer zones, to no avail.

We cannot accept that contention. Although respondents claim that Massachusetts “tried other laws already on the books,” they identify not a single prosecution brought under those laws within at least the last 17 years. And while they also claim that the Commonwealth “tried injunctions,” the last injunctions they cite date to the 1990s. In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective.

The supposed defect in the alternatives we have identified is that laws like subsection (e) of the Act and the federal FACE Act require a showing of intentional or deliberate obstruction, intimidation, or harassment, which is often difficult to prove. As Captain Evans predicted in his legislative testimony, fixed buffer zones would “make our job so much easier.”

Of course they would. But that is not enough to satisfy the First Amendment. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency. In any case, we do not think that showing intentional obstruction is nearly so difficult in this context as respondents suggest. To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional. Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked.<sup>9</sup>

Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

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<sup>9</sup> Because we find that the Act is not narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of communication. Nor need we consider petitioners’ overbreadth challenge.

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

*It is so ordered.*

Justice SCALIA, with whom Justice KENNEDY and Justice THOMAS join, concurring in the judgment.

Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. *See, e.g., Hill v. Colorado; Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

The second half of the Court's analysis today, invalidating the law at issue because of inadequate "tailoring," is certainly attractive to those of us who oppose an abortion-speech edition of the First Amendment. But think again. This is an opinion that has Something for Everyone, and the more significant portion continues the onward march of abortion-speech-only jurisprudence. That is the first half of the Court's analysis, which concludes that a statute of this sort is not content based and hence not subject to so-called strict scrutiny.

#### I. The Court's Content-Neutrality Discussion Is Unnecessary

The gratuitous portion of today's opinion is Part III, which concludes—in seven pages of the purest dicta—that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically directed at speech opposing (or even concerning) abortion and hence need not meet the strict-scrutiny standard applicable to content-based speech regulations. Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral "time, place, and manner" regulations, there is no principled reason for the majority to decide whether the statute is subject to strict scrutiny.

The Court points out that its opinion goes on to suggest (in Part IV) possible alternatives that apply only at abortion clinics, which therefore "raises the question whether those provisions are content neutral." Of course, the Court has no obligation to provide advice on alternative speech restrictions, and appending otherwise unnecessary constitutional pronouncements to such advice produces nothing but an impermissible advisory opinion.

By the way, there is dictum favorable to advocates of abortion rights even in Part IV. The Court invites Massachusetts, as a means of satisfying the tailoring requirement, to "consider an ordinance such as the one adopted in New York City that . . . makes it a crime to follow and harass another person within 15 feet of the premises of a reproductive health care facility." Is it harassment, one wonders, for Eleanor McCullen to ask a woman, quietly and politely, two times, whether she will take literature or whether she has any questions? Three times? Four times? It seems to me far from certain that First Amendment rights can be imperiled by threatening jail time (only at "reproductive health care facilities," of course) for so vague an offense as "follow[ing] and harass[ing]." It is wrong for the Court to give its approval to such legislation without benefit of briefing and argument.

## II. The Statute Is Content Based and Fails Strict Scrutiny

Having eagerly volunteered to take on the level-of-scrutiny question, the Court provides the wrong answer. Petitioners argue for two reasons that subsection (b) articulates a content-based speech restriction—and that we must therefore evaluate it through the lens of strict scrutiny.

### A. Application to Abortion Clinics Only

First, petitioners maintain that the Act targets abortion-related—for practical purposes, abortion-opposing—speech because it applies outside abortion clinics only (rather than outside other buildings as well).

Public streets and sidewalks are traditional forums for speech on matters of public concern. Therefore, as the Court acknowledges, they hold a “special position in terms of First Amendment protection.” Moreover, “the public spaces outside of [abortion-providing] facilities . . . ha[ve] become, by necessity and by virtue of this Court’s decisions, a forum of last resort for those who oppose abortion.” *Hill*, 530 U.S. at 763 (SCALIA, J., dissenting). It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content based. Would the Court exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma-to-Montgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not.

I begin, as suggested above, with the fact that the Act burdens only the public spaces outside abortion clinics. One might have expected the majority to defend the statute’s peculiar targeting by arguing that those locations regularly face the safety and access problems that it says the Act was designed to solve. But the majority does not make that argument because it would be untrue. As the Court belatedly discovers in Part IV of its opinion, although the statute applies to all abortion clinics in Massachusetts, only one is known to have been beset by the problems that the statute supposedly addresses. The Court uses this striking fact (a smoking gun, so to speak) as a basis for concluding that the law is insufficiently “tailored” to safety and access concerns (Part IV) rather than as a basis for concluding that it is not *directed* to those concerns at all, but to the suppression of antiabortion speech.

Whether the statute “restrict[s] more speech than necessary” in light of the problems that it allegedly addresses, is, to be sure, relevant to the tailoring component of the First Amendment analysis. But it is also relevant—powerfully relevant—to whether the law is really directed to safety and access concerns or rather to the suppression of a particular type of speech. Showing that a law that suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based. In its zeal to treat abortion-related speech as a special category, the majority distorts not only the First Amendment but also the ordinary logic of probative inferences.

Further contradicting the Court’s fanciful defense of the Act is the fact that subsection (b) was enacted as a more easily enforceable substitute for a prior provision. That provision did not exclude people entirely from the restricted areas around abortion clinics; rather, it forbade people in those areas to approach within six feet of another person *without that person’s consent* “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person.” As the majority acknowledges, that provision was “modeled on a . . . Colorado law that this Court had upheld in *Hill*.” And in that case, the Court recognized that the statute in question was directed at the suppression of unwelcome speech, vindicating what *Hill* called “[t]he unwilling listener’s interest in avoiding unwanted communication.” 530 U.S. at 716. The Court held that interest to be content neutral. [But] protecting people from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.

### B. Exemption for Abortion-Clinic Employees or Agents

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpoint-discriminatory restriction) for another reason as well: It exempts “employees or agents” of an abortion clinic “acting within the scope of their employment.”

It goes without saying that granting waivers to favored speakers (or denying them to disfavored speakers) would of course be unconstitutional. The majority opinion sets forth a two-part inquiry for assessing whether a regulation is content based, but when it comes to assessing the exemption for abortion-clinic employees or agents, the Court forgets its own teaching. Its opinion jumps right over the prong that asks whether the provision “draw[s] . . . distinctions on its face,” and instead proceeds directly to the purpose-related prong, asking whether the exemption “represent[s] a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people.” I disagree with the majority’s negative answer to that question, but that is beside the point if the text of the statute—whatever its purposes might have been—“license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.” *R.A.V. v. St. Paul* (1992).

Is there any serious doubt that *abortion-clinic employees or agents* “acting within the scope of their employment” near clinic entrances may—indeed, often will—speak in favor of abortion (“You are doing the right thing”)? Or speak in opposition to the message of abortion opponents—saying, for example, that “this is a safe facility” to rebut the statement that it is not?. The Court’s contrary assumption is simply incredible. Are we to believe that a clinic employee sent out to “escort” prospective clients into the building would not seek to prevent a counselor like Eleanor McCullen from communicating with them? He could pull a woman away from an approaching counselor, cover her ears, or make loud noises to drown out the counselor’s pleas.

The Court points out that the exemption may allow into the speech-free zones clinic employees other than escorts, such as “the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance.” I doubt that Massachusetts legislators had those people in mind, but whether they did is in any event irrelevant. Whatever other activity is permitted, so long as the statute permits speech favorable to abortion rights while excluding antiabortion speech, it discriminates on the basis of viewpoint.



There is not a shadow of a doubt that the assigned or foreseeable conduct of a clinic employee or agent can include both speaking in favor of abortion rights and countering the speech of people like petitioners. Indeed, as the majority acknowledges, the trial record includes testimony that escorts at the Boston clinic “expressed views about abortion to the women they were accompanying, thwarted petitioners’ attempts to speak and hand literature to the women, and disparaged petitioners in various ways,” including by calling them “crazy.” What a surprise! The Web site for the Planned Parenthood League of Massachusetts (which operates the three abortion facilities where petitioners attempt to counsel women), urges readers to “Become a Clinic Escort Volunteer” in order to “provide a safe space for patients by escorting them through protestors to the health center.” The dangers that the Web site attributes to “protestors” are related entirely to speech, not to safety or access. “Protestors,” it reports, “hold signs, try to speak to patients entering the building, and distribute literature that can be misleading.” The “safe space” provided by escorts is protection from that speech.

Going from bad to worse, the majority’s opinion contends that “the record before us contains insufficient evidence to show” that abortion-facility escorts have actually spoken in favor of abortion (or, presumably, hindered antiabortion speech) while acting within the scope of their employment. Here is a brave new First Amendment test: Speech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed. A city ordinance closing a park adjoining the Republican National Convention to all speakers except those whose remarks have been approved by the Republican National Committee is thus not subject to strict scrutiny unless it can be shown that someone has given committee-endorsed remarks. For this Court to suggest such a test is astonishing.

### C. Conclusion

In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation. That standard requires that a regulation represent “the least restrictive means” of furthering “a compelling Government interest.” Respondents do not even attempt to argue that subsection (b) survives this test. Suffice it to say that if protecting people from unwelcome communications—the actual purpose of the provision—is a compelling state interest, the First Amendment is a dead letter.

### III. Narrow Tailoring

Having determined that the Act is content based and does not withstand strict scrutiny, I need not pursue the inquiry conducted in Part IV of the Court’s opinion—whether the statute is “narrowly tailored to serve a significant governmental interest.” I suppose I *could* do so, taking as a given the Court’s erroneous content-neutrality conclusion in Part III; and if I did, I suspect I would agree with the majority that the legislation is not narrowly tailored to advance the interests asserted by respondents. But I prefer not to take part in the assembling of an apparent but specious unanimity. I leave both the plainly unnecessary and erroneous half and the arguably correct half of the Court’s analysis to the majority.

\* \* \*

The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to “protect” prospective clients of abortion clinics from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch and cannot be saved, as the majority suggests, by limiting its application to the single facility that has experienced the safety and access problems to which it is quite obviously not addressed. I concur only in the judgment that the statute is unconstitutional under the First Amendment.

## V. Expressive Conduct/Symbolic Speech

88 S. Ct. 1673.

Supreme Court of the United States.

UNITED STATES, Petitioner,

v.

David Paul O'BRIEN.

Nos. 232, 233.

Argued Jan. 24, 1968.

Decided May 27, 1968.

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.

[Picture removed]

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence

others to adopt his antiwar beliefs, as he put it, ‘so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.’

[The Universal Military Training and Service Act as amended in 1965 prohibited “forging, altering, knowingly destroying, knowingly mutilating, or in any manner changing” one’s draft registration certificates. O’Brien argued that this amendment to the Act was unconstitutional because it was enacted to abridge free speech and because it served no legitimate legislative purpose. The District Court rejected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court was not competent to inquire into the motives of Congress in amending the Act to prohibit the destruction of draft cards, and that the amendment was a reasonable exercise of the power of Congress to raise armies.]

We hold that the 1965 Amendment is constitutional both as enacted and as applied.

## I.

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board. He is assigned a Selective Service number, and within five days he is issued a registration certificate. Subsequently, and based on a questionnaire completed by the registrant, he is assigned a classification denoting his eligibility for induction, and ‘(a)s soon as practicable’ thereafter he is issued a Notice of Classification. This initial classification is not necessarily permanent, and if in the interim before induction the registrant’s status changes in some relevant way, he may be reclassified. After such a reclassification, the local board ‘as soon as practicable’ issues to the registrant a new Notice of Classification.

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant’s birth, his residence at registration, his physical description, his signature, and his Selective Service number. The Selective Service number itself indicates his State of registration, his local board, his year of birth, and his chronological position in the local board’s classification record.

The classification certificate shows the registrant’s name, Selective Service number, signature, and eligibility classification. It specifies whether he was so classified by his local board, an appeal board, or the President. It contains the address of his local board and the date the certificate was mailed.

Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant’s Selective Service number should appear on all communications to his local board.

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. The 1948 Act itself prohibited many different abuses involving ‘any registration certificate . . . or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder.’ Under the 1948 Act, it was unlawful (1) to transfer a certificate to aid a person in making false identification; (2) to possess a certificate not duly issued with the intent of using it for false identification; (3) to forge, alter, ‘or in any manner’ change a certificate or any notation validly inscribed thereon; (4) to photograph or make an imitation of a certificate for the purpose of false identification; and (5) to possess a counterfeited or altered certificate. In addition, as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all times. And the Act made knowing violation of any provision of the Act or rules and regulations promulgated pursuant thereto a felony.

By the 1965 Amendment, Congress added the provision here at issue, subjecting to criminal liability not only one who ‘forges, alters, or in any manner changes’ but also one who ‘knowingly destroys (or) knowingly mutilates’ a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O’Brien to argue otherwise. Amended section 12(b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers’ licenses, or a tax law prohibiting the destruction of books and records.

## II.

O’Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected ‘symbolic speech’ within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of ‘communication of ideas by conduct,’ and that his conduct is within this definition because he did it in ‘demonstration against the war and against the draft.’

We cannot accept 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. However, even on the assumption that the alleged communicative element in O’Brien’s conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. 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 the Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping and the power of Congress to classify and conscript manpower for military service is beyond question. 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. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all suspected delinquents. Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.
2. 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.
3. 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 willfully 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 willful 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 willfully 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. California*, 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.

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended s 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.

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.

109 S. Ct. 2533.

Supreme Court of the United States.

TEXAS, Petitioner

v.

Gregory Lee JOHNSON.

No. 88–155.

Argued March 21, 1989.

Decided June 21, 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.

## I

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.” After the demonstrators dispersed, 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).<sup>1</sup> After a trial, he was convicted, sentenced to one year in prison, and fined \$2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson’s conviction, but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

The Court of Criminal Appeals began by recognizing that Johnson’s conduct was symbolic speech protected by the First Amendment: “Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant’s act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly ‘speech’ contemplated by the First Amendment.” To justify Johnson’s conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag’s symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education v. Barnette* suggested that furthering this interest by curtailing speech was impermissible. “Recognizing that the right to differ is the centerpiece of our First Amendment freedoms,” the court explained, “a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent.” Noting that the State had not shown that the flag was in “grave and immediate danger,”

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<sup>1</sup> Texas Penal Code Ann. § 42.09 (1989) provides in full:

“§ 42.09. Desecration of Venerated Object

“(a) A person commits an offense if he intentionally or knowingly desecrates:

“(1) a public monument;

“(2) a place of worship or burial; or

“(3) a state or national flag.

“(b) For purposes of this section, ‘desecrate’ means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

“(c) An offense under this section is a Class A misdemeanor.”

*Barnette*, of being stripped of its symbolic value, the Texas court also decided that the flag’s special status was not endangered by Johnson’s conduct.

As to the State’s goal of preventing breaches of the peace, the court concluded that the flag-desecration statute was not drawn narrowly enough to encompass only those flag burnings that were likely to result in a serious disturbance of the peace. And in fact, the court emphasized, the flag burning in this particular case did not threaten such a reaction. “‘Serious offense’ occurred,” the court admitted, “but there was no breach of peace nor does the record reflect that the situation was potentially explosive. One cannot equate ‘serious offense’ with incitement to breach the peace.”

Because it reversed Johnson’s conviction on the ground that [the Texas statute] was unconstitutional as applied to him, the state court did not address Johnson’s argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted certiorari, and now affirm.

## II

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson’s burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State’s regulation is related to the suppression of free expression. See, *e.g.*, *United States v. O’Brien*. If the State’s regulation is not related to expression, then the less stringent standard we announced in *United States v. O’Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O’Brien*’s test, and we must ask whether this interest justifies Johnson’s conviction under a more demanding standard.<sup>3</sup> A third possibility is that the State’s asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture.

The First Amendment literally forbids the abridgment only of “speech,” but we have long recognized that its protection does not end at the spoken or written word. While we have rejected

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<sup>3</sup> Although Johnson has raised a facial challenge to Texas’ flag-desecration statute, we choose to resolve this case on the basis of his claim that the statute as applied to him violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one “knows” that one’s physical treatment of the flag “will seriously offend one or more persons likely to observe or discover his action,” Tex. Penal Code Ann. § 42.09(b) (1989), this fact does not necessarily mean that the statute applies only to expressive conduct protected by the First Amendment. *Cf. Smith v. Goguen* (WHITE, J., concurring in judgment) (statute prohibiting “contemptuous” treatment of flag encompasses only expressive conduct). A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; neither the language nor the Texas courts’ interpretations of the statute precludes the possibility that such a person would be prosecuted for flag desecration. Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, and because this case may be disposed of on narrower grounds, we address only Johnson’s claim that § 42.09 as applied to political expression like his violates the First Amendment.

“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*, we have acknowledged that conduct may be “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,” *Spence*, 94 S. Ct. at 2730.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it. Hence, we have recognized the expressive nature of students’ wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines School Dist.*; of a sit-in by blacks in a “whites only” area to protest segregation, *Brown v. Louisiana*; of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*; and of picketing about a wide variety of causes, see, e.g., *Food Employees v. Logan Valley Plaza, Inc.*

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag (*Spence*); refusing to salute the flag (*Barnette*); and displaying a red flag (*Stromberg v. California*), we have held, all may find shelter under the First Amendment. That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, the one visible manifestation of two hundred years of nationhood. Thus, we have observed:

“[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.” *Barnette, supra*.

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in “America.”

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence’s taping of a peace sign to his flag was “roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy.” The State of Washington had conceded, in fact, that Spence’s conduct was a form of communication.

The State of Texas conceded for purposes of its oral argument in this case that Johnson’s conduct was expressive conduct, and this concession seems to us as prudent as was Washington’s in *Spence*. Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its re-nomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: “The American Flag was burned as Ronald Reagan was being re-nominated as

President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time." In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," *Spence*, to implicate the First Amendment.

### III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien*. It may not, however, proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." *Community for Creative Non-Violence* (Scalia, J., dissenting) (emphasis in original). It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, 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," *O'Brien*, *supra*, 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. 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*, 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. 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.

### A

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration.<sup>4</sup> However, no disturbance of the peace actually occurred or threatened to occur

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<sup>4</sup> Relying on our decision in *Boos v. Barry*, Johnson argues that this state interest is related to the suppression of free expression within the meaning of *O'Brien*. He reasons that the violent reaction to flag burnings feared by Texas would be the result of the message conveyed by them, and that this fact connects the State's interest to the suppression of expression. Johnson's theory may overread *Boos* insofar as it suggests that a

because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, it admits that "no actual breach of the peace occurred at the time of the flag-burning or in response to the flag-burning." 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.

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*. 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* (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.

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*. To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace" and that every flag burning necessarily possesses that potential would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*. No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs.

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." *Brandenburg, supra*. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Tex. Penal Code Ann. § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace.

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desire to prevent a violent audience reaction is "related to expression" in the same way that a desire to prevent an audience from being offended is "related to expression." Because we find that the State's interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.

## B

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. 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.

## IV

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*, we are confronted with a case of prosecution for the expression of an idea through activity and accordingly, we must examine with particular care the interests advanced by petitioner to support its prosecution. 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.

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. 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.

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*, 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.'" 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," 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.

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."

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. 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. 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. We have not recognized an exception to this principle even where our flag has been involved. In *Street v. New York*, 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." Nor may the government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." *West Virginia v. Barnette*.

In holding in *Barnette* that the Constitution did not leave this course open to the government, 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." 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.

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. To bring its argument outside our precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. Both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.<sup>11</sup> If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol—as a substitute for the written or spoken word or a “short cut from mind to mind”—only in one direction. We would be permitting a State to “prescribe what shall be orthodox” by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. See *Brandenburg v. Ohio*. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to preserve the national flag as an unalloyed symbol of our country. We reject the suggestion, urged at oral argument by counsel for Johnson, that the government lacks “any state interest whatsoever” in regulating the manner in which the flag may be displayed. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, see 36 U.S.C. §§ 173–177, and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a

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<sup>11</sup> THE CHIEF JUSTICE's dissent appears to believe that Johnson's conduct may be prohibited and, indeed, criminally sanctioned, because “his act . . . conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways.” Not only does this assertion sit uneasily next to the dissent's quite correct reminder that the flag occupies a unique position in our society—which demonstrates that messages conveyed without use of the flag are not “just as forcefu[l]” as those conveyed with it—but it also ignores the fact that, in *Spence, supra*, we “rejected summarily” this very claim.



person for burning a flag as a means of political protest. “National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.” *Barnette*.

We are fortified in today’s conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson’s will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation’s attitude towards its flag. See *Abrams v. United States* (Holmes, J., dissenting). Indeed, Texas’ argument that the burning of an American flag “is an act having a high likelihood to cause a breach of the peace,” and its statute’s implicit assumption that physical mistreatment of the flag will lead to “serious offense” tend to confirm that the flag’s special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.

We are tempted to say, in fact, that the flag’s deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson’s is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation’s resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. “To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. 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.” *Whitney v. California* (Brandeis, J., concurring). And, precisely because it is our flag that is involved, one’s response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag burner’s message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

## V

Johnson was convicted for engaging in expressive conduct. The State’s interest in preventing breaches of the peace does not support his conviction because Johnson’s conduct did not threaten to disturb the peace. Nor does the State’s interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

*Affirmed.*

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.” 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. 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.

No other American symbol has been as universally honored as the flag. With the exception of Alaska and Wyoming, all of the States now have statutes prohibiting the burning of the flag. Most of the state statutes 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.”

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.

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson’s freedom of expression. Such freedom, of course, is not absolute. In *Chaplinsky v. New Hampshire*, a unanimous Court said:

“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 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.”

The Court upheld Chaplinsky's conviction under a state statute that made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place." Chaplinsky had told a local marshal, "You are a God damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U.S. power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute.

The Court could not, and did not, say that Chaplinsky's utterances were not expressive phrases—they clearly and succinctly conveyed an extremely low opinion of the addressee. The same may be said of Johnson's public burning of the flag in this case; it obviously did convey Johnson's bitter dislike of his country. But his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace.

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. Only five years ago we said in *City Council of Los Angeles v. Taxpayers for Vincent*, that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols" the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the

profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court concludes its opinion with a regrettably patronizing civics lecture: “The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.” The Court’s role as the final expositor of the Constitution is well established, but its role as a Platonic guardian admonishing those responsible to public opinion as if they were truant school-children has no similar place in our system of government. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court “is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (Marshall, C.J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. [Under the majority’s decision,] 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.

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. 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. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag, see *Street v. New York*—be employed.

The Court is [also] quite wrong in blandly asserting that respondent “was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.” Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray-paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.\*

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent

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\* The Court suggests that a prohibition against flag desecration is not content-neutral because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion the Court does not pause to consider the far-reaching consequences of its introduction of disparate-impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content-neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he makes clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.

## VI. Compelled Speech

63 S. Ct. 1178.

Supreme Court of the United States.

WEST VIRGINIA STATE BOARD OF EDUCATION et al.

v.

BARNETTE et al.

No. 591.

Argued March 11, 1943.

Decided June 14, 1943.

Justice JACKSON delivered the opinion of the Court.

The West Virginia legislature [adopted a statute requiring] all schools to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State ‘for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government.’ Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to ‘prescribe the courses of study covering these subjects’ for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study ‘similar to those required for the public schools.’

The Board of Education on January 9, 1942, adopted a resolution [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.’ Failure to conform is ‘insubordination’ dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is ‘unlawfully absent’ and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding \$50 and jail term not exceeding thirty days.

Appellees brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah’s Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: ‘Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them.’ They consider that the flag is an ‘image’ within this command. For this reason they refuse to salute it. Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The [plaintiffs assert] a right of self-determination in matters that touch individual opinion and personal attitude.

The State may 'require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country.' Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or

to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights, it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

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.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Lastly:



National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement. 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. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to embrace. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

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. We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

[The] judgment enjoining enforcement of the West Virginia Regulation is affirmed.

Justice FRANKFURTER, dissenting.

One who belongs to the most vilified and persecuted minority in history 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. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the 'liberty' secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that 'the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.' We have been told that generalities do not decide concrete cases. But the intensity with which a general principle is held may determine a particular issue, and whether we put first things first may decide a specific controversy.

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', he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the state to compel participation in this exercise by those who choose to attend the public schools.

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the state's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not

lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law.

138 S. Ct. 2361.

Supreme Court of the United States.

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, et al.,  
Petitioners

v.

Xavier BECERRA, Attorney General of California, et al.

No. 16–1140.

Argued March 20, 2018.

Decided June 26, 2018.

Justice THOMAS delivered the opinion of the Court.

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

I

A

The California State Legislature enacted the FACT Act to regulate crisis pregnancy centers. Crisis pregnancy centers—according to a report commissioned by the California State Assembly—are “pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center.” “[U]nfortunately,” the author of the FACT Act stated, “there are nearly 200 licensed and unlicensed” crisis pregnancy centers in California. These centers “aim to discourage and prevent women from seeking abortions.” The author of the FACT Act observed that crisis pregnancy centers “are commonly affiliated with, or run by organizations whose stated goal” is to oppose abortion—including “the National Institute of Family and Life Advocates,” one of the petitioners here. To address this perceived problem, the FACT Act imposes two notice requirements on facilities that provide pregnancy-related services—one for licensed facilities and one for unlicensed facilities.

1

The first notice requirement applies to “licensed covered facilit[ies].” To fall under the definition of “licensed covered facility,” a clinic must be a licensed primary care or specialty clinic or qualify as an intermittent clinic under California law. A licensed covered facility also must have the “primary purpose” of “providing family planning or pregnancy-related services.” And it must satisfy at least two of the following six requirements:

“(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

“(2) The facility provides, or offers counseling about, contraception or contraceptive methods.

“(3) The facility offers pregnancy testing or pregnancy diagnosis.

“(4) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

“(5) The facility offers abortion services.

“(6) The facility has staff or volunteers who collect health information from clients.”

The FACT Act exempts several categories of clinics that would otherwise qualify as licensed covered facilities. Clinics operated by the United States or a federal agency are excluded, as are clinics that are “enrolled as a Medi-Cal provider” and participate in “the Family Planning, Access, Care, and Treatment Program” (Family PACT program). To participate in the Family PACT program, a clinic must provide “the full scope of family planning . . . services specified for the program,” including sterilization and emergency contraceptive pills.

If a clinic is a licensed covered facility, the FACT Act requires it to disseminate a government-drafted notice on site. The notice states that “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].” This notice must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in. The notice must be in English and any additional languages identified by state law.

The stated purpose of the FACT Act, including its licensed notice requirement, is to “ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them.” The Legislature posited that “thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery.” Citing the “time sensitive” nature of pregnancy-related decisions, the Legislature concluded that requiring licensed facilities to inform patients themselves would be “[t]he most effective” way to convey this information.

The second notice requirement in the FACT Act applies to “unlicensed covered facilit[ies].” To fall under the definition of “unlicensed covered facility,” a facility must not be licensed by the State, not have a licensed medical provider on staff or under contract, and have the “primary

purpose” of “providing pregnancy-related services.” An unlicensed covered facility also must satisfy at least two of the following four requirements:

“(1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women.

“(2) The facility offers pregnancy testing or pregnancy diagnosis.

“(3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling.

“(4) The facility has staff or volunteers who collect health information from clients.”

Clinics operated by the United States and licensed primary care clinics enrolled in Medi-Cal and Family PACT are excluded.

Unlicensed covered facilities must provide a government-drafted notice stating that “[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.” This notice must be provided on site and in all advertising materials. Onsite, the notice must be posted “conspicuously” at the entrance of the facility and in at least one waiting area. It must be “at least 8.5 inches by 11 inches and written in no less than 48-point type.” In advertisements, the notice must be in the same size or larger font than the surrounding text, or otherwise set off in a way that draws attention to it. Like the licensed notice, the unlicensed notice must be in English and any additional languages specified by state law. Its stated purpose is to ensure “that pregnant women in California know when they are getting medical care from licensed professionals.”

## B

After the Governor of California signed the FACT Act, petitioners—a licensed pregnancy center, an unlicensed pregnancy center, and an organization composed of crisis pregnancy centers—filed this suit. Petitioners alleged that the licensed and unlicensed notices abridge the freedom of speech protected by the First Amendment. The District Court denied their motion for a preliminary injunction.

The Court of Appeals for the Ninth Circuit affirmed. The Ninth Circuit held that petitioners could not show a likelihood of success on the merits. It concluded that the licensed notice survives the “lower level of scrutiny” that applies to regulations of “professional speech.” And it concluded that the unlicensed notice satisfies any level of scrutiny.

We granted certiorari to review the Ninth Circuit’s decision. We reverse with respect to both notice requirements.

## II

We first address the licensed notice.<sup>2</sup>

### A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations of speech. Content-based regulations “target speech based on its communicative content.” As a general matter, such laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” This stringent standard reflects the fundamental principle that governments have “no power to restrict expression because of its message, its ideas, its subject matter, or its content.”

The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices alter the content of their speech. *Turner Broadcasting System, Inc. v. FCC*. Here, for example, licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing. By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly “alters the content” of petitioners’ speech.

### B

Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates “professional speech.” Some Courts of Appeals have recognized “professional speech” as a separate category of speech that is subject to different rules. These courts define “professionals” as individuals who provide personalized services to clients and who are subject to “a generally applicable licensing and regulatory regime.” “Professional speech” is then defined as any speech by these individuals that is based on “[their] expert knowledge and judgment,” or that is “within the confines of [the] professional relationship.” So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny.

But this Court has not recognized “professional speech” as a separate category of speech. Speech is not unprotected merely because it is uttered by “professionals.” This Court has been reluctant to mark off new categories of speech for diminished constitutional protection. And it has been especially reluctant to exempt a category of speech from the normal prohibition on content-based restrictions. This Court’s precedents do not permit governments to impose content-based

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<sup>2</sup> Petitioners raise serious concerns that both the licensed and unlicensed notices discriminate based on viewpoint. Because the notices are unconstitutional either way, as explained below, we need not reach that issue.



restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect.

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

1

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

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

2

In addition to disclosure requirements under *Zauderer*, this Court has upheld regulations of professional conduct that incidentally burden speech. “[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech,” and professionals are no exception to this rule. Longstanding torts for professional malpractice, for example, “fall within the traditional purview of state regulation of professional conduct.” While drawing the line between speech and conduct can be difficult, this Court’s precedents have long drawn it.

In *Planned Parenthood of Southeastern Pa. v. Casey*, for example, this Court upheld a law requiring physicians to obtain informed consent before they could perform an abortion. Pennsylvania law required physicians to inform their patients of “the nature of the procedure, the health risks of the abortion and childbirth, and the ‘probable gestational age of the unborn child.’” The law also required physicians to inform patients of the availability of printed materials from the State, which provided information about the child and various forms of assistance.

The joint opinion in *Casey* rejected a free-speech challenge to this informed-consent requirement. It described the Pennsylvania law as “a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion,” which “for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure.” The joint opinion explained that the law regulated speech only “as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State.” Indeed, the requirement that a doctor obtain informed consent to perform an operation is “firmly entrenched in American tort law.”

The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed. If a covered facility does provide medical procedures, the notice provides no information about the risks or benefits of those procedures. Tellingly, many facilities that provide the exact same services as covered facilities—such as general practice clinics—are not required to provide the licensed notice. The licensed notice regulates speech as speech.

3

Outside of the two contexts discussed above—disclosures under *Zauderer* and professional conduct—this Court’s precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, professional fundraisers, and organizations that provided specialized advice about international law, *see Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). And the Court emphasized that the lawyer’s statements in *Zauderer* would have been “fully protected” if they were made in a context other than advertising. Moreover, this Court has stressed the danger of content-based regulations “in the fields of medicine and public health, where information can save lives.”

The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals’ speech “pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.” *Turner Broadcasting*. Take medicine, for example: Doctors help patients make deeply personal decisions, and their candor is crucial. Throughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities:

“For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. Recently, Nicolae Ceausescu’s strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS.” Berg, *Toward a First*

*Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U.L. Rev. 201 (1994).

Further, when the government polices the content of professional speech, it can fail to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,” *Abrams v. United States* (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

“Professional speech” is also a difficult category to define with precision. As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others. One court of appeals has even applied it to fortune tellers. All that is required to make something a “profession,” according to these courts, is that it involves personalized services and requires a professional license from the State. But that gives the States unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose invidious discrimination of disfavored subjects.

## C

In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently [tailored] to achieve it.

If California’s goal is to educate low-income women about the services it provides, then the licensed notice is “wildly underinclusive.” The notice applies only to clinics that have a “primary purpose” of “providing family planning or pregnancy-related services” and that provide two of six categories of specific services. Other clinics that have another primary purpose, or that provide only one category of those services, also serve low-income women and could educate them about the State’s services. According to the legislative record, California has “nearly 1,000 community clinics”—including “federally designated community health centers, migrant health centers, rural health centers, and frontier health centers”—that “serv[e] more than 5.6 million patients . . . annually through over 17 million patient encounters.” But most of those clinics are excluded from the licensed notice requirement without explanation. Such underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.

The FACT Act also excludes, without explanation, federal clinics and Family PACT providers from the licensed-notice requirement. California notes that those clinics can enroll women in California’s programs themselves, but California’s stated interest is informing women that these services exist in the first place. California has identified no evidence that the exempted clinics are more likely to provide this information than the covered clinics. In fact, the exempted clinics have long been able to enroll women in California’s programs, but the FACT Act was premised on the notion that “thousands of women remain unaware of [them].” If the goal is to maximize women’s awareness of these programs, then it would seem that California would ensure that the places that can immediately enroll women also provide this information. The FACT Act’s exemption for these clinics, which serve many women who are pregnant or could become pregnant in the future, demonstrates the disconnect between its stated purpose and its actual scope. Yet precision must be the touchstone when it comes to regulations of speech, which so closely touch our most precious freedoms.”

Further, California could inform low-income women about its services “without burdening a speaker with unwanted speech.” Most obviously, it could inform the women itself with a public-information campaign. California could even post the information on public property near crisis pregnancy centers. California argues that it has already tried an advertising campaign, and that many women who are eligible for publicly-funded healthcare have not enrolled. But California has identified no evidence to that effect. And regardless, a “tepid response” does not prove that an advertising campaign is not a sufficient alternative. Here, for example, individuals might not have enrolled in California’s services because they do not want them, or because California spent insufficient resources on the advertising campaign. Either way, California cannot co-opt the licensed facilities to deliver its message for it. The First Amendment does not permit the State to sacrifice speech for efficiency.

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

### III

We next address the unlicensed notice. The parties dispute whether the unlicensed notice is subject to deferential review under *Zauderer*. We need not decide whether the *Zauderer* standard applies to the unlicensed notice. Even under *Zauderer*, a disclosure requirement cannot be unjustified or unduly burdensome. Our precedents require disclosures to remedy a harm that is potentially real not purely hypothetical, and to extend no broader than reasonably necessary. Otherwise, they risk chilling protected speech. Importantly, California has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome. It has not met its burden.

We need not decide what type of state interest is sufficient to sustain a disclosure requirement like the unlicensed notice. California has not demonstrated any justification for the unlicensed notice that is more than purely hypothetical. The only justification that the California Legislature put forward was ensuring that “pregnant women in California know when they are getting medical

care from licensed professionals.” At oral argument, however, California denied that the justification for the FACT Act was that women “go into [crisis pregnancy centers] and they don’t realize what they are.” Indeed, California points to nothing suggesting that pregnant women do not already know that the covered facilities are staffed by unlicensed medical professionals. The services that trigger the unlicensed notice—such as having “volunteers who collect health information from clients,” “advertizing pregnancy options counseling,” and offering over-the-counter “pregnancy testing,” § 123471(b)—do not require a medical license. And California already makes it a crime for individuals without a medical license to practice medicine. At this preliminary stage of the litigation, we agree that petitioners are likely to prevail on the question whether California has proved a justification for the unlicensed notice.

Even if California had presented a non-hypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech. The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California’s informational interest. It requires covered facilities to post California’s precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers. While the licensed notice applies to facilities that provide “family planning” services and “contraception or contraceptive methods,” the California Legislature dropped these triggering conditions for the unlicensed notice. The unlicensed notice applies only to facilities that primarily provide “pregnancy-related” services. Thus, a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed. This Court’s precedents are deeply skeptical of laws that “distinguish[h] among different speakers, allowing speech by some but not others.” *Citizens United v. Federal Election Comm’n*. Speaker-based laws run the risk that the State has left unburdened those speakers whose messages are in accord with its own views.

For all these reasons, the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies. California has offered no justification that the notice plausibly furthers. It targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech. Taking all these circumstances together, we conclude that the unlicensed notice is unjustified and unduly burdensome under *Zauderer*. We express no view on the legality of a similar disclosure requirement that is better supported or less burdensome.

#### IV

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

Justice KENNEDY, with whom THE CHIEF JUSTICE, Justice ALITO, and Justice GORSUCH join, concurring.

I join the Court’s opinion in all respects.

This separate writing seeks to underscore that the apparent viewpoint discrimination here is a matter of serious constitutional concern. The Court, in my view, is correct not to reach this question. It was not sufficiently developed, and the rationale for the Court’s decision today suffices to resolve the case. And had the Court’s analysis been confined to viewpoint discrimination, some legislators might have inferred that if the law were reenacted with a broader base and broader coverage it then would be upheld.

It does appear that viewpoint discrimination is inherent in the design and structure of this Act. This law is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression. For here the State requires primarily pro-life pregnancy centers to promote the State’s own preferred message advertising abortions. This compels individuals to contradict their most deeply held beliefs, beliefs grounded in basic philosophical, ethical, or religious precepts, or all of these. And the history of the Act’s passage and its under-inclusive application suggest a real possibility that these individuals were targeted because of their beliefs.

The California Legislature included in its official history the congratulatory statement that the Act was part of California’s legacy of “forward thinking.” But it is not forward thinking to force individuals to be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable. It is forward thinking to begin by reading the First Amendment as ratified in 1791; to understand the history of authoritarian government as the Founders then knew it; to confirm that history since then shows how relentless authoritarian regimes are in their attempts to stifle free speech; and to carry those lessons onward as we seek to preserve and teach the necessity of freedom of speech for the generations to come. Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.

