Chapter VII: Compelled Expression and Compelled Association

A. Compelled Expression

The Supreme Court's first specific encounter with the subject of compelled expression was in *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). In that case, the Court by a vote of 8-1, in an opinion by Justice Frankfurter, rejected a challenge brought by a member of the Jehovah's Witnesses to a mandatory daily flag salute exercise required of public school students and teachers. Three years later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court reversed its position, overruled *Gobitis*, and struck down a similar West Virginia requirement by a vote of 6-3.

1. WEST VIRGINIA STATE BOARD OF EDUCATION v. BARNETTE

319 U.S. 624 (1943)

MR. JUSTICE JACKSON delivered the opinion of the Court joined by STONE, C.J. AND BLACK, DOUGLAS, MURPHY and RUTLEDGE, JJ.

Following the decision by this Court in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), the West Virginia Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's Gobitis opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all." 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, citizens of the United States and of West Virginia, 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 Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution. The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The Board of Education brought the case here by direct appeal.

This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do. Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

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 latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, 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. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.

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.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. *Stromberg v. California*, 283 U.S. 359 (1931). Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.

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. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, assumed, as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule. The question which underlies the flag salute controversy is whether

such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, reexamine specific grounds assigned for the *Gobitis* decision.

1. It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?' and that the answer must be in favor of strength." It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority, and would require us to override every liberty thought to weaken or delay execution of their policies.

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 subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

2. It was also considered in the *Gobitis* case that functions of educational officers in States, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country."

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.

3. The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the

wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena," since all the "effective means of inducing political changes are left free."

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.

The freedoms of speech and of press, of assembly, and of worship may not be infringed on slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that, while it is the Fourteenth Amendment which bears directly upon the State, it is the more specific limiting principles of the First Amendment that finally govern this case.

4. Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. Upon the verity of this assumption depends our answer in this case.

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 unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. 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. If there are any circumstances which permit an exception, they do not now occur to us.

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 decision of this Court in *Minersville School District v. Gobitis* and the holdings of those few per curiam decisions which preceded and foreshadowed it, are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is affirmed.

JUSTICE BLACK and JUSTICE DOUGLAS, concurring.

We are substantially in agreement with the opinion just read, but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.

Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong. We believe that the statute before us fails to accord full scope to the freedom of religion secured by the First and Fourteenth Amendments.

Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for

disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

JUSTICE MURPHY, concurring.

I agree with the opinion of the Court and join in it. I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: "all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness." Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

MR. 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 wholeheartedly 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.

When Mr. 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 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.

Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents.

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.

JUSTICE ROBERTS and JUSTICE REED adhere to the views expressed by the Court in *Minersville School District v. Gobitis* and are of the opinion that the judgment below should be reversed.

2. WOOLEY v. MAYNARD
430 U.S. 705 (1977)

BURGER, C.J., delivered the opinion of the Court, in which BRENNAN, STEWART, MARSHALL, POWELL, and STEVENS, JJ., joined, and in which WHITE, J., joined in part.

The issue on appeal is whether the State of New Hampshire may constitutionally enforce criminal sanctions against persons who cover the motto "Live Free or Die" on passenger vehicle license plates because that motto is repugnant to their moral and religious beliefs.

Since 1969 New Hampshire has required that noncommercial vehicles bear license plates embossed with the state motto, "Live Free or Die." Another New Hampshire statute makes it a misdemeanor "knowingly [to obscure]... the figures or letters on any number plate." The term "letters" in this section has been interpreted by the State's highest court to include the state motto.

Appellees George Maynard and his wife Maxine are followers of the Jehovah's Witnesses faith. The Maynards consider the New Hampshire State motto to be repugnant to their moral, religious, and political beliefs,[1] and therefore assert it objectionable to disseminate this message by displaying it on their automobiles.[2] Pursuant to these beliefs, the Maynards began early in 1974 to cover up the motto on their license plates.[3]

On November 27, 1974, Mr. Maynard was issued a citation for violating § 262:27-c. On December 6, 1974, he appeared pro se in Lebanon, N. H. District Court to answer the charge. After waiving his right to counsel, he entered a plea of not guilty and proceeded to explain his religious objections to the motto. The state trial judge expressed sympathy for Mr. Maynard's situation, but considered himself bound to hold Maynard guilty. A $25 fine was imposed, but execution was suspended during "good behavior."

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[1] Mr. Maynard described his objection to the state motto: "[B]y religious training and belief, I believe my 'government' - Jehovah's Kingdom - offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant living in bondage. Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions.... I also disagree with the motto on political grounds. I believe that life is more precious than freedom."

[2] At the time this suit was commenced, appellees owned two automobiles, a Toyota Corolla and a Plymouth station wagon. Both automobiles were registered in New Hampshire, where the Maynards are domiciled.

[3] In May or June, 1974, Mr. Maynard actually snipped the words "or Die" off the license plates, and then covered the resulting hole, as well as the words "Live Free," with tape. This was done, according to Mr. Maynard, because neighborhood children kept removing the tape. The Maynards have since been issued new license plates, and have disavowed any intention of physically mutilating them.

On December 28, 1974, Mr. Maynard was again charged with violating § 262:27-c. He appeared in court on January 31, 1975, and again chose to represent himself; he was found guilty, fined $50, and sentenced to six months in the Grafton County House of Corrections. The court suspended this jail sentence but ordered Mr. Maynard to also pay the $25 fine for the first offense. Maynard informed the court that, as a matter of conscience, he refused to pay the two fines. The court thereupon sentenced him to jail for a period of 15 days. He has served the full sentence.

Prior to trial on the second offense Mr.Maynard was charged with yet a third violation of § 262:27-c on January 3, 1975. He appeared on this complaint on the same day as for the second offense, and was, again, found guilty. This conviction was "continued for sentence" so that Maynard received no punishment in addition to the 15 days.

On March 4, 1975, appellees brought the present action pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of New Hampshire. They sought injunctive and declaratory relief against enforcement of N.H. Rev. Stat. Ann. §§ 262:27-c, 263:1, insofar as these required displaying the state motto on their vehicle license plates, and made it a criminal offense to obscure the motto.

In their complaint, the Maynards sought both declaratory and injunctive relief against the enforcement of the New Hampshire statutes. It is correct that generally a court will not enjoin "the enforcement of a criminal statute even though unconstitutional," since "[s]uch a result seriously impairs the State's interest in enforcing its criminal laws, and implicates the concerns for federalism. But this is not an absolute policy and in some circumstances injunctive relief may be appropriate. "To justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights."

We have such a situation here for, as we have noted, three successive prosecutions were undertaken against Mr. Maynard in the span of five weeks. This is quite different from a claim for federal equitable relief when a prosecution is threatened for the first time. The threat of repeated prosecutions in the future against both him and his wife, and the effect of such a continuing threat on their ability to perform the ordinary tasks of daily life which require an automobile, is sufficient to justify injunctive relief.

The District Court held that by covering up the state motto "Live Free or Die" on his automobile license plate, Mr. Maynard was engaging in symbolic speech and that "New Hampshire's interest in the enforcement of its defacement statute is not sufficient to justify the restriction on [appellee's] constitutionally protected expression." We find it unnecessary to pass on the "symbolic speech" issue, since we find more appropriate First Amendment grounds to affirm the judgment of the District Court. We turn instead to what in our view is the essence of appellees' objection to the requirement that they display the motto "Live Free or Die" on their automobile license plates. This is succinctly summarized in the statement made by Mr. Maynard in his affidavit filed with the District Court: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent."

We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.

We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education v. Barnette*, 319 U.S. 624, 633-34 (1943). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

The Court in *Barnette* was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville District v. Gobitis*, 310 U.S. 586 (1940), the Court held that "a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution." Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life - indeed constantly while his automobile is in public view - to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "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."

New Hampshire's statute in effect requires that appellees use their private property as a "mobile billboard" for the State's ideological message - or suffer a penalty, as Maynard already has. As a condition to driving an automobile - a virtual necessity for most Americans - the Maynards must display "Live Free or Die" to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable.

Identifying the Maynards' interests as implicating First Amendment protections does not end our inquiry however. We must also determine whether the State's countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates. The two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism, and state pride.

The State first points out that passenger vehicles, but not commercial, trailer, or other vehicles are required to display the state motto. Thus, the argument proceeds, officers of the law are more easily able to determine whether passenger vehicles are carrying the proper plates.

However, the record here reveals that New Hampshire passenger license plates normally consist of a specific configuration of letters and numbers, which makes them readily distinguishable from other types of plates, even without reference to the state motto. Even were we to credit the State's reasons and "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

The State's second claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

We conclude that the State of New Hampshire may not require appellees to display the state motto upon their vehicle license plates.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE BLACKMUN joins, dissenting.

The Court holds that a State is barred by the Federal Constitution from requiring that the state motto be displayed on a state license plate. The path that the Court travels to reach this result demonstrates the difficulty in supporting it. The Court holds that the required display of the motto is an unconstitutional "required affirmation of belief."

I not only agree with the Court's implicit recognition that there is no protected "symbolic speech" in this case, but I think that that conclusion goes far to undermine the Court's ultimate holding that there is an element of protected expression here. The State has not forced appellees to "say" anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to "speech," such as wearing a lapel button promoting a political candidate or waving a flag as a symbolic gesture. The State has simply required that all noncommercial automobiles bear license tags with the state motto, "Live Free or Die." Appellees have not been forced to affirm or reject that motto; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes.

The Court relies almost solely on *Board of Education v. Barnette*. The Court cites *Barnette* for the proposition that there is a constitutional right, in some cases, to "refrain from speaking." What the Court does not demonstrate is that there is any "speech" or "speaking" in the context of this case. The Court also relies upon the "right to decline to foster [religious, political, and ideological] concepts," and treats the state law in this case as if it were forcing appellees to proselytize, or to advocate an ideological point of view. But this begs the question. The issue, unconfronted by the Court, is whether appellees, in displaying, as they are required to do, state license tags, the format of which is known to all as having been prescribed by the State, would be considered to be advocating political or ideological views.

The Court recognizes, as it must, that this case substantially differs from *Barnette*, in which schoolchildren were forced to recite the pledge of allegiance while giving the flag salute. However, the Court states "the difference is essentially one of degree." But having recognized the rather obvious differences between these two cases, the Court does not explain why the same result should obtain. The Court suggests that the test is whether the individual is forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." But, once again, these are merely conclusory words, barren of analysis. For example, were New Hampshire to erect a multitude of billboards, each proclaiming "Live Free or Die," and tax all citizens for the cost of erection and maintenance, clearly the message would be "fostered" by the individual citizen-taxpayers and just as clearly those individuals would be "instruments" in that communication. Certainly, however, that case would not fall within the ambit of *Barnette*. In that case, as in this case, there is no affirmation of belief. For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually "asserting as true" the message. This was the focus of *Barnette*, and clearly distinguishes this case from that one.

There is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto "Live Free or Die" and that they violently disagree with the connotations of that motto. Since any implication that they affirm the motto can be so easily displaced, I cannot agree that the state statutory system for motor vehicle identification and tourist promotion may be invalidated under the fiction that appellees are unconstitutionally forced to affirm, or profess belief in, the state motto.

The logic of the Court's opinion leads to startling, and I believe totally unacceptable, results. For example, the mottoes "In God We Trust" and "E Pluribus Unum" appear on the coin and currency of the United States. I cannot imagine that the statutes proscribing defacement of United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto "In God We Trust." Similarly, there is no affirmation of belief involved in the display of state license tags upon private automobiles.

3. HURLEY v. IRISH AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON

515 U.S. 557 (1995)

JUSTICE SOUTER delivered the opinion for a unanimous Court.

Note: The first part of this opinion finding that a parade is expression protected by the Free Speech Clause is on pages 163-167 of the previous chapter.

"Since all speech inherently involves choices of what to say and what to leave unsaid," *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality

opinion), one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say." Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); outside that context it may not compel affirmance of a belief with which the speaker disagrees, see *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-798 (1988). Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.