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

The petitioners ask us to consider whether two sections of a California statute violate the First Amendment. The first section requires licensed medical facilities (that provide women with assistance involving pregnancy or family planning) to tell those women where they might obtain help, including financial help, with comprehensive family planning services, prenatal care, and abortion. The second requires *unlicensed* facilities offering somewhat similar services to make clear that they are unlicensed. In my view both statutory sections are likely constitutional, and I dissent from the Court’s contrary conclusions.

I

A

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

adds, “such notices alter the content of [their] speech.” “As a general matter,” the majority concludes, such laws are “presumptively unconstitutional” and are subject to “stringent” review.

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

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

Many ordinary disclosure laws would fall outside the majority’s exceptions for disclosures related to the professional’s own services or conduct. These include numerous commonly found disclosure requirements relating to the medical profession. See, *e.g.*, Cal. Veh. Code Ann. § 27363.5 (requiring hospitals to tell parents about child seat belts); Cal. Health & Safety Code Ann. § 123222.2 (requiring hospitals to ask incoming patients if they would like the facility to give their family information about patients’ rights and responsibilities); N.C. Gen. Stat. Ann. § 131E–79.2 (2017) (requiring hospitals to tell parents of newborns about pertussis disease and the available vaccine). These also include numerous disclosure requirements found in other areas. See, *e.g.*, N.Y.C. Rules & Regs., tit. 1, § 27–01 (requiring signs by elevators showing stair locations); San Francisco Dept. of Health, Director’s Rules & Regs., Garbage and Refuse (July 8, 2010) (requiring property owners to inform tenants about garbage disposal procedures).

The majority, at the end of Part II of its opinion, perhaps recognizing this problem, adds a general disclaimer. It says that it does not “question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.” But this generally phrased disclaimer would seem more likely to invite litigation than to provide needed limitation and clarification. The majority, for example, does not explain why the Act here, which is justified in part by health and safety considerations, does not fall within its “health” category. See also *Planned Parenthood of Southeastern Pa. v. Casey* (joint opinion of O’Connor, KENNEDY, and Souter, JJ.) (reasoning that disclosures related to fetal development and childbirth are related to the health of a woman seeking an abortion). Nor does the majority opinion offer any reasoned basis that might help apply its disclaimer for distinguishing lawful from unlawful disclosures. In the absence of a reasoned explanation of the disclaimer’s meaning and rationale, the disclaimer is unlikely to withdraw the invitation to litigation that the majority’s general broad “content-based” test issues. That test invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle.

Notably, the majority says nothing about limiting its language to the kind of instance where the Court has traditionally found the First Amendment wary of content-based laws, namely, in cases of viewpoint discrimination. “Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint.” *Reed* (ALITO, J., concurring). Accordingly, “[l]imiting speech based on its ‘topic’ or ‘subject’” can favor “those who do not want to disturb the status quo.” *Id.* But the mine run of disclosure requirements do nothing of that sort. They simply alert the public about child seat belt laws, the location of stairways, and the process to have their garbage collected, among other things.

Precedent does not require a test such as the majority’s. Rather, in saying the Act is not a longstanding health and safety law, the Court substitutes its own approach—without a defining standard—for an approach that was reasonably clear. Historically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution. Ever since this Court departed from the approach it set forth in *Lochner v. New York*, ordinary economic and social legislation has been thought to raise little constitutional concern. As Justice Brandeis wrote, typically this Court’s function in such cases “is only to determine the reasonableness of the Legislature’s belief in the existence of evils and in the effectiveness of the remedy provided.”

The Court has taken this same respectful approach to economic and social legislation when a First Amendment claim like the claim present here is at issue. See, e.g., *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio* (1985) (upholding reasonable disclosure requirements for attorneys); cf. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.* (1980) (applying intermediate scrutiny to other restrictions on commercial speech); *In re R.M. J.* (1982) (no First Amendment protection for misleading or deceptive commercial speech). *But see Sorrell v. IMS Health Inc.* (2011) (striking down regulation of pharmaceutical drug-related information).

Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession. The Court took the view that a State may condition the practice of medicine on any number of requirements, and physicians, in exchange for following those reasonable requirements, could receive a license to practice medicine from the State. Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions. In the name of the First Amendment, the majority today treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go.

The Court, in justification, refers to widely accepted First Amendment goals, such as the need to protect the Nation from laws that “suppress unpopular ideas or information” or inhibit the “marketplace of ideas in which truth will ultimately prevail.” I, too, value this role that the First Amendment plays—in an appropriate case. But here, the majority enunciates a general test that reaches far beyond the area where this Court has examined laws closely in the service of those goals. And, in suggesting that heightened scrutiny applies to much economic and social legislation, the majority pays those First Amendment goals a serious disservice through dilution. Using the First Amendment to strike down economic and social laws that legislatures long would have



thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.

## B

Still, what about this specific case? The disclosure at issue here concerns speech related to abortion. It involves health, differing moral values, and differing points of view. Thus, rather than set forth broad, new, First Amendment principles, I believe that we should focus more directly upon precedent more closely related to the case at hand. This Court has more than once considered disclosure laws relating to reproductive health. Though those rules or holdings have changed over time, they should govern our disposition of this case.

I begin with *Akron v. Akron Center for Reproductive Health, Inc.* In that case the Court considered a city ordinance requiring a doctor to tell a woman contemplating an abortion about the:

“status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth[, and] . . . the particular risks associated with her own pregnancy and the abortion technique to be employed.”

The ordinance further required a doctor to tell such a woman that “the unborn child is a human life from the moment of conception.”

The plaintiffs claimed that this ordinance violated a woman’s constitutional right to obtain an abortion. And this Court agreed. The Court stated that laws providing for a woman’s “informed consent” to an abortion were normally valid, for they helped to protect a woman’s health. Still, the Court held that the law at issue went “beyond permissible limits” because “much of the information required [was] designed not to inform the woman’s consent but rather to persuade her to withhold it altogether.” In the Court’s view, the city had placed unreasonable “obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.”

In *Planned Parenthood of Southeastern Pa. v. Casey*, the Court considered a state law that required doctors to provide information to a woman deciding whether to proceed with an abortion. That law required the doctor to tell the woman about the nature of the abortion procedure, the health risks of abortion and of childbirth, the probable gestational age of the unborn child, and the availability of printed materials describing the fetus, medical assistance for childbirth, potential child support, and the agencies that would provide adoption services (or other alternatives to abortion).

The *Casey* Court, in judging whether the State could impose these informational requirements, asked whether doing so imposed an “undue burden” upon women seeking an abortion. It held that it did not. Hence the statute was constitutional. The joint opinion stated that the statutory requirements amounted to “reasonable measure[s] to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.” And, it overruled portions of two cases [*Akron* and *Thornburgh*] that might indicate the contrary.

In respect to overruling the earlier cases, the *Casey* Court wrote:

“To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus, those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.”

The joint opinion specifically discussed the First Amendment, the constitutional provision now directly before us. It concluded that the statute did not violate the First Amendment. It wrote:

“All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.”

Thus, the Court considered the State’s statutory requirements, including the requirement that the doctor must inform his patient about where she could learn how to have the newborn child adopted (if carried to term) and how she could find related financial assistance. To repeat the point, the Court then held that the State’s requirements did *not* violate either the Constitution’s protection of free speech or its protection of a woman’s right to choose to have an abortion.

## C

Taking *Casey* as controlling, the law’s demand for evenhandedness requires [upholding the statute here]. If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services? As the question suggests, there is no convincing reason to distinguish between information about adoption and information about abortion in this context. After all, the rule of law embodies evenhandedness, and what is sauce for the goose is normally sauce for the gander.

## 1

The majority tries to distinguish *Casey* as concerning a regulation of professional conduct that only incidentally burdened speech. *Casey*, in its view, applies only when obtaining “informed consent” to a medical procedure is directly at issue.

This distinction, however, lacks moral, practical, and legal force. The individuals at issue here are all medical personnel engaging in activities that directly affect a woman’s health—not significantly different from the doctors at issue in *Casey*. After all, the statute here applies only to “primary care clinics,” which provide “services for the care and treatment of patients for whom the clinic accepts responsibility.” Cal. Code Regs., tit. 22, § 75026(a). And the persons responsible

for patients at those clinics are all persons “licensed, certified or registered to provide” pregnancy-related medical services. Cal. Code Regs., tit. 22, § 75026(c). The petitioners have not, either here or in the District Court, provided any example of a covered clinic that is not operated by licensed doctors or what the statute specifies are equivalent professionals.

The Act requires these medical professionals to disclose information about the possibility of abortion (including potential financial help) that is as likely helpful to granting “informed consent” as is information about the possibility of adoption and childbirth (including potential financial help). That is why I find it impossible to drive any meaningful legal wedge between the law, as interpreted in *Casey*, and the law as it should be applied in this case. If the law in *Casey* regulated speech “only as part of the *practice* of medicine,” so too here.

The majority contends that the disclosure here is unrelated to a “medical procedure,” unlike that in *Casey*, and so the State has no reason to inform a woman about alternatives to childbirth (or, presumably, the health risks of childbirth). Really? No one doubts that choosing an abortion is a medical procedure that involves certain health risks. But the same is true of carrying a child to term and giving birth. That is why prenatal care often involves testing for anemia, infections, measles, chicken pox, genetic disorders, diabetes, pneumonia, urinary tract infections, preeclampsia, and hosts of other medical conditions. Childbirth itself, directly or through pain management, risks harms of various kinds, some connected with caesarean or surgery-related deliveries, some related to more ordinary methods of delivery. Indeed, nationwide “childbirth is 14 times more likely than abortion to result in” the woman’s death. Health considerations do not favor disclosure of alternatives and risks associated with the latter but not those associated with the former.

2

Separately, finding no First Amendment infirmity in the licensed notice is consistent with earlier Court rulings. For instance, in *Zauderer* we upheld a requirement that attorneys disclose in their advertisements that clients might be liable for significant litigation costs even if their lawsuits were unsuccessful. We refused to apply heightened scrutiny, instead asking whether the disclosure requirements were “reasonably related to the State’s interest in preventing deception of consumers.”

The majority concludes that *Zauderer* does not apply because the disclosure “in no way relates to the services that licensed clinics provide.” But information about state resources for family planning, prenatal care, and abortion *is* related to the services that licensed clinics provide. These clinics provide counseling about contraception (which is a family-planning service), ultrasounds or pregnancy testing (which is prenatal care), or abortion. The required disclosure is related to the clinic’s services because it provides information about state resources for the very same services. A patient who knows that she can receive free prenatal care from the State may well prefer to forgo the prenatal care offered at one of the clinics here. And for those interested in family planning and abortion services, information about such alternatives is relevant information to patients offered prenatal care, just as *Casey* considered information about adoption to be relevant to the abortion decision.

Regardless, *Zauderer* is not so limited. *Zauderer* turned on the material differences between disclosure requirements and outright prohibitions on speech. A disclosure requirement does not prevent speakers “from conveying information to the public,” but “only require[s] them to provide somewhat more information than they might otherwise be inclined to present.” *Id.* Where a State’s requirement to speak “purely factual and uncontroversial information” does not attempt “to 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,” it does not warrant heightened scrutiny. *Id.* at 651 (quoting *West Virginia Bd. of Ed. v. Barnette*).

In *Zauderer*, the Court emphasized the reason that the First Amendment protects commercial speech at all: “the value to consumers of the information such speech provides.” For that reason, a professional’s “constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.” But this rationale is not in any way tied to advertisements about a professional’s own services. For instance, it applies equally to a law that requires doctors, when discharging a child under eight years of age, to “provide to and discuss with the parents . . . information on the current law requiring child passenger restraint systems, safety belts, and the transportation of children in rear seats.” Cal. Veh. Code Ann. § 27363.5(a). Even though child seat belt laws do not directly relate to the doctor’s own services, telling parents about such laws does nothing to undermine the flow of factual information. Whether the context is advertising the professional’s own services or other commercial speech, a doctor’s First Amendment interest in not providing factual information to patients is the same: minimal, because his professional speech is protected precisely because of its informational value to patients. There is no reason to subject such laws to heightened scrutiny.

Of course, one might take the majority’s decision to mean that speech about abortion is special, that it involves in this case not only professional medical matters, but also views based on deeply held religious and moral beliefs about the nature of the practice. To that extent, arguably, the speech here is different from that at issue in *Zauderer*. But assuming that is so, the law’s insistence upon treating like cases alike should lead us to reject the petitioners’ arguments that I have discussed. This insistence, the need for evenhandedness, should prove particularly weighty in a case involving abortion rights. That is because Americans hold strong, and differing, views about the matter. Some Americans believe that abortion involves the death of a live and innocent human being. Others believe that the ability to choose an abortion is “central to personal dignity and autonomy,” *Casey*, and note that the failure to allow women to choose an abortion involves the deaths of innocent women. We have previously noted that we cannot try to adjudicate who is right and who is wrong in this moral debate. But we can do our best to interpret American constitutional law so that it applies fairly within a Nation whose citizens strongly hold these different points of view. That is one reason why it is particularly important to interpret the First Amendment so that it applies evenhandedly as between those who disagree so strongly. For this reason too a Constitution that allows States to insist that medical providers tell women about the possibility of adoption should also allow States similarly to insist that medical providers tell women about the possibility of abortion.

## II

The second statutory provision covers pregnancy-related facilities that provide women with certain medical-type services (such as obstetric ultrasounds or sonograms, pregnancy diagnosis, counseling about pregnancy options, or prenatal care), are not licensed as medical facilities by the State, and do not have a licensed medical provider on site. The statute says that such a facility must disclose that it is not “licensed as a medical facility.” And it must make this disclosure in a posted notice and in advertising.

The majority does not question that the State’s interest (ensuring that “pregnant women in California know when they are getting medical care from licensed professionals”) is the type of informational interest that *Zauderer* encompasses. Nor could it. In *Riley*, the Court noted that the First Amendment would permit a requirement for “professional fundraisers to disclose their professional status”—nearly identical to the unlicensed disclosure at issue here. Such informational interests have long justified regulations in the medical context.

Nevertheless, the majority concludes that the State’s interest is “purely hypothetical” because unlicensed clinics provide innocuous services that do not require a medical license. To do so, it applies a searching standard of review based on our precedents that deal with speech *restrictions*, not *disclosures*. This approach is incompatible with *Zauderer*.

There is no basis for finding the State’s interest “hypothetical.” The legislature heard that information-related delays in qualified healthcare negatively affect women seeking to terminate their pregnancies as well as women carrying their pregnancies to term, with delays in qualified prenatal care causing life-long health problems for infants. Even without such testimony, it is “self-evident” that patients might think they are receiving qualified medical care when they enter facilities that collect health information, perform obstetric ultrasounds or sonograms, diagnose pregnancy, and provide counseling about pregnancy options or other prenatal care. The State’s conclusion to that effect is certainly reasonable.

The majority also suggests that the Act applies too broadly, namely, to all unlicensed facilities “no matter what the facilities say on site or in their advertisements.” But the Court has long held that a law is not unreasonable merely because it is overinclusive. For instance, in *Semler* the Court upheld as reasonable a state law that prohibited licensed dentists from advertising that their skills were superior to those of other dentists. A dentist complained that he was, in fact, better than other dentists. Yet the Court held that “[i]n framing its policy, the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners.” To the contrary, “[t]he legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement.”

Relatedly, the majority suggests that the Act is suspect because it covers some speakers but not others. I agree that a law’s exemptions can reveal viewpoint discrimination (although the majority does not reach this point). An exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in

expressing its views to the people. Such speaker-based laws warrant heightened scrutiny “when they reflect the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).” *Turner Broadcasting*. Accordingly, where a law’s exemptions facilitate speech on only one side of the abortion debate, there is a clear form of viewpoint discrimination.

There is no cause for such concern here. The Act does not, on its face, distinguish between facilities that favor pro-life and those that favor pro-choice points of view. Nor is there any convincing evidence before us or in the courts below that discrimination was the purpose or the effect of the statute. Notably, California does not single out pregnancy-related facilities for this type of disclosure requirement. See, e.g., Cal. Bus. & Prof. Code Ann. § 2053.6 (unlicensed providers of alternative health services must disclose that “he or she is not a licensed physician” and “the services to be provided are not licensed by the state”). And it is unremarkable that the State excluded the provision of family planning and contraceptive services as triggering conditions. After all, the State was seeking to ensure that “pregnant women in California know when they are getting medical care from licensed professionals,” and pregnant women generally do not need contraceptive services.

Finally, the majority concludes that the Act is overly burdensome. I agree that “unduly burdensome disclosure requirements might offend the First Amendment.” But these and similar claims are claims that the statute could be applied unconstitutionally, not that it is unconstitutional on its face. Compare *New York State Club Assn., Inc. v. City of New York* (a facial overbreadth challenge must show “from actual fact” that a “substantial number of instances exist in which the Law cannot be applied constitutionally”), with *Chicago v. Morales* (Scalia, J., dissenting) (an as-applied challenge asks whether “the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case”). And it will be open to the petitioners to make these claims if and when the State threatens to enforce the statute in this way. But facial relief is inappropriate here, where the petitioners fail even to describe [these] instances of arguable overbreadth of the contested law, where no record was made in this respect, and where the petitioners thus have not shown “from actual fact” that a “substantial number of instances exist in which the Law cannot be applied constitutionally.” *New York State Club Assn.*

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

## VII. Public Student Speech

The protest armbands described in *Tinker*, below, are shown here being held by the Tinker siblings.

[Image removed]

89 S. Ct. 733.

Supreme Court of the United States.

John F. TINKER and Mary Beth Tinker, Minors, etc., et al., Petitioners,  
v.  
DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT et al.

No. 21.

Argued Nov. 12, 1968.  
Decided Feb. 24, 1969.

Justice FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under 42 USC Section 1983. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing, the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline.

On appeal, the Court of Appeals for the Eighth Circuit affirmed. We granted certiorari.

## I.

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. See *West Virginia State Board of Education v. Barnette*. As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Barnette*, this Court held that under the First Amendment, a student in public school may not be compelled to salute the flag. Speaking through Justice Jackson, the Court said:

'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of



the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.’

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

## II.

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners’ interference, actual or nascent, with the schools’ work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this 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.

In order for the State in the person of school officials 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. Certainly where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed

the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.<sup>3</sup>

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper.

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

In *Keyishian v. Board of Regents*, Justice Brennan, speaking for the Court, said:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"

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<sup>3</sup> The only suggestions of fear of disorder in the report are these:

'A former student of one of our high schools was killed in Vietnam. Some of his friends are still in school and it was felt that if any kind of a demonstration existed, it might evolve into something which would be difficult to control.'

'Students at one of the high schools were heard to say they would wear arm bands of other colors if the black bands prevailed.'

Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; and regulation was directed against 'the principle of the demonstration' itself. School authorities simply felt that 'the schools are no place for demonstrations,' and if the students 'didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools.'

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. In the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit 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. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

Reversed and remanded.

Justice BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected officials of state supported public schools in the United States is in ultimate effect transferred to the Supreme Court.

As I read the Court's opinion it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is 'symbolic speech' which is 'akin to 'pure speech' and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise 'symbolic speech' as long as normal school functions are not 'unreasonably' disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are 'reasonable.'

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech—'symbolic' or 'pure'—and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleased and when he pleases.

While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, non-protesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with Mary Beth Tinker, who wore her armband for her 'demonstration.' Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker 'self-conscious' in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually 'disrupt' the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary.

Change has been said to be truly the law of life, but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will

not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

127 S. Ct. 2618.

Supreme Court of the United States.

Deborah MORSE et al., Petitioners,

v.

Joseph FREDERICK.

No. 06–278.

Argued March 19, 2007.

Decided June 25, 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.” *Tinker v. Des Moines Community School Dist.* 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 and that the rights of students must be applied in light of the special characteristics of the school environment. 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. 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." 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 . . ." 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.

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." 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."

The superintendent continued:

"The common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage their use."

Relying on our decision in *Fraser, supra*, the superintendent concluded that the principal's actions were permissible because Frederick's banner was "speech or action that intrudes upon the work of the schools." The Juneau School District Board of Education upheld the suspension.

Frederick then filed suit under 42 U.S.C. § 1983, alleging that the school board and Morse had violated his First Amendment rights. The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's First Amendment rights. The court found that Morse reasonably interpreted the banner as promoting illegal drug use—a message that "directly contravened the Board's policies relating to drug abuse prevention." Under the circumstances, the court held that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity."

The Ninth Circuit reversed. Deciding that Frederick acted during a "school-authorized activit[y]," and "proceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use," the court nonetheless found a violation of Frederick's First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a "risk of substantial disruption."

## II

At the outset, we reject Frederick's argument that this is not a school speech case. The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip," and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct." Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." There is some uncertainty at the outer boundaries as to when courts should apply school speech precedents, but not on these facts.

## III

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." 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.

As Morse later explained in a declaration, when she saw the sign, she thought that "the reference to a 'bong hit' would be widely understood by high school students and others as referring to smoking marijuana." She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use" in violation of school policy.

We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: “[Take] bong hits . . .”—a message equivalent, as Morse explained in her declaration, to “smoke marijuana” or “use an illegal drug.” Alternatively, the phrase could be viewed as celebrating drug use—“bong hits [are a good thing],” or “[we take] bong hits”—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion.

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is “meaningless and funny.” The dissent similarly refers to the sign’s message as “curious,” “ambiguous,” “nonsense,” “ridiculous,” “obscure,” “silly,” “quixotic,” and “stupid.” Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick’s “credible and uncontradicted explanation for the message—he just wanted to get on television.” But that is a description of Frederick’s *motive* for displaying the banner; it is not an interpretation of what the banner says. The *way* Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster “national debate about a serious issue,” as if to suggest that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent’s suggestion, thus is plainly not a case about political debate over the criminalization of drug use or possession.

#### IV

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.” *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. 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.” 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. Political speech, of course, is at the core of what the First Amendment is designed to protect. 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." That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."

This Court's next student speech case was *Fraser*. 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." [We held] that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."

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." 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."

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." Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment." *Tinker, supra*. 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*.

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." 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. 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* 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." And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights . . . at

the schoolhouse gate,’ . . . the nature of those rights is what is appropriate for children in school.” In particular, “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject.” *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). *See also Vernonia, supra*, at 656 (“Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere . . .”); *Board of Ed. v. Earls*, 536 U.S. 822 (2002) (“‘special needs’ inhere in the public school context; while schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights . . . are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children”).

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an “important—indeed, perhaps compelling” interest. *Id.* at 661. Drug abuse can cause severe and permanent damage to the health and well-being of young people:

“School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.” *Id.* at 661–62.

The drug abuse problem among our Nation’s youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse.

Congress has declared that part of a school’s job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs, and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug-prevention programs “convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful.”

Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps “the single most important factor leading schoolchildren to take drugs,” and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The “special characteristics of the school environment,” *Tinker*, 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.” 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, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick’s speech is proscribable because it is plainly “offensive” as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of “offensive.” After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick’s speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Although accusing this decision of doing “serious violence to the First Amendment” by authorizing “viewpoint discrimination,” the dissent concludes that “it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting.” Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting “imminent” lawless action. See *post*, at 2646 (“[I]t is possible that our rigid imminence requirement ought to be relaxed at schools”). Stripped of rhetorical flourishes, then, the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick’s banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent’s contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.

\* \* \*

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

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

*It is so ordered.*

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* is without basis in the Constitution.

\* \* \* \*

In light of the history of American public education [Justice Thomas’s preceding discussion of that history is omitted for the sake of length], it cannot seriously be suggested that the First Amendment

“freedom of speech” encompasses a student’s right to speak in public schools. Early public schools gave total control to teachers, who expected obedience and respect from students. And courts routinely deferred to schools’ authority to make rules and to discipline students for violating those rules. Several points are clear: (1) Under *in loco parentis*, speech rules and other school rules were treated identically; (2) the *in loco parentis* doctrine imposed almost no limits on the types of rules that a school could set while students were in school; and (3) schools and teachers had tremendous discretion in imposing punishments for violations of those rules.

It might be suggested that the early school speech cases dealt only with slurs and profanity. But that criticism does not withstand scrutiny. First, state courts repeatedly reasoned that schools had discretion to impose discipline to maintain order. The substance of the student’s speech or conduct played no part in the analysis. Second, some cases involved punishment for speech on weightier matters, for instance a speech criticizing school administrators for creating a fire hazard. Yet courts refused to find an exception to *in loco parentis* even for this advocacy of public safety.

To be sure, our educational system faces administrative and pedagogical challenges different from those faced by 19th-century schools. And the idea of treating children as though it were still the 19th century would find little support today. But I see no constitutional imperative requiring public schools to allow all student speech. Parents decide whether to send their children to public schools. If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or homeschool them; or they can simply move. Whatever rules apply to student speech in public schools, those rules can be challenged by parents in the political process.

In place of that democratic regime, *Tinker* substituted judicial oversight of the day-to-day affairs of public schools. The *Tinker* Court made little attempt to ground its holding in the history of education or in the original understanding of the First Amendment. Instead, it imposed a new and malleable standard: Schools could not inhibit student speech unless it “substantially interfere[d] with the requirements of appropriate discipline in the operation of the school.” *Tinker*, 393 U.S. at 509. Inherent in the application of that standard are judgment calls about what constitutes interference and what constitutes appropriate discipline. *See id.* at 517–18 (Black, J., dissenting) (arguing that the armbands in fact caused a disruption). Historically, courts reasoned that only local school districts were entitled to make those calls. The *Tinker* Court usurped that traditional authority for the judiciary.

And because *Tinker* utterly ignored the history of public education, courts (including this one) routinely find it necessary to create ad hoc exceptions to its central premise. This doctrine of exceptions creates confusion without fixing the underlying problem by returning to first principles. Just as I cannot accept *Tinker*’s standard, I cannot subscribe to *Kuhlmeier*’s alternative. Local school boards, not the courts, should determine what pedagogical interests are “legitimate” and what rules “reasonably relate” to those interests.

Justice Black may not have been “a prophet or the son of a prophet,” but his dissent in *Tinker* has proved prophetic. In the name of the First Amendment, *Tinker* has undermined the traditional authority of teachers to maintain order in public schools. “Once a society that generally respected the authority of teachers, deferred to their judgment, and trusted them to act in the best interest of

school children, we now accept defiance, disrespect, and disorder as daily occurrences in many of our public schools.” Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 Geo. Wash. L. Rev. 49, 50 (1996). We need look no further than this case for an example: Frederick asserts a constitutional right to utter at a school event what is either “gibberish,” or an open call to use illegal drugs. To elevate such impertinence to the status of constitutional protection would be farcical and would indeed be to “surrender control of the American public school system to public school students.” *Tinker*, *supra*, at 526 (Black, J., dissenting).

I join the Court’s opinion because it erodes *Tinker*’s hold in the realm of student speech, even though it does so by adding to the patchwork of exceptions to the *Tinker* standard. I think the better approach is to dispense with *Tinker* altogether, and given the opportunity, I would do so.

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 would hold that the school’s interest in protecting its students from exposure to speech “reasonably regarded as promoting illegal drug use” 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. The First Amendment demands more, indeed, much more.

The Court holds otherwise only after laboring to establish two uncontroversial propositions: first, that the constitutional rights of students in school settings are not coextensive with the rights of adults, and second, that deterring drug use by schoolchildren is a valid and terribly important interest. As to the first, I take the Court’s point that the message on Frederick’s banner is not *necessarily* protected speech, even though it unquestionably would have been had the banner been unfurled elsewhere. As to the second, I am willing to assume that the Court is correct that the pressing need to deter drug use supports JDHS’ rule prohibiting willful conduct that expressly “advocates the use of substances that are illegal to minors.” But it is a gross non sequitur to draw from these two unremarkable propositions the remarkable conclusion that the school may suppress student speech that was never meant to persuade anyone to do anything.

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.

In December 1965, we were engaged in a controversial war, a war that “divided this country as few other issues ever have.” *Tinker*, 393 U.S. at 524 (Black, J., dissenting). Having learned that some students planned to wear black armbands as a symbol of opposition to the country’s involvement in Vietnam, officials of the Des Moines public school district adopted a policy calling for the suspension of any student who refused to remove the armband. As we explained when we considered the propriety of that policy, “[t]he school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners.” The district justified its censorship on the ground that it feared that the expression of a controversial and unpopular opinion would generate disturbances. Because the school officials had insufficient reason to believe that those disturbances would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” we found the justification for the rule to lack any foundation and therefore held that the censorship violated the First Amendment.

Justice Harlan dissented, but not because he thought the school district could censor a message with which it disagreed. Rather, he would have upheld the district’s rule only because the students never cast doubt on the district’s antidisruption justification by proving that the rule was motivated “by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.”

Two cardinal First Amendment principles animate both the Court’s opinion in *Tinker* and Justice Harlan’s dissent. First, censorship based on the content of speech, particularly censorship that depends on the viewpoint of the speaker, is subject to the most rigorous burden of justification:

“Discrimination against speech because of its message is presumed to be unconstitutional . . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” *Rosenberger v. University of Virginia*.

Second, punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid. See *Brandenburg v. Ohio* (distinguishing “mere advocacy” of illegal conduct from “incitement to imminent lawless action”).

However necessary it may be to modify those principles in the school setting, *Tinker* affirmed their continuing vitality: “In order for the State in the person of school officials 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. Certainly where there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained.”

Yet today the Court fashions a test that trivializes the two cardinal principles upon which *Tinker* rests. See *ante*, at 2629 (“[S]chools [may] restrict student expression that they reasonably regard as promoting illegal drug use”). The Court’s test invites stark viewpoint discrimination. In this case, for example, the principal has unabashedly acknowledged that she disciplined Frederick because she disagreed with the pro-drug viewpoint she ascribed to the message on the banner—a viewpoint, incidentally, that Frederick has disavowed. The Court’s holding in this case strikes at “the heart of the First Amendment” because it upholds a punishment meted out on the basis of a listener’s disagreement with her understanding (or, more likely, misunderstanding) of the speaker’s viewpoint. “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*.

It is also perfectly clear that “promoting illegal drug use” comes nowhere close to proscribable “incitement to imminent lawless action.” *Brandenburg*. Encouraging drug use might well increase the likelihood that a listener will try an illegal drug, but that hardly justifies censorship:

“Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. . . . Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.” *Whitney v. California* (Brandeis, J., concurring).

No one seriously maintains that drug advocacy (much less Frederick’s ridiculous sign) comes within the vanishingly small category of speech that can be prohibited because of its feared consequences. Such advocacy, to borrow from Justice Holmes, “ha[s] no chance of starting a present conflagration.” *Gitlow v. New York* (dissenting opinion).

## II

The Court rejects outright these twin foundations of *Tinker* because, in its view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use. Whether or not such a rule is sensible as a matter of policy, carving out pro-drug speech for uniquely harsh treatment finds no support in our case law and is inimical to the values protected by the First Amendment.

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 . . . .” 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, 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 incite imminent lawless action [per] *Brandenburg*, it is possible that our rigid imminence requirement ought to be relaxed at schools.

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. Even the school recognizes the paramount need to hold the line between, on the one hand, nondisruptive speech that merely expresses a viewpoint that is unpopular or contrary to the school’s preferred message, and on the other hand, advocacy of an illegal or unsafe course of conduct. The district’s prohibition of drug advocacy is a gloss on a more general rule that is otherwise quite tolerant of nondisruptive student speech:

“Students will not be disturbed in the exercise of their constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly, provided that their activities do not infringe on the rights of others and do not interfere with the operation of the educational program.

“The Board will not permit the conduct on school premises of any willful activity . . . that interferes with the orderly operation of the educational program or offends the rights of others. The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .”

There is absolutely no evidence that Frederick’s banner’s reference to drug paraphernalia “willful[ly]” infringed on anyone’s rights or interfered with any of the school’s educational programs. On its face, then, the rule gave Frederick wide berth “to express [his] ideas and opinions” so long as they did not amount to “advoca[cy]” of drug use. If the school’s rule is, by hypothesis, a valid one, it is valid only insofar as it scrupulously preserves adequate space for constitutionally protected speech. When First Amendment rights are at stake, a rule that “sweep[s] in a great variety of conduct under a general and indefinite characterization” may not leave “too wide a discretion in its application.” *Cantwell v. Connecticut*. Therefore, just as we insisted in *Tinker* that the school establish some likely connection between the armbands and their feared consequences, so too JDHS must show that Frederick’s supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana.

But instead of demanding that the school make such a showing, the Court punts. Figuring out just *how* it punts is tricky; “[t]he mode of analysis [it] employ[s] . . . is not entirely clear,” see *ante*, at 2626. On occasion, the Court suggests it is deferring to the principal’s “reasonable” judgment that Frederick’s sign qualified as drug advocacy. At other times, the Court seems to say that *it* thinks the banner’s message constitutes express advocacy. Either way, its approach is indefensible.

To the extent the Court defers to the principal’s ostensibly reasonable judgment, it abdicates its constitutional responsibility. The beliefs of third parties, reasonable or otherwise, have never dictated which messages amount to proscribable advocacy. Indeed, it would be a strange constitutional doctrine that would allow the prohibition of only the narrowest category of speech advocating unlawful conduct, see *Brandenburg*, yet would permit a listener’s perceptions to determine which speech deserved constitutional protection.

Such a peculiar doctrine is alien to our case law. In *Abrams v. United States*, this Court affirmed the conviction of a group of Russian “rebels, revolutionists, [and] anarchists,” on the ground that the leaflets they distributed were thought to “incite, provoke and encourage resistance to the United



States.” Yet Justice Holmes’ dissent—which has emphatically carried the day—never inquired into the reasonableness of the United States’ judgment that the leaflets would likely undermine the war effort. The dissent instead ridiculed that judgment: “[N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.” In *Cox v. Louisiana*, we vacated a civil rights leader’s conviction for disturbing the peace, even though a Baton Rouge sheriff had “deem[ed]” the leader’s “appeal to . . . students to sit in at the lunch counters to be ‘inflammatory.’” We never asked if the sheriff’s in-person, on-the-spot judgment was “reasonable.” Even in *Fraser*, we made no inquiry into whether the school administrators reasonably thought the student’s speech was obscene or profane; we rather satisfied ourselves that “[t]he pervasive sexual innuendo in Fraser’s speech was plainly offensive to both teachers and students—indeed to any mature person.”

To the extent the Court independently finds that “BONG HITS 4 JESUS” *objectively* amounts to the advocacy of illegal drug use—in other words, that it can *most* reasonably be interpreted as such—that conclusion practically refutes itself. This is a nonsense message, not advocacy. The Court’s feeble effort to divine its hidden meaning is strong evidence of that. *Ante*, at 2625 (positing that the banner might mean, alternatively, “[Take] bong hits,” “bong hits [are a good thing],” or “[we take] bong hits”). Frederick’s credible and uncontradicted explanation for the message—he just wanted to get on television—is also relevant because a speaker who does not intend to persuade his audience can hardly be said to be advocating anything. But most importantly, it takes real imagination to read a “cryptic” message (the Court’s characterization, not mine) with a slanting drug reference as an incitement to drug use. Admittedly, some high school students (including those who use drugs) are dumb. Most students, however, do not shed their brains at the schoolhouse gate, and most students know dumb advocacy when they see it. The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible. That the Court believes such a silly message can be proscribed as advocacy underscores the novelty of its position, and suggests that the principle it articulates has no stopping point.

Among other things, the Court’s ham-handed, categorical approach is deaf to the constitutional imperative to permit unfettered debate, even among high school students, about the wisdom of the war on drugs or of legalizing marijuana for medicinal use. See *Tinker* (“[Students] may not be confined to the expression of those sentiments that are officially approved”). If Frederick’s stupid reference to marijuana can in the Court’s view justify censorship, then high school students everywhere could be forgiven for zipping their mouths about drugs at school lest some “reasonable” observer censor and then punish them for promoting drugs.

### III

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. 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. Whatever the better policy may be, a full and frank discussion of the costs and benefits of the attempt to prohibit the use of marijuana is far wiser than suppression of speech because it is unpopular. I respectfully dissent.

## VIII. Public Employee Speech

88 S. Ct. 1731.

Supreme Court of the United States.

Marvin L. PICKERING, Appellant,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205,  
WILL COUNTY, ILLINOIS.

No. 510.

Argued March 27, 1968.

Decided June 3, 1968.

Justice MARSHALL delivered the opinion of the Court.

Appellant Marvin L. Pickering was dismissed from his position as a teacher in District 205 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, 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 [by the Board and on trial and appeal]. For the reasons detailed below, we agree that appellant's rights to freedom of speech were violated and we reverse.

### I.

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise \$4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of \$5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964, a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of the School Board that appellant wrote the letter to the editor that resulted in his dismissal.

Prior to the vote on the second tax increase proposal, a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of

education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment 'controversy, conflict and dissension' among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was 'detrimental to the best interests of the schools.' Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in.' It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection.

In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

## II.

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. The 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.

### III.

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*, 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 [factually] correct may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.<sup>3</sup>

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

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<sup>3</sup> It is possible to conceive of some positions in public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissible ground for dismissal.

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 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 on such questions 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<sup>5</sup> 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.

#### IV.

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—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*. 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. 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, 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.

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<sup>5</sup> We also note that this case does not present a situation in which a teacher's public statements are so without foundation as to call into question his fitness to perform his duties in the classroom. In such a case, of course, the statements would merely be evidence of the teacher's general competence, or lack thereof, and not an independent basis for dismissal.

126 S. Ct. 1951.

Supreme Court of the United States.

Gil GARCETTI et al., Petitioners,

v.

Richard CEBALLOS.

No. 04–473.

Argued March 21, 2006.

Decided May 30, 2006.

Justice KENNEDY delivered the opinion of the Court.

It is well settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. 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.

## I

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.