Petitioners' claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another. The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Respondents argue that any tension between this rule and the Massachusetts law falls short of unconstitutionality. Respondents contend that admission of GLIB to the parade would not threaten the core principle of speaker's autonomy because the Council is merely "a conduit" for the speech of participants in the parade "rather than itself a speaker." But this metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well. A newspaper, similarly, "is more than a passive receptacle or conduit for news, comment, and advertising," and we have held that "[t]he choice of material . . . and the decisions made as to limitations on the size and content . . . and treatment of public issues . . .--whether fair or unfair--constitute the exercise

of editorial control and judgment" upon which the State can not intrude. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Indeed, in *Pacific Gas & Electric*, we invalidated coerced access to the envelope of a private utility's bill and newsletter because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond." 475 U.S. at 15 (plurality). The plurality made the further point that if "the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Id.* at 16. Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.

The parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade. Cf. *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (owner of shopping mall "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand"). In the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.

The statute, Mass. Gen. Laws §272:98, is a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation. On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.

It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. Having availed itself of the public thoroughfares "for purposes of assembly [and] communicating thoughts between citizens," the Council is engaged in a use of the streets that has "from ancient times, been a part of the privileges, immunities, rights, and liberties of

citizens." *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says. *See, e.g., Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. *See, e.g., Barnette*, 319 U.S. at 642; *Pacific Gas & Electric*, 475 U.S. at 20. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

4. JANUS v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES

138 S. Ct. 2448 (2018)

JUSTICE ALITO delivered the opinion of the Court joined by CHIEF JUSTICE ROBERTS and JUSTICES KENNEDY, THOMAS, AND GORSUCH.

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.

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.

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.

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.

Janus then sought review in this Court, asking us to overrule *Abood* and hold that public-sector agency-fee arrangements are unconstitutional. We granted certiorari to consider this important question.

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." 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."

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.

When speech is compelled, 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.

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." 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."

We again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even a more permissive standard.

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." *Id.* at 221.

We assume that "labor peace," in this sense of the term, is a compelling state interest, but *Abood* cited no evidence that the pandemonium it imagined would result if agency fees were not allowed, and it is now clear that *Abood*'s fears were unfounded. The *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.

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.

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.

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

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. In short, the Union has offered no basis for concluding that *Abood* is supported by the original understanding of the First Amendment.

For the reasons given above, we conclude that public-sector agency-shop arrangements violate the First Amendment, and *Abood* erred in concluding otherwise. There remains the question whether stare decisis nonetheless counsels against overruling *Abood*. It does not.

"Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." We will not overturn a past decision unless there are strong grounds for doing so. But as we have often recognized, stare decisis is "'not an inexorable command.'"

The doctrine "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." And stare decisis applies with perhaps least force of all to decisions that wrongly denied First Amendment rights: "This Court has not hesitated to overrule decisions offensive to the First Amendment (a fixed star in our constitutional constellation, if there is one)."

Our cases identify factors that should be taken into account in deciding whether to overrule a

past decision. Five of these are most important here: the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. After analyzing these factors, we conclude that stare decisis does not require us to retain *Abood*.

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

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

For over 40 years, *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper. Under that decision, a government entity could require public employees to pay a fair share of the cost that a union incurs when negotiating on their behalf over terms of employment. But no part of that fair-share payment could go to any of the union's political or ideological activities.

That holding fit comfortably with this Court's general framework for evaluating claims that a condition of public employment violates the First Amendment. The Court's decisions have long made plain that government entities have substantial latitude to regulate their employees' speech—especially about terms of employment—in the interest of operating their workplaces effectively. *Abood* allowed governments to do just that. While protecting public employees' expression about non-workplace matters, the decision enabled a government to advance important managerial interests—by ensuring the presence of an exclusive employee representative to bargain with. Far from an "anomaly," the *Abood* regime was a paradigmatic example of how the government can regulate speech in its capacity as an employer.

Not any longer. Today, the Court succeeds in its 6-year campaign to reverse *Abood*. Rarely if ever has the Court overruled a decision—let alone one of this import—with so little regard for the usual principles of stare decisis. There are no special justifications for reversing *Abood*. It has proved workable. No recent developments have eroded its underpinnings. And it is deeply entrenched, in both the law and the real world. More than 20 States have statutory schemes built on the decision. Those laws underpin thousands of ongoing contracts involving millions of employees. Reliance interests do not come any stronger than those surrounding *Abood*. And likewise, judicial disruption does not get any greater than what the Court does today. I respectfully dissent.

B. Compelled Association

The Supreme Court has recognized that the freedom of association "for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the first case addressing the issue of compelled association, the Court reiterated that principle: "An

individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* at 622.

In *Roberts*, the Court considered whether the enforcement of a public accommodation law that outlawed gender discrimination could require an organization to admit women as full voting members over the organization's objection. In its decision, the Court rejected the argument that the United States Jaycees' right to expressive association was violated by the forced admission of women based on the fact that the Jaycees had failed to present sufficient evidence that forcing it to admit women would "change the content or impact of the organization's speech." *Id.* at 628. *Accord Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

Justice Brennan's majority opinion in *Roberts* went on to conclude that even if the organization's right to expressive association was infringed, Minnesota's interest in eliminating discrimination was compelling and the use of the state's Human Rights Act to achieve that objective was the "least restrictive means of achieving its ends." *Id.* at 626. Sixteen years later in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Court upheld a claim that the expressive association rights of the Boy Scouts of America were violated by forcing the organization to retain "an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform." *Id.* at 655-56.

1. BOY SCOUTS OF AMERICA v. DALE
530 U.S. 640 (2000)

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined.

Petitioners are the Boy Scouts of America and the Monmouth Council, a division of the Boy Scouts of America (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. The Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill. Respondent is James Dale, a former Eagle Scout whose adult membership in the Boy Scouts was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. The New Jersey Supreme Court held that New Jersey's public accommodations law requires that the Boy Scouts admit Dale. This case presents the question whether applying New Jersey's public accommodations law in this way violates the Boy Scouts' First Amendment right of expressive association. We hold that it does.

I

James Dale entered scouting in 1978 at the age of eight. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his

application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/Gay Alliance.

Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts "specifically forbid membership to homosexuals."

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute by revoking Dale's membership based on his sexual orientation. New Jersey's statute prohibits discrimination on the basis of sexual orientation in places of public accommodation.

The New Jersey Supreme Court held that the Boy Scouts was a place of public accommodation subject to the law, that the organization was not exempt from the law under any of its exceptions, and that the Boy Scouts violated the law by revoking Dale's membership based on his avowed homosexuality. The court addressed the Boy Scouts' claims that application of the public accommodations law in this case violated its federal constitutional rights. With respect to the right of expressive association, the court concluded that it was "not persuaded . . . that a shared goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." Accordingly, the court held "that Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.'" The court also determined that New Jersey has a compelling interest in eliminating "the destructive consequences of discrimination," and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose.

We granted the Boy Scouts' petition for certiorari to determine whether the application of New Jersey's public accommodations law violated the First Amendment.

II

In *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984), we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it

intends to express. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate."

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. But the freedom of expressive association is not absolute. We have held that the freedom could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."

To determine whether a group is protected by the First Amendment's expressive associational right, we must determine whether the group engages in "expressive association." The First Amendment's protection of expressive association is not reserved for advocacy groups. But to come within its ambit, a group must engage in some form of expression, whether it be public or private.

Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. The record reveals the following. The Boy Scouts is a private, nonprofit organization. According to its mission statement:

"It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.

"The values we strive to instill are based on those found in the Scout Oath and Law:

Scout Oath:
"On my honor I will do my best / To do my duty to God and my country / and to obey the Scout Law; / To help other people at all times; / To keep myself physically strong, mentally awake, and morally straight."

Scout Law:
"A Scout is: Trustworthy, Obedient, Loyal, Cheerful, Helpful, Thrifty, Friendly, Brave, Courteous, Clean, Kind, Reverent."

Thus, the general mission of the Boy Scouts is clear: "To instill values in young people." The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values -- both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity.

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality.

The values the Boy Scouts seeks to instill are "based on" those listed in the Scout Oath and Law. The Boy Scouts explains that the Scout Oath and Law provide "a positive moral code for living; they are a list of 'do's' rather than 'don'ts.'" The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean."

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. And the terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership . . . [and] contradicts Boy Scouts' overarching objective to reach 'all eligible youth.'" The court concluded that the exclusion of members like Dale "appears antithetical to the organization's goals and philosophy." But it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent.

The Boy Scouts asserts that it "teaches that homosexual conduct is not morally straight," and that it does "not want to promote homosexual conduct as a legitimate form of behavior." We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs.

A 1978 position statement to the Boy Scouts' Executive Committee, signed by Downing B. Jenks, the President of the Boy Scouts, and Harvey L. Price, the Chief Scout Executive, expresses the Boy Scouts'"official position" with regard to "homosexuality and Scouting":

"Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

"A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership."

This position statement was redrafted numerous times but its core message remained consistent. A 1993 position statement, the most recent in the record, reads, in part:

"The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA."

We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior." As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression. That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

Hurley is illustrative on this point. As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's choice not to propound a point of view contrary to its beliefs.

The New Jersey Supreme Court determined that the Boy Scouts' ability to disseminate its message was not significantly affected by the forced inclusion of Dale as an assistant scoutmaster because of the following findings:

"Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality."

We disagree with the New Jersey Supreme Court's conclusion drawn from these findings.

First, associations do not have to associate for the "purpose" of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection. For example, the purpose of the St. Patrick's Day parade in *Hurley* was not to espouse any views about sexual orientation, but we held that the parade organizers had a right to exclude certain participants nonetheless.

Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues -- a fact that the Boy Scouts disputes -- the First Amendment protects the Boy Scouts' method of expression. If the Boy Scouts wishes Scout leaders to avoid questions of sexuality and teach only by example, this fact does not negate the sincerity of its belief discussed above.

Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not

trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale would significantly affect its expression, we inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation -- like inns and trains. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location. As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

We recognized in cases such as *Roberts* that States have a compelling interest in eliminating discrimination against women in public accommodations. But we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. In *Roberts*, we said "indeed, the Jaycees has failed to demonstrate . . . any serious burden on the male members' freedom of expressive association." We thereupon concluded in each of these cases that the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws.

In *Hurley*, we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

JUSTICE STEVENS, with whom JUSTICES SOUTER, GINSBURG and BREYER join, dissenting.

New Jersey "prides itself on judging each individual by his or her merits" and on being "in the vanguard in the fight to eradicate the cancer of unlawful discrimination." Since 1945, it has had a law against discrimination. The law broadly protects the opportunity of all persons to obtain the advantages and privileges "of any place of public accommodation." The New Jersey Supreme Court's construction of the statutory definition of a "place of public accommodation" has given its statute a more expansive coverage than most similar state statutes. And as

amended in 1991, the law prohibits discrimination on the basis of nine different traits including "sexual orientation." The question in this case is whether that expansive construction trenches on the federal constitutional rights of the Boy Scouts of America (BSA).

The majority holds that New Jersey's law violates BSA's right to associate and its right to free speech. But that law does not "impose any serious burdens" on BSA's "collective effort on behalf of [its] shared goals," nor does it force BSA to communicate any message that it does not wish to endorse. New Jersey's law abridges no constitutional right of the Boy Scouts.

James Dale joined BSA as a Cub Scout in 1978, when he was eight years old. Three years later he became a Boy Scout, and he remained a member until his 18th birthday. He earned 25 merit badges, was admitted into the prestigious Order of the Arrow, and was awarded the rank of Eagle Scout. In 1989, BSA approved his application to be an Assistant Scoutmaster.

On July 19, 1990, after more than 12 years of active and honored participation, the Boys Scouts sent Dale a letter advising him of the revocation of his membership. The letter stated that membership in BSA may be denied "whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth." Expressing surprise at his sudden expulsion, Dale sent a letter requesting an explanation of the decision. In response, BSA sent him a second letter stating that the grounds for the decision "are the standards for leadership, which specifically forbid membership to homosexuals." At that time, no such standard had been publicly expressed by BSA.

In this case, Boy Scouts of America contends that it teaches the young boys who are Scouts that homosexuality is immoral. Consequently, it argues, it would violate its right to associate to force it to admit homosexuals as members, as doing so would be at odds with its own shared goals and values. This contention, quite plainly, requires us to look at what, exactly, are the values that BSA actually teaches.

To bolster its claim that its shared goals include teaching that homosexuality is wrong, BSA directs our attention to two terms appearing in the Scout Oath and Law. The first is the phrase "morally straight," which appears in the Oath ("On my honor I will do my best . . . To keep myself . . . morally straight"); the second term is the word "clean," which appears in a list of 12 characteristics together comprising the Scout Law.