The Court of Appeals for the Ninth Circuit reversed, holding that Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment. In reaching its conclusion the court looked to the First Amendment analysis set forth in *Pickering* and *Connick*. *Connick* instructs courts to begin by considering whether the expressions in question were made by the speaker "as a citizen upon matters of public concern." The Court of Appeals determined that Ceballos' memo, which recited what he thought to be governmental misconduct, was "inherently a matter of public concern." The court did not, however, consider whether the speech was made in Ceballos' capacity as a citizen. Rather, it relied on Circuit precedent rejecting the idea that "a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility."

Having concluded that Ceballos' memo satisfied the public-concern requirement, the Court of Appeals proceeded to balance Ceballos' interest in his speech against his supervisors' interest in responding to it. See *Pickering*, *supra*. The court struck the balance in Ceballos' favor, noting that



petitioners “failed even to suggest disruption or inefficiency in the workings of the District Attorney’s Office” as a result of the memo.

We granted certiorari, and we now reverse.

## II

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. 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.

*Pickering* provides a useful starting point in explaining the Court’s doctrine. There the relevant speech was a teacher’s letter to a local newspaper addressing issues including the funding policies of his school board. “The problem in any case,” the Court stated, “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 Court found the teacher’s speech “neither [was] 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.” Thus, the Court concluded 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.”

*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. 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. 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. This consideration reflects the importance of the relationship between the speaker’s expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.

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. 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. 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. *Connick, supra* (“[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. 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* (“Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government”).

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to “limit teachers' opportunities to contribute to public debate.” It also noted that teachers are “the members of a community most likely to have informed and definite opinions” about school expenditures. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society.

The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to “constitutionalize the employee grievance [process].” *Connick*, 461 U.S. at 154.

### III

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. 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*, 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. 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.” 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. 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. University of Virginia* (“[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.

Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.

The Court of Appeals based its holding in part on what it perceived as a doctrinal anomaly. The court suggested it would be inconsistent to compel public employers to tolerate certain employee speech made publicly but not speech made pursuant to an employee's assigned duties. This objection misconceives the theoretical underpinnings of our decisions. Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government. The same goes for writing a letter to a local newspaper, see *Pickering*, or discussing politics with a co-worker, see *Rankin*. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

The Court of Appeals' concern also is unfounded as a practical matter. The perceived anomaly, it should be noted, is limited in scope: It relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment. If, moreover, a government employer is troubled by the perceived anomaly, it has the means at hand to avoid it. A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.

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.

Two final points warrant mentioning. First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Second, Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

#### IV

Exposing governmental inefficiency and misconduct is a matter of considerable significance. Public employers should, as a matter of good judgment, be receptive to constructive criticism offered by their employees. The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing. Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment. See, *e.g.*, Cal. Rule Prof. Conduct 5–110 (2005) (“A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause”); *Brady v. Maryland*. These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

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

*It is so ordered.*

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.” 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. 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. 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. 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.

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.*, 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. The difference between a case like *Givhan* and this one is that the subject of Ceballos's speech fell within the scope of his job responsibilities, whereas choosing personnel was not what the teacher was hired to do. The effect of the majority's constitutional line between these two cases, then, is that a *Givhan* schoolteacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal disapproved of hiring minority job applicants. This is an odd place to draw a distinction,<sup>1</sup> and while necessary judicial line-drawing sometimes looks arbitrary, any distinction obliges a court to justify its choice. Here, there is no adequate justification for the majority's line categorically denying *Pickering* protection to any speech uttered "pursuant to official duties."

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-

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<sup>1</sup> It seems stranger still in light of the majority's concession of some First Amendment protection when a public employee repeats statements made pursuant to his duties but in a separate, public forum or in a letter to a newspaper.

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.<sup>2</sup>

As for the importance of such speech to the individual, it stands to reason that a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day. Would anyone doubt that a school principal evaluating the performance of teachers for promotion or pay adjustment retains a citizen's interest in addressing the quality of teaching in the schools? (Still, the majority indicates he could be fired without First Amendment recourse for fair but unfavorable comment when the teacher under review is the superintendent's daughter.) Would anyone deny that a prosecutor like Richard Ceballos may claim the interest of any citizen in speaking out against a rogue law enforcement officer, simply because his job requires him to express a judgment about the officer's performance? (But the majority says the First Amendment gives Ceballos no protection, even if his judgment in this case was sound and appropriately expressed.)

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." 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.

But why do the majority's concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a *Pickering* balance? 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

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<sup>2</sup> I do not say the value of speech "pursuant to duties" will always be greater, because I am pessimistic enough to expect that one response to the Court's holding will be moves by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from First Amendment purview. Now that the government can freely penalize the school personnel officer for criticizing the principal because speech on the subject falls within the personnel officer's job responsibilities, the government may well try to limit the English teacher's options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school.

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.

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. 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.

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.

## I

I begin with what I believe is common ground:

(1) Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protective presumptions in different contexts, scrutinizing government's speech-related restrictions differently depending upon the general category of activity.

(2) Where the speech of government employees is at issue, the First Amendment offers protection only where the offer of protection itself will not unduly interfere with legitimate governmental interests, such as the interest in efficient administration. That is because the government, like any employer, must have adequate authority to direct the activities of its employees. That is also because efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will.

(3) Consequently, where a government employee speaks "as an employee upon matters only of personal interest," the First Amendment does not offer protection. Where the employee speaks "as a citizen . . . upon matters of public concern," the First Amendment offers protection but only where the speech survives a screening test. That test, called, in legal shorthand, "*Pickering* balancing," requires a judge to "balance . . . the interests" of the employee "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."



(4) Our prior cases do not decide what screening test a judge should apply in the circumstances before us, namely, when the government employee both speaks upon a matter of public concern and does so in the course of his ordinary duties as a government employee.

## II

The majority answers the question by holding 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.” In a word, the majority says, “never.” That word, in my view, is too absolute.

Like the majority, I understand the need to “affor[d] government employers sufficient discretion to manage their operations.” And I agree that the Constitution does not seek to “displac[e] . . . managerial discretion by judicial supervision.” 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*. 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* (“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”).

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. *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? There may well be other examples.

Where professional and special constitutional obligations are both present, the need to protect the employee’s speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances. Thus, I would apply the *Pickering* balancing test here.

## IX. Campaign Finance, Unions, and Corporate Speech Issues

130 S. Ct. 876.

Supreme Court of the United States.

CITIZENS UNITED, Appellant,  
v.  
FEDERAL ELECTION COMMISSION.

No. 08–205.

Argued March 24, 2009.

Reargued Sept. 9, 2009.

Decided Jan. 21, 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 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan 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 Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*) (SCALIA, J., concurring in part 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. We turn to the case now before us.

I

A

Citizens United is a nonprofit corporation [with] an annual budget of about \$12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party’s 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite

critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of \$1.2 million, to make *Hillary* available on a video-on-demand channel called “Elections ‘08.” Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie’s Web site address. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

## B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited—and still does prohibit—corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. 2 U.S.C. § 441b (2000 ed.). BCRA § 203 amended § 441b to prohibit any “electioneering communication” as well. 2 U.S.C. § 441b(b)(2). An electioneering communication is defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election. § 434(f)(3)(A). The Federal Election Commission’s (FEC) regulations further define an electioneering communication as a communication that is “publicly distributed.” “In the case of a candidate for nomination for President . . . *publicly distributed* means” that the communication “[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days.” Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a “separate segregated fund” (known as a political action committee, or PAC) for these purposes. The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union.

## C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by § 441b’s ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under § 437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) § 441b is unconstitutional as applied to *Hillary*; and (2) BCRA’s disclaimer and disclosure requirements, BCRA §§ 201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie.

The District Court denied Citizens United’s motion for a preliminary injunction. The court held that § 441b was facially constitutional under *McConnell*, and that § 441b was constitutional as applied to *Hillary* because it was “susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.” The court also rejected Citizens United’s challenge to BCRA’s disclaimer and disclosure requirements. It noted that “the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment.”

We noted probable jurisdiction. The case was reargued in this Court after the Court asked the parties to file supplemental briefs addressing whether we should overrule either or both *Austin* and the part of *McConnell* which addresses the facial validity of 2 U.S.C. § 441b.

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### III

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” Laws enacted to control or suppress speech may operate at different points in the speech process. The following are just a few examples of restrictions that have been attempted at different stages of the speech process—all laws found to be invalid: restrictions requiring a permit at the outset, *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton* (2002); imposing a burden by impounding proceeds on receipts or royalties, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); seeking to exact a cost after the speech occurs, *New York Times Co. v. Sullivan*; and subjecting the speaker to criminal penalties, *Brandenburg v. Ohio*.

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate’s defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC 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.

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:

These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over \$200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affiliated committees to whom expenditures aggregating over \$200 have been made; persons to whom loan repayments or refunds have been made; the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation.

PACs have to comply with these regulations just to speak. 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.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*. Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. See *McConnell, supra* (opinion of SCALIA, J.) (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others"). If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley, supra* ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. As instruments to censor, these

categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

A.

1.

The Court has recognized that First Amendment protection extends to corporations. This protection has been extended by explicit holdings to the context of political speech. See, *e.g.*, *NAACP v. Button*. Under the rationale of these precedents, political speech does not lose First Amendment protection simply because its source is a corporation. See *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (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.”). 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.”

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates. Yet not until 1947 did Congress first prohibit independent expenditures by corporations and labor unions in § 304 of the Labor Management Relations Act. In passing this Act Congress overrode the veto of President Truman, who warned that the expenditure ban was a “dangerous intrusion on free speech.”

For almost three decades thereafter, the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional. The question was in the background of *United States v. CIO*, 335 U.S. 106 (1948). There, a labor union endorsed a congressional candidate in its weekly periodical. The Court stated that “the gravest doubt would arise in our minds as to [the federal expenditure prohibition’s] constitutionality” if it were construed to suppress that writing. The Court engaged in statutory interpretation and found the statute did not cover the publication. Four [concurring] Justices, however, said they would reach the constitutional question and invalidate the Labor-Management Relations Act’s expenditure ban. The concurrence explained that any “undue influence” generated by a speaker’s “large expenditures” was outweighed “by the loss for democratic processes resulting from the restrictions upon free and full public discussion.”

In *United States v. Automobile Workers*, the Court again encountered the independent expenditure ban, which had been recodified at 18 U.S.C. § 610. After holding only that a union television broadcast that endorsed candidates was covered by the statute, the Court “[refused] to anticipate constitutional questions” and remanded for the trial to proceed. Three Justices dissented, arguing that the Court should have reached the constitutional question and that the ban on independent expenditures was unconstitutional:

“Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important—vitaly important—that all channels of communication be open to them during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community.” (opinion of Douglas, J., joined by Warren, C.J., and Black, J.).

The dissent concluded that deeming a particular group “too powerful” was not a “justificatio[n] for withholding First Amendment rights from any group—labor or corporate.”

## 2.

In *Buckley*, the Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974. These amendments created 18 U.S.C. § 608(e), an independent expenditure ban separate from § 610 that applied to individuals as well as corporations and labor unions.

Before addressing the constitutionality of § 608(e)’s independent expenditure ban, *Buckley* first upheld § 608(b), FECA’s limits on direct contributions to candidates. The *Buckley* Court recognized a “sufficiently important” governmental interest in “the prevention of corruption and the appearance of corruption.” This followed from the Court’s concern that large contributions could be given to secure a political *quid pro quo*.

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that “the independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process,” because “[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.” *Buckley* invalidated § 608(e)’s restrictions on independent expenditures, with only one Justice dissenting.

*Buckley* did not consider § 610’s separate ban on corporate and union independent expenditures. Had § 610 been challenged in the wake of *Buckley*, however, it could not have been squared with the reasoning and analysis of that precedent. The expenditure ban invalidated in *Buckley*, § 608(e), applied to corporations and unions, and some of the prevailing plaintiffs in *Buckley* were corporations. Notwithstanding this precedent, Congress recodified § 610’s corporate and union expenditure ban at 2 U.S.C. § 441b four months after *Buckley* was decided. See 90 Stat. 490. Section 441b is the independent expenditure restriction challenged here.

Less than two years after *Buckley*, [our decision in *Bellotti*] reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity. *Bellotti* could not have been clearer when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues:

“We thus find no support in the First Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . . In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.”

It is important to note that the reasoning and holding of *Bellotti* did not rest on the existence of a viewpoint-discriminatory statute. It rested on the principle that the Government lacks the power to ban corporations from speaking.

*Bellotti* did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti*'s central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity.

### 3

Thus the law stood until *Austin*. *Austin* upheld a direct restriction on the independent expenditure of funds for political speech for the first time in this Court's history. There, the Michigan Chamber of Commerce sought to use general treasury funds to run a newspaper ad supporting a specific candidate. Michigan law, however, prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony. The Court sustained the speech prohibition.

To bypass *Buckley* and *Bellotti*, the *Austin* Court identified a new governmental interest in limiting political speech: an anti-distortion 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.”

### B

The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity. In its defense of the corporate-speech restrictions in § 441b, the Government notes the anti-distortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support *Austin*'s holding that corporate expenditure restrictions



are constitutional: an anti-corruption interest and a shareholder-protection interest. We consider the three points in turn.

1

As for *Austin*'s antidistortion rationale, the Government does little to defend it. 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. 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.” 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. *See also id.* (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”). This protection for speech is inconsistent with *Austin*'s anti-distortion rationale. *Austin* sought to defend the anti-distortion rationale as a means to prevent corporations from obtaining “an unfair advantage in the political marketplace” by using “resources amassed in the economic marketplace.” 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.” *Buckley* was specific in stating that “the skyrocketing cost of political campaigns” could not sustain the governmental prohibition [and that] the First Amendment's protections do not depend on the speaker's “financial ability to engage in public discussion.” The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.

Either as support for its anti-distortion rationale or as a further argument, the *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” This does not suffice, however, to allow laws prohibiting speech. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.

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.” 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 *Austin* 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 anti-distortion rationale would also 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* (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. 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. The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the anti-distortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

The censorship we now confront is vast in its reach. The Government has muffled the voices that best represent the most significant segments of the economy. And the electorate has been deprived of information, knowledge and opinion vital to its function. By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease." The Federalist No. 10, p. 130 (J. Madison). Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false.

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the anti-distortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley*, the Court found this interest “sufficiently important” to allow limits on contributions but did not extend that reasoning to expenditure limits. When *Buckley* examined an expenditure ban, it found “that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures.”

With regard to large direct contributions, *Buckley* reasoned that they could be given “to secure a political *quid pro quo*.” The Court has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.

“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.” Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government’s interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question.

A single footnote in *Bellotti* purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. Dicta in *Bellotti*’s footnote suggested that “a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.” Seizing on this aside in *Bellotti*’s footnote, the Court in *NRWC* did say there is a “sufficient” governmental interest in “ensur[ing] that substantial aggregations of wealth amassed” by corporations would not “be used to incur political debts from legislators who are aided by the contributions.” *NRWC*, however, has little relevance here. *NRWC* decided no more than that a restriction on a corporation’s ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment. *NRWC* thus involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption. Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

“Favoritism and influence are not avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.” *McConnell*, 540 U.S. at 297 (opinion of KENNEDY, J.).

Reliance on a generic favoritism or influence theory is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse “to take part in democratic governance” because of additional political speech made by a corporation or any other speaker.

When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin*’s anti-distortion rationale, would allow the Government to ban the political speech even of media corporations. See *supra*. Assume, for example, that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. Under the Government’s view, that potential disagreement could give the Government the authority to restrict the media corporation’s political speech. The First Amendment does not allow that power. There is, furthermore, little evidence of abuse that cannot be corrected by shareholders “through the procedures of corporate democracy.” *Bellotti*, 435 U.S. at 794.

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders.

[Lengthy discussion of *stare decisis* wherein the Court overruled *Austin* is omitted]

#### IV

##### A

Citizens United next challenges BCRA's disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that “\_\_\_\_\_ is responsible for the content of this advertising.” The required statement must be made in a “clearly spoken manner,” and displayed on the screen in a “clearly readable manner” for at least four seconds. It must state that the communication “is not authorized by any candidate or candidate's committee”; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. Under BCRA § 201, any person who spends more than \$10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors.

Disclaimer and disclosure requirements may burden the ability to speak, but they “impose no ceiling on campaign-related activities,” *Buckley*, and “do not prevent anyone from speaking,” *McConnell*. The Court has subjected these requirements to “exacting scrutiny,” which requires a “substantial relation” between the disclosure requirement and a “sufficiently important” governmental interest.

In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in “provid[ing] the electorate with information” about the sources of election-related spending. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. There was evidence in the record that independent groups were running election-related advertisements while hiding behind dubious and misleading names. The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens make informed choices in the political marketplace.

Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could show a “reasonable probability” that disclosure of its contributors' names “will subject them to threats, harassment, or reprisals from either Government officials or private parties.”

For the reasons stated below, we find the statute valid as applied to the ads for the movie and to the movie itself.

## B

Citizens United sought to broadcast one 30-second and two 10-second ads to promote *Hillary*. Under FEC regulations, a communication that “[p]roposes a commercial transaction” was not subject to 2 U.S.C. § 441b’s restrictions on corporate or union funding of electioneering communications. The regulations, however, do not exempt those communications from the disclaimer and disclosure requirements in BCRA §§ 201 and 311.

Citizens United argues that the disclaimer requirements in § 311 are unconstitutional as applied to its ads. It contends that the governmental interest in providing information to the electorate does not justify requiring disclaimers for any commercial advertisements, including the ones at issue here. We disagree. The ads fall within BCRA’s definition of an “electioneering communication”: They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. The disclaimers required by § 311 “provid[e] the electorate with information,” *McConnell*, *supra*, at 196, and “insure that the voters are fully informed” about the person or group who is speaking, *Buckley*, *supra*, at 76; see also *Bellotti*, 435 U.S. at 792 n.32 (“Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected”). At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.

Citizens United argues that § 311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising. It asserts that § 311 decreases both the quantity and effectiveness of the group’s speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer. We rejected these arguments in *McConnell*. And we now adhere to that decision as it pertains to the disclosure provisions.

As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b’s restrictions on independent expenditures to express advocacy and its functional equivalent. Citizens United seeks to import a similar distinction into BCRA’s disclosure requirements. We reject this contention.

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA’s disclosure and disclaimer requirements. 540 U.S. at 321 (opinion of KENNEDY, J., joined by Rehnquist, C.J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U.S. 612 (1954) (Congress “has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or

spend funds for that purpose”). For these reasons, we reject Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Citizens United also disputes that an informational interest justifies the application of § 201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace. This is similar to the argument rejected above with respect to disclaimers. Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational interest alone is sufficient to justify application of § 201 to these ads, it is not necessary to consider the Government’s other asserted interests.

Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. Some *amici* point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation. In *McConnell*, the Court recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed. The examples cited by *amici* are cause for concern. Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.

For the same reasons we uphold the application of BCRA §§ 201 and 311 to the ads, we affirm their application to *Hillary*. We find no constitutional impediment to the application of BCRA’s disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.

## V

When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution. Under *Austin*, though, officials could have done more than discourage its distribution—they could have banned the film. After all, it, like *Hillary*, was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force.

Modern day movies, television comedies, or skits on YouTube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value” in order to engage in political speech. 2 U.S.C. § 431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often

hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute’s purpose and design.

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation’s course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. § 441b’s restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA’s disclaimer and disclosure requirements. The case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Justice SCALIA, with whom Justice ALITO joins, and with whom Justice THOMAS joins in part, concurring.

I join the opinion of the Court.

I write separately to address Justice STEVENS’ discussion of “*Original Understandings*” (opinion concurring in part and dissenting in part) (hereinafter referred to as the dissent). This section of the dissent purports to show that today’s decision is not supported by the original understanding of the First Amendment. The dissent attempts this demonstration, however, in splendid isolation from the text of the First Amendment. It never shows why “the freedom of speech” that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form. To be sure, in 1791 (as now) corporations could pursue only the objectives set forth in their charters; but the dissent provides no evidence that their speech in the pursuit of those objectives could be censored.

Instead of taking this straightforward approach to determining the Amendment’s meaning, the dissent embarks on a detailed exploration of the Framers’ views about the “role of corporations in society.” The Framers did not like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech. Of course the Framers’ personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted—not, as the dissent suggests, as a freestanding substitute for that text. But the dissent’s distortion of proper analysis is even worse than that. Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered, but places the burden on appellant to bring forward statements showing that they *are*.



Despite the corporation-hating quotations the dissent has dredged up, it is far from clear that by the end of the 18th century corporations were despised. If so, how came there to be so many of them? The dissent's statement that there were few business corporations during the 18th century—"only a few hundred during all of the 18th century"—is misleading. There were approximately 335 charters issued to business corporations in the United States by the end of the 18th century. This was a considerable extension of corporate enterprise in the field of business, and represented unprecedented growth. Moreover, what seems like a small number by today's standards surely does not indicate the relative importance of corporations when the Nation was considerably smaller. As I have previously noted, "[b]y the end of the eighteenth century the corporation was a familiar figure in American economic life." *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part).

Even if we thought it proper to apply the dissent's approach of excluding from First Amendment coverage what the Founders disliked, and even if we agreed that the Founders disliked founding-era corporations, modern corporations might not qualify for exclusion. Most of the Founders' resentment toward corporations was directed at the state-granted monopoly privileges that individually chartered corporations enjoyed. Modern corporations do not have such privileges, and would probably have been favored by most of our enterprising Founders—excluding, perhaps, Thomas Jefferson and others favoring perpetuation of an agrarian society. Moreover, if the Founders' specific intent with respect to corporations is what matters, why does the dissent ignore the Founders' views about other legal entities that have more in common with modern business corporations than the founding-era corporations? At the time of the founding, religious, educational, and literary corporations were incorporated under general incorporation statutes, much as business corporations are today.<sup>4</sup> There were also small unincorporated business associations, which some have argued were the true progenitors of today's business corporations. Were all of these silently excluded from the protections of the First Amendment?

The lack of a textual exception for speech by corporations cannot be explained on the ground that such organizations did not exist or did not speak. To the contrary, colleges, towns and cities, religious institutions, and guilds had long been organized as corporations at common law and under the King's charter, and as I have discussed, the practice of incorporation only expanded in the United States. Both corporations and voluntary associations actively petitioned the Government and expressed their views in newspapers and pamphlets. For example: An antislavery Quaker corporation petitioned the First Congress, distributed pamphlets, and communicated through the press in 1790. The New York Sons of Liberty sent a circular to Colonies farther south in 1766. And the Society for the Relief and Instruction of Poor Germans circulated a biweekly paper from 1755 to 1757. The dissent offers no evidence—none whatever—that the First Amendment's unqualified text was originally understood to exclude such associational speech from its protection.

In passing, the dissent also claims that the Court's conception of corruption is unhistorical. The Framers "would have been appalled," it says, by the evidence of corruption in the congressional

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<sup>4</sup> At times (though not always) the dissent seems to exclude such non-"business corporations" from its denial of free-speech rights. Finding in a seemingly categorical text a distinction between the rights of business corporations and the rights of nonbusiness corporations is even more imaginative than finding a distinction between the rights of *all* corporations and the rights of other associations.

findings supporting the Bipartisan Campaign Reform Act of 2002. For this proposition, the dissent cites a law-review article arguing that “corruption” was originally understood to include “moral decay” and even actions taken by citizens in pursuit of private rather than public ends. Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009). It is hard to see how this has anything to do with what sort of corruption can be combated by restrictions on political speech. Moreover, if speech can be prohibited because, in the view of the Government, it leads to “moral decay” or does not serve “public ends,” then there is no limit to the Government’s censorship power.

The dissent says that when the Framers “constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.” That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women—not, for example, of trees or polar bears. But the individual person’s right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of “an individual American.” It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different—or at least it cannot be denied the right to speak on the simplistic ground that it is not “an individual American.”<sup>7</sup>

But to return to, and summarize, my principal point, which is the conformity of today’s opinion with the original meaning of the First Amendment. The Amendment is written in terms of “speech,” not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals—and the dissent offers no evidence about the original meaning of the text to support any such exclusion. We are therefore simply left with the question whether the speech at issue in this case is “speech” covered by the First Amendment. No one says otherwise. A documentary film critical of a potential Presidential candidate is core political speech, and its nature as such does not change simply because it was funded by a corporation. Nor does the character of that funding produce any reduction whatever in the “inherent worth of the speech” and “its capacity for informing the public,” *Bellotti*, 435 U.S. at 777. Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.

Justice STEVENS, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring in part and dissenting in part.

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it

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<sup>7</sup> The dissent says that “speech” refers to oral communications of human beings, and since corporations are not human beings they cannot speak. This is sophistry. The authorized spokesman of a corporation is a human being, who speaks on behalf of the human beings who have formed that association—just as the spokesman of an unincorporated association speaks on behalf of its members. The power to publish thoughts, no less than the power to speak thoughts, belongs only to human beings, but the dissent sees no problem with a corporation’s enjoying the freedom of the press.

could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United’s nor any other corporation’s speech has been “banned.” All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

The basic premise underlying the Court’s ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker’s identity, including its “identity” as a corporation. While that glittering generality has rhetorical appeal, it is not a correct statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court’s disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

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### *The So-Called “Ban”*

Pervading the Court’s analysis is the ominous image of a “categorical ba[n]” on corporate speech. Indeed, the majority invokes the specter of a “ban” on nearly every page of its opinion. This characterization is highly misleading, and needs to be corrected.

In fact it already has been. Our cases have repeatedly pointed out that, “[c]ontrary to the [majority’s] critical assumptions,” the statutes upheld in *Austin* and *McConnell* do “not impose an *absolute* ban on all forms of corporate political spending.” *Austin*, 494 U.S. at 660; see also *McConnell*, 540 U.S. at 203–04. For starters, both statutes provide exemptions for PACs, separate segregated funds established by a corporation for political purposes. “The ability to form and administer separate segregated funds,” we observed in *McConnell*, “has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court’s unanimous view.”

Under BCRA, any corporation’s “stockholders and their families and its executive or administrative personnel and their families” can pool their resources to finance electioneering

communications. A significant and growing number of corporations avail themselves of this option; during the most recent election cycle, corporate and union PACs raised nearly a billion dollars. Administering a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds, and no one has suggested that the burden is severe for a sophisticated for-profit corporation. To the extent the majority is worried about this issue, it is important to keep in mind that we have no record to show how substantial the burden really is, just the majority's own unsupported factfinding. Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form. The owners of a "mom & pop" store can simply place ads in their own names, rather than the store's.

The laws upheld in *Austin* and *McConnell* leave open many additional avenues for corporations' political speech. Consider the statutory provision we are ostensibly evaluating in this case, BCRA § 203. It has no application to genuine issue advertising—a category of corporate speech Congress found to be far more substantial than election-related advertising,—or to Internet, telephone, and print advocacy. Like numerous statutes, it exempts media companies' news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the institutional press in sustaining public debate. It also allows corporations to spend unlimited sums on political communications with their executives and shareholders, to fund additional PAC activity through trade associations, to distribute voting guides and voting records, to underwrite voter registration and voter turnout activities, to host fundraising events for candidates within certain limits, and to publicly endorse candidates through a press release and press conference.

At the time Citizens United brought this lawsuit, the only types of speech that could be regulated under § 203 were: (1) broadcast, cable, or satellite communications; (2) capable of reaching at least 50,000 persons in the relevant electorate; (3) made within 30 days of a primary or 60 days of a general federal election; (4) by a labor union or a non-*MCFL*, nonmedia corporation; (5) paid for with general treasury funds; and (6) "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The category of communications meeting all of these criteria is not trivial, but the notion that corporate political speech has been "suppress[ed] . . . altogether," that corporations have been "exclu[ded] . . . from the general public dialogue," or that a work of fiction such as *Mr. Smith Goes to Washington* might be covered, is nonsense.

In many ways, then, § 203 functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels. In the case at hand, all Citizens United needed to do to broadcast *Hillary* right before the primary was to abjure business contributions or use the funds in its PAC, which by its own account is one of the most active conservative PACs in America.

## *Identity-Based Distinctions*

The second pillar of the Court's opinion is its assertion that "the Government cannot restrict political speech based on the speaker's . . . identity." Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.

"Our jurisprudence over the past 216 years has rejected an absolutist interpretation" of the First Amendment. *WRTL*, 551 U.S. at 482 (opinion of ROBERTS, C.J.). The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Apart perhaps from measures designed to protect the press, that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students,<sup>41</sup> prisoners,<sup>42</sup> members of the Armed Forces,<sup>43</sup> foreigners,<sup>44</sup> and its own employees.<sup>45</sup> When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems. In contrast to the blanket rule that the majority espouses, our cases recognize that the Government's interests may be more or less compelling with respect to different classes of speakers,<sup>47</sup> cf. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) ("[D]ifferential treatment" is constitutionally suspect "*unless* justified by some special characteristic" of the regulated class of speakers), and that the constitutional rights of certain categories of speakers, in certain contexts, are not automatically coextensive with the rights that are normally accorded to members of our society.

The free speech guarantee thus does not render every other public interest an illegitimate basis for qualifying a speaker's autonomy; society could scarcely function if it did. It is fair to say that our First Amendment doctrine has frowned on certain identity-based distinctions, particularly those

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<sup>41</sup> See, e.g., *Bethel School Dist. No. 403 v. Fraser* ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

<sup>42</sup> See, e.g., *Jones v. North Carolina Prisoners' Labor Union, Inc.* ("In a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system" (internal quotation marks omitted)).

<sup>43</sup> See, e.g., *Parker v. Levy*, 417 U.S. 733 ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections").

<sup>44</sup> See, e.g., 2 U.S.C. § 441e(a)(1) (foreign nationals may not directly or indirectly make contributions or independent expenditures in connection with a U.S. election).

<sup>45</sup> See, e.g., *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (upholding statute prohibiting Executive Branch employees from taking "an active part in political management or in political campaigns").

<sup>47</sup> Outside of the law, of course, it is a commonplace that the identity and incentives of the speaker might be relevant to an assessment of his speech. See Aristotle, *Poetics* § 11-2(vi), pp. 43–44 (M. Heath transl. 1996) ("In evaluating any utterance or action, one must take into account not just the moral qualities of what is actually done or said, but also the identity of the agent or speaker, the addressee, the occasion, the means, and the motive"). The insight that the identity of speakers is a proper subject of regulatory concern, it bears noting, motivates the disclaimer and disclosure provisions that the Court today upholds.

that may reflect invidious discrimination or preferential treatment of a politically powerful group. But it is simply incorrect to suggest that we have prohibited all legislative distinctions based on identity or content. Not even close.

[Here,] it is the identity of corporations, rather than individuals, that the Legislature has taken into account. As we have unanimously observed, legislatures are entitled to decide “that the special characteristics of the corporate structure require particularly careful regulation” in an electoral context. Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also furthest from the core of political expression, since corporations’ First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information.” Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the “speakers” are not natural persons, much less members of our political community, and the governmental interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from noncorporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism.

If taken seriously, our colleagues’ assumption that the identity of a speaker has *no* relevance to the Government’s ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by “Tokyo Rose” during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could “enhance the relative voice” of some (*i.e.*, humans) over others (*i.e.*, nonhumans). Under the majority’s view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.<sup>52</sup>

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

### *Original Understandings*

Let us start from the beginning. The Court invokes “ancient First Amendment principles” and original understandings to defend today’s ruling, yet it makes only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the Amendment. Perhaps this is because there is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers’ views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority’s position.

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<sup>52</sup> Of course, voting is not speech in a pure or formal sense, but then again neither is a campaign expenditure; both are nevertheless communicative acts aimed at influencing electoral outcomes.

This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter. Corporations were created, supervised, and conceptualized as quasi-public entities, “designed to serve a social function for the state.” Handlin & Handlin, *Origins of the American Business Corporation*, 5 J. Econ. Hist. 1 (1945). It was “assumed that [they] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare.” R. Seavoy, *Origins of the American Business Corporation* (1982).

Thomas Jefferson famously fretted that corporations would subvert the Republic.<sup>54</sup> General incorporation statutes, and widespread acceptance of business corporations as socially useful actors did not emerge until the 1800’s. The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.<sup>55</sup> While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. Even “the notion that business corporations could invoke the First Amendment would probably have been quite a novelty,” given that “at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign.” Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const. L.Q. 541 (1991); Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 S. Ct. Rev. 105 (“The framers of the First Amendment could scarcely have anticipated its application to the corporation form. That, of course, ought not to be dispositive. What is compelling, however, is an understanding of who was supposed to be the beneficiary of the free speech guaranty—the individual”). In light of these background practices and understandings, it seems to me implausible that the Framers believed “the freedom of speech” would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections.

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<sup>54</sup> See Letter from Thomas Jefferson to Tom Logan (Nov. 12, 1816), in 12 *The Works of Thomas Jefferson* 42, 44 (P. Ford ed. 1905) (“I hope we shall . . . crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country”).

<sup>55</sup> In normal usage then, as now, the term “speech” referred to oral communications by individuals. See, e.g., 2 S. Johnson, *Dictionary of the English Language 1853–54* (4th ed. 1773) (listing as primary definition of “speech”: “The power of articulate utterance; the power of expressing thoughts by vocal words”). Indeed, it has been “claimed that the notion of institutional speech . . . did not exist in post-revolutionary America.” Fagundes, *State Actors as First Amendment Speakers*, 100 Nw. U. L. Rev. 1637 (2006); see also Bezanson, *Institutional Speech*, 80 Iowa L. Rev. 735 (1995) (“In the intellectual heritage of the eighteenth century, the idea that free speech was individual and personal was deeply rooted and clearly manifest in the writings of Locke, Milton, and others on whom the framers of the Constitution and the Bill of Rights drew”). Given that corporations were conceived of as artificial entities and do not have the technical capacity to “speak,” the burden of establishing that the Framers and ratifiers understood “the freedom of speech” to encompass corporate speech is, I believe, far heavier than the majority acknowledges.

The Court observes that the Framers drew on diverse intellectual sources, communicated through newspapers, and aimed to provide greater freedom of speech than had existed in England. From these (accurate) observations, the Court concludes that “[t]he First Amendment was certainly not understood to condone the suppression of political speech in society’s most salient media.” This conclusion is far from certain, given that many historians believe the Framers were focused on prior restraints on publication and did not understand the First Amendment to “prevent the subsequent punishment of such [publications] as may be deemed contrary to the public welfare.” *Near v. Minnesota*. Yet, even if the majority’s conclusion were correct, it would tell us only that the First Amendment was understood to protect political speech *in* certain media. It would tell us little about whether the Amendment was understood to protect general treasury electioneering expenditures *by* corporations, *and to what extent*.

As a matter of original expectations, then, it seems absurd to think that the First Amendment prohibits legislatures from taking into account the corporate identity of a sponsor of electoral advocacy. As a matter of original meaning, it likewise seems baseless—unless one evaluates the First Amendment’s “principles” or its “purpose” at such a high level of generality that the historical understandings of the Amendment cease to be a meaningful constraint on the judicial task. This case sheds a revelatory light on the assumption of some that an impartial judge’s application of an originalist methodology is likely to yield more determinate answers, or to play a more decisive role in the decisional process, than his or her views about sound policy.

Justice SCALIA criticizes the foregoing discussion for failing to adduce statements from the founding era showing that corporations were understood to be excluded from the First Amendment’s free speech guarantee. Of course, Justice SCALIA adduces no statements to suggest the contrary proposition, or even to suggest that the contrary proposition better reflects the kind of right that the drafters and ratifiers of the Free Speech Clause thought they were enshrining. Although Justice SCALIA makes a perfectly sensible argument that an individual’s right to speak entails a right to speak with others for a common cause, he does not explain why those two rights must be precisely identical, or why that principle applies to electioneering by corporations that serve no “common cause.” Nothing in his account dislodges my basic point that members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights and that they conceptualized speech in individualistic terms. If no prominent Framers bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition—if not also the very notion of “corporate speech”—was inconceivable.

In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, whose political universe differed profoundly from that of today. But historical context is usually relevant, and in light of the Court’s effort to cast itself as guardian of ancient values, it pays to remember that nothing in our constitutional history dictates today’s outcome. To the contrary, this history helps illuminate just how extraordinarily dissonant the decision is.

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Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that § 203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades.

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle elevates corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests. At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

138 S. Ct. 2448.

Supreme Court of the United States.

Mark JANUS, Petitioner

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL  
EMPLOYEES, COUNCIL 31, et al.

No. 16–1466.

Argued Feb. 26, 2018.

Decided June 27, 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. 209 (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 practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions. Developments since *Abood* was handed down have shed new light on the issue of agency fees, and no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years. *Abood* is therefore overruled.

I

A

Under the Illinois Public Labor Relations Act (IPLRA), employees of the State and its political subdivisions are permitted to unionize. 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. 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.

Once a union is so designated, it is vested with broad authority. Only the union may negotiate with the employer on matters relating to “pay, wages, hours [,] and other conditions of employment.” And this authority extends to the negotiation of what the IPLRA calls “policy matters,” such as merit pay, the size of the work force, layoffs, privatization, promotion methods, and non-discrimination policies.

Designating a union as the employees' exclusive representative substantially restricts the rights of individual employees. Among other things, this designation means that individual employees may not be represented by any agent other than the designated union; nor may individual employees negotiate directly with their employer. Protection of the employees' interests is placed in the hands of the union, and therefore the union is required by law to provide fair representation for all employees in the unit, members and nonmembers alike.

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. In labor-law parlance, the outlays in the first category are known as "chargeable" expenditures, while those in the latter are labeled "nonchargeable."

Illinois law does not specify in detail which expenditures are chargeable and which are not. The IPLRA provides that an agency fee may compensate a union for the costs incurred in "the collective bargaining process, contract administration[,] and pursuing matters affecting wages, hours, and conditions of employment." Excluded from the agency-fee calculation are union expenditures "related to the election or support of any candidate for political office."