The Boy Scout Handbook defines "morally straight," as such:

"To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant."

The Scoutmaster Handbook emphasizes these points about being "morally straight":

"In any consideration of moral fitness, a key word has to be 'courage.' A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster."

As for the term "clean," the Boy Scout Handbook offers the following:

"A Scout is CLEAN. A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.

"You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help getting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.

"There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.

"Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults."

It is plain as the light of day that neither one of these principles -- "morally straight" and "clean" -- says the slightest thing about homosexuality. Indeed, neither term in the Boy Scouts' Law and Oath expresses any position whatsoever on sexual matters.

BSA's published guidance on that topic underscores this point. Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization: "Your parents or guardian or a sex education teacher should give you the facts about sex that you must know."

More specifically, BSA has set forth a number of rules for Scoutmasters when these types of issues come up:

"You may have boys asking you for information or advice about sexual matters. . . .

"How should you handle such matters?

"Rule number 1: You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area, and that you are probably not well qualified to do this.

"Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your competence. A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.

"Rule number 3: You should refer boys with sexual problems to persons better qualified than you [are] to handle them. If the boy has a spiritual leader or a doctor, he should go there. If such persons are not available, you may just have to do the best you can. But don't try to play a highly professional role. And at the other extreme, avoid passing the buck."

In light of BSA's self-proclaimed ecumenism, furthermore, it is even more difficult to discern any shared goals or common moral stance on homosexuality. Insofar as religious matters are

concerned, BSA's bylaws state that it is "absolutely nonsectarian in its attitude toward . . . religious training." "The BSA does not define what constitutes duty to God or the practice of religion. This is the responsibility of parents and religious leaders." Because a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals, it is exceedingly difficult to believe that BSA nonetheless adopts a single particular religious or moral philosophy when it comes to sexual orientation.

BSA's claim finds no support in our cases. We have recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment -- speech, assembly, petition for the redress of grievances, and the exercise of religion." And we have acknowledged that "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association may be implicated." But "the right to associate for expressive purposes is not . . . absolute"; rather, "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which . . . protected liberty is at stake in a given case." Indeed, the right to associate does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution."

Several principles are made perfectly clear. First, to prevail on a claim of expressive association in the face of a State's anti-discrimination law, it is not enough simply to engage in some kind of expressive activity. Second, it is not enough to adopt an openly avowed exclusionary membership policy. Third, it is not sufficient merely to articulate some connection between the group's expressive activities and its exclusionary policy.

Rather, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), we asked whether Minnesota's Human Rights Law requiring the admission of women "imposed any serious burdens" on the group's "collective effort on behalf of [its] shared goals." The relevant question is whether the mere inclusion of the person at issue would "impose any serious burden," "affect in any significant way," or be "a substantial restraint upon" the organization's "shared goals," "basic goals," or "collective effort to foster beliefs." Accordingly, it is necessary to examine what, exactly, are BSA's shared goals and the degree to which its expressive activities would be burdened, affected, or restrained by including homosexuals.

The evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality. In short, Boy Scouts of America is simply silent on homosexuality. There is no shared goal or collective effort to foster a belief about homosexuality at all -- let alone one that is significantly burdened by admitting homosexuals.

The majority finds that BSA in fact "'teaches that homosexual conduct is not morally straight.'" This conclusion, remarkably, rests entirely on statements in BSA's briefs. Moreover, the majority insists that we must "give deference to an association's assertions regarding the nature of its expression" and "we must also give deference to an association's view of what would impair its expression." So long as the record "contains written evidence" to support a group's bare assertion, "we need not inquire further." Once the organization "asserts" that it engages in particular expression, ibid., "we cannot doubt" the truth of that

assertion.

This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. It is even more astonishing in the First Amendment area, because "we are obligated to independently review the factual record."

An organization can adopt the message of its choice. But we must inquire whether the group is, in fact, expressing a message and whether that message is significantly affected by a State's anti-discrimination law. More critically, that inquiry requires our independent analysis, rather than deference to a group's litigating posture.

Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's anti-discrimination laws will have a First Amendment right to association that precludes forced compliance with those laws. But that right is not a freedom to discriminate at will, nor is it a right to maintain an exclusionary membership policy simply out of fear of what the public reaction would be if the group's membership were opened up.

In this case, no such concern is warranted. It is entirely clear that BSA in fact expresses no clear, unequivocal message burdened by New Jersey's law.

Nothing even remotely suggests that Dale would advocate any views on homosexuality to his troop. The Scoutmaster Handbook instructs all Scoutmasters that sexual issues are not their "proper area," and there is no evidence that Dale had any intention of violating this rule. From all accounts Dale was a model Assistant Scoutmaster until his membership was revoked, and there is no reason to believe that he would suddenly disobey the directives of BSA.

The majority, though, does not rest its conclusion on the claim that Dale will use his position as a bully pulpit. Rather, it contends that Dale's mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality. The majority holds that "the presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinct message," and, accordingly, BSA is entitled to exclude that message.

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not carry a banner or a sign; he did not distribute any fact sheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute symbolic speech under the First Amendment.

The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone -- unlike any other individual's -- should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority. As counsel for the Boy Scouts remarked, Dale "put a banner around his neck when he . . . got himself into the newspaper . . . . He created a reputation. . . . He can't take that banner off. He

put it on himself and, indeed, he has continued to put it on himself."

In this case there is no evidence that the young Scouts in Dale's troop, or members of their families, were even aware of his sexual orientation, either before or after his public statements at Rutgers University. It is equally farfetched to assert that Dale's open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster. For an Olympic gold medal winner or a Wimbledon tennis champion, being "openly gay" perhaps communicates a message -- for example, that openness about one's sexual orientation is more virtuous than concealment; that a homosexual person can be a capable and virtuous person who should be judged like anyone else; and that homosexuality is not immoral -- but it certainly does not follow that they necessarily send a message on behalf of the organizations that sponsor the activities in which they excel. The fact that such persons participate in these organizations is not usually construed to convey a message on behalf of those organizations any more than does the inclusion of women, African-Americans, religious minorities, or any other discrete group. Surely the organizations are not forced by antidiscrimination laws to take any position on the legitimacy of any individual's private beliefs or private conduct.

Unfavorable opinions about homosexuals "have ancient roots." Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis advised, "we must be ever on our guard, lest we erect our prejudices into legal principles." I respectfully dissent.

SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined.

The right of expressive association does not turn on the popularity of the views advanced by a group. Whether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group's rights. I conclude that BSA has not made out an expressive association claim, therefore, not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy. As Justice Stevens explains, no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way. To require less would convert the right of expressive association into an easy trump of any antidiscrimination law.

If, on the other hand, an expressive association claim has met the conditions Justice Stevens describes as necessary, there may be circumstances in which the antidiscrimination law must yield. It is certainly possible for an individual to become so identified with a position as to epitomize it publicly. When that position is at odds with a group's advocated position, applying an antidiscrimination statute to require the acceptance of the individual in a position of leadership could so modify or muddle or frustrate the group's advocacy as to violate the expressive associational right. The character of the group's position will be irrelevant to the First Amendment analysis if such a case comes to us for decision.

2. Compelled Disclosure of Members and Donors of Expressive Associations

In addition to the cases involving compelled expression and association, there are also compelled disclosure cases where the government requires a speaker to disclose specific content over the speaker's objection. Some examples were included in the chapter on commercial speech (pages 141-44). While in the commercial speech context, the Court has imposed a lesser burden on the government to justify disclosure requirements, outside the area of commercial speech, compelled disclosure may be subject to more rigorous review.

One issue that has arisen is a requirement that a group disclose its members or donors. In *NAACP v. Alabama*, 357 U.S. 449 (1958), because the NAACP had made a showing that its Alabama members would be discouraged from belonging to the organization due to disclosure of their names and addresses, the Supreme Court applied a heightened standard to review an Alabama court order requiring disclosure. The Court concluded that the state's effort to investigate whether the NAACP, an out-of-state corporation, was operating illegally in the state did not justify the disclosure of its members. In the Court's view, the state had no need for the information since the NAACP had already provided the state with business records that allowed the state to determine the legality of the organization's activities in Alabama.

One very recent decision reached the same result in a case in which a charitable organization challenged the requirement that it provide information about major donors to the California Attorney General in order to be permitted to solicit funds in the state. California argued the information was necessary to "polic[e] misconduct by charities." The case, *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), was a 6-3 decision with Chief Justice Roberts writing the opinion for the majority on most issues. One issue where there was disagreement among the justices in the majority was on the standard of review to apply to such cases. Chief Justice Roberts, along with Justices Kavanaugh and Barrett, refused to apply strict scrutiny and instead applied exacting scrutiny. That standard required that the state demonstrate a "substantial relation between the disclosure requirement and a sufficiently important governmental interest," *id.* at 2385, as well as requiring that the disclosure rules be narrowly tailored. The Court found that California could not satisfy that standard.

One controversial aspect of *Americans for Prosperity* was that the Court struck down the disclosure requirement on its face rather than only as applied to the Foundation. That was a departure from *NAACP v. Alabama* and subsequent cases where the disclosure requirement was only struck down as applied to the challengers based on a showing that disclosure would subject their members to "harassment and reprisals." In *Americans for Prosperity*, the Court based the facial invalidation on the substantial overbreadth of the requirement.

Among the cases relied on by the majority in *Americans for Prosperity* were a number of cases striking down campaign finance regulations. Those cases struck down various limits, such as spending limits and contribution limits, but they upheld requirements that the names, addresses, and donation amounts of campaign contributors be reported or disclosed. In her dissent, Justice Sotomayor, joined by Justices Breyer and Kagan, expressed grave concern about the future consequence of the Court's decision, writing that [t]oday's analysis marks reporting and disclosure requirements with a bull's-eye." *Id.* at 2392.

Chapter VIII: Content Based vs. Content Neutral Regulations

One of the most important distinctions in analyzing regulations of speech is the different treatment of content based vs. content neutral regulations. Content-based regulations can be either based on the viewpoint of the speech or the subject matter of the speech. Viewpoint based regulations are almost never constitutional. One example of a viewpoint based regulation from earlier in the reading is the Texas flag desecration statute struck down in *Texas v. Johnson*, 491 U.S. 397 (1989) (Chapter VI, pages 156-162). In that case, the Court wrote: “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.” While subject matter restrictions are slightly less violative of bedrock principles, they are nevertheless presumptively unconstitutional. To survive a constitutional challenge, the government must satisfy the strict scrutiny standard and show that it has a compelling interest for the regulation of speech, that it has employed a narrowly tailored means to accomplish its compelling interest, and that there are no less restrictive means available to accomplish its compelling interest.

By contrast, when the government regulates speech based on something other than its content it only as to satisfy a version of intermediate scrutiny. Such content-neutral regulations can be regulations of conduct that can also prohibit expressive conduct and are then analyzed under the *O’Brien* test (*United States v. O’Brien*, Chapter VI, pages 145-150) or, as they frequently are, based on the time, place, and manner of the speech rather than its content. The “government may regulate the time, place, and manner of expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.” *Burson v. Freeman*, 504 U.S. 191, 197 (1992). The government may be able to demonstrate that a content-neutral time, place, and manner regulation is constitutional, but that is not true in all such cases.

While the content based vs. content neutral distinction is often seen in cases involving access to government property, the distinction also applies to regulations of private property. In cases where government property is at issue, another issue often raised is the nature of the property and whether it is a public forum. While references to the public forum doctrine are found in the cases in this chapter, it is a subject that is addressed more specifically in Chapter X.

A. Content Based Regulations

1. POLICE DEPARTMENT OF THE CITY OF CHICAGO v. MOSLEY

408 U.S. 92 (1972)

JUSTICE MARSHALL delivered the opinion of the Court, joined by BURGER, C.J., and DOUGLAS, BRENNAN, STEWART, WHITE, and POWELL, JJ.

At issue in this case is the constitutionality of the following Chicago ordinance:

A person commits disorderly conduct when he knowingly:

.....

> "(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute . . . . Municipal Code, c. 193-1 (i).

The suit was brought by Earl Mosley, a federal postal employee, who for seven months prior to the enactment of the ordinance had frequently picketed Jones Commercial High School in Chicago. During school hours and usually by himself, Mosley would walk the public sidewalk adjoining the school, carrying a sign that read: "Jones High School practices black discrimination. Jones High School has a black quota." His lonely crusade was always peaceful, orderly, and quiet, and was conceded to be so by the city of Chicago.