As illustrated by the record in this case, unions charge nonmembers not just for the cost of collective bargaining *per se*, but also for many other supposedly connected activities. Here, the nonmembers were told that they had to pay for "[l]obbying," "[s]ocial and recreational activities," "advertising," "[m]embership meetings and conventions," and "litigation," as well as other unspecified "[s]ervices" that "may ultimately inure to the benefit of the members of the local bargaining unit." The total chargeable amount for nonmembers was 78.06% of full union dues.

## B

Petitioner Mark Janus is employed by the Illinois Department of Healthcare and Family Services as a child support specialist. The employees in his unit are among the 35,000 public employees in Illinois who are represented by respondent American Federation of State, County, and Municipal Employees, Council 31 (Union). Janus refused to join the Union because he opposes "many of the public policy positions that [it] advocates," including the positions it takes in collective bargaining. Janus believes that the Union's "behavior in bargaining does not appreciate the current fiscal crises in Illinois and does not reflect his best interests or the interests of Illinois citizens." Therefore, if he had the choice, he "would not pay any fees or otherwise subsidize [the Union]." Under his unit's collective-bargaining agreement, however, he was required to pay an agency fee of \$44.58 per month, which would amount to about \$535 per year.

The complaint claims that all "nonmember fee deductions are coerced political speech" and that "the First Amendment forbids coercing any money from the nonmembers." Respondents moved to dismiss the complaint, correctly recognizing that the claim it asserted was foreclosed by *Abood*. The District Court granted the motion, and the Court of Appeals for the Seventh Circuit affirmed.

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### III

We first consider whether *Abood*'s holding is consistent with standard First Amendment principles.

#### A

The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech “includes both the right to speak freely and the right to refrain from speaking at all.” The right to eschew association for expressive purposes is likewise protected. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (“Freedom of association . . . plainly presupposes a freedom not to associate”). As Justice Jackson memorably put it: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein.*” *West Virginia Bd. of Ed. v. Barnette* (emphasis added).

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

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

Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth. Whenever the Federal Government or a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends.

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

Compelling a person to *subsidize* the speech of other private speakers raises similar First Amendment concerns. As Jefferson famously put it, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhor[s] is sinful and tyrannical.” *A Bill for Establishing Religious Freedom*, in 2 Papers of Thomas Jefferson 545. We have therefore recognized that a significant impingement on First Amendment rights occurs when public

employees are required to provide financial support for a union that takes many positions during collective bargaining that have powerful political and civic consequences.

Because the compelled subsidization of private speech seriously impinges on First Amendment rights, it cannot be casually allowed. Our free speech cases have identified “levels of scrutiny” to be applied in different contexts, and in three recent cases, we have considered the standard that should be used in judging the constitutionality of agency fees. See *Knox, supra*; *Harris, supra*; *Friedrichs v. California Teachers Assn.*, 578 U.S. \_\_\_\_ (2016).

In *Knox*, the first of these cases, we found it sufficient to hold that the conduct in question was unconstitutional under even the test used for the compulsory subsidization of commercial speech. Even though commercial speech has been thought to enjoy a lesser degree of protection, see, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980), prior precedent in that area had applied what we characterized as “exacting” scrutiny, 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.”

In *Harris*, the second of these cases, we again found that an agency-fee requirement failed “exacting scrutiny.” But we questioned whether that test provides sufficient protection for free speech rights, since “it is apparent that the speech compelled” in agency-fee cases “is not commercial speech.” Picking up that cue, petitioner in the present case contends that the Illinois law at issue should be subjected to “strict scrutiny.” The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.

In the remainder of this part of our opinion, we will apply this standard to the justifications for agency fees adopted by the Court in *Abood*. Then, in Parts IV and V, we will turn to alternative rationales proffered by respondents and their *amici*.

## B

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

We assume that “labor peace,” in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed,

and it is now clear that *Abood*'s fears were unfounded. The *Abood* Court assumed that designation of a union as the exclusive representative of all the employees in a unit and the exaction of agency fees are inextricably linked, but that is simply not true.

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. 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, 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.

## C

In addition to the promotion of “labor peace,” *Abood* cited “the risk of ‘free riders’” as justification for agency fees. Respondents and some of their *amici* endorse this reasoning, contending that agency fees are needed to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs. Petitioner strenuously objects to this free-rider label. 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 benefiting nonmembers. May all those who are thought to benefit from such efforts be compelled to subsidize this speech?

Suppose that a particular group lobbies or speaks out on behalf of what it thinks are the needs of senior citizens or veterans or physicians, to take just a few examples. Could the government require that all seniors, veterans, or doctors pay for that service even if they object? It has never been thought that this is permissible. Private speech often furthers the interests of nonspeakers, but that does not alone empower the state to compel the speech to be paid for. In simple terms, the First Amendment does not permit the government to compel a person to pay for another party's speech just because the government thinks that the speech furthers the interests of the person who does not want to pay.

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

restricts the nonmembers' rights. Protection of their interests is placed in the hands of the union, and if the union were free to disregard or even work against those interests, these employees would be wholly unprotected. That is why we said many years ago that serious "constitutional questions [would] arise" if the union were *not* subject to the duty to represent all employees fairly.

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

#### IV

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

#### A

The most surprising of these new arguments is the Union respondent's originalist defense of *Abood*. According to this argument, *Abood* was correctly decided because the First Amendment was not originally understood to provide *any* protection for the free speech rights of public employees.

As an initial matter, we doubt that the Union—or its members—actually want us to hold that public employees have *no* free speech rights. It is particularly discordant to find this argument in a brief that trumpets the importance of *stare decisis*. Taking away free speech protection for public employees would mean overturning decades of landmark precedent. Under the Union's theory, *Pickering* and its progeny would fall. Yet *Pickering*, as we will discuss, is now the foundation for respondents' chief defense of *Abood*. And indeed, *Abood* itself would have to go if public employees have no free speech rights, since *Abood* holds that the First Amendment prohibits the exaction of agency fees for political or ideological purposes. Respondents presumably want none of this, desiring instead that we apply the Constitution's supposed original meaning only when it suits them—to retain the part of *Abood* that they like. We will not engage in this halfway originalism.

Nor, in any event, does the First Amendment's original meaning support the Union's claim. The Union offers no persuasive founding-era evidence that public employees were understood to lack free speech protections. While it observes that restrictions on federal employees' activities have existed since the First Congress, most of its historical examples involved limitations on public officials' outside business dealings, not on their speech. The only early *speech* restrictions the Union identifies are an 1806 statute prohibiting military personnel from using "contemptuous or disrespectful words against the President" and other officials, and an 1801 directive limiting electioneering by top government employees. But those examples at most show that the government was understood to have power to limit employee speech that threatened important governmental interests (such as maintaining military discipline and preventing corruption)—not that public employees' speech was entirely unprotected. Indeed, more recently this Court has upheld similar restrictions even while recognizing that government employees possess First Amendment rights. See, e.g., *Brown v. Glines*, 444 U.S. 348 (1980) (upholding military restriction

on speech that threatened troop readiness); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548 (1973) (upholding limits on public employees' political activities).

The Union has also failed to show that, even if public employees enjoyed free speech rights, the First Amendment was nonetheless originally understood to allow forced subsidies like those at issue here. We can safely say that, at the time of the adoption of the First Amendment, no one gave any thought to whether public-sector unions could charge nonmembers agency fees. Entities resembling labor unions did not exist at the founding, and public-sector unions did not emerge until the mid-20th century. The idea of public-sector unionization and agency fees would astound those who framed and ratified the Bill of Rights.<sup>7</sup> Thus, the Union cannot point to any accepted founding-era practice that even remotely resembles the compulsory assessment of agency fees from public-sector employees. We do know, however, that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed. As noted, Jefferson denounced compelled support for such beliefs as “sinful and tyrannical,” and others expressed similar views.

In short, the Union has offered no basis for concluding that *Abood* is supported by the original understanding of the First Amendment.

## B

The principal defense of *Abood* advanced by respondents and the dissent is based on our decision in *Pickering*, 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*, or if it involved a matter of only private concern. 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.”

## 1

As we pointed out in *Harris*, *Abood* was not based on *Pickering*. The *Abood* majority cited the case exactly once—in a footnote—and then merely to acknowledge that “there may be limits on the extent to which an employee in a sensitive or policymaking position may freely criticize his superiors and the policies they espouse.” That aside has no bearing on the agency-fee issue here.<sup>9</sup>

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<sup>7</sup> Indeed, under common law, collective bargaining was unlawful. So even the concept of a private third-party entity with the power to bind employees on the terms of their employment likely would have been foreign to the Founders. We note this only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law.

<sup>9</sup> Justice Powell's separate opinion did invoke *Pickering* in a relevant sense, but he did so only to acknowledge the State's relatively greater interest in regulating speech when it acts as employer than when it acts as sovereign. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977) (concurring in judgment). In the very next sentence, he explained that “even in public employment, a significant impairment of First Amendment rights must survive exacting scrutiny.” That is the test we apply today.



Respondents' reliance on *Pickering* is thus an effort to find a new justification for the decision in *Abood*. We see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework.

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Even if that were attempted, the shoe would be a painful fit.

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. 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. A speech-restrictive law with widespread impact gives rise to far more serious concerns than could any single supervisory decision. Therefore, when such a law is at issue, the government must shoulder a correspondingly heavier burden, and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights. The end product of those adjustments is a test that more closely resembles exacting scrutiny than the traditional *Pickering* analysis.

The core collective-bargaining issue of wages and benefits illustrates this point. Suppose that a single employee complains that he or she should have received a 5% raise. This individual complaint would likely constitute a matter of only private concern and would therefore be unprotected under *Pickering*. But a public-sector union's demand for a 5% raise for the many thousands of employees it represents would be another matter entirely. Granting such a raise could have a serious impact on the budget of the government unit in question, and by the same token, denying a raise might have a significant effect on the performance of government services. When a large number of employees speak through their union, the category of speech that is of public concern is greatly enlarged, and the category of speech that is of only private concern is substantially shrunk. By disputing this, the dissent denies the obvious.

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

Consider our decision in *Connick*. In that case, we held that an assistant district attorney's complaints about the supervisors in her office were, for the most part, matters of only private concern. As a result, we held, the district attorney could fire her for making those comments. Now, suppose that the assistant had not made any critical comments about the supervisors but that the

district attorney, out of the blue, demanded that she circulate a memo praising the supervisors. Would her refusal to go along still be a matter of purely private concern? And if not, would the order be justified on the ground that the effective operation of the office demanded that the assistant voice complimentary sentiments with which she disagreed? If *Pickering* applies at all to compelled speech—a question that we do not decide—it would certainly require adjustment in that context.

For all these reasons, *Pickering* is a poor fit indeed.

[The Court’s discussion of what result *Pickering* would dictate if it were applied is omitted. The Court concluded that even if *Pickering* were applied, it would not support the imposition of mandatory union dues.]

\* \* \* \*

## VII

For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. Under Illinois law, if a public-sector collective-bargaining agreement includes an agency-fee provision and the union certifies to the employer the amount of the fee, that amount is automatically deducted from the nonmember’s wages. No form of employee consent is required.

This procedure violates the First Amendment and cannot continue. Neither an agency fee nor any other payment to the union may be deducted from a nonmember’s wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by “clear and compelling” evidence. Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met.

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

*It is so ordered.*

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

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

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

Not any longer. [The Court’s] decision will have large-scale consequences. Public employee unions will lose a secure source of financial support. State and local governments that thought fair-share provisions furthered their interests will need to find new ways of managing their workforces. Across the country, the relationships of public employees and employers will alter in both predictable and wholly unexpected ways.

\* \* \* \*

B

1

In many cases over many decades, this Court has addressed how the First Amendment applies when the government, acting not as sovereign but as employer, limits its workers’ speech. Those decisions have granted substantial latitude to the government, in recognition of its significant interests in managing its workforce so as to best serve the public. *Abood* fit neatly with that caselaw, in both reasoning and result. Indeed, its reversal today creates a significant anomaly—an exception, applying to union fees alone, from the usual rules governing public employees’ speech.

“Time and again our cases have recognized that the Government has a much freer hand” in dealing with its employees than with “citizens at large.” The government, we have stated, needs to run “as effectively and efficiently as possible.” That means it must be able, much as a private employer is, to manage its workforce as it thinks fit. A public employee thus must submit to “certain limitations on his or her freedom.” *Garcetti v. Ceballos* (2006). Government workers, of course, do not wholly lose their constitutional rights when they accept their positions. But under our precedent, their rights often yield when weighed against the realities of the employment context. If it were otherwise—if every employment decision were to become a constitutional matter—the Government could not function.

Those principles apply with full force when public employees’ expressive rights are at issue. As we have explained: “Government employers, like private employers, need a significant degree of control over their employees’ words” in order to “efficient[ly] provi[de] public services.” *Garcetti*, 547 U.S. at 418. Again, significant control does not mean absolute authority. In particular, the Court has guarded against government efforts to leverage the employment relationship to shut down its employees’ speech as private citizens. But when the government imposes speech

restrictions relating to workplace operations, of the kind a private employer also would, the Court reliably upholds them.

In striking the proper balance between employee speech rights and managerial interests, the Court has long applied a test originating in *Pickering*. That case arose out of an individual employment action: the firing of a public school teacher. As we later described the *Pickering* test, the Court first asks whether the employee “spoke as a citizen on a matter of public concern.” *Garcetti*, 547 U.S. at 418. If she did not—but rather spoke as an employee on a workplace matter—she has no “possibility of a First Amendment claim”: A public employer can curtail her speech just as a private one could. But if she did speak as a citizen on a public matter, the public employer must demonstrate “an adequate justification for treating the employee differently from any other member of the general public.” The government, that is, needs to show that legitimate workplace interests lay behind the speech regulation.

*Abood* coheres with that framework. The point here is not, as the majority suggests, that *Abood* is an overt, one-to-one “application of *Pickering*.” It is not. *Abood* related to a municipality’s labor policy, and so the Court looked to prior cases about unions, not to *Pickering*’s analysis of an employee’s dismissal. (And truth be told, *Pickering* was not at that time much to look at: What the Court now thinks of as the two-step *Pickering* test, as the majority’s own citations show, really emerged from *Garcetti* and *Connick*—two cases post-dating *Abood*. But *Abood* and *Pickering* raised variants of the same basic issue: the extent of the government’s authority to make employment decisions affecting expression. And in both, the Court struck the same basic balance, enabling the government to curb speech when—but only when—the regulation was designed to protect its managerial interests.)

*Abood* thus dovetailed with the Court’s usual attitude in First Amendment cases toward the regulation of public employees’ speech. That attitude is one of respect—even solicitude—for the government’s prerogatives as an employer. So long as the government is acting as an employer—rather than exploiting the employment relationship for other ends—it has a wide berth, comparable to that of a private employer. And when the regulated expression concerns the terms and conditions of employment—the very stuff of the employment relationship—the government really cannot lose. There, managerial interests are obvious and strong. And so government employees are . . . just employees, even though they work for the government. Except that today the government does lose, in a first for the law. Now, the government can constitutionally adopt all policies regulating core workplace speech in pursuit of managerial goals—save this single one.

2

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. 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. *West Virginia Bd. of Ed. v. Barnette*. 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.” See *Wooley v.*

*Maynard* (referring to “[t]he right to speak and the right to refrain from speaking” as “complementary components” of the First Amendment). And if anything, the First Amendment scales tip the opposite way when (as here) the government is not compelling actual speech, but instead compelling a subsidy that others will use for expression.<sup>3</sup> So when a government mandates a speech subsidy from a public employee—here, we might think of it as levying a tax to support collective bargaining—it should get at least as much deference as when it restricts the employee’s speech. As this case shows, the former may advance a managerial interest as well as the latter—in which case the government’s “freer hand” in dealing with its employees should apply with equal (if not greater) force.

\* \* \* \*

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* (invalidating a law requiring medical and counseling facilities to provide relevant information to users). 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.

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<sup>3</sup> That’s why this Court has blessed the constitutionality of compelled speech subsidies in a variety of cases beyond *Abood*, involving a variety of contexts beyond labor relations. The list includes mandatory fees imposed on state bar members (for professional expression); university students (for campus events); and fruit processors (for generic advertising).

## X. The Government Speech Doctrine

The following brief excerpt<sup>1</sup> provides an overview of the government speech doctrine, which is at issue in *Walker* (the next case).

“The government speech doctrine is a fairly recent development in First Amendment law. The Supreme Court has stated that “[a] government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express.” Thus, the government speech doctrine operates as an exception/defense to the usual First Amendment requirements of content and viewpoint neutrality. Government entities may express or promote their own messages. The key to the doctrine is that the speech must be the government’s own. When the government disfavors or endorses private speech, the usual First Amendment rules of content and viewpoint neutrality apply.

The Court has offered two primary rationales for the government speech doctrine. First, the doctrine recognizes that the effective functioning of government sometimes requires it to express or promote its own viewpoints through its policies. Government entities routinely express certain messages rather than others. A requirement of absolute neutrality regarding the government’s own speech would be untenable. The government, for example, can spend funds to promote its own message of honoring military veterans without being required to spend similar funds honoring the country’s wartime enemies.<sup>7</sup> The Court has held that the First Amendment allows such selectivity, provided that the government does not suppress competing private speech or violate another constitutional provision in effectuating its own speech.<sup>8</sup>

The second rationale for the government speech doctrine relates to democratic accountability. Strict judicial review is applied when the government engages in content or viewpoint discrimination regarding private speech because such suppression or favoritism is usually a sign of a defect in the democratic process.<sup>9</sup> When the government privileges or punishes private speech, it is generally because the disfavored speaker or the message is one that the government dislikes, disagrees with, or finds dangerous. Thus, either the speaker or the speech is presumed to be the kind of “discrete and insular minority” for which heightened scrutiny is appropriate since the

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<sup>1</sup> William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 31–36 (2011).

<sup>7</sup> *Cf. Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (stating by way of analogy, in rejecting a First Amendment challenge to federal regulations prohibiting funding recipients from promoting or discussing abortion, that “[w]hen Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage . . . communism and fascism” (citation omitted)).

<sup>8</sup> *See, e.g., Summum*, 129 S. Ct. at 1139 (Stevens, J., concurring) (“[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”).

<sup>9</sup> *See generally* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–79 (1980) (discussing “process defect theory” as a reason for judicial intervention on behalf of minorities).

speaker cannot effectively protect him or herself through the political process.<sup>10</sup> By contrast, the Court has stated, “When 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.”<sup>11</sup> Thus, the government speech doctrine holds that there is no need for a judicial check on the government’s own speech because such speech is presumably both generated by and subject to correction through normal political processes.

*Rust v. Sullivan* is considered to be the first major Supreme Court case applying the government speech doctrine. *Rust* involved a First Amendment challenge to regulations that prohibited programs that received federal family planning funds from providing abortion-related services. The regulations conditioned funding on recipients refraining from engaging in a variety of pro-choice expressive activity. The Court ruled that the First Amendment did not forbid the government from choosing to fund certain programs to the exclusion of others in order to advance its own message. The Court reasoned that the regulations did not punish, proscribe, or privilege private speech based on its viewpoint, but were instead a constitutionally permissible instance of the government using public funds to promote the government’s own anti-abortion speech.

In *Legal Services Corp. v. Velasquez*, by contrast, the Court found the government speech doctrine inapplicable. *Velasquez* concerned restrictions imposed on recipients of federal funding from the Legal Services Corporation (LSC) to provide legal services to the indigent. The restrictions prohibited grantees from engaging in legal representation aimed at challenging existing welfare law. Thus, the speech at issue was that of attorneys representing their clients. Various LSC grantees and clients sued, alleging that the restrictions violated the First Amendment. The government argued that the restrictions were permissible under *Rust*. The Court disagreed, distinguishing *Rust* as involving the government promoting its own message by transmitting it through private speakers. *Velasquez*, in the Court’s view, instead involved government facilitation of private speech, not the harnessing of private speech to promote a government message. The Court reasoned that selectively funding private speech for its own sake runs the risk that the government has done so to suppress dangerous or disfavored ideas. When the government itself speaks or promotes its own message by subsidizing private speech, however, it is functioning as another speaker in the marketplace of ideas, and ultimately remains accountable to the voters if they disagree with the message. In short, when promoting the government’s own message is the goal and subsidizing private speech is the means, the government speech exception applies. When promoting or suppressing private speech is the goal, the government speech exception does not apply.

The *Velasquez* Court rejected the government speech argument, stating that “[t]he lawyer is not the government’s speaker.” Indeed, in a suit challenging existing welfare law on behalf of a client, the attorney’s speech would be in opposition to the government’s position. Accordingly, the Court held, “[t]he advice from the attorney to the client and the advocacy by the attorney to the courts

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<sup>10</sup> Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (recognizing without deciding that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

<sup>11</sup> *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).

cannot be classified as governmental speech even under a generous understanding of the concept.” Rather, the effect of the funding restriction was to curtail private speech, that is, to “insulate current welfare laws from constitutional scrutiny and certain other legal challenges, [thereby] implicating central First Amendment concerns.” The funding restrictions were therefore subject to the traditional First Amendment prohibition of viewpoint discrimination and found unconstitutional.

*Pleasant Grove City v. Summum* involved a public park containing fifteen permanent displays, of which at least eleven were donated to the park by private persons or groups. The monuments included historical items, such as an historic granary, the city’s first fire station, and a September 11th monument, as well as a Ten Commandments monument that the Fraternal Order of Eagles donated in 1971. Summum, a religious organization, wished to donate a monument containing its “Seven Aphorisms,” which were religious tenets. The proposed monument was to be “similar in size and nature” to the existing Ten Commandments monument. The city refused Summum’s donation, citing its policy that monuments in the park were limited to those relating to the city’s history or that were donated by groups with “longstanding ties” to the community.

Summum sued, alleging that the city violated the Free Speech Clause by distinguishing between the religious monuments that it would accept—the Ten Commandments—and those that it would reject—the Seven Aphorisms—based on content and/or the speaker’s identity. The Court rejected this claim, holding that the display of permanent monuments in a public park on city-owned property fell within the government speech doctrine. The Court stated that a government entity “has the right to speak for itself [and] is entitled to say what it wishes, and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom.”

Although the *Summum* Court did not embrace a single bright-line rule, it unanimously held that the monument display had the attributes of government speech. While admitting “there may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf,” the Court found that it was clear that the placement of monuments in the park amounted to government speech. The Court held that visitors to the park would likely perceive the monuments as expressing a government message and that the government in fact established and fully controlled that message. Accordingly, the Court found the government speech exception to be satisfied.



135 S. Ct. 2239.

Supreme Court of the United States.

John WALKER, III, Chairman, Texas Department of Motor Vehicles Board, et al., Petitioners

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., et al.

No. 14–144.

Argued March 23, 2015.

Decided June 18, 2015.

Justice BREYER delivered the opinion of the Court.

Texas offers automobile owners a choice between ordinary and specialty license plates. Those who want the State to issue a particular specialty plate may propose a plate design, comprising a slogan, a graphic, or (most commonly) both. If the Texas Department of Motor Vehicles Board approves the design, the State will make it available for display on vehicles registered in Texas.

In this case, the Texas Division of the Sons of Confederate Veterans proposed a specialty license plate design featuring a Confederate battle flag. The Board rejected the proposal. We must decide whether that rejection violated the Constitution’s free speech guarantees. We conclude that it did not.

I

A

Texas law requires all motor vehicles operating on the State’s roads to display valid license plates, and Texas makes available several kinds of plates. Drivers may choose to display the State’s general-issue license plates. Each of these plates contains the word “Texas,” a license plate number, a silhouette of the State, a graphic of the Lone Star, and the slogan “The Lone Star State.” In the alternative, drivers may choose from an assortment of specialty license plates. Each of these plates contains the word “Texas,” a license plate number, and one of a selection of designs prepared by the State. Finally, Texas law provides for personalized plates (also known as vanity plates). Pursuant to the personalization program, a vehicle owner may request a particular alphanumeric pattern for use as a plate number, such as “BOB” or “TEXPL8.”

Here we are concerned only with the second category of plates, namely specialty license plates, not with the personalization program. Texas offers vehicle owners a variety of specialty plates, generally for an annual fee. Texas selects the designs for specialty plates through three distinct processes.

First, the state legislature may specifically call for the development of a specialty license plate. The legislature has enacted statutes authorizing, for example, plates that say “Keep Texas

Beautiful” and “Mothers Against Drunk Driving,” plates that “honor” the Texas citrus industry, and plates that feature an image of the World Trade Center towers and the words “Fight Terrorism.”

Second, the Board may approve a specialty plate design proposal that a state-designated private vendor has created at the request of an individual or organization. Among the plates created through the private-vendor process are plates promoting the “Keller Indians” and plates with the slogan “Get it Sold with RE/MAX.”

Third, the Board “may create new specialty license plates on its own initiative or on receipt of an application from a” nonprofit entity seeking to sponsor a specialty plate. A nonprofit must include in its application “a draft design of the specialty license plate.” And Texas law vests in the Board authority to approve or to disapprove an application. The relevant statute says that the Board “may refuse to create a new specialty license plate” for a number of reasons, for example “if the design might be offensive to any member of the public . . . or for any other reason established by rule.” Specialty plates that the Board has sanctioned through this process include plates featuring the words “The Gator Nation,” together with the Florida Gators logo, and plates featuring the logo of Rotary International and the words “SERVICE ABOVE SELF.”

## B

In 2009, the Sons of Confederate Veterans, Texas Division (a nonprofit entity), applied to sponsor a specialty license plate through this last-mentioned process. SCV’s application included a draft plate design. At the bottom of the proposed plate were the words “SONS OF CONFEDERATE VETERANS.” At the side was the organization’s logo, a square Confederate battle flag framed by the words “Sons of Confederate Veterans 1896.” A faint Confederate battle flag appeared in the background on the lower portion of the plate. Additionally, in the middle of the plate was the license plate number, and at the top was the State’s name and silhouette. The Board’s predecessor denied this application.

In 2010, SCV renewed its application before the Board. The Board invited public comment on its website and at an open meeting. After considering the responses, including a number of letters sent by elected officials who opposed the proposal, the Board voted unanimously against issuing the plate. The Board explained that it had found “it necessary to deny th[e] plate design application, specifically the confederate flag portion of the design, because public comments ha[d] shown that many members of the general public find the design offensive, and because such comments are reasonable.” The Board added “that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups.”

In 2012, SCV brought this lawsuit against the Board. SCV argued that the Board’s decision violated the Free Speech Clause of the First Amendment, and it sought an injunction requiring the Board to approve the proposed plate design. The District Court entered judgment for the Board. A divided panel of the Court of Appeals for the Fifth Circuit reversed. It held that Texas’s specialty license plate designs are private speech and that the Board, in refusing to approve SCV’s design, engaged in constitutionally forbidden viewpoint discrimination. The dissenting judge argued that

Texas's specialty license plate designs are government speech, the content of which the State is free to control.

We granted the Board's petition for certiorari, and we now reverse.

## II

When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. *Pleasant Grove City v. Summum*. That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas. Instead, the Free Speech Clause helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate.

Were the Free Speech Clause interpreted otherwise, government would not work. How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization? “[I]t is not easy to imagine how government could function if it lacked th[e] freedom” to select the messages it wishes to convey. *Summum, supra*.

We have therefore refused “[t]o 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.” *Rust v. Sullivan*. We have pointed out that a contrary holding would render numerous Government programs constitutionally suspect. Cf. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (“If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed”). And we have made clear that “the government can speak for itself.” *Southworth, supra*.

That is not to say that a government's ability to express itself is without restriction. Constitutional and statutory provisions outside of the Free Speech Clause may limit government speech. And the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech. But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.

## III

In our view, specialty license plates issued pursuant to Texas's statutory scheme convey government speech. Our reasoning rests primarily on our analysis in *Summum*, a recent case that

presented a similar problem. We conclude here, as we did there, that our precedents regarding government speech (and not our precedents regarding forums for private speech) provide the appropriate framework through which to approach the case.

## A

In *Summum*, we considered a religious organization’s request to erect in a 2.5-acre city park a monument setting forth the organization’s religious tenets. In the park were 15 other permanent displays. At least 11 of these—including a wishing well, a September 11 monument, a historic granary, the city’s first fire station, and a Ten Commandments monument—had been donated to the city by private entities. The religious organization argued that the Free Speech Clause required the city to display the organization’s proposed monument because, by accepting a broad range of permanent exhibitions at the park, the city had created a forum for private speech in the form of monuments.

This Court rejected the organization’s argument. We held that the city had not “provid[ed] a forum for private speech” with respect to monuments. Rather, the city, even when “accepting a privately donated monument and placing it on city property,” had “engage[d] in expressive conduct.” The speech at issue, this Court decided, was “best viewed as a form of government speech” and “therefore [was] not subject to scrutiny under the Free Speech Clause.”

We based our conclusion on several factors. First, history shows that “[g]overnments have long used monuments to speak to the public.” Thus, we observed that “[w]hen a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure.”

Second, we noted that it “is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated.” As a result, “persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner’s behalf.” And “observers” of such monuments, as a consequence, ordinarily “appreciate the identity of the speaker.”

Third, we found relevant the fact that the city maintained control over the selection of monuments. We thought it “fair to say that throughout our Nation’s history, the general government practice with respect to donated monuments has been one of selective receptivity.” And we observed that the city government in *Summum* “effectively controlled the messages sent by the monuments in the [p]ark by exercising final approval authority over their selection.”

In light of these and a few other relevant considerations, the Court concluded that the expression at issue was government speech. And, in reaching that conclusion, the Court rejected the premise that the involvement of private parties in designing the monuments was sufficient to prevent the government from controlling which monuments it placed in its own public park.

## B

Our analysis in *Summum* leads us to the conclusion that here, too, government speech is at issue. First, the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States [including] slogans to urge action, to promote tourism, and to tout local industries.

Texas, too, has selected various messages to communicate through its license plate designs. By 1919, Texas had begun to display the Lone Star emblem on its plates. In 1936, the State's general-issue plates featured the first slogan on Texas license plates: the word "Centennial." In 1968, Texas plates promoted a San Antonio event by including the phrase "Hemisfair 68." In 1977, Texas replaced the Lone Star with a small silhouette of the State. And in 1995, Texas plates celebrated "150 Years of Statehood." Additionally, the Texas Legislature has specifically authorized specialty plate designs stating, among other things, "Read to Succeed," "Houston Livestock Show and Rodeo," "Texans Conquer Cancer," and "Girl Scouts." This kind of state speech has appeared on Texas plates for decades.

Second, Texas license plate designs "are often closely identified in the public mind with the [State]." *Summum, supra*. Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. And Texas dictates the manner in which drivers may dispose of unused plates.

Texas license plates are, essentially, government IDs. And issuers of ID "typically do not permit" the placement on their IDs of messages with which they do not wish to be associated. *Summum*, 555 U.S. at 471. Consequently, "persons who observe" designs on IDs "routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf." *Id.*

Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas's license plate designs convey government agreement with the message displayed.

Third, Texas maintains direct control over the messages conveyed on its specialty plates. Texas law provides that the State "has sole control over the design, typeface, color, and alphanumeric pattern for all license plates." The Board must approve every specialty plate design proposal before the design can appear on a Texas plate. And the Board and its predecessor have actively exercised this authority. Texas asserts, and SCV concedes, that the State has rejected at least a dozen proposed designs. Accordingly, like the city government in *Summum*, Texas "has 'effectively controlled' the messages [conveyed] by exercising 'final approval authority' over their selection."

This final approval authority allows Texas to choose how to present itself and its constituency. Thus, Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida's oranges as far better. And Texas offers plates that say "Fight Terrorism." But it need not issue plates promoting al Qaeda.

These considerations, taken together, convince us that the specialty plates here in question are similar enough to the monuments in *Summum* to call for the same result. That is not to say that every element of our discussion in *Summum* is relevant here. For instance, in *Summum* we emphasized that monuments were "permanent" and we observed that "public parks can accommodate only a limited number of permanent monuments." We believed that the speech at issue was government speech rather than private speech in part because we found it "hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression." Here, a State could theoretically offer a much larger number of license plate designs, and those designs need not be available for time immemorial.

But those characteristics of the speech at issue in *Summum* were particularly important because the government speech at issue occurred in public parks, which are traditional public forums for "the delivery of speeches and the holding of marches and demonstrations" by private citizens. By contrast, license plates are not traditional public forums for private speech.

And other features of the designs on Texas's specialty license plates indicate that the message conveyed by those designs is conveyed on behalf of the government. Texas, through its Board, selects each design featured on the State's specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying "TEXAS" as the issuer of the IDs. The designs that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

## C

SCV believes that Texas's specialty license plate designs are not government speech, at least with respect to the designs (comprising slogans and graphics) that were initially proposed by private parties. According to SCV, the State does not engage in expressive activity through such slogans and graphics, but rather provides a forum for private speech by making license plates available to display the private parties' designs. We cannot agree.

We have previously used what we have called "forum analysis" to evaluate government restrictions on purely private speech that occurs on government property. But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.

The parties agree that Texas's specialty license plates are not a "traditional public forum," such as a street or a park, "which ha[s] immemorially been held in trust for the use of the public and, time

out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” The Court has rejected the view that traditional public forum status extends beyond its historic confines. And state-issued specialty license plates lie far beyond those confines.

It is equally clear that Texas’s specialty plates are neither a “designated public forum,” which exists where “government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose,” nor a “limited public forum,” which exists where a government has reserved a forum for certain groups or for the discussion of certain topics. A 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. And in order to ascertain whether a government intended to designate a place not traditionally open to assembly and debate as a public forum, this Court has looked to the policy and practice of the government and to the nature of the property and its compatibility with expressive activity.

Texas’s policies and the nature of its license plates indicate that the State did not intend its specialty license plates to serve as either a designated public forum or a limited public forum. First, the State exercises final authority over each specialty license plate design. This authority militates against a determination that Texas has created a public forum. Second, Texas takes ownership of each specialty plate design, making it particularly untenable that the State intended specialty plates to serve as a forum for public discourse. Finally, Texas license plates have traditionally been used for government speech, are primarily used as a form of government ID, and bear the State’s name. These features of Texas license plates indicate that Texas explicitly associates itself with the speech on its plates.

For similar reasons, we conclude that Texas’s specialty license plates are not a “nonpublic for[um],” which exists “[w]here the government is acting as a proprietor, managing its internal operations.” *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992). With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers’ reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas’s specialty license plate designs “are meant to convey and have the effect of conveying a government message.” *Summum*, 555 U.S. at 472. They therefore constitute government speech.

The fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government’s role into that of a mere forum-provider. In *Summum*, private entities “financed and donated monuments that the government accept[ed] and display[ed] to the public.” Here, similarly, private parties propose designs that Texas may accept and display on its license plates. In this case, as in *Summum*, the “government entity may exercise [its] freedom to express its views” even “when it receives assistance from private sources for the purpose of delivering a government-controlled message.” And in this case, as in *Summum*, forum analysis is inapposite.

Of course, Texas allows many more license plate designs than the city in *Summum* allowed monuments. But our holding in *Summum* was not dependent on the precise number of monuments

found within the park. Indeed, we indicated that the permanent displays in New York City’s Central Park also constitute government speech. And an *amicus* brief had informed us that there were, at the time, 52 such displays. Further, there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments. Texas’s desire to communicate numerous messages does not mean that the messages conveyed are not Texas’s own.

Additionally, the fact that Texas vehicle owners pay annual fees in order to display specialty license plates does not imply that the plate designs are merely a forum for private speech. While some nonpublic forums provide governments the opportunity to profit from speech, see, *e.g.*, *Lehman v. Shaker Heights* (plurality opinion), the existence of government profit alone is insufficient to trigger forum analysis. Thus, if the city in *Summum* had established a rule that organizations wishing to donate monuments must also pay fees to assist in park maintenance, we do not believe that the result in that case would have been any different. Here, too, we think it sufficiently clear that Texas is speaking through its specialty license plate designs, such that the existence of annual fees does not convince us that the specialty plates are a nonpublic forum.

Nor is this case like *Cornelius*, where we determined that a charitable fundraising program directed at federal employees constituted a nonpublic forum. That forum lacked the kind of history present here. The fundraising drive had never been a medium for government speech. Instead, it was established “to bring order to [a] solicitation process” which had previously consisted of ad hoc solicitation by individual charitable organizations. The drive “was designed to minimize . . . disruption to the [federal] workplace,” not to communicate messages from the government. Further, the charitable solicitations did not appear on a government ID under the government’s name. In contrast to the instant case, there was no reason for employees to “interpret [the solicitation] as conveying some message on the [government’s] behalf.” *Summum*, 555 U.S. at 471.

#### IV

For the reasons stated, we hold that Texas’s specialty license plate designs constitute government speech and that Texas was consequently entitled to refuse to issue plates featuring SCV’s proposed design. Accordingly, the judgment of the United States Court of Appeals for the Fifth Circuit is

*Reversed.*

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY join, dissenting.

The Court’s decision passes off private speech as government speech and, in doing so, establishes a precedent that threatens private speech that government finds displeasing. Under our First Amendment cases, the distinction between government speech and private speech is critical. The First Amendment “does not regulate government speech,” and therefore when government speaks, it is free “to select the views that it wants to express.” *Pleasant Grove City v. Summum*. By contrast, “[i]n the realm of private speech or expression, government regulation may not favor one speaker over another.” *Rosenberger v. University of Virginia*.



Unfortunately, the Court’s decision categorizes private speech as government speech and thus strips it of all First Amendment protection. The Court holds that all the privately created messages on the many specialty plates issued by the State of Texas convey a government message rather than the message of the motorist displaying the plate. Can this possibly be correct?

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says “Rather Be Golfing” passed by at 8:30 am on a Monday morning, would you think: “This is the official policy of the State—better to golf than to work?” If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas’s out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns’ opponents? And when a car zipped by with a plate that reads “NASCAR—24 Jeff Gordon,” would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government?

The Court says that all of these messages are government speech. It is essential that government be able to express its own viewpoint, the Court reminds us, because otherwise, how would it promote its programs, like recycling and vaccinations? So when Texas issues a “Rather Be Golfing” plate, but not a “Rather Be Playing Tennis” or “Rather Be Bowling” plate, it is furthering a state policy to promote golf but not tennis or bowling. And when Texas allows motorists to obtain a Notre Dame license plate but not a University of Southern California plate, it is taking sides in that long-time rivalry.

This capacious understanding of government speech takes a large and painful bite out of the First Amendment. Specialty plates may seem innocuous. They make motorists happy, and they put money in a State’s coffers. But the precedent this case sets is dangerous. While all license plates unquestionably contain *some* government speech (*e.g.*, the name of the State and the numbers and/or letters identifying the vehicle), the State of Texas has converted the remaining space on its specialty plates into little mobile billboards on which motorists can display their own messages. And what Texas did here was to reject one of the messages that members of a private group wanted to post on some of these little billboards because the State thought that many of its citizens would find the message offensive. That is blatant viewpoint discrimination.

If the State can do this with its little mobile billboards, could it do the same with big, stationary billboards? Suppose that a State erected electronic billboards along its highways. Suppose that the

State posted some government messages on these billboards and then, to raise money, allowed private entities and individuals to purchase the right to post their own messages. And suppose that the State allowed only those messages that it liked or found not too controversial. Would that be constitutional?

What if a state college or university did the same thing with a similar billboard or a campus bulletin board or dorm listserv? What if it allowed private messages that are consistent with prevailing views on campus but banned those that disturbed some students or faculty? Can there be any doubt that these examples of viewpoint discrimination would violate the First Amendment? I hope not, but the future uses of today's precedent remain to be seen.

## I

The Texas Division of Sons of Confederate Veterans (SCV) is an organization composed of descendants of Confederate soldiers. The group applied for a Texas specialty license plate in 2009 and again in 2010. Their proposed design featured a controversial symbol, the Confederate battle flag, surrounded by the words "Sons of Confederate Veterans 1896" and a gold border. App. 29. The Texas Department of Motor Vehicles Board (or Board) invited public comments and considered the plate design at a meeting in April 2011. At that meeting, one board member was absent, and the remaining eight members deadlocked on whether to approve the plate. The Board thus reconsidered the plate at its meeting in November 2011. This time, many opponents of the plate turned out to voice objections. The Board then voted unanimously against approval and issued an order stating:

"The Board has considered the information and finds it necessary to deny this plate design application, specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable. The Board finds that a significant portion of the public associate the confederate flag with organizations advocating expressions of hate directed toward people or groups that is demeaning to those people or groups."

The Board also saw "a compelling public interest in protecting a conspicuous mechanism for identification, such as a license plate, from degrading into a possible public safety issue." And it thought that the public interest required rejection of the plate design because the controversy surrounding the plate was so great that "the design could distract or disturb some drivers to the point of being unreasonably dangerous."

At the same meeting, the Board approved a Buffalo Soldiers plate design by a 5-to-3 vote. Proceeds from fees paid by motorists who select that plate benefit the Buffalo Soldier National Museum in Houston, which is "dedicated primarily to preserving the legacy and honor of the African American soldier." "Buffalo Soldiers" is a nickname that was originally given to black soldiers in the Army's 10th Cavalry Regiment, which was formed after the Civil War, and the name was later used to describe other black soldiers. The original Buffalo Soldiers fought with distinction in the Indian Wars, but the "Buffalo Soldiers" plate was opposed by some Native Americans. One leader commented that he felt "the same way about the Buffalo Soldiers" as African-Americans felt about

the Confederate flag. “When we see the U.S. Cavalry uniform,” he explained, “we are forced to relive an American holocaust.”

## II

### A

Relying almost entirely on one precedent—*Pleasant Grove City v. Summum*—the Court holds that messages that private groups succeed in placing on Texas license plates are government messages. The Court badly misunderstands *Summum*.

In *Summum*, a private group claimed the right to erect a large stone monument in a small city park. The 2.5-acre park contained 15 permanent displays, 11 of which had been donated by private parties. The central question concerned the nature of the municipal government’s conduct when it accepted privately donated monuments for placement in its park: Had the city created a forum for private speech, or had it accepted donated monuments that expressed a government message? We held that the monuments represented government speech, and we identified several important factors that led to this conclusion.

First, governments have long used monuments as a means of expressing a government message. As we put it, “[s]ince ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power.” Here in the United States, important public monuments like the Statue of Liberty, the Washington Monument, and the Lincoln Memorial, express principles that inspire and bind the Nation together. Thus, long experience has led the public to associate public monuments with government speech.

Second, there is no history of landowners allowing their property to be used by third parties as the site of large permanent monuments that do not express messages that the landowners wish to convey. While “[a] great many of the monuments that adorn the Nation’s public parks were financed with private funds or donated by private parties,” “cities and other jurisdictions take some care in accepting donated monuments” and select those that “conve[y] a government message.” *Summum*, at 471–72. We were not presented in *Summum* with any examples of public parks that had been thrown open for private groups or individuals to put up whatever monuments they desired.

Third, spatial limitations played a prominent part in our analysis. “[P]ublic parks can accommodate only a limited number of permanent monuments,” and consequently permanent monuments “monopolize the use of the land on which they stand and interfere permanently with other uses of public space.” Because only a limited number of monuments can be built in any given space, governments do not allow their parks to be cluttered with monuments that do not serve a government purpose, a point well understood by those who visit parks and view the monuments they contain.

These characteristics, which rendered public monuments government speech in *Summum*, are not present in Texas’s specialty plate program.

The Texas specialty plate program also does not exhibit the “selective receptivity” present in *Summum*. To the contrary, Texas’s program is *not* selective by design. The Board’s chairman, who is charged with approving designs, explained that the program’s purpose is “to encourage private plates” in order to “generate additional revenue for the state.” And most of the time, the Board “base[s] [its] decisions on rules that primarily deal with reflectivity and readability.” A Department brochure explains: “Q. Who provides the plate design? A. You do, though your design is subject to reflectivity, legibility, and design standards.”

Pressed to come up with any evidence that the State has exercised “selective receptivity,” Texas (and the Court) rely primarily on sketchy information not contained in the record, specifically that the Board’s predecessor (might have) rejected a “pro-life” plate and perhaps others on the ground that they contained messages that were offensive. But even if this happened, it shows only that the present case may not be the only one in which the State has exercised viewpoint discrimination.

Even if Texas’s extrarecord information is taken into account, the picture here is different from that in *Summum*. Texas does not take care to approve only those proposed plates that convey messages that the State supports. Instead, it proclaims that it is open to all private messages—except those, like the SCV plate, that would offend some who viewed them.

The Court believes that messages on privately created plates are government speech because motorists want a seal of state approval for their messages and therefore prefer plates over bumper stickers. This is dangerous reasoning. There is a big difference between government speech (that is, speech by the government in furtherance of its programs) and governmental blessing (or condemnation) of private speech. Many private speakers in a forum would welcome a sign of government approval. But in the realm of private speech, government regulation may not favor one viewpoint over another.

3

A final factor that was important in *Summum* was space. A park can accommodate only so many permanent monuments. Often large and made of stone, monuments can last for centuries and are difficult to move. License plates, on the other hand, are small, light, mobile, and designed to last for only a relatively brief time. The only absolute limit on the number of specialty plates that a State could issue is the number of registered vehicles. The variety of available plates is limitless, too. Today Texas offers more than 350 varieties. In 10 years, might it be 3,500?

In sum, the Texas specialty plate program has none of the factors that were critical in *Summum*, and the Texas program exhibits a very important characteristic that was missing in that case: Individuals who want to display a Texas specialty plate, instead of the standard plate, must pay an increased annual registration fee. How many groups or individuals would clamor to pay \$8,000 (the cost of the deposit required to create a new plate) in order to broadcast the government’s message as opposed to their own? And if Texas really wants to speak out in support of, say, Iowa State University (but not the University of Iowa) or “Young Lawyers” (but not old ones), why must it be paid to say things that it really wants to say? The fees Texas collects pay for much more than merely the administration of the program.

States have not adopted specialty license plate programs like Texas's because they are now bursting with things they want to say on their license plates. Those programs were adopted because they bring in money. Texas makes public the revenue totals generated by its specialty plate program, and it is apparent that the program brings in many millions of dollars every year. Texas has space available on millions of little mobile billboards. And Texas, in effect, sells that space to those who wish to use it to express a personal message—provided only that the message does not express a viewpoint that the State finds unacceptable. That is not government speech; it is the regulation of private speech.

### III

What Texas has done by selling space on its license plates is to create what we have called a limited public forum. It has allowed state property (*i.e.*, motor vehicle license plates) to be used by private speakers according to rules that the State prescribes. Under the First Amendment, however, those rules cannot discriminate on the basis of viewpoint.. But that is exactly what Texas did here. The Board rejected Texas SCV's design, "specifically the confederate flag portion of the design, because public comments have shown that many members of the general public find the design offensive, and because such comments are reasonable." These statements indisputably demonstrate that the Board denied Texas SCV's design because of its viewpoint.

The Confederate battle flag is a controversial symbol. To the Texas Sons of Confederate Veterans, it is said to evoke the memory of their ancestors and other soldiers who fought for the South in the Civil War. To others, it symbolizes slavery, segregation, and hatred. Whatever it means to motorists who display that symbol and to those who see it, the flag expresses a viewpoint. The Board rejected the plate design because it concluded that many Texans would find the flag symbol offensive. That was pure viewpoint discrimination.

If the Board's candid explanation of its reason for rejecting the SCV plate were not alone sufficient to establish this point, the Board's approval of the Buffalo Soldiers plate at the same meeting dispels any doubt. The proponents of both the SCV and Buffalo Soldiers plates saw them as honoring soldiers who served with bravery and honor in the past. To the opponents of both plates, the images on the plates evoked painful memories. The Board rejected one plate and approved the other.

Like these two plates, many other specialty plates have the potential to irritate and perhaps even infuriate those who see them. Texas allows a plate with the words "Choose Life," but the State of New York rejected such a plate because the message "[is] so incredibly divisive," and the Second Circuit recently sustained that decision. Texas allows a specialty plate honoring the Boy Scouts, but the group's refusal to accept gay leaders angers some. Virginia, another State with a proliferation of specialty plates, issues plates for controversial organizations like the National Rifle Association, controversial commercial enterprises (raising tobacco and mining coal), controversial sports (fox hunting), and a professional sports team with a controversial name (the Washington Redskins). Allowing States to reject specialty plates based on their potential to offend is viewpoint discrimination.

The Board's decision cannot be saved by its suggestion that the plate, if allowed, "could distract or disturb some drivers to the point of being unreasonably dangerous." This rationale cannot withstand strict scrutiny. Other States allow specialty plates with the Confederate Battle Flag, and Texas has not pointed to evidence that these plates have led to incidents of road rage or accidents. Texas does not ban bumper stickers bearing the image of the Confederate battle flag. Nor does it ban any of the many other bumper stickers that convey political messages and other messages that are capable of exciting the ire of those who loathe the ideas they express.

Messages that are proposed by private parties and placed on Texas specialty plates are private speech, not government speech. Texas cannot forbid private speech based on its viewpoint. That is what it did here. Because the Court approves this violation of the First Amendment, I respectfully dissent.

### **Notes and Questions:**

1. How, if at all, would the Court's reasoning in *Walker* been different had it found that state-issued license plates should be analyzed under the designated or limited public forum doctrines? And would the Court have reached a different result under a forum analysis?
2. Keep *Walker* in mind when we discuss the "true threats" doctrine in *Virginia v. Black*. Could the proposed confederate battle flag license plate design be analyzed under as a true threats analysis rather than either a government speech analysis or a private speech/viewpoint discrimination analysis?

## **XI. Defamation and False Speech**

84 S. Ct. 710.

Supreme Court of the United States.

The NEW YORK TIMES COMPANY, Petitioner,

v.

L. B. SULLIVAN.

Nos. 39, 40.

Argued Jan. 6 and 7, 1964.

Decided March 9, 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.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He brought this civil libel action against the four individual petitioners, 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.

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.

The cost of the advertisement was approximately \$4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, 'We in the south \* \* \* warmly endorse this appeal,' and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Acceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of 'a number of people who are well known and whose reputation' he 'had no reason to question.' Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Respondent served such a

demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that ‘we \* \* \* are somewhat puzzled as to how you think the statements in any way reflect on you,’ and ‘you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.’ Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with ‘grave misconduct and \* \* \* improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama.’ When asked to explain why there had been a retraction for the Governor but not for respondent, the Secretary of the Times testified: ‘We did that because we didn’t want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman \* \* \*.’ On the other hand, he testified that he did not think that ‘any of the language in there referred to Mr. Sullivan.’

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were ‘libelous per se’ and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made ‘of and concerning’ respondent. The jury was instructed that, because the statements were libelous per se, ‘the law \* \* \* implies legal injury from the bare fact of publication itself,’ ‘falsity and malice are presumed,’ ‘general damages need not be alleged or proved but are presumed,’ and ‘punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown.’ An award of punitive damages—as distinguished from ‘general’ damages, which are compensatory in nature—apparently requires proof of actual malice under Alabama law, and the judge charged that ‘mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages.’ He refused to charge, however, that the jury must be ‘convinced’ of malice, in the sense of ‘actual intent’ to harm or ‘gross negligence and recklessness,’ to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners’ contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge’s rulings and instructions in all respects. It held that ‘(w)here the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt,’ they are ‘libelous per se’; that ‘the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff’; and that it was actionable without ‘proof of pecuniary injury \* \* \*, such injury being implied.’ It approved the trial court’s ruling that the jury could find the statements to have been made ‘of and concerning’ respondent, stating: ‘We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control

and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.' In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' 'irresponsibility' in printing the advertisement while 'the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement'; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and 'the matter contained in the advertisement was equally false as to both parties'; and from the testimony of the Times' Secretary that, apart from the statement that the dining hall was padlocked, he thought the two paragraphs were 'substantially correct.' The court reaffirmed a statement in an earlier opinion that 'There is no legal measure of damages in cases of this character.' It rejected petitioners' constitutional contentions with the brief statements that 'The First Amendment of the U.S. Constitution does not protect libelous publications' and 'The Fourteenth Amendment is directed against State action and not private action.'

We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First Amendment in a libel action brought by a public official against critics of his official conduct. We further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

\* \* \* \*

## II.

Under Alabama law as applied in this case, a publication is 'libelous per se' if the words 'tend to injure a person \* \* \* in his reputation' or to 'bring (him) into public contempt'; the trial court stated that the standard was met if the words are such as to 'injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust \* \* \*.' The jury must find that the words were published 'of and concerning' the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once 'libel per se' has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. His privilege of 'fair comment' for expressions of opinion depends on the truth of the facts upon which the comment is based. Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight.

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

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* 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*, 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.’ 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*. 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. 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. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’ *Roth v. United States*. ‘The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.’ *Stromberg v. California*. ‘(I)t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions,’ *Bridges v. California*, and this opportunity is to be afforded for ‘vigorous advocacy’ no less than ‘abstract discussion.’ *N.A.A.C.P. v. Button*. The First Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.’ *United States v. Associated Press*. Justice Brandeis, in his concurring opinion in *Whitney v. California*, gave the principle its classic formulation:

‘Those who won our independence believed \* \* \* that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that 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. Believing in the power of reason

as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.’

Thus we consider this case 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 present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the ‘breathing space’ that they need to survive. Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, which first crystallized a national awareness of the central meaning of the First Amendment. Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.

There is no force in respondent’s argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and that Jefferson, for one, while denying the power of Congress ‘to control the freedom of the press,’ recognized such a power in the States. But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment’s restrictions. What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.

The state law here is not saved by its allowance of the defense of truth. 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.<sup>19</sup> 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. 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

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<sup>19</sup> Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’ Mill, *On Liberty*.

make only statements which ‘steer far wider of the unlawful zone.’ 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.

### III.

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,<sup>23</sup> 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. 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. Because of this uncertainty, the judgment must be reversed and the case remanded.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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<sup>23</sup> We have no occasion here to determine how far down into the lower ranks of government employees the ‘public official’ designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Nor need we here determine the boundaries of the ‘official conduct’ concept. It is enough for the present case that respondent’s position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department.

94 S. Ct. 2997.

Supreme Court of the United States.

Elmer GERTZ, Petitioner,

v.

ROBERT WELCH, INC.

No. 72-617.

Argued Nov. 14, 1973.

Decided June 25, 1974.

Justice POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen.

## I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes *American Opinion*, a monthly outlet for the views of the John Birch Society. Early in the 1960s, the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a Communist dictatorship. As part of the continuing effort to alert the public to this assumed danger, the managing editor of *American Opinion* commissioned an article on the murder trial of Officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March 1969 respondent published the resulting article under the title 'FRAME-UP: Richard Nuccio And The War On Police.' The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed Officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the 'frame-up.' According to the article, the police file on petitioner [was so large that it] took 'a big cop to lift.' The article stated that petitioner had been an official of the 'Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.' It labeled Gertz a 'Leninist'

and a ‘Communist-fronter.’ It also stated that Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that ‘probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention.’

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago. There was also no basis for the charge that petitioner was a ‘leninist’ or a ‘Communist-fronter.’ And he had never been a member of the ‘Marxist League for Industrial Democracy’ or the ‘Intercollegiate Socialist Society.’

The managing editor of *American Opinion* made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction stating that the author had ‘conducted extensive research into the Richard Nuccio Case.’ And he included in the article a photograph of petitioner and wrote the caption that appeared under it: ‘Elmer Gertz of Red Guild harasses Nuccio.’ Respondent placed the issue of *American Opinion* containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation. It asserted that petitioner was a public official or a public figure and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in *New York Times Co. v. Sullivan*. Under this rule, respondent would escape liability unless petitioner could prove publication of defamatory falsehood “with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” Respondent claimed that petitioner could not make such a showing and submitted a supporting affidavit by the magazine’s managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author’s reputation and on his prior experience with the accuracy and authenticity of the author’s contributions to *American Opinion*.

## II

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements.

[In] *New York Times Co. v. Sullivan*, this Court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation. This Court concluded that a ‘rule compelling the critic of official conduct to guarantee the truth of all his factual assertions would deter protected speech, announced the constitutional privilege designed to counter that effect:



“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.”<sup>6</sup>

Three years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of ‘public figures.’ This extension was announced in *Curtis Publishing Co. v. Butts*. [*Curtis*] involved the Saturday Evening Post’s charge that Coach Wally Butts of the University of Georgia had conspired with Coach ‘Bear’ Bryant of the University of Alabama to fix a football game between their respective schools. Because Butts was paid by a private alumni association [he] could [not] be classified as a ‘public official’ under *New York Times*. A majority of the Court agreed with Mr. Chief Justice Warren’s conclusion that the *New York Times* test should apply to criticism of ‘public figures’ as well as ‘public officials.’ The Court extended the constitutional privilege announced in that case to protect defamatory criticism of those persons who [are not public officials but who] ‘are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.’

### III

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues. They belong to that category of utterances which ‘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.’ *Chaplinsky v. New Hampshire*.

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798: ‘Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press.’ And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or

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<sup>6</sup> *New York Times* and later cases explicated the meaning of the new standard. In *New York Times*, the Court held that under the circumstances the newspaper’s failure to check the accuracy of the advertisement against news stories in its own files did not establish reckless disregard for the truth. In *St. Amant v. Thompson*, the Court equated reckless disregard of the truth with subjective awareness of probable falsity: ‘There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.’ In *Beckley Newspapers Corp. v. Hanks*, the Court emphasized the distinction between the *New York Times* test of knowledge of falsity or reckless disregard of the truth and ‘actual malice’ in the traditional sense of ill-will. Finally, in *Rosenblatt v. Baer*, the Court stated that the “public official” designation applies at the very least “to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”

broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *New York Times Co. v. Sullivan*: ‘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.’ The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and infeasible immunity from liability for defamation. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for 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. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise. *NAACP v. Button*, 371 U.S. 415 (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood.

The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship [by virtue of] the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgment of the state law right to compensation for wrongful hurt to one’s reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. For the reasons stated below, [however], we conclude that the state

interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

We have no difficulty in distinguishing among defamation plaintiffs. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.<sup>9</sup> Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an influential role in ordering society. He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test [to private figures] would abridge this legitimate state interest to a degree that we find unacceptable. We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for

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<sup>9</sup> Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement makes substantial danger to reputation apparent. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Such a case is not now before us, and we intimate no view as to its proper resolution.

#### IV

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define ‘actual injury,’ as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

## V

Notwithstanding our refusal to extend the *New York Times* privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a 'de facto public official.' Our cases recognized no such concept. Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the 'public official' category beyond all recognition. We decline to follow it.

Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civic groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful

context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is ordered.

Reversed and remanded.

Justice WHITE, dissenting.

For some 200 years—from the very founding of the Nation—the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule. Given such publication, general damage to reputation was presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

But now, using that Amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory material but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will not be required.

I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. I do not suggest that the

decision is illegitimate or beyond the bounds of judicial review, but it is an ill-considered exercise of the power entrusted to this Court. I respectfully dissent.

## **XII. Hate Speech**

**Note:** The cases in this unit contain words and descriptions of conduct that you may find disturbing.

72 S. Ct. 725.

Supreme Court of the United States.

BEAUHARNAIS

v.

PEOPLE of the STATE OF ILLINOIS.

No. 118.

Argued Nov. 28–29, 1951.

Decided April 28, 1952.

Justice FRANKFURTER delivered the opinion of the Court.

The petitioner was convicted of violating s 224a of Division 1 of the Illinois Criminal Code. The section provides:

‘It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes 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.’

Beauharnais challenged the statute as violating the liberty of speech and of the press guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment, and as too vague, under the restrictions implicit in the same Clause, to support conviction for crime. The Illinois courts rejected these contentions and sustained defendant’s conviction. We granted certiorari in view of the serious questions raised concerning the limitations imposed by the Fourteenth Amendment on the power of a State to punish utterances promoting friction among racial and religious groups.

Beauharnais created and posted a leaflet setting forth a petition calling on the Mayor and City Council of Chicago ‘to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro.’ Below was a call for ‘One million self-respecting white people in Chicago to unite’ with the statement added that ‘If persuasion and the

need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions, rapes, robberies, knives, guns and marijuana of the negro, surely will.’ This, with more language, similar if not so violent, concluded with an attached application for membership in the White Circle League of America, Inc.

The statute before us is not a catchall enactment left at large by the State court which applied it. It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions a meaning confirmed by the Supreme Court of that State in upholding this conviction. The Illinois Supreme Court tells us that s 224a ‘is a form of criminal libel law’. The defendant, the trial court and the Supreme Court consistently treated it as such. Moreover, the Supreme Court’s characterization of the words prohibited by the statute as those ‘liable to cause violence and disorder’ paraphrases the traditional justification for punishing libels criminally, namely their ‘tendency to cause breach of the peace.’

[In *Chaplinsky*, we stated:] “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 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. 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.”

No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana. The precise question before us, then, is whether the protection of ‘liberty’ in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels—as criminal libel has been defined, limited and constitutionally recognized time out of mind—directed at designated collectivities. If an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group.

Illinois did not have to look beyond her own borders or await the tragic experience of the last three decades to conclude that willful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community. From the murder of the abolitionist Elijah Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction. In many of these outbreaks, utterances of the character here in question played a significant part. The law was passed on June 29, 1917, at a time when the State was struggling to assimilate vast numbers of new inhabitants, as yet concentrated in discrete racial or national or religious groups—foreign-born brought to it by the crest of the great wave of immigration, and Negroes attracted by jobs in war plants and the allurements of northern claims. Nine years earlier, in the very city where the legislature sat, what is said to be the first northern race riot had cost the lives of six people, left hundreds of Negroes homeless and shocked citizens into action far beyond the borders of the State. Less than a month before the [law] was



enacted, East St. Louis had seen a day's rioting, prelude to an out-break, only four days after the bill became law, so bloody that it led to Congressional investigation. A series of bombings had begun which was to culminate two years later in the awful race riot which held Chicago in its grip for seven days in the summer of 1919.

In the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it was presented. There are limits to the exercise of these liberties (of speech and of the press). The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the states appropriately may punish.

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence between racial and religious groups must be traced to causes more deeply embedded in our society than the rantings of modern know-nothings. Only those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion. This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems, would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues.

We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced. Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law.

Affirmed.

Justice BLACK, with whom Justice DOUGLAS concurs, dissenting.

This case is here because Illinois inflicted criminal punishment on Beauharnais for causing the distribution of leaflets in the city of Chicago. The conviction rests on the leaflet's contents, not on the time, manner or place of distribution.

I think the First Amendment, with the Fourteenth, absolutely forbids such laws without any 'ifs' or 'buts' or 'whereases.' Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech. The Court does not act on this view of the Founders. It calculates what it deems to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship. This method of decision offers little protection to First Amendment liberties.

If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: ‘Another such victory and I am undone.’

Justice DOUGLAS, dissenting.

My view is that if in any case other public interests are to override the plain command of the First Amendment, the peril of speech must be clear and present, leaving no room for argument, raising no doubts as to the necessity of curbing speech in order to prevent disaster.

The First Amendment is couched in absolute terms—freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights. For example, privacy, equally sacred to some, is protected by the Fourth Amendment only against unreasonable searches and seizures. There is room for regulation of the ways and means of invading privacy. No such leeway is granted the invasion of the right of free speech guaranteed by the First Amendment. Until recent years that had been the course and direction of constitutional law. Yet recently the Court in this and in other cases<sup>2</sup> has engrafted the right of regulation onto the First Amendment by placing in the hands of the legislative branch the right to regulate ‘within reasonable limits’ the right of free speech. This to me is an ominous and alarming trend. The free trade in ideas which the Framers of the Constitution visualized disappears. In its place there is substituted a new orthodoxy—an orthodoxy that changes with the whims of the age or the day, an orthodoxy which the majority by solemn judgment proclaims to be essential to the safety, welfare, security, morality, or health of society. Free speech in the constitutional sense disappears. Limits are drawn—limits dictated by expediency, political opinion, prejudices or some other desideratum of legislative action.

The Court in this and in other cases places speech under an expanding legislative control. Today a white man stands convicted for protesting in unseemly language against our decisions invalidating [segregation]. Tomorrow a negro will be hailed before a court for denouncing lynch law in heated terms. Debate and argument are not always calm and dispassionate. Emotions sway speakers and audiences alike. Intemperate speech is a distinctive characteristic of man. The Framers of the Constitution knew human nature as well as we do. They too had lived in dangerous days; they too knew the suffocating influence of orthodoxy and standardized thought. They weighed the compulsions for restrained speech and thought against the abuses of liberty. They chose liberty. That should be our choice today no matter how distasteful to us the pamphlet of *Beauharnais* may be. It is true that this is only one decision which may later be distinguished or confined to narrow limits. But it represents a philosophy at war with the First Amendment—a constitutional interpretation which puts free speech under the legislative thumb. It is a warning to every minority that when the Constitution guarantees free speech it does not mean what it says.

### **Notes and Questions:**

1. The Supreme Court has never again applied *Beauharnais*'s group libel theory; the Court has also never formally overruled it. Most scholars therefore agree that while *Beauharnais* technically remains “good law,” it is of limited precedential value unless and until the Court reaffirms it in a future case.

2. The following three article excerpts provide differing perspectives on the problem of hate speech and the First Amendment.

### **Free Speech Can Be Messy, but We Need It**

by Lee Rowland, Senior Staff Attorney, ACLU Speech, Privacy, and Technology Project  
MARCH 9, 2018

The year 2017 was a hell of a year for the First Amendment. Nowhere was more central to this culture war than the campuses of universities across America—including right here at the University of Nevada, Reno.

Two students found themselves embroiled in the biggest free speech controversies of recent years. Peter Cytanovic became the face of white nationalism when a picture of him snarling, holding a tiki torch at the Unite the Right Rally in Charlottesville went viral. On the opposite end of the political spectrum, graduate Colin Kaepernick went on to the NFL and used his position to highlight police brutality and racial injustice by taking a knee during the national anthem. Both men became incredibly controversial for their speech. There were calls and campaigns for them to be expelled for their opinions.

But regardless of whether you agree with one of them, both of them, or neither, the First Amendment protects both of those men and their opinions from censorship and retaliation by the government. That's a good thing. Let me tell you why.

It's becoming more common to call for lower legal protections for speech—specifically, that we should criminalize “hate speech.” I think many would love a world where Mr. Kaepernick could take a knee without any worry the government would force the NFL to fire him, but where a government school would still have the power to expel Mr. Cytanovic. This is a dangerous proposition.

I'm a progressive. It's not hard for me to choose between white nationalism and racial justice. The first is abhorrent and racist. The other is a demand for equal rights. But what if we gave the government the power to decide which of those men was too hateful to speak? Look at our current president—he called Charlottesville marchers “very fine people,” while reserving his ire for Black NFL players, whom he called “sons of bitches.” Your idea of “hate speech” may not be the government's idea of “hate speech.” I know mine isn't. But even if you agree with Trump—are you sure our next president will agree with your worldview? You shouldn't be. That's why I'm a true believer in the First Amendment. I am an anti-authoritarian. And I know that the government has historically wielded its raw power to silence those who speak truth to power. And because I want students everywhere to be able to take a knee without fear of government censorship, I know we have to cherish our robust First Amendment—even for speech that is hateful.

But even though I'm a free speech attorney, I find many of the common tropes and myths about free speech unsatisfying. I'm going to explain why I'm a true believer by debunking [some] common myths, and, in the process, hopefully reveal practical tips for exercising your free speech rights powerfully and strategically.

Let's start with one myth we all learned in kindergarten: *Sticks and stones may break my bones, but words will never hurt me.*

Does anyone as an adult actually believe this? It's manifestly untrue. I'm a free speech attorney precisely because I believe that words matter. We cannot protect free speech by denying its power.

Yes, there is power in hateful words. But there is also power in [the] unwillingness to be goaded into a fight or to play the role of censor.

Second Myth: *Hate speech isn't protected by the First Amendment.*

I often hear younger people say that hate speech isn't protected by the First Amendment. But that's untrue. As President Trump's views of Mr. Kaepernick should make plain, "hate speech" is a flexible concept. Just this week, the Spanish government arrested and charged a man with "hate speech" for calling cops "slackers" on Facebook. That's what criticizing the government looks like without a First Amendment. "Hate speech" can easily be redefined as speech that threatens the state.

But we shouldn't only protect speech out of paranoia—there's an upshot here, too. Our history shows the same First Amendment that protects hateful, racist speech can be and has been used by civil rights advocates to protect historically vulnerable communities.

Charles Brandenburg was an avowed racist convicted of "incitement to violence" for holding an Ohio Ku Klux Klan rally in the late 1960s. The KKK's lawyers took it all the way up to the Supreme Court, arguing his hateful ideas were protected by the First Amendment. The Supreme Court agreed with Brandenburg that his vicious, genocidal talk about Jews and Black people was constitutionally protected because it only fantasized about future violence. The court decided that before the government can punish speech, there has to be an immediate and specific risk of actual violence to a real person.

In a vacuum, that result might upset you. But at around the same time, NAACP leader and civil rights icon Charles Evers gave a passionate speech advocating a boycott of racist, white-owned businesses. He promised that he'd "break the damn neck" of any activist who broke the boycott. White business owners sued Evers and the NAACP for—you guessed it—"incitement," arguing that his violent language had led to riots. But the NAACP looked to that *Brandenburg* case. Those civil rights leaders appealed all the way to the Supreme Court, to be sure that Mr. Evers benefitted from the same rights as a KKK member. And they succeeded.

The court boiled it down to this question: Are we talking about theoretical future violence, or is there an immediate risk of harm to a real person? And while there is nothing equivalent about the KKK and the NAACP, from that point of view, these cases looked the same.

There is reason to be skeptical that the rights extended to a KKK member will actually trickle down to someone like an NAACP leader. The hard truth is that every right in our society first gets distributed to the privileged and powerful.

But would you say the answer to that uneven distribution of rights is to eliminate the very constitutional protections that enable us to fight the government when it violates them? No. Distributing our constitutional rights equally is a process. The First Amendment is no different.

It's our job to ensure that everyone benefits from the same level of constitutional protection, that our free speech rights are truly "indivisible." Our First Amendment is necessary to ensure that those who challenge the government are not silenced—but that's not sufficient to ensure justice. We have to do the rest of the work.

\* \* \* \*

## **87 Mich. L. Rev. 2320**

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### **Public Response to Racist Speech: Considering the Victim's Story**

#### **I. INTRODUCTION**

*A black family enters a coffee shop in a small Texas town. A white man places a card on their table. The card reads, "You have just been paid a visit by the Ku Klux Klan." The family stands and leaves.*

*A law student goes to her dorm and finds an anonymous message posted on the door, a caricature image of her race, with a red line slashed through it.*

*A Japanese-American professor arrives in an Australian city and finds a proliferation of posters stating "Asians Out or Racial War" displayed on telephone poles. She uses her best, educated inflection in speaking with clerks and cab drivers, and decides not to complain when she is overcharged.*

These unheralded stories share company with the more notorious provocation of swastikas at Skokie and burning crosses on suburban lawns. The threat of hate groups like the Ku Klux Klan and the neo-Nazi skinheads goes beyond their repeated acts of illegal violence. Their presence and the active dissemination of racist propaganda means that citizens are denied personal security and liberty as they go about their daily lives. This Article [suggests] that formal criminal and administrative sanction is an appropriate response to racist speech.

In calling for legal sanctions for racist speech, this Article rejects an absolutist First Amendment position. It calls for movement of the societal response to racist speech from the private to the public realm. The places where the law does not go to redress harm have tended to be the places where women, children, people of color, and poor people live.

[My] call for a formal, legal-structural response to racist speech goes against the long-standing and healthy American distrust of government power. It goes against an American tradition of tolerance that is precious in the sense of being both valuable and fragile. Dean Lee Bollinger has concluded

that a primary reason for the legal protection of hate speech is to reinforce our commitment to tolerance as a value. If we can shore up our commitment to free speech in the hard and public cases, like *Skokie*, perhaps we will internalize the need for tolerance and spare ourselves from regrettable error in times of stress. Given the real historical costs of state intolerance of minority views, the First Amendment purpose identified by Dean Bollinger is not one lightly set aside.

[This Article nonetheless] concludes that an absolutist First Amendment response to hate speech has the effect of perpetuating racism: Tolerance of hate speech is not tolerance borne by the community at large. Rather, it is a psychic tax imposed on those least able to pay.

## **[II. The Effects of Hate Speech]**

Racist hate messages are rapidly increasing and are widely distributed in this country using a variety of low and high technologies. The negative effects of hate messages are real and immediate for the victims. Victims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide. Professor Patricia Williams has called the blow of racist messages “spirit murder” in recognition of the psychic destruction victims experience.

Victims are restricted in their personal freedom. In order to avoid receiving hate messages, victims have had to quit jobs, forgo education, leave their homes, avoid certain public places, curtail their own exercise of speech rights, and otherwise modify their behavior and demeanor. The recipient of hate messages struggles with inner turmoil. One subconscious response is to reject one’s own identity as a victim-group member.

As much as one may try to resist a piece of hate propaganda, the effect on one’s self-esteem and sense of personal security is devastating. To be hated, despised, and alone is the ultimate fear of all human beings. However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the courts refuse redress for racial insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.

## **[III. International Human Rights Law]**

The international community has chosen to outlaw racist hate propaganda. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination states:

### *Article 4*

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and

undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organization or activities as an offence punishable by law; [and]

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Under this treaty, states are required to criminalize racial hate messages. Prohibiting dissemination of ideas of racial superiority or hatred is not easily reconciled with American concepts of free speech. An American lawyer, trained in a tradition of liberal thought, would read article 4 and conclude immediately that it is unworkable. Acts of violence, and perhaps imminent incitement to violence are properly prohibited, but the control of ideas is doomed to failure. In signing the Convention, the United States made a relatively short reservation, stating:

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of The United States of America.

The reservation separates the United States from an evolving world standard. This position represents an extreme commitment to the First Amendment at the expense of antidiscrimination goals.

The Convention is not the only expression of the emerging international view. The United Kingdom, for example, under the Race Relations Act, has criminalized incitement to discrimination and incitement to racial hatred. The Act criminalizes the publication or distribution of “threatening, abusive, or insulting” written matter or use of such language in a public place. The Act is consistent with the international standard in that it recognizes that avoiding the spread of hatred is a legitimate object of the law, and that some forms of racist expression are properly criminalized.

Canada has similarly adopted a national statute governing hate propaganda. Sections 318 and 319 of the Canadian Criminal Code outlaw communications inciting hatred against any identifiable group where a breach of peace is likely to follow. The law further outlaws the expression of ideas

inciting hatred if such expression is tied to a probable threat to order. Australia and New Zealand also have laws restricting racist speech, leaving the United States alone among the major common law jurisdictions in its complete tolerance of such speech. What these laws and the United Nations Convention have in common is that they specify a particularly egregious form of expression for criminalization. All ideas about differences between races are not banned. The definitive elements are discrimination, connection to violence, and messages of inferiority, hatred, or persecution. Thus the entire spectrum of what could be called racist speech is not prohibited. A belief in intellectual differences between the races, for instance, is not subject to sanctions unless it is coupled with an element of hatred or persecution. What the emerging global standard prohibits is the kind of expression that most interferes with the rights of subordinated-group members to participate equally in society, maintaining their basic sense of security and worth as human beings.

The failure of American law to accept this emerging standard reflects a unique First Amendment jurisprudence. In order to discuss the significance of this contradiction, it is necessary to consider the American position of tolerance.

#### **[IV. Protection of Traditional First Amendment Values]**

This Article attempts to recognize and accommodate the [traditional] civil libertarian position. The victim's perspective requires respect for the idea of rights, for it is those on the bottom who are most hurt by the absence of rights, and it is those on the bottom who have sustained the struggle for rights in American history. The image of book burnings should unnerve us and remind us to argue long and hard before selecting a class of speech to exclude from the public domain. I am uncomfortable in making the suggestions made in this section if others fall too easily into agreement.