On March 26, 1968, Chapter 193-1 (i) was passed, to become effective on April 5. Seeing a newspaper announcement of the new ordinance, Mosley contacted the Chicago Police Department to find out how the ordinance would affect him; he was told that, if his picketing continued, he would be arrested. On April 4, the day before the ordinance became effective, Mosley ended his picketing next to the school. Thereafter, he brought this action in the United States District Court for the Northern District of Illinois, seeking declaratory and injunctive relief. He alleged a violation of constitutional rights in that (1) the statute punished activity protected by the First Amendment; and (2) by exempting only peaceful labor picketing from its general prohibition against picketing, the statute denied him "equal protection of the law in violation of the First and Fourteenth Amendments."

The city of Chicago exempts peaceful labor picketing from its general prohibition on picketing next to a school. The question we consider here is whether this selective exclusion from a public place is permitted. Our answer is "No."

Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests; the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing. As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited. The operative distinction is the message on a picket sign. But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the

"national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression. In *Niemotko v. Maryland*, 340 U.S. 268 (1951), a group of Jehovah's Witnesses were denied a permit to use a city park for Bible talks, although other political and religious groups had been allowed to put the park to analogous uses. Concluding that the permit was denied because of the city's "dislike for or disagreement with the Witnesses or their views," this Court held that the permit refusal violated "[t]he right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments." *Id.* at 272.

The late Mr. Justice Black, who thought that picketing was not only a method of expressing an idea but also conduct subject to broad state regulation, nevertheless recognized the deficiencies of laws like Chicago's ordinance. This was the thrust of his opinion concurring in *Cox v. Louisiana*, 379 U.S. 536, 581 (1965):

> [B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to voice opinions on other subjects, also amounts to an invidious discrimination forbidden by the Equal Protection Clause.

We accept Mr. Justice Black's quoted views.

This is not to say that all picketing must always be allowed. We have continually recognized that reasonable "time, place and manner" regulations of picketing may be necessary to further significant governmental interests. Because picketing plainly involves expressive conduct within the protection of the First Amendment, discriminations among pickets must be tailored to serve a substantial governmental interest.

In this case, the ordinance itself describes impermissible picketing not in terms of time, place, and manner, but in terms of subject matter. The regulation "thus slip[s] from the neutrality of

time, place, and circumstance into a concern about content." This is never permitted. In spite of this, Chicago urges that the ordinance is not improper content censorship, but rather a device for preventing disruption of the school. Cities certainly have a substantial interest in stopping picketing which disrupts a school. "The crucial question, however, is whether [Chicago's ordinance] advances that objective in a manner consistent with the command of the Equal Protection Clause." It does not.

Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore, under the Equal Protection Clause, Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. If peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful. "Peaceful" nonlabor picketing is obviously no more disruptive than "peaceful" labor picketing. But Chicago's ordinance permits the latter and prohibits the former.

Similarly, we reject the city's argument that, although it permits peaceful labor picketing, it may prohibit all nonlabor picketing because, as a class, nonlabor picketing is more prone to produce violence than labor picketing. Predictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter. Freedom of expression, and its intersection with the guarantee of equal protection, would rest on a soft foundation indeed if government could distinguish among picketers on such a wholesale and categorical basis. Some labor picketing is peaceful, some disorderly; the same is true of picketing on other themes. No labor picketing could be more peaceful or less prone to violence than Mosley's solitary vigil. In seeking to restrict nonlabor picketing that is clearly more disruptive than peaceful labor picketing, Chicago may not prohibit all nonlabor picketing at the school forum.

The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives. Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject. Chicago's ordinance imposes a selective restriction on expressive conduct far "greater than is essential to the furtherance of [a substantial governmental] interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression. Therefore, under the Equal Protection Clause, it may not stand.

2. BURSON v. FREEMAN
504 U.S. 191 (1992)

JUSTICE BLACKMUN announced the judgment of the Court and delivered an opinion in which CHIEF JUSTICE REHNQUIST and JUSTICES WHITE and KENNEDY join.

The question presented is whether a provision of the Tennessee Code, which prohibits the solicitation of votes and the display or distribution of campaign materials within 100 feet of

the entrance to a polling place, violates the First and Fourteenth Amendments.

I

The State of Tennessee has carved out an election-day "campaign-free zone" through § 2-7—111(b) of its election code. That section reads in pertinent part:

"Within the appropriate boundary as established in subsection (a) [100 feet from the entrances], and the building in which the polling place is located, the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question are prohibited." Tenn. Code Ann. § 2-7—111(b) (Supp. 1991).

Violation of § 2-7—111(b) is a Class C misdemeanor punishable by a term of imprisonment not greater than 30 days or a fine not to exceed $50, or both. Tenn. Code Ann. §§ 2-19— 119 and XX-XX-XXX(e)(3) (1990).

II

Respondent Mary Rebecca Freeman has been a candidate for office in Tennessee, has managed local campaigns, and has worked actively in statewide elections. In 1987, she was the treasurer for the campaign of a city-council candidate in Metropolitan Nashville-Davidson County.

Asserting that §§ 2-7—111(b) and 2-19-119 limited her ability to communicate with voters, respondent brought a facial challenge to these statutes in Davidson County Chancery Court. She sought a declaratory judgment that the provisions were unconstitutional under both the United States and the Tennessee Constitutions.

The Chancellor ruled that the statutes did not violate the United States or Tennessee Constitutions and dismissed respondent's suit. He determined that § 2-7—111(b) was a content-neutral and reasonable time, place, and manner restriction; that the 100-foot boundary served a compelling state interest in protecting voters from interference, harassment, and intimidation during the voting process; and that there was an alternative channel for respondent to exercise her free speech rights outside the 100-foot boundary.