In order to respect First Amendment values, a narrow definition of actionable racist speech is required. Racist speech is best treated as a *sui generis* category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse. The courts in the *Skokie* case expressed doubt that principles were available to single out racist speech for public limitation. This section attempts to construct a doctrinal and evidentiary world in which we might begin to draw the lines the *Skokie* courts could not imagine.

The alternative to recognizing racist speech as qualitatively different because of its content is to continue to stretch existing first amendment exceptions, such as the "fighting words" doctrine and the "content/conduct" distinction. This stretching ultimately weakens the First Amendment fabric, creating neutral holes that remove protection for many forms of speech. Setting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve free speech.

In order to distinguish the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech, three identifying characteristics are suggested here:

1. The message is of racial inferiority;



2. The message is directed against a historically oppressed group; and
3. The message is persecutorial, hateful, and degrading.

Making each element a prerequisite to prosecution prevents opening of the dreaded floodgates of censorship.

## **[V. Hard Cases]**

### ***The Case of the Angry Nationalist***

Expressions of hatred, revulsion, and anger directed against historically dominant-group members by subordinated-group members are not criminalized by the definition of racist hate messages used here. Malcolm X's "white devil" statements—which he later retracted—are an example. Some would find this troublesome, arguing that any attack on any person's ethnicity is harmful. The harm and hurt is there, but it is of a different degree. Because the attack is not tied to the perpetuation of racist vertical relationships, it is not the paradigm worst example of hate propaganda. The dominant-group member hurt by conflict with the angry nationalist is more likely to have access to a safe harbor of exclusive dominant-group interactions. Retreat and reaffirmation of personhood are more easily attained for historically non-subjugated-group members.

While white-hating nationalist expressions are troublesome both politically and personally, I would interpret an angry, hateful poem by a person from a historically subjugated group as a victim's struggle for self-identity in response to racism. It is tied to the structural domination of another group. Should history change course, placing former victim groups in a dominant or equalized position, the newly equalized group will lose the special protection suggested here for expression of nationalist anger.

Critics of this proposal ask how one knows who is oppressed and who isn't. Poor whites, ethnic whites, wealthy ethnics—the confusing examples and barriers to classification abound. In some cases, a group's social well-being may improve, while their victimization continues. Asians who experience economic success are often underemployed relative to their talents. Jews who attain equality in employment still experience anti-Semitic vilification, harassment, and exclusion. Catholics are relatively free from discrimination in some communities, and subject to vile bigotry in others. In the same way that lawyers deploy evidence in an adversarial setting to find facts in other areas of law, we can learn to do the same to know the facts about subordination, and to determine when hate speech is used as an instrument of that subordination.

### ***Anti-Semitism and Racism by Non-Whites***

What of hateful racist and anti-Semitic speech by non-whites? The phenomena of one subordinated group inflicting racist speech upon another subordinated group is a persistent and touchy problem. Similarly, members of a subordinated group sometimes direct racist language at their own group. The victim's privilege becomes problematic when it is used by one subordinated person to lash out at another. While I have argued here for tolerance of hateful speech that comes from an experience of oppression, when that speech is used to attack a subordinated-group member, using

language of persecution, and adopting a rhetoric of racial inferiority, I am inclined to prohibit such speech.

## [VI. Conclusion]

The victims' experience reminds us that the harm of racist hate messages is a real harm, to real people. When the legal system offers no redress for that real harm, it perpetuates racism.

This Article attempts to begin a conversation about the first amendment that acknowledges both the civil libertarian's fear of tyranny and the victims' experience of loss of liberty in a society that tolerates racist speech. It suggests criminalization of a narrow, explicitly defined class of racist hate speech, to provide public redress for the most serious harm, while leaving many forms of racist speech to private remedies. Some may feel this proposal does not go far enough, leaving much hurtful speech to the uneven control of the marketplace of ideas. Others will cringe at what they perceive as a call for censorship. This is not an easy legal or moral puzzle, but it is precisely in these places where we feel conflicting tugs at heart and mind that we have the most work to do and the most knowledge to gain.

\* \* \* \*

53 U. Chi. L. Rev. 1485

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### ***Review of *The Tolerant Society: Freedom of Speech and Extremist Speech in America* by Lee Bollinger (Oxford Univ. Press)***

Lee Bollinger argues that the institution of free speech, established by the First Amendment, functions principally as a kind of didactic ritual: by requiring us to be tolerant of the most abhorrent speech, the First Amendment teaches us to be tolerant throughout political life. Bollinger's primary focus is on what he calls 'extremist speech.' His principal example of extremist speech is the effort a few years ago by a Nazi group to march in Skokie, Illinois, a Chicago suburb with a large Jewish population that includes several thousand survivors of concentration camps. Bollinger rejects, not as worthless but rather as insufficient and obsolete, what he sees as the two principal received justifications for providing legal protection to such extremist speech: the view that all speech, including extremist speech, must be protected so that democratic politics can function successfully; and the theory that if extremist speech is not tolerated, the government will be able to suppress speech that is unquestionably valuable and worthy of protection. He argues instead that the purpose of free speech is to teach self-control by forcing people to tolerate an activity they would like to suppress. In particular, this enforced toleration teaches us to understand and control the 'impulse toward intolerance' that is present in everyone—an impulse that has its legitimate claims, Bollinger says, but that, if unchecked, can have devastating consequences for society.

Bollinger begins by challenging what he calls the ‘classical’ defense of free speech. This is the view that free speech is necessary to enlightened democratic self-government because the suppression of information and ideas thwarts the search for truth and impairs a political system’s ability to reach the right decisions. In acknowledging, ungrudgingly, that this view has considerable force, Bollinger relies on an insight into personal psychology: he points out that we all know from our personal lives that dialogue with others helps us reach better decisions. And he acknowledges that the ‘classical’ defense of free speech is of great importance when a community is trying to establish ‘the minimally essential conditions of a ‘democratic’ society.’

But while some level of free exchange of information and ideas is necessary to a self-governing society, our society has far surpassed that level, Bollinger says, and we could suppress a good deal of extremist speech without rendering ourselves literally incapable of democratic self-government. Most Western European nations, for example, have laws forbidding speech that incites racial hatred, including speech that is almost certainly constitutionally protected here.

Bollinger also attacks the classical view on the ground that it prevents us from applying to speech the kind of cost-benefit calculations that we unhesitatingly apply in dealing with actions. Perhaps speech is, in general, less harmful than action. But is it plausible to say that speech is *so much* less harmful that the government has free rein to regulate action but can almost never regulate speech? Perhaps, as John Stuart Mill argued, the search for truth is advanced by confrontation even with egregiously false ideas. But do we really believe that the search for truth is advanced by allowing the Nazis to march? Or, more precisely, is the likelihood that the Nazis will contribute to our search for truth really great enough to outweigh the harms that their speech will inflict—in particular, the very real emotional suffering of the concentration camp victims? Bollinger meets the usual objection—if Skokie can lawfully suppress the Nazis, then segregationist communities could have suppressed civil rights demonstrators—by denying that it is impossible to draw the necessary lines. After all, we have no difficulty drawing a line that prohibits the *actions* that the Nazis advocated while permitting the actions supported by the civil rights movement. Why should we have any more difficulty drawing a line that distinguishes the speech of those two groups?

Bollinger argues in addition that the defense of the classical view systematically ignores the virtues of *intolerance*. People confronted with an idea they abhor, Bollinger says, have a deep need to express their abhorrence. Intolerance is itself a ‘communicative act[ ],’ a ‘form of expression intended to avoid creating the wrong impression—either that we don’t really believe what we claim to believe or that we don’t have the courage of our convictions or the power to defend them.’ Both individuals and communities define themselves by refusing to tolerate certain ideas, and if they are forced to tolerate an abhorrent view they may ‘feel implicated in, and their identity tarnished by,’ that view. In reply to the contention that one should express intolerance of a view by speaking against it, not by suppressing it, Bollinger argues that legal prohibition is a particularly effective way for a community to express its opposition to an idea.

Bollinger’s [justification for robust free speech protection] begins from the premise that excessive intolerance can be a threat throughout political life. That is why it is so important that we be educated to control it. Speech is a good area in which to practice self-control because the stakes are lower than in the area of conduct: less harm will be done if we tolerate bad speech than if we

tolerate bad actions. But we exercise ‘extraordinary self-restraint’ toward speech in order to teach ourselves to be more tolerant throughout ‘the whole tapestry of social intercourse.’

The institution of free speech serves this educative function in several ways. First, Bollinger says, when people tolerate harmful speech—when the residents of Skokie tolerate the emotionally bruising speech of the Nazis, for example—their ‘self-restraint in the face of the injury sustained’ has a broader social meaning; it ‘demonstrates powerfully, more powerfully than a general injunction to be appropriately tolerant in all circumstances ever would, to [them]selves and others, a commitment to exercise moderation throughout social intercourse.’

Second, enforced tolerance makes us confront the motivations underlying our impulse to be intolerant—motivations that, according to Bollinger, are often a mix of the good (for example, a desire to dissociate oneself from an abhorrent idea) and the bad (for example, a desire to suppress differences among people or to make scapegoats of the extremists). When we are forced to confront the speech itself and therefore our impulse to suppress it, we may be led to try to purge ourselves of the illegitimate aspects of our motivations. Third, since extremist speech often reflects the attitudes of the intolerant mind—contempt for the views of others, ‘incapacity to cope with uncertainty in human affairs,’ and a ‘quest for simple and clear answers’—exposure to such speech enables us to identify those attitudes and resolve not to entertain them ourselves.

### **XIII. Types of “Unprotected” and Less Protected Speech**

**Note:** The cases in this unit contain words and descriptions of conduct that you may find disturbing.

#### **A. Fighting Words**

62 S. Ct. 766.

Supreme Court of the United States.

CHAPLINSKY

v.

STATE OF NEW HAMPSHIRE.

No. 255.

Argued Feb. 5, 1942.

Decided March 9, 1942.

Justice MURPHY delivered the opinion of the Court.

Appellant, a 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 ‘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.’

Upon appeal there was a trial de novo of appellant before a jury in the Superior Court. He was found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. 91 N.H. 310, 18 A.2d 754.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

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.

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 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. 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.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. 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.

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.

Affirmed.

71 S. Ct. 303.

Supreme Court of the United States.

FEINER

v.

PEOPLE OF STATE OF NEW YORK.

No. 93.

Argued Oct. 17, 1950.

Decided Jan. 15, 1951.

Chief Justice VINSON delivered the opinion of the Court.

Petitioner was convicted of the offense of disorderly conduct, a misdemeanor under the New York penal laws. The case is here on certiorari, petitioner having claimed that the conviction is in violation of his right of free speech under the Fourteenth Amendment.

On the evening of March 8, 1949, petitioner Irving Feiner was addressing an open-air meeting at the corner of South McBride and Harrison Streets in the City of Syracuse. At approximately 6:30 p.m., the police received a telephone complaint concerning the meeting, and two officers were detailed to investigate. One of these officers went to the scene immediately, the other arriving some twelve minutes later. They found a crowd of about seventy-five or eighty people, both Negro and white, filling the sidewalk and spreading out into the street. Petitioner, standing on a large wooden box on the sidewalk, was addressing the crowd through a loud-speaker system attached to an automobile. Although the purpose of his speech was to urge his listeners to attend a meeting to be held that night in the Syracuse Hotel, in its course he was making derogatory remarks concerning President Truman, the American Legion, the Mayor of Syracuse, and other local political officials.

The police officers made no effort to interfere with petitioner's speech, but were first concerned with the effect of the crowd on both pedestrian and vehicular traffic. They observed the situation from the opposite side of the street, noting that some pedestrians were forced to walk in the street

to avoid the crowd. Since traffic was passing at the time, the officers attempted to get the people listening to petitioner back on the sidewalk. The crowd was restless and there was some pushing, shoving and milling around. One of the officers telephoned the police station from a nearby store, and then both policemen crossed the street and mingled with the crowd without any intention of arresting the speaker.

At this time, petitioner was speaking in a 'loud, high-pitched voice.' He gave the impression that he was endeavoring to arouse the Negro people against the whites, urging that they rise up in arms and fight for equal rights. Some of the onlookers made remarks to the police about their inability to handle the crowd and at least one threatened violence if the police did not act. There were others who appeared to be favoring petitioner's arguments. Because of the feeling that existed in the crowd both for and against the speaker, the officers finally stepped in to prevent it from resulting in a fight. One of the officers approached the petitioner, not for the purpose of arresting him, but to get him to break up the crowd. He asked petitioner to get down off the box, but petitioner refused and continued talking. The officer waited for a minute and then demanded that he cease talking. Although the officer had thus twice requested petitioner to stop over the course of several minutes, petitioner not only ignored him but continued talking. During all this time, the crowd was pressing closer around petitioner and the officer. Finally, the officer told petitioner he was under arrest and ordered him to get down from the box, reaching up to grab him. Petitioner stepped down, announcing over the microphone that 'the law has arrived, and I suppose they will take over now.' In all, the officer had asked petitioner to get down off the box three times over a space of four or five minutes. Petitioner had been speaking for over a half hour.

On these facts, petitioner was charged with violation of s 722 of the Penal Law of New York:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:

- '1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
- '2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;
- '3. Congregates with others on a public street and refuses to move on when ordered by the police."

The courts below recognized petitioner's right to hold a street meeting at this locality, to make use of loud-speaking equipment in giving his speech, and to make derogatory remarks concerning public officials and the American Legion. They found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.



The language of *Cantwell v. Connecticut* is appropriate here: ‘The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would [suggest] that the principle of freedom of speech sanctions incitement to riot. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.’ The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner.

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. ‘A State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.’ *Cantwell v. Connecticut*. But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner’s deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.

Affirmed.

Justice BLACK, dissenting.

Assuming that the facts did indicate a critical situation, I reject the implication of the Court’s opinion that the police had no obligation to protect petitioner’s constitutional right to talk. The police of course have power to prevent breaches of the peace. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. Here the policemen did not even pretend to try to protect petitioner. According to the officers’ testimony, the crowd was restless but there is no showing of any attempt to quiet it; pedestrians were forced to walk into the street, but there was no effort to clear a path on the sidewalk; one person threatened to assault petitioner but the officers did nothing to discourage this when even a word might have sufficed. Their duty was to protect petitioner’s right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak. In my judgment, today’s holding means that as a practical matter, minority speakers can be silenced in any city.

I would reverse the conviction, thereby adhering to the great principles of the First and Fourteenth Amendments as announced for this Court in 1940 by Justice Roberts:

‘In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these 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*.

I regret my inability to persuade the Court not to retreat from this principle.

Justice DOUGLAS, with whom Justice MINTON concurs, dissenting.

Feiner, a university student, made a speech on a street corner in Syracuse, New York, on March 8, 1949. The purpose of the speech was to publicize a meeting of the Young Progressives of America to be held that evening. A permit authorizing the meeting to be held in a public school auditorium had been revoked and the meeting shifted to a local hotel.

Feiner delivered his speech in a small shopping area in a predominantly colored residential section of Syracuse. He stood on a large box and spoke over loudspeakers mounted on a car. His audience was composed of about 75 people, colored and white. A few minutes after he started two police officers arrived.

The speech was mainly devoted to publicizing the evening’s meeting and protecting the revocation of the permit. It also touched on various public issues. The following are the only excerpts revealed by the record:

‘Mayor Costello (of Syracuse) is a champagne-sipping bum; he does not speak for the negro people.’

‘The 15th Ward is run by corrupt politicians.’

‘President Truman is a bum.’

‘Mayor O’Dwyer is a bum.’

‘The American Legion is a Nazi Gestapo.’

‘The negroes don’t have equal rights; they should rise up in arms and fight for their rights.’

There was some pushing and shoving in the crowd and some angry muttering. That is the testimony of the police. But there were no fights and no ‘disorder’ even by the standards of the police. There was not even any heckling of the speaker.

But after Feiner has been speaking about 20 minutes a man said to the police officers, ‘If you don’t get that son of a bitch off, I will go over and get him off there myself.’ It was then that the police ordered Feiner to stop speaking; when he refused, they arrested him.

Public assemblies and public speech occupy an important role in American life. One high function of the police is to protect these lawful gatherings so that the speakers may exercise their constitutional rights. 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, as we emphasized in *Cantwell v. Connecticut*, do not justify penalizing the speaker by depriving him of the platform or by punishing him for his conduct.

A speaker may not, of course, incite a riot any more than he may incite a breach of the peace by the use of ‘fighting words’. See *Chaplinsky v. State of New Hampshire*. But this record shows no such extremes. It shows an unsympathetic audience and the threat of one man to haul the speaker from the stage. It is against that kind of threat that speakers need police protection. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech.

### **Notes and Questions:**

1. What is the *Chaplinsky* test for fighting words?
2. What is the primary difference between the incitement doctrine under *Brandenburg* and the fighting words doctrine under *Chaplinsky*? Hint: the difference revolves around what we are concerned that listeners will do in response to the speech at issue.
3. The fighting words doctrine of *Chaplinsky* and *Feiner* holds that the government may, at least in some limited circumstances, punish or prevent speech based upon an anticipated or actual hostile reaction from the listener. What difficulties do you see arising in applying the fighting words doctrine? Conversely, what difficulties do you see in applying the alternative approach suggested by Justice Douglas’s dissent in *Feiner*?
4. Subsequent cases have substantially narrowed the fighting words doctrine without formally overruling *Chaplinsky*. Thus, while the fighting words doctrine remains good law, the Court has since been extremely reluctant to apply it to justify censoring or punishing speech.

In *Street v. New York*, for example, Sidney Street, an African-American veteran of World War II, was listening to the radio when he heard that civil rights leader James Meredith had been shot during a protest march. Mr. Street immediately took an American flag that he owned and burned it outdoors in protest, saying “If they did that to Meredith, we don’t need an American flag.” He was convicted of “malicious mischief” under New York Law. The Supreme Court reversed the conviction, distinguishing but not overruling *Chaplinsky*. The Court reasoned that “Though it is conceivable that some listeners might have been moved to retaliate [against Mr. Street] upon hearing [his] disrespectful words, we cannot say that appellant’s remarks were so inherently

inflammatory as to come within that small class of “fighting words” which are “likely to provoke the average person to retaliation, and thereby cause a breach of the peace” (citing *Chaplinsky*). The Court continued: “It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.” (*Street* is also discussed in the cases regarding symbolic speech presented elsewhere in this course packet).

In *Cohen v. California* (presented in full below in the unit regarding Indecent and Profane speech), the Court further indicated that it intended to apply the fighting words doctrine narrowly. In *Cohen*, the Court held that in order to amount to unprotected fighting words, the speech at issue must be both objectively *likely* to provoke an immediate violent response in the listener *and* must be directed at a specific individual. The Court held that defendant Cohen’s speech—a jacket with the words “F--- the Draft” written on the back—was not directed at any particular individual and that the fighting words doctrine was therefore inapplicable. Similarly, in *Gooding v. Wilson*, the Court invalidated on overbreadth grounds a state statute making it a crime for “Any person [to] without provocation use [toward] another and in his presence . . . opprobrious words or abusive language tending to cause a breach of the peace.” The *Gooding* Court held that the statute was unconstitutionally overbroad because the state courts had not limited its application to the narrow class of “opprobrious” or “abusive” words that, per *Chaplinsky*, would have “a direct tendency to cause acts of violence by the person to whom the remark is addressed” but had instead applied it more broadly to a wide variety of offensive language.

Finally, in *Texas v. Johnson* (presented earlier in the unit on Expressive Conduct/Symbolic Speech), the Court held that burning an American flag at a public protest did not amount to unprotected fighting words. The Court stated: “Johnson’s expressive conduct does not fall within that small class of ‘fighting words’ that are ‘likely to provoke the average person to retaliation, and thereby cause a breach of the peace.’ *Chaplinsky v. New Hampshire*. No reasonable onlooker would have regarded Johnson’s generalized expression of dissatisfaction with the policies of the Federal Government [by burning a flag] as a direct personal insult or an invitation to exchange fisticuffs.”

*R.A.V. v. St. Paul*, presented immediately below, further modifies the fighting words doctrine.

112 S. Ct. 2538.

Supreme Court of the United States.

R.A.V., Petitioner,  
v.  
CITY OF ST. PAUL, MINNESOTA.

No. 90–7675.

Argued Dec. 4, 1991.  
Decided June 22, 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, one of the two provisions under which respondent city of St. Paul chose to charge petitioner was the St. Paul Bias-Motivated Crime Ordinance, 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, 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” and therefore the ordinance reached only expression “that the First Amendment does not protect.” 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.” We granted certiorari.

## I

In construing the St. Paul ordinance, we are bound by the construction given to it by the Minnesota court. 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*. Petitioner and his *amici* urge us to modify the scope of the *Chaplinsky* formulation, thereby invalidating the ordinance as “substantially overbroad.” 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.

The First Amendment generally prevents government from proscribing speech or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which 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.” *Chaplinsky, supra*, 315 U.S. at 572. We have recognized that “the freedom of speech” referred to by the First Amendment does not include a freedom to disregard these traditional limitations. See, *e.g.*, *Roth v. United States* (obscenity); *Beauharnais v. Illinois* (defamation); *Chaplinsky v. New Hampshire* (fighting words).

We have sometimes said that these categories of expression are “not within the area of constitutionally protected speech” or that the “protection of the First Amendment does not extend” to them. Such statements must be taken in context, however, and are no more literally true than is the occasionally repeated shorthand characterizing obscenity “as not being speech at all.” What they mean is that these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.

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. 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, or that their content is *in all respects* “worthless and undeserving of constitutional protection”; 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*.

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. 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*. And just as the power to proscribe particular speech on the basis of a non-content 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 “non-speech” element of communication. Fighting words are thus analogous to a noisy sound truck: Each is a mode of speech; 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.

The concurrences describe us as setting forth a new First Amendment principle that prohibition of constitutionally proscribable speech cannot be “underinclusiv[e]” (WHITE, J., concurring in judgment)—a First Amendment “absolutism” whereby “[w]ithin a particular ‘proscribable’ category of expression, . . . a government must either proscribe *all* speech or no speech at all,” (STEVENS, J., concurring in judgment). That easy target is of the concurrences’ own invention. In our view, the First Amendment imposes not an “underinclusiveness” limitation but a “content discrimination” limitation upon a State’s prohibition of proscribable speech. There is no problem whatever, for example, with a State’s prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be “underinclusive,” it would not discriminate on the basis of content.

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. 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. 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. 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 in dissent), 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) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.

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. 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. 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.

These bases for distinction refute the proposition that the selectivity of the restriction is even arguably conditioned upon the sovereign’s agreement with what a speaker may intend to say. There may be other such 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.) Save for that limitation, the regulation of “fighting words,” like the regulation of noisy speech, may address some offensive instances and leave other, equally offensive, instances alone.

## II

Applying these principles to the St. Paul ordinance, we 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.

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 messages of “bias-motivated” hatred and in particular, as applied to this case, messages “based on virulent notions of racial supremacy.” 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,” 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.” 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.

Despite the fact that the Minnesota Supreme Court and St. Paul acknowledge that the ordinance is directed at expression of group hatred, Justice STEVENS suggests that this “fundamentally misreads” the ordinance. It is directed, he claims, not to speech of a particular content, but to particular “injur[ies]” that are “qualitatively different” from other injuries. This is wordplay. What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols which will arouse “anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” are those symbols that communicate a message of hostility based on one of these characteristics. St. Paul concedes in its brief that the ordinance applies only to “racial, religious, or gender-specific symbols” such as “a burning cross, Nazi swastika or other instrumentality of like import.” Indeed, St. Paul argued in the Juvenile Court that “[t]he burning of a cross does express a message and it is, in fact, the content of that message which the St. Paul Ordinance attempts to legislate.”

The content-based discrimination reflected in the St. Paul ordinance comes within neither any of the specific exceptions to the First Amendment prohibition we discussed earlier nor a more general exception for content discrimination that does not threaten censorship of ideas. It assuredly does not fall within the exception for content discrimination based on the very reasons why the particular class of speech at issue (here, fighting words) is proscribable. As explained earlier, the reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey. St. Paul has not singled out an especially offensive mode of expression—it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words

of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas. That possibility would alone be enough to render the ordinance presumptively invalid, but St. Paul's comments and concessions in this case elevate the possibility to a certainty.

St. Paul argues that the ordinance comes within another of the specific exceptions we mentioned, the one that allows content discrimination aimed only at the "secondary effects" of the speech. According to St. Paul, the ordinance is intended, "not to impact on [*sic*] the right of free expression of the accused," but rather to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against." It is clear that the St. Paul ordinance is not directed to secondary effects within the meaning of [our cases]. As we said in *Boos v. Barry*: "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. The emotive impact of speech on its audience is not a 'secondary effect.'"

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 requires that that weapon be employed only where it is *necessary* to serve the asserted [compelling] interest. The existence of adequate content-neutral alternatives thus undercuts significantly any defense of such a statute, 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. 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. The politicians of St. Paul are entitled to express that hostility—but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

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.

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

*It is so ordered.*

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.

I agree with the majority that the judgment of the Minnesota Supreme Court should be reversed. However, our agreement ends there.

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.

## 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* 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.”

Thus, as the majority concedes, 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*. The Court has concluded that neither child pornography nor obscenity is protected by the First Amendment. And the Court has observed that, leaving aside the special considerations when public officials or public figures are the target, a libelous publication is not protected by the Constitution.

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. 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. 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. The present Court submits that such clear statements “must be taken in context” and are not “literally true.”

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.”

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.” Should the government want to criminalize certain fighting words, the Court now requires it to criminalize all fighting words.

To borrow a phrase: “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 inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, but that the government may not treat a subset of that category differently without violating the First Amendment. The content of the subset is by definition worthless and undeserving of constitutional protection.

The Court’s insistence on inventing its brand of First Amendment underinclusiveness puzzles me. The overbreadth doctrine has the redeeming virtue of attempting to avoid the chilling of protected expression, but the Court’s new “underbreadth” creation serves no desirable function. Instead, it permits, indeed invites, the continuation of expressive conduct that in this case is evil and worthless in First Amendment terms, until the city of St. Paul cures the underbreadth by adding to its ordinance a catchall phrase such as “and all other fighting words that may constitutionally be subject to this ordinance.”

Any contribution of this holding to First Amendment jurisprudence is surely a negative one, since it necessarily signals that expressions of violence, such as the message of intimidation and racial hatred conveyed by burning a cross on someone’s lawn, are of sufficient value to outweigh the social interest in order and morality that has traditionally placed such fighting words outside the First Amendment.<sup>4</sup> Indeed, by characterizing fighting words as a form of “debate,” the majority legitimates hate speech as a form of public discussion.

## 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.

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<sup>4</sup> This does not suggest, of course, that cross burning is always unprotected. Burning a cross at a political rally would almost certainly be protected expression. Cf. *Brandenburg*. But in such a context, the cross burning could not be characterized as a “direct personal insult or an invitation to exchange fisticuffs,” *Texas v. Johnson*, to which the fighting words doctrine applies.

We have emphasized time and again that overbreadth doctrine is an exception to the established principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A defendant being prosecuted for speech or expressive conduct may challenge the law on its face if it reaches protected expression, even when that person's activities are not protected by the First Amendment. This is because the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. However, 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," and when the statute is not susceptible to limitation or partial invalidation. Here, the Minnesota Supreme Court has provided an authoritative construction of the St. Paul antibias ordinance. Consideration of petitioner's overbreadth claim must be based on that interpretation.

I agree with petitioner that the ordinance is invalid on its face. Although the ordinance as construed reaches categories of speech that are constitutionally unprotected, it also criminalizes a substantial amount of expression that—however repugnant—is shielded by the First Amendment.

In attempting to narrow the scope of the St. Paul antibias ordinance, the Minnesota Supreme Court relied upon two of the categories of speech and expressive conduct that fall outside the First Amendment's protective sphere: words that incite "imminent lawless action," *Brandenburg v. Ohio*, and "fighting" words, *Chaplinsky v. New Hampshire*. The Minnesota Supreme Court erred in its application of the *Chaplinsky* fighting words test and consequently interpreted the St. Paul ordinance in a fashion that rendered the ordinance facially overbroad.

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." 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." 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 *Texas v. Johnson*; *Cohen v. California*; *Street v. New York*.

In the First Amendment context, criminal 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. 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.<sup>13</sup> The ordinance is therefore fatally overbroad and invalid on its face.

Today's decision is mischievous at best and will surely confuse the lower courts. I join the judgment, but not the folly of the opinion.

Justice STEVENS, with whom Justice WHITE and Justice BLACKMUN join as to Part I, concurring in the judgment.

Conduct that creates special risks or causes special harms may be prohibited by special rules. Lighting a fire near an ammunition dump or a gasoline storage tank is especially dangerous; such behavior may be punished more severely than burning trash in a vacant lot. Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules.

## I

Fifty years ago [in *Chaplinsky v. New Hampshire*], the Court articulated a categorical approach to First Amendment jurisprudence.

“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.”

We have, as Justice WHITE observes, often described such categories of expression as “not within the area of constitutionally protected speech.” The Court today revises this categorical approach. It is not, the Court rules, that certain “categories” of expression are “unprotected,” but rather that certain “elements” of expression are wholly “proscribable.” To the Court, an expressive act, like a chemical compound, consists of more than one element. Although the act may be regulated because it contains a proscribable element, it may not be regulated on the basis of another (nonproscribable) element it also contains. Thus, obscene antigovernment speech may be regulated because it is obscene, but not because it is antigovernment. It is this revision of the categorical approach that allows the Court to assume that the St. Paul ordinance proscribes *only* fighting words, while at the same time concluding that the ordinance is invalid because it imposes a content-based regulation on expressive activity.

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<sup>13</sup> Although the First Amendment protects offensive speech, *Johnson v. Texas*, it does not require us to be subjected to such expression at all times, in all settings. We have held that such expression may be proscribed when it intrudes upon a “captive audience.” *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). And expression may be limited when it merges into conduct. *United States v. O'Brien*, 391 U.S. 367 (1968). However, because of the manner in which the Minnesota Supreme Court construed the St. Paul ordinance, those issues are not before us in this case.

Drawing on broadly worded dicta, the Court establishes a near-absolute ban on content-based regulations of expression and holds that the First Amendment prohibits the regulation of fighting words by subject matter. Thus, while the Court rejects the “all-or-nothing-at-all” nature of the categorical approach, it promptly embraces an absolutism of its own: Within a particular “proscribable” category of expression, the Court holds, a government must either proscribe *all* speech or no speech at all. This aspect of the Court’s ruling fundamentally misunderstands the role and constitutional status of content-based regulations on speech, conflicts with the very nature of First Amendment jurisprudence, and disrupts well-settled principles of First Amendment law.

Although the Court has, on occasion, declared that content-based regulations of speech are “never permitted,” such claims are overstated. Our decisions demonstrate that content-based distinctions, far from being presumptively invalid, are an inevitable and indispensable aspect of a coherent understanding of the First Amendment.

This is true at every level of First Amendment law. In broadest terms, our entire First Amendment jurisprudence creates a regime based on the content of speech. The scope of the First Amendment is determined by the content of expressive activity: Although the First Amendment broadly protects “speech,” it does not protect the right to “fix prices, breach contracts, make false warranties, place bets with bookies, threaten, [or] extort.” Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265, 270 (1981). Likewise, whether speech falls within one of the categories of “unprotected” or “proscribable” expression is determined, in part, by its content. Whether a magazine is obscene, a gesture a fighting word, or a photograph child pornography is determined, in part, by its content.

Consistent with this general premise, we have frequently upheld content-based regulations of speech. For example, in *Young v. American Mini Theatres*, the Court upheld zoning ordinances that regulated movie theaters based on the content of the films shown. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (plurality opinion), we upheld a restriction on the broadcast of *specific* indecent words. In *Lehman v. Shaker Heights*, 418 U.S. 298 (plurality opinion), we upheld a city law that permitted commercial advertising, but prohibited political advertising, on city buses. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), we upheld a state law that restricted the speech of state employees, but only as concerned partisan political matters. We have long recognized the power of the Federal Trade Commission to regulate misleading advertising and labeling, and the National Labor Relations Board’s power to regulate an employer’s election-related speech on the basis of its content. It is also beyond question that the Government may choose to limit advertisements for cigarettes, but not for cigars; choose to regulate airline advertising, but not bus advertising; or choose to monitor solicitation by lawyers, but not by doctors.

All of these cases involved the selective regulation of speech based on content—precisely the sort of regulation the Court invalidates today. Such selective regulations are unavoidably content based, but they are not, in my opinion, “presumptively invalid.”

[In addition to] disregarding this vast body of case law, the Court today goes [even further] and applies the prohibition on content-based regulation to speech that the Court had until today considered wholly “unprotected” by the First Amendment—namely, fighting words. This new

absolutism in the prohibition of content-based regulations severely contorts the fabric of settled First Amendment law.

Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all. Assuming that the Court is correct that this last class of speech is not wholly “unprotected,” it certainly does not follow that fighting words and obscenity receive the *same* sort of protection afforded core political speech. If Congress can prohibit false advertising directed at airline passengers without also prohibiting false advertising directed at bus passengers and if a city can prohibit political advertisements in its buses while allowing other advertisements, it is ironic to hold that a city cannot regulate fighting words based on “race, color, creed, religion or gender” while leaving unregulated fighting words based on “union membership . . . or homosexuality.” The Court today turns First Amendment law on its head: Communication that was once entirely unprotected (and that still can be wholly proscribed) is now entitled to greater protection than commercial speech—and possibly greater protection than core political speech.

Perhaps because the Court recognizes these perversities, it quickly offers some ad hoc limitations on its newly extended prohibition on content-based regulations. First, the Court states that a content-based regulation is valid “[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech . . . is proscribable.” In a pivotal passage, the Court writes:

“[T]he 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 . . . President.”

As I understand this opaque passage, Congress may choose from the set of unprotected speech (all threats) to proscribe only a subset (threats against the President) because those threats are particularly likely to cause “fear of violence,” “disruption,” and actual “violence.”

Precisely this same reasoning, however, compels the conclusion that St. Paul’s ordinance is constitutional. Just as Congress may determine that threats against the President entail more severe consequences than other threats, so St. Paul’s City Council may determine that threats based on the target’s race, religion, or gender cause more severe harm to both the target and to society than other threats. This latter judgment—that harms caused by racial, religious, and gender-based invective are qualitatively different from that caused by other fighting words—seems to me eminently reasonable and realistic.

In sum, the central premise of the Court’s ruling—that “[c]ontent-based regulations are presumptively invalid”—has simplistic appeal, but lacks support in our First Amendment jurisprudence. To make matters worse, the Court today extends this overstated claim to reach categories of hitherto unprotected speech and, in doing so, wreaks havoc in an area of settled law.



Finally, although the Court recognizes exceptions to its new principle, those exceptions undermine its very conclusion that the St. Paul ordinance is unconstitutional. Stated directly, the majority's position cannot withstand scrutiny.

The St. Paul ordinance (as construed by the Court) regulates expressive activity that is wholly proscribable and does so not on the basis of viewpoint, but rather in recognition of the different harms caused by such activity. Taken together, these several considerations persuade me that the St. Paul ordinance is not an unconstitutional content-based regulation of speech. Thus, were the ordinance not overbroad, I would vote to uphold it.

## B. True Threats

113 S. Ct. 2194.

Supreme Court of the United States.

WISCONSIN, Petitioner,

v.

Todd MITCHELL.

No. 92–515.

Argued April 21, 1993.

Decided June 11, 1993.

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent Todd Mitchell's sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race. The question presented in this case is whether this penalty enhancement is prohibited by the First and Fourteenth Amendments. We hold that it is not.

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?" 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 f\*\*\* somebody up? There goes a white boy; go get him." 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.

After a jury trial in the Circuit Court for Kenosha County, Mitchell was convicted of aggravated battery. That offense ordinarily carries a maximum sentence of two years' imprisonment. But because the jury found that Mitchell had intentionally selected his victim because of the boy's race, the maximum sentence for Mitchell's offense was increased to seven years under § 939.645.

That provision enhances the maximum penalty for an offense whenever the defendant “[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. . . .”

Mitchell appealed his conviction and sentence, challenging the constitutionality of Wisconsin’s penalty-enhancement provision on First Amendment grounds. The Wisconsin Court of Appeals rejected Mitchell’s challenge, but the Wisconsin Supreme Court reversed. The Wisconsin Supreme Court held that the statute “violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought.” It rejected the State’s contention that the statute punishes only the ‘conduct’ of intentional selection of a victim. According to the court, “[t]he statute punishes the ‘because of’ aspect of the defendant’s selection, the *reason* the defendant selected the victim, the *motive* behind the selection [and] under *R.A.V. v. St. Paul*, “the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees.”

The Wisconsin Supreme Court also held that the penalty-enhancement statute was unconstitutionally overbroad. It reasoned that, in order to prove that a defendant intentionally selected his victim because of the victim’s protected status, the State would often have to introduce evidence of the defendant’s prior speech, such as racial epithets he may have uttered before the commission of the offense. This evidentiary use of protected speech, the court thought, would have a “chilling effect” on those who feared the possibility of prosecution for offenses subject to penalty enhancement. Finally, the court distinguished antidiscrimination laws, which have long been held constitutional, on the ground that the Wisconsin statute punishes the “subjective mental process” of selecting a victim because of his protected status, whereas antidiscrimination laws prohibit “objective acts of discrimination.”

We granted certiorari because of the importance of the question presented and the existence of a conflict of authority among state high courts on the constitutionality of statutes similar to Wisconsin’s penalty-enhancement provision. We reverse.

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*; accord, *R.A.V.* 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 (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 (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. 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. 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. 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." Thus, in *Barclay v. Florida* (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. 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.

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. 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." In *Hishon*, we rejected the argument that Title VII infringed employers' First Amendment rights. And more recently, in *R.A.V. v. St. Paul*, we cited Title VII 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." Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city—*i.e.*, those that contained messages of 'bias-motivated' hatred—we held that it violated the rule against content-based discrimination. But whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression (*i.e.*, "speech" or "messages"), 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. 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.

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. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

For the foregoing reasons, we hold that Mitchell's First Amendment rights were not violated by the application of the Wisconsin penalty-enhancement provision in sentencing him. The judgment of the Supreme Court of Wisconsin is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

### **Notes and Questions:**

1. *Mitchell* unanimously rejected defendant's argument that the Wisconsin statute's bias-motivated sentencing enhancement was inconsistent with its decision in *R.A.V.* What was the Court's basis for distinguishing *R.A.V.*?
2. *R.A.V.* held, *inter alia*, that the statute at issue in that case was inconsistent with the First Amendment because it made content-based distinctions within a category of unprotected speech. Does the statute at issue in *Mitchell* arguably do the same, i.e., subdivide unprotected *conduct* by providing a bias-motivated penalty enhancement only on certain grounds (e.g., "race, religion, color, disability, sexual orientation, national origin or ancestry") but not others (e.g., per *R.A.V.*, "political affiliation, union membership, or homosexuality")?

123 S. Ct. 1536.

Supreme Court of the United States.

VIRGINIA, Petitioner,

v.

Barry Elton BLACK, Richard J. Elliott, and Jonathan O'Mara.

No. 01–1107.

Argued Dec. 11, 2002.

Decided April 7, 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.

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. We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

## I

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating Virginia's cross-burning statute, § 18.2–423. That statute 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. 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 wha[t][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.

During the rally, Sechrist heard Klan members speak about “what they were” and “what they believed in.” The speakers “talked real bad about the blacks and the Mexicans.” One speaker told the assembled gathering that “he would love to take a .30/.30 and just random[ly] shoot the blacks.” The speakers also talked about “President Clinton and Hillary Clinton,” and about how their tax money “goes to . . . the black people.” Sechrist testified that this language made her “very . . . scared.”

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross “then all of a sudden . . . went up in a flame.” As the cross burned, the Klan played Amazing Grace over the loudspeakers. Sechrist stated that the cross burning made her feel “awful” and “terrible.”

When the sheriff observed the cross burning, he informed his deputy that they needed to “find out who’s responsible and explain to them that they cannot do this in the State of Virginia.” The sheriff then went down the driveway, entered the rally, and asked “who was responsible for burning the cross.” Black responded, “I guess I am because I’m the head of the rally.” The sheriff then told Black, “[T]here’s a law in the State of Virginia that you cannot burn a cross and I’ll have to place you under arrest for this.”

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.” 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.” 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.” The jury found Black guilty, and fined him \$2,500. The Court of Appeals of Virginia affirmed Black’s conviction.

On May 2, 1998, respondents Richard Elliott and Jonathan O’Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African-American, was Elliott’s next-door neighbor in Virginia Beach, Virginia. Four months prior to the incident, Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to Elliott’s mother to inquire about shots being fired from behind the Elliott home. Elliott’s mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee’s property, planted a cross, and set it on fire. Their apparent motive was to “get back” at Jubilee for complaining about the shooting in the backyard. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was “very nervous” because he “didn’t know what

would be the next phase,” and because “a cross burned in your yard . . . tells you that it’s just the first round.”

Elliott and O’Mara were charged with attempted cross burning and conspiracy to commit cross burning. O’Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O’Mara to 90 days in jail and fined him \$2,500. The judge also suspended 45 days of the sentence and \$1,000 of the fine.

At Elliott’s trial, the judge originally ruled that the jury would be instructed “that the burning of a cross by itself is sufficient evidence from which you may infer the required intent.” At trial, however, the court instructed the jury that the Commonwealth must prove that “the defendant intended to commit cross burning,” that “the defendant did a direct act toward the commission of the cross burning,” and that “the defendant had the intent of intimidating any person or group of persons.” The court did not instruct the jury on the meaning of the word “intimidate,” nor on the prima facie evidence provision of § 18.2–423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a \$2,500 fine. The Court of Appeals of Virginia affirmed the convictions of both Elliott and O’Mara.

Each respondent appealed to the Supreme Court of Virginia, arguing that § 18.2–423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases, and held that the statute is unconstitutional on its face. It held that the Virginia cross-burning statute “is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V. v. St. Paul*.” The Virginia statute, the court held, discriminates on the basis of content since it “selectively chooses only cross burning because of its distinctive message.” The court also held that the prima facie evidence provision renders the statute overbroad because “[t]he enhanced probability of prosecution under the statute chills the expression of protected speech.”

Three justices dissented, concluding that the Virginia cross-burning statute passes constitutional muster because it proscribes only conduct that constitutes a true threat. The justices noted that unlike the ordinance found unconstitutional in *R.A.V.*, the Virginia statute does not just target cross burning “on the basis of race, color, creed, religion or gender.” Rather, “the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate.” The dissenters also disagreed with the majority’s analysis of the prima facie provision because the inference alone “is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate.” The dissent noted that the burden of proof still remains on the Commonwealth to prove intent to intimidate. We granted certiorari.

## II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. Sir Walter Scott used cross burnings for dramatic effect in *The Lady of the Lake*, where the burning cross signified both a summons and a call to arms. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

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. The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. 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. In response, Congress passed what is now known as the Ku Klux Klan Act (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. 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. 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. 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.

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." 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.

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. 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 organization." These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), along with the civil rights movement of the 1950's and 1960's, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." And the Klan has often published its newsletters and magazines under the name The Fiery Cross.

In short, a burning cross has remained a symbol of Klan ideology and of Klan unity. To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. at 771 (THOMAS, J., concurring). And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

### III

#### A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of

people might find distasteful or discomfoting. *Abrams v. United States* (Holmes, J., dissenting); see also *Texas v. Johnson*, 491 U.S. 397 (“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”). Thus, the First Amendment “ordinarily” denies a State “the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.” *Whitney v. California* (Brandeis, J., concurring). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech.

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, e.g., *Chaplinsky v. New Hampshire* (“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”). The First Amendment permits “restrictions upon the content of speech in a few limited areas, which 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.” *R.A.V. v. City of St. Paul*.

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*. See also *R.A.V.* (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*; see also *Chaplinsky v. New Hampshire*. 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*. And the First Amendment also permits a State to ban a true threat.

“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* (“political hyperbole” is not a true threat). 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.” *Id.* 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. As noted in Part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

## B

The Supreme Court of Virginia ruled that in light of *R.A.V.*, even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R.A.V.* to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

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. 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. 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.” *Id.* This content-based discrimination was unconstitutional because it allowed the city “to impose special prohibitions on those speakers who express views on disfavored subjects.”

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.”

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.” 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.” Consequently, while the holding of *R.A.V.* does not permit a State to ban only obscenity based on “offensive *political* messages,” or “only those threats against the President that mention his policy on aid to inner cities,” the First Amendment permits content discrimination “based on the very reasons why the particular class of speech at issue . . . is proscribable.”

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." 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." 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* (noting the instances of cross burnings directed at union members); *State v. Miller*, 6 Kan. App. 2d 432 (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 (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.

#### IV

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." The Commonwealth added the prima facie provision to the statute in 1968. 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.

The Supreme Court of Virginia has not ruled on the meaning of the prima facie evidence provision. It has, however, stated that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless 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." The jury in the case of Richard Elliott did not receive any instruction on the prima facie evidence provision, and the provision was not an issue in the case of Jonathan O'Mara because he pleaded guilty. The court in Barry Black's case, however, instructed the jury that the provision means: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent."

The prima facie evidence provision [and jury instruction] renders the statute unconstitutional [because it] 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 [because] the provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision would create an unacceptable risk of the suppression of ideas. The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. The provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

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.* (White, J., concurring in judgment) (citing *Brandenburg v. Ohio*). Cf. *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (*per curiam*). 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.

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 [constitutional law professor] 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.” 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. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision is unconstitutional on its face.

## V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott

and O'Mara, we vacate the judgment of the Supreme Court of Virginia, and remand the case for further proceedings.

*It is so ordered*

Justice THOMAS, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas v. Johnson*, and the profane. I believe that cross burning is the paradigmatic example of the latter.

## I

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban . . . cross burning carried out with the intent to intimidate," I believe that the majority errs in imputing an expressive component to the activity in question. In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

## A

[The Court's opinion] ignores Justice Holmes' familiar aphorism that a page of history is worth a volume of logic:

"The world's oldest, most persistent terrorist organization is not European or Middle Eastern in origin. Fifty years before the Irish Republican Army was organized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing, and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States." M. Newton & J. Newton, *The Ku Klux Klan: An Encyclopedia* vii (1991) (hereinafter Newton & Newton).

To me, the majority's brief history of the Ku Klux Klan reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods.

Such methods typically include cross burning—a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan. For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder. As the Government points out, the association between acts of intimidating cross burning and violence is well documented in recent American history. Indeed, the connection between cross burning and violence is well ingrained, and lower courts have so recognized:

“After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband’s life. She testified what the burning cross symbolized to her as a black American: ‘Nothing good. Murder, hanging, lynching. Just anything bad that you can name. It is the worst thing that could happen to a person.’ . . . Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. . . . Seven months after the incident, the family still lived in fear. . . . This is a reaction reasonably to be anticipated from this criminal conduct.” United States v. Skillman, 922 F.2d 1370 (C.A.9 1991).

But the perception that a burning cross is a threat and a precursor of worse things to come is not limited to blacks. Because the modern Klan expanded the list of its enemies beyond blacks and “radicals” to include Catholics, Jews, most immigrants, and labor unions, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly agree with the observation made by the Commonwealth of Virginia:

“A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police.”

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

## B

Virginia’s experience has been no exception. In Virginia, though facing widespread opposition in the 1920’s, the Klan developed localized strength in the southeastern part of the Commonwealth, where there were reports of scattered raids and floggings. Although the Klan was disbanded at the national level in 1944, a series of cross burnings in Virginia took place between 1949 and 1952.

Most of the crosses were burned on the lawns of black families, who either were business owners or lived in predominantly white neighborhoods. At least one of the cross burnings was accompanied by a shooting. The crosses burned near residences were about five to six feet tall, while a “huge cross reminiscent of the Ku Klux Klan days” that burned “atop a hill” as part of the initiation ceremony of the secret organization of the Knights of Kavaliers was 12 feet tall. These incidents were, in the words of the time, “*terroristic*” and “un-American acts, designed to *intimidate* Negroes from seeking their rights as citizens.”

In February 1952, in light of this series of cross burnings and attendant reports that the Klan, “long considered dead in Virginia, is being revitalized in Richmond,” Governor Battle announced that “Virginia ‘might well consider passing legislation’ to restrict the activities of the Ku Klux Klan.” As newspapers reported at the time, the bill was “to ban the burning of crosses and other similar evidences of *terrorism*.” The bill was presented to the House of Delegates by a former FBI agent

and future two-term Governor, Delegate Mills E. Godwin, Jr. “Godwin said law and order in the State were impossible if organized groups could *create fear by intimidation*.”

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.

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).

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.

Because I would uphold the validity of this statute, I respectfully dissent.

### **Notes and Questions:**

1. How does the Court in *Black* distinguish the statute at issue in that case from the one at issue in *R.A.V.*?

2. Why exactly does the Court find the statute at issue in *Black* unconstitutional?

### C. Incitement of Illegal Activity (review *Brandenburg*, pp. 26–27)



## D. Commercial Speech

96 S. Ct. 1817.

Supreme Court of the United States.

VIRGINIA STATE BOARD OF PHARMACY et al., Appellants,

v.

VIRGINIA CITIZENS CONSUMER COUNCIL, INC., et al.

No. 74–895.

Argued Nov. 11, 1975.

Decided May 24, 1976.

Justice BLACKMUN delivered the opinion of the Court.

The plaintiff-appellees in this case attack, as violative of the First and Fourteenth Amendments,<sup>1</sup> [a Virginia statute] which provides that a pharmacist licensed in Virginia is guilty of unprofessional conduct if he “(3) publishes, advertises or promotes, directly or indirectly, in any manner whatsoever, any price, fee, premium, discount, rebate or credit terms . . . for any drugs which may be dispensed only by prescription.” [Inasmuch as only a licensed pharmacist may dispense prescription drugs in Virginia, advertising or other affirmative dissemination of prescription drug price information is effectively forbidden in the State.]

### I

Since the challenged restraint is one that peculiarly concerns the licensed pharmacist in Virginia, we begin with a description of that profession as it exists under Virginia law.

The practice of pharmacy is declared [by state law] to be “a professional practice affecting the public health, safety and welfare,” and to be “subject to regulation and control in the public interest.” Indeed, the practice is subject to extensive regulation aimed at preserving high professional standards. The regulatory body is the appellant Virginia State Board of Pharmacy. The Board is broadly charged by statute with various responsibilities, including the maintenance of the quality, quantity, integrity, safety and efficacy of drugs or devices distributed, dispensed or administered. It also is to concern itself with “maintaining the integrity of, and public confidence in, the profession and improving the delivery of quality pharmaceutical services to the citizens of Virginia.” The Board is empowered to “make such bylaws, rules and regulations . . . as may be necessary for the lawful exercise of its powers.” The Board is also the licensing authority. Once licensed, a pharmacist is subject to a civil monetary penalty, or to revocation or suspension of his license, if the Board finds that [the pharmacist] has violated any of a number of stated professional standards or is guilty of “unprofessional conduct.”

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<sup>1</sup> The First Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. See, e.g., *Bigelow v. Virginia* (1975); *Schneider v. State* (1939).

## II

The plaintiffs are an individual Virginia resident who suffers from diseases that require her to take prescription drugs on a daily basis, and two nonprofit organizations.<sup>10</sup> Their claim is that the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.

Certainly that information may be of value. Drug prices in Virginia, for both prescription and nonprescription items, strikingly vary from outlet to outlet even within the same locality. It is stipulated, for example, that in Richmond the cost of 40 Achromycin tablets ranges from \$2.59 to \$6.00, a difference of 140% and that in the Newport News-Hampton area, the cost of tetracycline ranges from \$1.20 to \$9.00, a difference of 650%.

## III

The question first arises whether, even assuming that First Amendment protection attaches to the flow of drug price information, it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. In *Kleindienst v. Mandel*, we acknowledged that this Court has referred to a First Amendment right to “receive information and ideas,” and that freedom of speech “necessarily protects the right to receive.” And in *Procunier v. Martinez*, where censorship of prison inmates’ mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. If there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these appellees.

## IV

The appellants contend that the advertisement of prescription drug prices is outside the protection of the First Amendment because it is “commercial speech.” There can be no question that in past decisions the Court has given some indication that commercial speech is unprotected. In *Valentine v. Chrestensen*, the Court upheld a New York statute that prohibited the distribution of any “handbill, circular . . . or other advertising matter whatsoever in or upon any street.” The Court concluded that, although the First Amendment would forbid the banning of all communication by

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<sup>10</sup> The organizations are the Virginia Citizens Consumer Council, Inc., and the Virginia State AFL-CIO. Each has a substantial membership (approximately 150,000 and 69,000, respectively) many of whom are users of prescription drugs. The American Association of Retired Persons and the National Retired Teachers Association, also claiming many members who “depend substantially on prescription drugs for their well-being,” are among those who have filed briefs *Amici curiae* in support of the appellees.

handbill in the public thoroughfares, it imposed “no such restraint on government as respects purely commercial advertising.” Further support for a “commercial speech” exception to the First Amendment may perhaps be found in *Breard v. Alexandria*, where the Court upheld a conviction for violation of an ordinance prohibiting door-to-door solicitation of magazine subscriptions. The Court reasoned: “The selling . . . brings into the transaction a commercial feature,” and it distinguished *Martin v. Struthers*, where it had reversed a conviction for door-to-door distribution of leaflets publicizing a religious meeting, as a case involving “no element of the commercial.” Moreover, the Court several times has stressed that communications to which First Amendment protection was given were not “purely commercial.” See, e.g., *New York Times Co. v. Sullivan*.

Since the decision in *Breard*, however, the Court has never denied protection on the ground that the speech in issue was “commercial speech.” Last Term, in *Bigelow v. Virginia*, the notion of unprotected “commercial speech” all but passed from the scene. We reversed a conviction for violation of a Virginia statute that made the circulation of any publication to encourage or promote the processing of an abortion in Virginia a misdemeanor. The defendant had published in his newspaper the availability of abortions in New York. The advertisement in question, in addition to announcing that abortions were legal in New York, offered the services of a referral agency in that State. We rejected the contention that the publication was unprotected because it was commercial. *Chrestensen’s* continued validity was questioned and its holding was described as “distinctly a limited one” that merely upheld “a reasonable regulation of the manner in which commercial advertising could be distributed.” We concluded that “the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection,” and we observed that the “relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.”

Some fragment of hope for the continuing validity of a “commercial speech” exception arguably might have persisted because of the subject matter of the advertisement in *Bigelow*. We noted that in announcing the availability of legal abortions in New York, the advertisement did more than simply propose a commercial transaction. It contained factual material of clear public interest. And, of course, the advertisement related to activity with which, at least in some respects, the State could not interfere. See *Roe v. Wade*. Indeed, we observed in *Bigelow*: “We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.”

Here, in contrast, the question whether there is a First Amendment exception for “commercial speech” is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The “idea” he wishes to communicate is simply this: “I will sell you the X prescription drug at the Y price.” Our question, then, is whether this communication is wholly outside the protection of the First Amendment.

## V

We begin with several propositions that already are settled or beyond serious dispute. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. *Buckley v. Valeo*; *New York Times*

*Co. v. Sullivan*. Speech likewise is protected even though it is carried in a form that is “sold” for profit [such as books and movies], and even though it may involve a solicitation to purchase or otherwise pay or contribute money. *New York Times Co. v. Sullivan*; *NAACP v. Button*.

If there is a kind of commercial speech that lacks all First Amendment protection, therefore, it must be distinguished by its content. Yet the speech whose content deprives it of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical prices should be regulated, or their advertisement forbidden. Nor can it be dispositive that a commercial advertisement is noneditorial, and merely reports a fact. Purely factual matter of public interest may claim protection. *Bigelow v. Virginia*.

Our question is whether speech which does “no more than propose a commercial transaction” is so removed from any “exposition of ideas,” see *Chaplinsky v. New Hampshire*, that it lacks all protection. Our answer is that it is not.

Focusing first on the individual parties to the transaction that is proposed in the commercial advertisement, we may assume that the advertiser’s interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment. The interests of the contestants in a labor dispute are primarily economic, but it has long been settled that both the employee and the employer are protected by the First Amendment when they express themselves on the merits of the dispute in order to influence its outcome.

As to the particular consumer’s interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day’s most urgent political debate. Appellees’ case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely “commercial,” may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available, *Bigelow v. Virginia*; that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, see *Fur Information & Fashion Council, Inc. v. E. F. Timme & Son*, 364 F. Supp. 16 (S.D.N.Y.1973); and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs, cf. *Chicago Joint Board v. Chicago Tribune Co.*, 435 F.2d 470 (C.A.7 1970). Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.

Moreover, there is another consideration that suggests that no line between publicly “interesting” or “important” commercial advertising and the opposite kind could ever be drawn. Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Arrayed against these substantial individual and societal interests are a number of justifications for the advertising ban. These have to do principally with maintaining a high degree of professionalism on the part of licensed pharmacists. Price advertising, it is argued, will place in jeopardy the pharmacist’s expertise and, with it, the customer’s health. It is claimed that the aggressive price competition that will result from unlimited advertising will make it impossible for the pharmacist to supply professional services in the compounding, handling, and dispensing of prescription drugs. Such services are time consuming and expensive; if competitors who economize by eliminating them are permitted to advertise their resulting lower prices, the more painstaking and conscientious pharmacist will be forced either to follow suit or to go out of business. Finally, it is argued that damage will be done to the professional image of the pharmacist. This image, that of a skilled and specialized craftsman, attracts talent to the profession and reinforces the better habits of those who are in it. Price advertising, it is said, will reduce the pharmacist’s status to that of a mere retailer.

The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject. And this case concerns the retail sale by the pharmacist more than it does his professional standards. Surely, any pharmacist guilty of professional dereliction that actually endangers his customer will promptly lose his license. At the same time, we cannot discount the Board’s justifications entirely.

On close inspection [from a First Amendment perspective], however, it is seen that the State’s protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is assumed people will have to the free flow of drug price information. There is no claim that the advertising ban in any way prevents the cutting of corners by the pharmacist who is so inclined. That pharmacist is likely to cut corners in any event. The only effect the advertising ban has on him is to insulate him from price competition and to open the way for him to make a substantial, and perhaps even excessive, profit in addition to providing an inferior service. The more painstaking pharmacist is also protected but, again, it is a protection based in large part on public ignorance.

It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the “professional” pharmacist out of business. They will respond only to costly and excessive advertising, and end up paying the price. They will go from one pharmacist to another, following the discount, and destroy the pharmacist-customer relationship. They will lose respect for the profession because it advertises. All this is not in their best interests, and all this can be avoided if they are not permitted to know who is charging what.

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents the “professional” pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not ours to make or the Virginia General Assembly’s. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. In this sense, the justifications Virginia has offered for suppressing the flow of prescription drug price information, far from persuading us that the flow is not protected by the First Amendment, have reinforced our view that it is. We so hold.

## VI

In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.

There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute, which singles out speech of a particular content and seeks to prevent its dissemination completely.

Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing

effectively with this problem.<sup>24</sup> The First Amendment does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. Finally, the special problems of the electronic broadcast media are likewise not in this case.

What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.

The judgment of the District Court is affirmed.

### **Notes and Questions:**

1. **Important:** The Court later elaborated upon *Virginia State Board of Pharmacy* in *Central Hudson Gas & Electric v. Public Service Commission*, 447 U.S. 557 (1980). The test for commercial speech is therefore commonly referred to as the "Central Hudson" test.

In *Board of Trustees of SUNY v. Fox* (1989), the Court revised one aspect of the *Central Hudson* test. In *Central Hudson*, the Court had said the regulation must be the "least restrictive means" of directly advancing a substantial interest. In *Fox*, the Court changed this prong to require only that the regulation be a "reasonable fit" in directly advancing the substantial interest. This modification is reflected in the Court's opinion in *Sorrell*, which is presented below. (Neither *Central Hudson* nor *Fox* are assigned for this course.)

In sum: the form of intermediate scrutiny applicable to commercial speech is as stated in *Sorrell*, not as originally stated in *Central Hudson*. Hence, for the sake of precision (if, for example, answering a bar exam or final exam question), I would be inclined to state that "The test for

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<sup>24</sup> In concluding that commercial speech enjoys First Amendment protection, we have not held that it is wholly undifferentiable from other forms. There are commonsense differences between speech that does no more than propose a commercial transaction and other varieties. Even if the differences do not justify the conclusion that commercial speech is valueless, and thus subject to complete suppression by the State, they nonetheless suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial information is unimpaired. The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else. Also, commercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.

Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive. They may also make inapplicable the prohibition against prior restraints.

commercial speech, taken from *Central Hudson* as modified by *Fox* and reaffirmed by *Sorrell*, is as follows: \_\_\_\_\_”.

131 S. Ct. 2653.

Supreme Court of the United States.

SORRELL, Attorney General of Vermont, et al.

v.

IMS HEALTH INC. et al.

No. 10–779.

Argued April 26, 2011.

Decided June 23, 2011.

Justice KENNEDY delivered the opinion of the Court.

Vermont law restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. Subject to certain exceptions, the information may not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers. Vermont argues that its prohibitions safeguard medical privacy and diminish the likelihood that marketing will lead to prescription decisions not in the best interests of patients or the State. It can be assumed that these interests are significant. Speech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment. As a consequence, Vermont’s statute must be subjected to heightened judicial scrutiny. The law cannot satisfy that standard.

I

A

Pharmaceutical manufacturers promote their drugs to doctors through a process called “detailing.” This often involves a scheduled visit to a doctor’s office to persuade the doctor to prescribe a particular pharmaceutical. Detailers bring drug samples as well as medical studies that explain the “details” and potential advantages of various prescription drugs. Interested physicians listen, ask questions, and receive follow-up data. Salespersons can be more effective when they know the background and purchasing preferences of their clientele, and pharmaceutical salespersons are no exception. Knowledge of a physician’s prescription practices—called “prescriber-identifying information”—enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message. Detailing is an expensive undertaking, so pharmaceutical companies most often use it to promote high-profit brand-name drugs protected by patent. Once a brand-name drug’s patent expires, less expensive bioequivalent generic alternatives are manufactured and sold.



Pharmacies, as a matter of business routine and federal law, receive prescriber-identifying information when processing prescriptions. Many pharmacies sell this information to “data miners,” firms that analyze prescriber-identifying information and produce reports on prescriber behavior. Data miners lease these reports to pharmaceutical manufacturers subject to nondisclosure agreements. Detailers, who represent the manufacturers, then use the reports to refine their marketing tactics and increase sales.

In 2007, Vermont enacted the Prescription Confidentiality Law. The measure is also referred to as Act 80. It has several components. The central provision of the present case is § 4631(d).

“A health insurer, a self-insured employer, an electronic transmission intermediary, a pharmacy, or other similar entity shall not sell, license, or exchange for value regulated records containing prescriber-identifiable information, nor permit the use of regulated records containing prescriber-identifiable information for marketing or promoting a prescription drug, unless the prescriber consents . . . . Pharmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents . . . .”

The quoted provision has three component parts. The provision begins by prohibiting pharmacies, health insurers, and similar entities from selling prescriber-identifying information, absent the prescriber’s consent. The parties here dispute whether this clause applies to all sales or only to sales for marketing. The provision then goes on to prohibit pharmacies, health insurers, and similar entities from allowing prescriber-identifying information to be used for marketing, unless the prescriber consents. This prohibition in effect bars pharmacies from disclosing the information for marketing purposes. Finally, the provision’s second sentence bars pharmaceutical manufacturers and pharmaceutical marketers from using prescriber-identifying information for marketing, again absent the prescriber’s consent.

Separate statutory provisions elaborate the scope of the prohibitions set out in § 4631(d). “Marketing” is defined to include “advertising, promotion, or any activity” that is “used to influence sales or the market share of a prescription drug.” Section 4631(c)(1) further provides that Vermont’s Department of Health must allow “a prescriber to give consent for his or her identifying information to be used for the purposes” identified in § 4631(d). Finally, the Act’s prohibitions on sale, disclosure, and use are subject to a list of exceptions. For example, prescriber-identifying information may be disseminated or used for “health care research”; to enforce “compliance” with health insurance formularies, or preferred drug lists; for “care management educational communications provided to” patients on such matters as “treatment options”; for law enforcement operations; and for purposes “otherwise provided by law.”

Act 80 also authorized funds for an “evidence-based prescription drug education program” designed to provide doctors and others with “information and education on the therapeutic and cost-effective utilization of prescription drugs.” An express aim of the program is to advise prescribers “about commonly used brand-name drugs for which the patent has expired” or will soon expire. Similar efforts to promote the use of generic pharmaceuticals are sometimes referred to as “counter-detailing.” The counterdetailer’s recommended substitute may be an older, less expensive drug and not a bioequivalent of the brand-name drug the physician might otherwise

prescribe. Like the pharmaceutical manufacturers whose efforts they hope to resist, counterdetailers in some States use prescriber-identifying information to increase their effectiveness. States themselves may supply the prescriber-identifying information used in these programs.

Act 80 was accompanied by legislative findings. Vermont found, for example, that the “goals of marketing programs are often in conflict with the goals of the state” and that the “marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors.” Detailing, in the legislature’s view, caused doctors to make decisions based on “incomplete and biased information.” Because they “are unable to take the time to research the quickly changing pharmaceutical market,” Vermont doctors “rely on information provided by pharmaceutical representatives.” The legislature further found that detailing increases the cost of health care and health insurance; encourages hasty and excessive reliance on [more-expensive] brand-name drugs; and fosters disruptive and repeated marketing visits. The legislative findings further noted that use of prescriber-identifying information “increase[s] the effect of detailing programs” by allowing detailers to target their visits to particular doctors. Use of prescriber-identifying data also helps detailers shape their messages by “tailoring” their “presentations to individual prescriber styles, preferences, and attitudes.”

## B

The present case involves two consolidated suits. One was brought by three Vermont data miners, the other by an association of pharmaceutical manufacturers that produce brand-name drugs. These entities are the respondents here. Contending that § 4631(d) violates their First Amendment rights as incorporated by the Fourteenth Amendment, the respondents sought declaratory and injunctive relief against the petitioners, the Attorney General and other officials of the State of Vermont.

## II

### A

#### 1

On its face, Vermont’s law enacts content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information. The provision first forbids sale subject to exceptions based in large part on the content of a purchaser’s speech. For example, those who wish to engage in certain “educational communications” may purchase the information. The measure then bars any disclosure when recipient speakers will use the information for marketing. Finally, the provision’s second sentence prohibits pharmaceutical manufacturers from using the information for marketing. The statute thus disfavors marketing, that is, speech with a particular content. More than that, the statute disfavors specific speakers, namely pharmaceutical manufacturers. As a result of these content- and speaker-based rules, detailers cannot obtain prescriber-identifying information, even though the information may be purchased or acquired by other speakers with diverse purposes and viewpoints. Detailers are likewise barred from using the information for marketing, even though the information may be used by a wide range of other speakers. For

example, it appears that Vermont could supply academic organizations with prescriber-identifying information to use in countering the messages of brand-name pharmaceutical manufacturers and in promoting the prescription of generic drugs. But § 4631(d) leaves detailers no means of purchasing, acquiring, or using prescriber-identifying information. The law on its face burdens disfavored speech by disfavored speakers.

Act 80 is designed to impose a specific, content-based burden on protected expression. It follows that heightened judicial scrutiny is warranted. *See Turner Broadcasting System* (explaining that strict scrutiny applies to regulations reflecting “aversion” to what “disfavored speakers” have to say). The Court has recognized that the “distinction between laws burdening and laws banning speech is but a matter of degree” and that the “Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.” Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.

The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys. A government bent on frustrating an impending demonstration might pass a law demanding two years’ notice before the issuance of parade permits. Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional. Commercial speech is no exception. A consumer’s concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. That reality has great relevance in the fields of medicine and public health, where information can save lives.

2

The State argues that heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation. It is true that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct. It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove “White Applicants Only” signs; why an ordinance against outdoor fires might forbid burning a flag; and why antitrust laws can prohibit agreements in restraint of trade.

But § 4631(d) imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont’s law imposes a burden based on the content of speech and the identity of the speaker. While the burdened speech results from an economic motive, so too does a great deal of vital expression. *See Bigelow v. Virginia; New York Times Co. v. Sullivan. See also United States v. United Foods, Inc.* (applying “First Amendment scrutiny” where speech effects were not incidental and noting that “those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little-noticed groups”). Vermont’s law does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers. The Constitution “does not enact Mr. Herbert Spencer’s Social Statics.” *Lochner v. New York* (Holmes, J., dissenting). It does enact the First Amendment.

Vermont further argues that § 4631(d) regulates not speech but simply access to information. Prescriber-identifying information was generated in compliance with a legal mandate, the State argues, and so could be considered a kind of governmental information. This argument finds some support in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, where the Court held that a plaintiff could not raise a facial challenge to a content-based restriction on access to government held information. Because no private party faced a threat of legal punishment, the Court characterized the law at issue as “nothing more than a governmental denial of access to information in its possession.” Under those circumstances, the special reasons for permitting First Amendment plaintiffs to invoke the rights of others did not apply. Having found that the plaintiff could not raise a facial challenge, the Court remanded for consideration of an as-applied challenge. *United Reporting* is thus a case about the availability of facial challenges. The Court did not rule on the merits of any First Amendment claim.

*United Reporting* is distinguishable in at least two respects. First, Vermont has imposed a restriction on access to information in private hands. This confronts the Court with a point reserved, and a situation not addressed, in *United Reporting*. Here, unlike in *United Reporting*, we do have “a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses.” The difference is significant. An individual’s right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated. In *Seattle Times v. Rhinehart*, this Court applied heightened judicial scrutiny before sustaining a trial court order prohibiting a newspaper’s disclosure of information it learned through coercive discovery. It is true that the respondents here, unlike the newspaper in *Seattle Times*, do not themselves possess information whose disclosure has been curtailed. That information, however, is in the hands of pharmacies and other private entities. There is no question that the “threat of prosecution . . . hangs over their heads.” *United Reporting*, 528 U.S. at 41. For that reason, *United Reporting* does not bar respondents’ facial challenge.

*United Reporting* is distinguishable for a second and even more important reason. The plaintiff in *United Reporting* had neither attempted to qualify for access to the government’s information nor presented an as-applied claim in this Court. As a result, the Court assumed that the plaintiff had not suffered a personal First Amendment injury and could prevail only by invoking the rights of others through a facial challenge. Here, by contrast, the respondents claim—with good reason—that § 4631(d) burdens their own speech. That argument finds support in the separate writings in *United Reporting*, which were joined by eight Justices. All of those writings recognized that restrictions on the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment. See *id.* at 42 (SCALIA, J., concurring) (suggesting that “a restriction upon access that *allows* access to the press but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech”); *id.* at 43 (GINSBURG, J., concurring) (noting that “the provision of [government] information is a kind of subsidy to people who wish to speak” about certain subjects, “and once a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed”); *id.* at 46 (Stevens, J., dissenting) (concluding that, “because the State’s discrimination is based on its desire to prevent the information from being used for constitutionally protected purposes, [i]t must assume the burden of justifying its conduct”). Vermont’s law imposes a content- and speaker-based burden on

respondents' own speech. That consideration provides a separate basis for distinguishing *United Reporting* and requires heightened judicial scrutiny.

The State also contends that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of prescriber-identifying information are conduct, not speech. Consistent with that submission, the United States Court of Appeals for the First Circuit has characterized prescriber-identifying information as a mere "commodity" with no greater entitlement to First Amendment protection than "beef jerky." In contrast, the courts below concluded that a prohibition on the sale of prescriber-identifying information is a content-based rule akin to a ban on the sale of cookbooks, laboratory results, or train schedules. See 630 F.3d at 271–72 ("The First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression" (internal quotation marks and alteration omitted)); 631 F. Supp. 2d at 445 ("A restriction on disclosure is a regulation of speech, and the 'sale' of [information] is simply disclosure for profit").

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. See, e.g., *Bartnicki* ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct"); *Rubin v. Coors Brewing Co.* ("information on beer labels" is speech); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (plurality opinion) (credit report is "speech"). Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.

## B

In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory. The State argues that a different analysis applies here because, assuming § 4631(d) burdens speech at all, it at most burdens only commercial speech. The outcome here is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. For the same reason there is no need to determine whether all speech hampered by § 4631(d) is commercial because [the law here fails even the test for commercial speech].

Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment. To sustain the targeted, content-based burden § 4631(d) imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). There must be a "fit between the legislature's ends and the means chosen to accomplish those ends." *Fox, supra*, at 480. As in other contexts, these standards ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message. See *Turner Broadcasting*.

The State's asserted justifications for § 4631(d) come under two general headings. First, the State contends that its law is necessary to protect medical privacy, including physician confidentiality

and the integrity of the doctor-patient relationship. Second, the State argues that § 4631(d) is integral to the achievement of policy objectives—namely, improved public health and reduced healthcare costs. Neither justification withstands scrutiny.

1

Vermont argues that its physicians have a “reasonable expectation” that their prescriber-identifying information “will not be used for purposes other than . . . filling and processing” prescriptions. It may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential. But § 4631(d) is not drawn to serve that interest. Under Vermont’s law, pharmacies may share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing. Exceptions further allow pharmacies to sell prescriber-identifying information for certain purposes, including “health care research.” And the measure permits insurers, researchers, journalists, the State itself, and others to use the information.

Perhaps the State could have addressed physician confidentiality through a more coherent policy. For instance, the State might have advanced its asserted privacy interest by allowing the information’s sale or disclosure in only a few narrow and well-justified circumstances. A statute of that type would present quite a different case than the one presented here. But the State did not enact a statute with that purpose or design. Instead, Vermont made prescriber-identifying information available to an almost limitless audience. The explicit structure of the statute allows the information to be studied and used by all but a narrow class of disfavored speakers. Given the information’s widespread availability and many permissible uses, the State’s asserted interest in physician confidentiality does not justify the burden that § 4631(d) places on protected expression.

Vermont [also] argues that detailers’ use of prescriber-identifying information undermines the doctor-patient relationship by allowing detailers to influence treatment decisions. According to the State, “unwanted pressure occurs” when doctors learn that their prescription decisions are being “monitored” by detailers. Some physicians accuse detailers of “spying” or of engaging in “underhanded” conduct in order to “subvert” prescription decisions. And Vermont claims that detailing makes people “anxious” about whether doctors have their patients’ best interests at heart. But the State does not explain why detailers’ use of prescriber-identifying information is more likely to prompt these objections than many other uses permitted by § 4631(d). In any event, this asserted interest is contrary to basic First Amendment principles. Speech remains protected even when it may stir people to action, move them to tears, or inflict great pain. The more benign and, many would say, beneficial speech of pharmaceutical marketing is also entitled to the protection of the First Amendment. If pharmaceutical marketing affects treatment decisions, it does so because doctors find it persuasive. Absent circumstances far from those presented here, the fear that speech might persuade provides no lawful basis for quieting it. *See Brandenburg v. Ohio*.

2

The State contends that § 4631(d) advances important public policy goals by lowering the costs of medical services and promoting public health. If prescriber-identifying information were available

for use by detailers, the State contends, then detailing would be effective in promoting brand-name drugs that are more expensive and less safe than generic alternatives.

While Vermont's stated policy goals may be proper, § 4631(d) does not advance them in a permissible way. As the Court of Appeals noted, the state's own explanation of how § 4631(d) advances its interests cannot be said to be direct. The State seeks to achieve its policy objectives through the indirect means of restraining certain speech by certain speakers—that is, by diminishing detailers' ability to influence prescription decisions. Those who seek to censor or burden free expression often assert that disfavored speech has adverse effects. But the fear that people would make bad decisions if given truthful information" cannot justify content-based burdens on speech. *See Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* 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. These precepts apply with full force when the audience, in this case prescribing physicians, consists of sophisticated and experienced consumers.

As Vermont's legislative findings acknowledge, the premise of § 4631(d) is that the force of speech can justify the government's attempts to stifle it. Indeed the State defends the law by insisting that "pharmaceutical marketing has a strong influence on doctors' prescribing practices." This reasoning is incompatible with the First Amendment. In an attempt to reverse a disfavored trend in public opinion, a State could not ban campaigning with slogans, picketing with signs, or marching during the daytime. Likewise the State may not seek to remove a popular but disfavored product from the marketplace by prohibiting truthful, nonmisleading advertisements that contain impressive endorsements or catchy jingles. That the State finds expression too persuasive does not permit it to quiet the speech or to burden its messengers.

There are divergent views regarding detailing and the prescription of brand-name drugs. Under the Constitution, resolution of that debate must result from free and uninhibited speech. As one Vermont physician put it: "We have a saying in medicine, information is power. And the more you know, or anyone knows, the better decisions can be made." There are similar sayings in law, including that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Virginia Bd.*, 425 U.S. at 770. The choice "between the dangers of suppressing information, and the dangers of its misuse if it is freely available" is one that "the First Amendment makes for us." *Id.*

Vermont may be displeased that detailers who use prescriber-identifying information are effective in promoting brand-name drugs. The State can express that view through its own speech. But a State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction. 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.

It is true that content-based restrictions on protected expression are sometimes permissible, and that principle applies to commercial speech. Indeed the government’s legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech. The Court has noted, for example, that “a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud . . . is in its view greater there.” *R.A.V.*, 505 U.S. at 388–89 (citing *Virginia Bd.*). Here, however, Vermont has not shown that its law has a neutral justification.

The State nowhere contends that detailing is false or misleading within the meaning of this Court’s First Amendment precedents. Nor does the State argue that the provision challenged here will prevent false or misleading speech. The State’s interest in burdening the speech of detailers instead turns on nothing more than a difference of opinion.

\* \* \*

The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. In considering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of a debate.

If Vermont’s statute provided that prescriber-identifying information could not be sold or disclosed except in narrow circumstances then the State might have a stronger position. Here, however, the State gives possessors of the information broad discretion and wide latitude in disclosing the information, while at the same time restricting the information’s use by some speakers and for some purposes, even while the State itself can use the information to counter the speech it seeks to suppress. Privacy is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers.

The State here has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.

The judgment of the Court of Appeals is affirmed.

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

The Vermont statute before us adversely affects expression in one, and only one, way. It deprives pharmaceutical and data-mining companies of data, collected pursuant to the government’s regulatory mandate, that could help pharmaceutical companies create better sales messages. In my view, this effect on expression is inextricably related to a lawful governmental effort to regulate a commercial enterprise. The First Amendment does not require courts to apply a special “heightened” standard of review when reviewing such an effort. And, in any event, the statute meets the First Amendment standard this Court has previously applied when the government seeks to regulate commercial speech. For any or all of these reasons, the Court should uphold the statute as constitutional.



## I

The Vermont statute before us says pharmacies and certain other entities

“shall not [1] sell . . . regulated records containing prescriber-identifiable information, nor [2] permit the use of [such] records . . . for marketing or promoting a prescription drug, unless the prescriber consents.”

In *Glickman v. Wileman Brothers & Elliott, Inc.*, this Court considered the First Amendment’s application to federal agricultural commodity marketing regulations that required growers of fruit to make compulsory contributions to pay for collective advertising. The Court reviewed the lawfulness of the regulation’s negative impact on the growers’ freedom voluntarily to choose their own commercial messages “under the standard appropriate for the review of economic regulation.”

In this case I would ask whether Vermont’s regulatory provisions work harm to First Amendment interests that is disproportionate to their furtherance of legitimate regulatory objectives. And in doing so, I would give significant weight to legitimate commercial regulatory objectives—as this Court did in *Glickman*. The far stricter, specially “heightened” First Amendment standards that the majority would apply to this instance of commercial regulation are out of place here.

## A

Because many, perhaps most, activities of human beings living together in communities take place through speech, and because speech-related risks and offsetting justifications differ depending upon context, this Court has distinguished for First Amendment purposes among different contexts in which speech takes place. Thus, the First Amendment imposes tight constraints upon government efforts to restrict, *e.g.*, “core” political speech, while imposing looser constraints when the government seeks to restrict, *e.g.*, commercial speech, the speech of its own employees, or the regulation-related speech of a firm subject to a traditional regulatory program.

These test-related distinctions reflect the constitutional importance of maintaining a free marketplace of ideas, a marketplace that provides access to social, political, esthetic, moral, and other ideas and experiences.” *See Abrams v. United States* (Holmes, J., dissenting). Without such a marketplace, the public could not freely choose a government pledged to implement policies that reflect the people’s informed will.

At the same time, our cases make clear that the First Amendment offers considerably less protection to the maintenance of a free marketplace for goods and services. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (“We have always been careful to distinguish commercial speech from speech at the First Amendment’s core”). And they also reflect the democratic importance of permitting an elected government to implement through effective programs policy choices for which the people’s elected representatives have voted.

Thus this Court has recognized that commercial speech including advertising has an “informational function” and is not “valueless in the marketplace of ideas.” *Central Hudson, supra*. But at the same time it has applied a less than strict, “intermediate” First Amendment test

when the government directly restricts commercial speech. Under that test, government laws and regulations may significantly restrict speech, as long as they also “directly advance” a “substantial” government interest that could not “be served as well by a more limited restriction.” *Central Hudson, supra*, at 564. Moreover, the Court has found that “sales practices” that are “misleading, deceptive, or aggressive” lack the protection of even this “intermediate” standard. *See Central Hudson; Virginia Bd. of Pharmacy*. And the Court has emphasized the need, in applying an intermediate test, to maintain the commonsense distinction between speech “proposing a commercial transaction, *which occurs in an area traditionally subject to government regulation*, and other varieties of speech.”

The Court has also normally applied a yet more lenient approach to ordinary commercial or regulatory legislation that affects speech in less direct ways. In doing so, the Court has taken account of the need in this area of law to defer significantly to legislative judgment—as the Court has done in cases involving the Commerce Clause or the Due Process Clause. “Our function” in such cases, Justice Brandeis said, “is only to determine the reasonableness of the legislature’s belief in the existence of evils and in the effectiveness of the remedy provided.” *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (dissenting opinion). *See also United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (“[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional” if it rests “upon some rational basis within the knowledge and experience of the legislators”).

To apply a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs (even if that program has a modest impact upon a firm’s ability to shape a commercial message) would work at cross-purposes with this more basic constitutional approach. Since ordinary regulatory programs can affect speech, particularly commercial speech, in myriad ways, to apply a “heightened” First Amendment standard of review whenever such a program burdens speech would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives. To apply a “heightened” standard of review in such cases as a matter of course would risk what then-Justice Rehnquist, dissenting in *Central Hudson*, described as a “return to the bygone era of *Lochner v. New York*, in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies.”

[B]

The Court (suggesting a standard yet stricter than *Central Hudson*) says that we must give *content-based* restrictions that burden speech “heightened” scrutiny. It adds that “[c]ommercial speech is no exception.” And the Court then emphasizes that this is a case involving both “content-based” and “speaker-based” restrictions. But neither of these categories—“content-based” nor “speaker-based”—has ever before justified greater scrutiny when regulatory activity affects commercial speech.

Regulatory programs necessarily draw distinctions on the basis of content. *Virginia Bd. of Pharmacy* (“If there is a kind of commercial speech that lacks all First Amendment protection, . . . it must be distinguished by its content”). Electricity regulators, for example, oversee company

statements, pronouncements, and proposals, but only about electricity. The Federal Reserve Board regulates the content of statements, advertising, loan proposals, and interest rate disclosures, but only when made by financial institutions. And the FDA oversees the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture. Given the ubiquity of content-based regulatory categories, why should the “content-based” nature of typical regulation require courts (other things being equal) to grant legislators and regulators *less* deference?

Nor, in the context of a regulatory program, is it unusual for particular rules to be “speaker-based,” affecting only a class of entities, namely, the regulated firms. An energy regulator, for example, might require the manufacturers of home appliances to publicize ways to reduce energy consumption, while exempting producers of industrial equipment. See, *e.g.*, 16 CFR pt. 305 (2011) (prescribing labeling requirements for certain home appliances). Or the FDA might control in detail just what a pharmaceutical firm can, and cannot, tell potential purchasers about its products. Such a firm, for example, could not suggest to a potential purchaser (say, a doctor) that he or she might put a pharmaceutical drug to an “off label” use, even if the manufacturer, in good faith and with considerable evidence, believes the drug will help. All the while, a third party (say, a researcher) is free to tell the doctor not to use the drug for that purpose. See 21 CFR pt. 99.

If the Court means to create constitutional barriers to regulatory rules that might affect the *content* of a commercial message, it has embarked upon an unprecedented task—a task that threatens significant judicial interference with widely accepted regulatory activity.

The Court also uses the words “aimed” and “targeted” when describing the relation of the statute to drug manufacturers. But, for the reasons just set forth, to require “heightened” scrutiny on this basis is to require its application early and often when the State seeks to regulate industry. Any statutory initiative stems from a legislative agenda. See, *e.g.*, Message to Congress, May 24, 1937, H.R. Doc. No. 255, 75th Cong., 1st Sess., 4 (request from President Franklin Roosevelt for legislation to ease the plight of factory workers). Any administrative initiative stems from a regulatory agenda. The related statutes, regulations, programs, and initiatives almost always reflect a point of view, for example, of the Congress and the administration that enacted them and ultimately the voters. And they often aim at, and target, particular firms that engage in practices about the merits of which the Government and the firms may disagree. Section 2 of the Sherman Act, 15 U.S.C. § 2, for example, which limits the truthful, nonmisleading speech of firms that, due to their market power, can affect the competitive landscape, is directly aimed at, and targeted at, monopolists.

In short, the case law in this area reflects the need to ensure that the First Amendment protects the “marketplace of ideas,” thereby facilitating the democratic creation of sound government policies without improperly hampering the ability of government to introduce an agenda, to implement its policies, and to favor them to the exclusion of contrary policies. To apply “heightened” scrutiny when the regulation of commercial activities (which often involve speech) is at issue is unnecessarily to undercut the latter constitutional goal. The majority’s view of this case presents that risk.

Moreover, given the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court’s vision of its reviewing task threatens to return us to a happily bygone era when judges

scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists. See *Lochner v. New York* (Holmes, J., dissenting). By inviting courts to scrutinize whether a State's legitimate regulatory interests can be achieved in less restrictive ways whenever they touch (even indirectly) upon commercial speech, today's majority risks repeating the mistakes of the past in a manner not anticipated by our precedents.

Nothing in Vermont's statute undermines the ability of persons opposing the State's policies to speak their mind or to pursue a different set of policy objectives through the democratic process. Whether Vermont's regulatory statute "targets" drug companies (as opposed to affecting them unintentionally) must be beside the First Amendment point.

This does not mean that economic regulation having some effect on speech is always lawful. Courts typically review the lawfulness of statutes for rationality and of regulations (if federal) to make certain they are not "arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). And our valuable free-speech tradition may play an important role in such review. But courts do not normally view these matters as requiring "heightened" First Amendment scrutiny—and particularly not the unforgiving brand of "intermediate" scrutiny employed by the majority. Because the imposition of "heightened" scrutiny in such instances would significantly change the legislative/judicial balance, in a way that would significantly weaken the legislature's authority to regulate commerce and industry, I would not apply a "heightened" First Amendment standard of review in this case.

### III

#### A

Turning to the constitutional merits, I believe Vermont's statute survives application of *Central Hudson's* "intermediate" commercial speech standard as well as any more limited "economic regulation" test.

The statute threatens only modest harm to commercial speech. I agree that it withholds from pharmaceutical companies information that would help those entities create a more effective selling message. But I cannot agree with the majority that the harm also involves unjustified discrimination in that it permits pharmacies to "share prescriber-identifying information with anyone for any reason" (but marketing). Whatever the First Amendment relevance of such discrimination, there is no evidence that it exists in Vermont. The record contains no evidence that prescriber-identifying data is widely disseminated. Cf. *Burson v. Freeman* ("States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist"); *Bates v. State Bar of Ariz.* ("[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context").

Nor can the majority find record support for its claim that the statute helps "favored" speech and imposes a "burde[n]" upon "disfavored speech by disfavored speakers." The Court apparently means that the statute (1) prevents pharmaceutical companies from creating individualized messages that would help them sell their drugs more effectively, but (2) permits "counterdetailing"

programs, which often promote generic drugs, to create such messages using prescriber-identifying data. I am willing to assume, for argument's sake, that this consequence would significantly increase the statute's negative impact upon commercial speech. The record before us, however, contains no evidentiary basis for the conclusion that any such individualized counterdetailing is widespread, or exists at all, in Vermont.

The upshot is that the only commercial-speech-related harm that the record shows this statute to have brought about is the one I have previously described: The withholding of information collected through a regulatory program, thereby preventing companies from shaping a commercial message they believe maximally effective. The absence of precedent suggesting that this kind of harm is serious reinforces the conclusion that the harm here is modest at most.

## B

The legitimate state interests that the statute serves are “substantial.” Vermont enacted its statute

“to advance the state’s interest in protecting the public health of Vermonters, protecting the privacy of prescribers and prescribing information, and to ensure costs are contained in the private health care sector, as well as for state purchasers of prescription drugs, through the promotion of less costly drugs and ensuring prescribers receive unbiased information.”

These objectives are important. And the interests they embody all are “neutral” in respect to speech.

The protection of public health falls within the traditional scope of a State’s police powers. The fact that the Court normally exempts the regulation of misleading and deceptive information even from the rigors of its “intermediate” commercial speech scrutiny testifies to the importance of securing unbiased information. As major payers in the health care system, health care spending is also of crucial state interest. And this Court has affirmed the importance of maintaining “privacy” as an important public policy goal—even in respect to information already disclosed to the public for particular purposes (but not others). See *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989).

At the same time, the record evidence is sufficient to permit a legislature to conclude that the statute “directly advances” each of these objectives. The statute helps to focus sales discussions on an individual drug’s safety, effectiveness, and cost, perhaps compared to other drugs (including generics). These drug-related facts have everything to do with general information that drug manufacturers likely possess. They have little, if anything, to do with the name or prior prescription practices of the particular doctor to whom a detailer is speaking. Shaping a detailing message based on an individual doctor’s prior prescription habits may help sell more of a particular manufacturer’s particular drugs. But it does so by diverting attention from scientific research about a drug’s safety and effectiveness, as well as its cost. This diversion comes at the expense of public health and the State’s fiscal interests.

The record also adequately supports the State’s privacy objective. Regulatory rules in Vermont make clear that the confidentiality of an individual doctor’s prescribing practices remains the norm. See, *e.g.*, Pharmacy Rule 8.7(c) (“Prescription and other patient health care information shall be secure from access by the public, and the information shall be kept confidential”); Pharmacy Rule 20.1(i) (forbidding disclosure of patient or prescriber information to “unauthorized persons” without consent). Exceptions to this norm are comparatively few. There is no indication that the State of Vermont, or others in the State, makes use of this information for counterdetailing efforts.

Pharmaceutical manufacturers and the data miners who sell information to those manufacturers would like to create (and did create) an additional exception, which means additional circulation of otherwise largely confidential information. Vermont’s statute closes that door. At the same time, the statute permits doctors who wish to permit use of their prescribing practices to do so. For purposes of *Central Hudson*, this would seem sufficiently to show that the statute serves a meaningful interest in increasing the protection given to prescriber privacy. See *Fox*, 492 U.S. at 480 (in commercial speech area, First Amendment requires “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”; see also *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993) (The First Amendment does not “require that the Government make progress on every front before it can make progress on any front”).

## V

In sum, I believe that the statute before us satisfies the “intermediate” standards this Court has applied to restrictions on commercial speech. *A fortiori* it satisfies less demanding standards that are more appropriately applied in this kind of commercial regulatory case—a case where the government seeks typical regulatory ends (lower drug prices, more balanced sales messages) through the use of ordinary regulatory means (limiting the commercial use of data gathered pursuant to a regulatory mandate). The speech-related consequences here are indirect, incidental, and entirely commercial.

The Court reaches its conclusion through the use of important First Amendment categories—“content-based,” “speaker-based,” and “neutral”—but without taking full account of the regulatory context, the nature of the speech effects, the values these First Amendment categories seek to promote, and prior precedent. At best the Court opens a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. At worst, it reawakens *Lochner*’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.

Regardless, whether we apply an ordinary commercial speech standard or a less demanding standard, I believe Vermont’s law is consistent with the First Amendment. And with respect, I dissent.

## Notes and Questions:

1. What is the test for commercial speech to be derived from *Virginia State Board of Pharmacy* and *Sorrell*?
2. Note that before applying the test for commercial speech, there's a threshold question to be decided: does the speech at issue qualify for First Amendment protection at all? Both *Virginia State Board of Pharmacy* and *Sorrell* give guidance both on this threshold question. What kinds of commercial speech do *not* qualify for First Amendment protection under these cases?
3. The dissent accuses the majority of engaging in the kind of judicial overreach that the Court has disclaimed since the *Lochner* era. Do you agree with the dissent on this point, or with the majority that it is simply applying established First Amendment principles with regard to content and viewpoint discrimination?

### E. Indecent and Profane Speech

91 S. Ct. 1780.

Supreme Court of the United States.

Paul Robert COHEN, Appellant,

v.

State of CALIFORNIA.

No. 299.

Argued Feb. 22, 1971.

Decided June 7, 1971.

Justice HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating [a provision of California law] which prohibits “maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person by . . . offensive conduct.” He was given 30 days’ imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

“On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words ‘Fuck the Draft’ which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words

were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.

In affirming the conviction the Court of Appeal held that “offensive conduct” means “behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace,” and that the State had proved this element because, on the facts of this case, “(i)t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forcibly remove his jacket.” California Supreme Court declined review by a divided vote. We now reverse.

## I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does not present.

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only “conduct” which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon speech, not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen’s ability to express himself. Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected.

Appellant’s conviction, then, rests squarely upon his exercise of the freedom of speech protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain



places. No fair reading of the phrase “offensive conduct” can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.<sup>3</sup>

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States’ broader power to prohibit obscene expression, such expression must be, in some significant way, erotic.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called “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. *Chaplinsky v. New Hampshire*. While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not “directed to the person of the hearer” [per *Chaplinsky*]. No individual actually or likely to be present could reasonably have regarded the words on appellant’s jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State’s police power to prevent a speaker from intentionally provoking a given group to hostile reaction. There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen’s distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant’s crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that we are often “captives” outside the sanctuary of the home and subject to objectionable speech. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen’s jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example,

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<sup>3</sup> It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folded over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom.

strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it.

## II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an "undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines*. We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves.

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and 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 hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "(w)holly neutral futilities come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters v. New York*, 333 U.S. 507 (1948) (Frankfurter, J.,

dissenting), and why “so long as the means are peaceful, the communication need not meet standards of acceptability,” *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man’s vulgarity is another’s lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Justice Frankfurter has said, ‘(o)ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.’

Finally, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.

Justice BLACKMUN, with whom THE CHIEF JUSTICE and Justice BLACK join.

I dissent.

Cohen’s absurd and immature antic, in my view, was mainly conduct and little speech. Further, the case appears to me to be well within the sphere of *Chaplinsky v. New Hampshire*, where Justice Murphy, a known champion of First Amendment freedoms, wrote for a unanimous bench. As a consequence, this Court’s agonizing over First Amendment values seem misplaced and unnecessary.

117 S. Ct. 2329.

Supreme Court of the United States.

Janet RENO, Attorney General of the United States, et al., Appellants

v.

AMERICAN CIVIL LIBERTIES UNION et al.

No. 96–511.

Argued March 19, 1997.

Decided June 26, 1997.

Justice STEVENS delivered the opinion of the Court.

At issue is the constitutionality of two statutory provisions enacted to protect minors from “indecent” and “patently offensive” communications on the Internet. Notwithstanding the legitimacy and importance of the congressional goal of protecting children from harmful materials, we agree with the three-judge District Court that the statute abridges the freedom of speech protected by the First Amendment.

## I

The District Court made extensive findings of fact, most of which were based on a detailed stipulation prepared by the parties. The findings describe the character and the dimensions of the Internet, the availability of sexually explicit material in that medium, and the problems confronting age verification for recipients of Internet communications. Because those findings provide the underpinnings for the legal issues, we begin with a summary of the undisputed facts.

### *The Internet*

The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called ARPANET, which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is “a unique and wholly new medium of worldwide human communication.”

The Internet has experienced “extraordinary growth.” The number of “host” computers—those that store information and relay communications—increased from about 300 in 1981 to approximately 9,400,000 by the time of the trial in 1996. Roughly 60% of these hosts are located in the United States. About 40 million people used the Internet at the time of trial, a number that is expected to mushroom to 200 million by 1999.

Individuals can obtain access to the Internet from many different sources, generally hosts themselves or entities with a host affiliation. Most colleges and universities provide access for their students and faculty; many corporations provide their employees with access through an office network; many communities and local libraries provide free access; and an increasing number of storefront “computer coffee shops” provide access for a small hourly fee. Several major national “online services” such as America Online, CompuServe, the Microsoft Network, and Prodigy offer access to their own extensive proprietary networks as well as a link to the much larger resources of the Internet. These commercial online services had almost 12 million individual subscribers at the time of trial.

Anyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely. But, as presently constituted, those most relevant to this case are electronic mail (e-mail), automatic mailing list services (“mail exploders,” sometimes referred to as “listservs”), “newsgroups,” “chat rooms,” and the “World Wide Web.” All of these methods can be used to transmit text; most can transmit sound, pictures, and moving video images. Taken together, these tools constitute a unique medium—known to its users as “cyberspace”—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet.

E-mail enables an individual to send an electronic message—generally akin to a note or letter—to another individual or to a group of addressees. The message is generally stored electronically, sometimes waiting for the recipient to check her “mailbox” and sometimes making its receipt known through some type of prompt. A mail exploder is a sort of e-mail group. Subscribers can send messages to a common e-mail address, which then forwards the message to the group’s other subscribers. Newsgroups also serve groups of regular participants, but these postings may be read by others as well. There are thousands of such groups, each serving to foster an exchange of information or opinion on a particular topic running the gamut from, say, the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls. About 100,000 new messages are posted every day. In most newsgroups, postings are automatically purged at regular intervals. In addition to posting a message that can be read later, two or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue—in other words, by typing messages to one another that appear almost immediately on the others’ computer screens. The District Court found that at any given time “tens of thousands of users are engaging in conversations on a huge range of subjects.” It is “no exaggeration to conclude that the content on the Internet is as diverse as human thought.”

The best known category of communication over the Internet is the World Wide Web, which allows users to search for and retrieve information stored in remote computers, as well as, in some cases, to communicate back to designated sites. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world. Some of these documents are simply files containing information. However, more elaborate documents, commonly known as Web “pages,” are also prevalent. Each has its own address—rather like a telephone number. Web pages frequently contain information and sometimes allow the viewer to communicate with the page’s (or “site’s”) author. They generally also contain “links” to other documents created by

that site's author or to other (generally) related sites. Typically, the links are either blue or underlined text—sometimes images.

Navigating the Web is relatively straightforward. A user may either type the address of a known page or enter one or more keywords into a commercial “search engine” in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the “surfer,” or, through its links, it may be an avenue to other documents located anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer “mouse” on one of the page's icons or links. Access to most Web pages is freely available, but some allow access only to those who have purchased the right from a commercial provider. The Web is thus comparable, from the readers' viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.

From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can “publish” information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege. No single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.

### *Sexually Explicit Material*

Sexually explicit material on the Internet includes text, pictures, and chat and “extends from the modestly titillating to the hardest-core.” These files are created, named, and posted in the same manner as material that is not sexually explicit, and may be accessed either deliberately or unintentionally during the course of an imprecise search. Once a provider posts its content on the Internet, it cannot prevent that content from entering any community. Thus, for example,

“when the UCR/California Museum of Photography posts to its Web site nudes by Edward Weston and Robert Mapplethorpe to announce that its new exhibit will travel to Baltimore and New York City, those images are available not only in Los Angeles, Baltimore, and New York City, but also in Cincinnati, Mobile, or Beijing—wherever Internet users live. Similarly, the safer sex instructions that Critical Path posts to its Web site, written in street language so that the teenage receiver can understand them, are available not just in Philadelphia, but also in Provo and Prague.”

Some of the communications over the Internet that originate in foreign countries are also sexually explicit.

Though such material is widely available, users seldom encounter such content accidentally. A document's title or a description of the document will usually appear before the document itself, and in many cases the user will receive detailed information about a site's content before he or she need take the step to access the document. Almost all sexually explicit images are preceded by warnings as to the content. For that reason, the “odds are slim” that a user would enter a sexually

explicit site by accident. Unlike communications received by radio or television, the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.

Systems have been developed to help parents control the material that may be available on a home computer with Internet access. A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features. Although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images. Nevertheless, the evidence indicates that a reasonably effective method by which parents can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.

### *Age Verification*

The problem of age verification differs for different uses of the Internet. The District Court categorically determined that there "is no effective way to determine the identity or the age of a user who is accessing material through e-mail, mail exploders, newsgroups or chat rooms." The Government offered no evidence that there was a reliable way to screen recipients and participants in such forums for age. Moreover, even if it were technologically feasible to block minors' access to newsgroups and chat rooms containing discussions of art, politics, or other subjects that potentially elicit "indecent" or "patently offensive" contributions, it would not be possible to block their access to that material and still allow them access to the remaining content, even if the overwhelming majority of that content was not indecent.

Technology exists by which an operator of a Web site may condition access on the verification of requested information such as a credit card number or an adult password. Credit card verification is only feasible, however, either in connection with a commercial transaction in which the card is used, or by payment to a verification agency. Using credit card possession as a surrogate for proof of age would impose costs on non-commercial Web sites that would require many of them to shut down. For that reason, at the time of the trial, credit card verification was effectively unavailable to a substantial number of Internet content providers. Moreover, the imposition of such a requirement would completely bar adults who do not have a credit card and lack the resources to obtain one from accessing any blocked material.

Commercial pornographic sites that charge their users for access have assigned them passwords as a method of age verification. The record does not contain any evidence concerning the reliability of these technologies. Even if passwords are effective for commercial purveyors of indecent material, the District Court found that an adult password requirement would impose significant burdens on noncommercial sites, both because they would discourage users from accessing their

sites and because the cost of creating and maintaining such screening systems would be beyond their reach.<sup>23</sup>

In sum, the District Court found:

“Even if credit card verification or adult password verification were implemented, the Government presented no testimony as to how such systems could ensure that the user of the password or credit card is in fact over 18. The burdens imposed by credit card verification and adult password verification systems make them effectively unavailable to a substantial number of Internet content providers.”

## II

The Telecommunications Act of 1996 was an unusually important legislative enactment. As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage “the rapid deployment of new telecommunications technologies.” The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting. The Act includes seven Titles, six of which are the product of extensive committee hearings and the subject of discussion in Reports prepared by Committees of the Senate and the House of Representatives. By contrast, Title V—known as the “Communications Decency Act of 1996” (CDA)—contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case. They are informally described as the “indecent transmission” provision and the “patently offensive display” provision.

The first, 47 U.S.C. § 223(a), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:

“(a) Whoever—

“(1) in interstate or foreign communications—

.....

“(B) by means of a telecommunications device knowingly—

“(i) makes, creates, or solicits, and

“(ii) initiates the transmission of,

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<sup>23</sup> The district court found that:

“At least some, if not almost all, non-commercial organizations, such as the ACLU, Stop Prisoner Rape or Critical Path AIDS Project, regard charging listeners to access their speech as contrary to their goals of making their materials available to a wide audience free of charge.”



“any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

.....

“(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,

“shall be fined under Title 18, or imprisoned not more than two years, or both.”

The second provision, § 223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:

“(d) Whoever—

“(1) in interstate or foreign communications knowingly—

“(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

“(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

“any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

“(2) knowingly permits any telecommunications facility under such person’s control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

“shall be fined under Title 18, or imprisoned not more than two years, or both.”

The breadth of these prohibitions is qualified by two affirmative defenses. One covers those who take “good faith, reasonable, effective, and appropriate actions” to restrict access by minors to the prohibited communications. The other covers those who restrict access to covered material by requiring certain designated forms of age proof, such as a verified credit card or an adult identification number or code.

### [III]

The Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) *Ginsberg v. New York*; (2) *FCC v. Pacifica Foundation*; and (3) *Renton v. Playtime Theatres, Inc.* A close look at these cases, however, raises—rather than relieves—doubts concerning the constitutionality of the CDA.

In *Ginsberg*, we upheld the constitutionality of a New York statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults. We rejected the defendant’s broad submission that “the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend on whether the citizen is an adult or a minor.” In rejecting that contention, we relied not only on the State’s independent interest in the well-being of its youth, but also on our consistent recognition of the principle that “the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”

In four important respects, the statute upheld in *Ginsberg* was narrower than the CDA. First, we noted in *Ginsberg* that “the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.” Under the CDA, by contrast, neither the parents’ consent—nor even their participation—in the communication would avoid the application of the statute. Second, the New York statute applied only to commercial transactions, whereas the CDA contains no such limitation. Third, the New York statute cabined its definition of material that is harmful to minors with the requirement that it be “utterly without redeeming social importance for minors.” The CDA fails to provide us with any definition of the term “indecent” as used in § 223(a)(1) and, importantly, omits any requirement that the “patently offensive” material covered by § 223(d) lack serious literary, artistic, political, or scientific value. Fourth, the New York statute defined a minor as a person under the age of 17, whereas the CDA, in applying to all those under 18 years, includes an additional year of those nearest majority.

In *Pacifica*, we upheld a declaratory order of the Federal Communications Commission, holding that the broadcast of a recording of a 12-minute monologue entitled “Filthy Words” that had previously been delivered to a live audience could have been the subject of administrative sanctions. The Commission had found that the repetitive use of certain words referring to excretory or sexual activities or organs “in an afternoon broadcast when children are in the audience was patently offensive” and concluded that the monologue was indecent as broadcast.

The plurality [in *Pacifica*] stated that the First Amendment does not prohibit all governmental regulation that depends on the content of speech. Accordingly, the availability of constitutional protection for a vulgar and offensive monologue that was not obscene depended on the context of the broadcast. Relying on the premise that of all forms of communication, broadcasting had received the most limited First Amendment protection, the plurality concluded that the ease with which children may obtain access to broadcasts justified special treatment of indecent broadcasting.

As with the New York statute at issue in *Ginsberg*, there are significant differences between the order upheld in *Pacifica* and the CDA. First, the order in *Pacifica*, issued by an agency that had

been regulating radio stations for decades, targeted a specific broadcast that represented a rather dramatic departure from traditional program content in order to designate when—rather than whether—it would be permissible to air such a program in that particular medium. The CDA’s broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet. Second, unlike the CDA, the Commission’s declaratory order was not punitive; we expressly refused to decide whether the indecent broadcast “would justify a criminal prosecution.” Finally, the Commission’s order applied to a medium which as a matter of history had “received the most limited First Amendment protection,” in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident [online] is remote because a series of affirmative steps is required to access specific material.

In *Renton*, we upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. The ordinance was aimed, not at the content of the films shown in the theaters, but rather at the “secondary effects”—such as crime and deteriorating property values—that these theaters fostered: “It is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of ‘offensive’ speech.” According to the Government, the CDA is constitutional because it constitutes a sort of “cyberzoning” on the Internet. But the CDA applies broadly to the entire universe of cyberspace. And the purpose of the CDA is to protect children from the primary effects of “indecent” and “patently offensive” speech, rather than any “secondary” effect of such speech. Thus, the CDA is a content-based blanket restriction on speech, and, as such, cannot be properly analyzed as a form of time, place, and manner regulation. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (“Listeners’ reaction to speech is not a content-neutral basis for regulation”).

These precedents, then, surely do not require us to uphold the CDA and are fully consistent with the application of the most stringent review of its provisions.

#### [IV.]

Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word “indecent,” while the second speaks of material that “in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.” Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, or the consequences of prison rape would not violate the CDA? This uncertainty undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials.

The vagueness of the CDA is a matter of special concern for two reasons. First, the CDA is a content-based regulation of speech. The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech. Second, the CDA is a

criminal statute. In addition to the opprobrium and stigma of a criminal conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. As a practical matter, this increased deterrent effect, coupled with the risk of discriminatory enforcement of vague regulations, poses greater First Amendment concerns than those implicated by civil regulations.

The Government argues that the statute is no more vague than the obscenity standard this Court established in *Miller v. California*, 413 U.S. 15 (1973). But that is not so. In *Miller*, this Court reviewed a criminal conviction against a commercial vendor who mailed brochures containing pictures of sexually explicit activities to individuals who had not requested such materials. We set forth in *Miller* the test for obscenity that controls to this day:

“(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the 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.”

Because the CDA’s “patently offensive” standard (and, we assume, *arguendo*, its synonymous “indecent” standard) is one part of the three-prong *Miller* test, the Government reasons, it cannot be unconstitutionally vague.

The Government’s assertion is incorrect as a matter of fact. The second prong of the *Miller* test—the purportedly analogous standard—contains a critical requirement that is omitted from the CDA: that the proscribed material be “specifically defined by the applicable state law.” This requirement reduces the vagueness inherent in the open-ended term “patently offensive” as used in the CDA. Moreover, the *Miller* definition is limited to “sexual conduct,” whereas the CDA extends also to include (1) “excretory activities” as well as (2) “organs” of both a sexual and excretory nature.

The Government’s reasoning is also flawed. Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague.<sup>38</sup> Each of *Miller*’s additional two prongs—(1) that, taken as a whole, the material appeals to the “prurient” interest, and (2) that it “lacks serious literary, artistic, political, or scientific value”—critically limits the uncertain sweep of the obscenity definition. The second requirement is particularly important because, unlike the “patently offensive” and “prurient interest” criteria, it is not judged by contemporary community standards. This “societal value” requirement, absent in the CDA, allows appellate courts to impose some limitations and regularity on the definition by setting, as a matter of law, a national floor for socially redeeming value.

In contrast to *Miller* and our other previous cases, the CDA thus presents a greater threat of censoring speech that, in fact, falls outside the statute’s scope. Given the vague contours of the

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<sup>38</sup> [For example]: the word “trunk,” standing alone, might refer to luggage, a swimming suit, the base of a tree, or the long nose of an animal. [But] its meaning is clear when it is one prong of a three-part description of a species of gray animals.

coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection. That danger provides further reason for insisting that the statute not be overly broad. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

[V]

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. 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. That 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.

In evaluating the free speech rights of adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment. Indeed, *Pacifica* itself admonished that “the fact that society may find speech offensive is not a sufficient reason for suppressing it.”

It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. The Government may not reduce the adult population to only what is fit for children. “[R]egardless of the strength of the government’s interest” in protecting children, “[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.” *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

The breadth of the CDA's coverage is wholly unprecedented. Unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general, undefined terms “indecent” and “patently offensive” cover large amounts of nonpornographic material with serious educational or other value. Moreover, the “community standards” criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message. The regulated subject matter may extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library.

For the purposes of our decision, we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all “indecent” and “patently offensive” messages communicated to a 17-year-old—no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute. Under the CDA, a parent allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate could face a lengthy prison term. Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in

their home community found the material “indecent” or “patently offensive,” if the college town’s community thought otherwise.

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 as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be “tagged” in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial Web sites—differently from others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.

## [VI]

In an attempt to curtail the CDA’s facial overbreadth, the Government advances three additional arguments for sustaining the Act’s affirmative prohibitions: (1) that the CDA is constitutional because it leaves open ample “alternative channels” of communication; (2) that the plain meaning of the CDA’s “knowledge” and “specific person” requirement significantly restricts its permissible applications; and (3) that the CDA’s prohibitions are “almost always” limited to material lacking redeeming social value.

The Government first contends that, even though the CDA effectively censors discourse on many of the Internet’s modalities—such as chat groups, newsgroups, and mail exploders—it is nonetheless constitutional because it provides a “reasonable opportunity” for speakers to engage in the restricted speech on the World Wide Web. This argument is unpersuasive because the CDA regulates speech on the basis of its content. A “time, place, and manner” analysis is therefore inapplicable. It is thus immaterial whether such speech would be feasible on the Web (which, as the Government’s own expert acknowledged, would cost up to \$10,000 if the speaker’s interests were not accommodated by an existing Web site, not including costs for data base management and age verification). The Government’s position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books.

The Government also asserts that the “knowledge” requirement of both §§ 223(a) and (d), especially when coupled with the “specific child” element found in § 223(d), saves the CDA from overbreadth. Because both sections prohibit the dissemination of indecent messages only to persons known to be under 18, the Government argues, it does not require transmitters to “refrain from communicating indecent material to adults; they need only refrain from disseminating such materials to persons they know to be under 18.” This argument ignores the fact that most Internet forums—including chat rooms, newsgroups, mail exploders, and the Web—are open to all. The Government’s assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the “specific person” requirement of § 223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a “heckler’s veto,” upon any opponent of indecent speech who might simply log on and inform the would-be discourses that his 17-year-old child would be present.

Finally, we find no textual support for the Government’s submission that material having scientific, educational, or other redeeming social value will necessarily fall outside the CDA’s “patently offensive” and “indecent” prohibitions.

[VII]

In this Court, though not in the District Court, the Government asserts that—in addition to its interest in protecting children—its “equally significant” interest in fostering the growth of the Internet provides an independent basis for upholding the constitutionality of the CDA. The Government apparently assumes that the unregulated availability of “indecent” and “patently offensive” material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material.

We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

For the foregoing reasons, the judgment of the District Court is affirmed.

#### **XIV. Technology and the First Amendment**

- A. Recording of Public Spaces and of Police Activity  
[reading assignment TBD]
  
- B. Social Media and the First Amendment  
[reading assignment TBD]