The Tennessee Supreme Court, by a 4-to-1 vote, reversed. The court first held that § 2-7—111(b) was content based "because it regulates a specific subject matter, the solicitation of votes and the display or distribution of campaign materials, and a certain category of speakers, campaign workers." The court then held that such a content-based statute could not be upheld unless (i) the burden placed on free speech rights is justified by a compelling state interest and (ii) the means chosen bear a substantial relation to that interest and are the least intrusive to achieve the State's goals. While the Tennessee Supreme Court found that the State unquestionably had shown a compelling interest in banning solicitation of voters and distribution of campaign materials within the polling place itself, it concluded that the State had not shown a compelling interest in regulating the premises around the polling place. Accordingly, the court held that the 100-foot limit was not narrowly tailored to protect the demonstrated interest. The court also held that the statute was not the least restrictive means to serve the State's interests. The court found less restrictive the current Tennessee statutes

prohibiting interference with an election or the use of violence or intimidation to prevent voting. Finally, the court noted that if the State were able to show a compelling interest in preventing congestion and disruption at the entrances to polling places, a shorter radius "might perhaps pass constitutional muster."

Because of the importance of the issue, we granted certiorari. We now reverse the Tennessee Supreme Court's judgment that the statute violates the First Amendment.

III

The Tennessee statute implicates three central concerns in our First Amendment jurisprudence: regulation of political speech, regulation of speech in a public forum, and regulation based on the content of the speech. The speech restricted by § 2-7—111(b) obviously is political speech. "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, this Court has recognized that "the First Amendment `has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989).

The second important feature of § 2-7—111(b) is that it bars speech in quintessential public forums. These forums include those places "which by long tradition or by government fiat have been devoted to assembly and debate," such as parks, streets, and sidewalks. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). At the same time, however, expressive activity, even in a quintessential public forum, may interfere with other important activities for which the property is used. Accordingly, this Court has held that the government may regulate the time, place, and manner of the expressive activity, so long as such restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication. *United States v. Grace*, 461 U.S. 171, 177 (1983). See also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Tennessee restriction under consideration, however, is not a facially content-neutral time, place, or manner restriction. Whether individuals may exercise their free speech rights near polling places depends entirely on whether their speech is related to a political campaign. The statute does not reach other categories of speech, such as commercial solicitation, distribution, and display. This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.

As a facially content-based restriction on political speech in a public forum, § 2-7—111(b) must be subjected to exacting scrutiny: The State must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. at 45.

Despite the ritualistic ease with which we state this now familiar standard, its announcement does not allow us to avoid the truly difficult issues involving the First Amendment. Perhaps foremost among these serious issues are cases that force us to reconcile our commitment to free speech with our commitment to other constitutional rights embodied in government proceedings. This case presents us with a particularly difficult reconciliation: the

accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy.

IV

Tennessee asserts that its campaign-free zone serves two compelling interests. First, the State argues that its regulation serves its compelling interest in protecting the right of its citizens to vote freely for the candidates of their choice. Second, Tennessee argues that its restriction protects the right to vote in an election conducted with integrity and reliability. The interests advanced by Tennessee obviously are compelling ones. This Court has recognized that the "right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Indeed,

> [n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

Accordingly, this Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence.

The Court also has recognized that a State "indisputably has a compelling interest in preserving the integrity of its election process." The Court thus has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." In other words, it has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process.

To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest. While we readily acknowledge that a law rarely survives such scrutiny, an examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places.

During the colonial period, many government officials were elected by the viva voce method or by the showing of hands, as was the custom in most parts of Europe. That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some. The opportunities that the viva voce system gave for bribery and intimidation gradually led to its repeal.

Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system. Initially, this paper ballot was a vast improvement. Individual voters made their own handwritten ballots, marked them in the privacy of their homes, and then brought them to the polls for counting. But the effort of making out such a ballot became increasingly more complex and cumbersome.

Wishing to gain influence, political parties began to produce their own ballots for voters. These ballots were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance. State attempts to standardize the ballots were easily thwarted—the vote buyer could simply place a ballot in the hands of the bribed voter

and watch until he placed it in the polling box. Thus, the evils associated with the earlier viva voce system reinfected the election process; the failure of the law to secure secrecy opened the door to bribery and intimidation.

Approaching the polling place under this system was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket peddlers "who were only too anxious to supply him with their party tickets." Often the competition became heated when several such peddlers found an uncommitted or wavering voter. Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. In short, these early elections "were not a pleasant spectacle for those who believed in democratic government."

The problems with voter intimidation and election fraud that the United States was experiencing were not unique. Several other countries were attempting to work out satisfactory solutions to these same problems. Some Australian provinces adopted a series of reforms intended to secure the secrecy of an elector's vote. The most famous feature of the Australian system was its provision for an official ballot, encompassing all candidates of all parties on the same ticket. But this was not the only measure adopted to preserve the secrecy of the ballot. The Australian system also provided for the erection of polling booths (containing several voting compartments) open only to election officials, two "scrutinees" for each candidate, and electors about to vote.

The Australian system was enacted in England in 1872 after a study by the committee of election practices identified Australia's ballot as the best possible remedy for the existing situation. Belgium followed England's example in 1877. Like the Australian provinces, both England and Belgium excluded the general public from the entire polling room.

One of the earliest indications of the reform movement in this country came in 1882 when the Philadelphia Civil Service Reform Association urged its adoption. Many articles were written praising its usefulness in preventing bribery, intimidation, disorder, and inefficiency at the polls. Commentators argued that it would diminish the growing evil of bribery by removing the knowledge of whether it had been successful. Another argument strongly urged in favor of the reform was that it would protect the weak and dependent against intimidation and coercion by employers and creditors. The inability to determine the effectiveness of bribery and intimidation accordingly would create order and decency at the polls.

After several failed attempts to adopt the Australian system in Michigan and Wisconsin, the Louisville, Kentucky, municipal government, the Commonwealth of Massachusetts, and the State of New York adopted the Australian system in 1888. The Louisville law prohibited all but voters, candidates or their agents, and electors from coming within 50 feet of the voting room inclosure. The Louisville law also provided that candidates' agents within the restricted area "were not allowed to persuade, influence, or intimidate any one in the choice of his candidate, or to attempt doing so . . . ." The Massachusetts and New York laws excluded the general public only from the area encompassed within a guardrail constructed six feet from the voting compartments. This modification was considered an improvement because it provided additional monitoring by members of the general public and independent candidates.

Finally, New York also prohibited any person from "electioneering on election day within any polling-place, or within one hundred feet of any polling place."

The success achieved through these reforms was immediately noticed and widely praised. One commentator remarked of the New York law of 1888:

> We have secured secrecy; and intimidation by employers, party bosses, police officers, saloon keepers and others has come to an end. In earlier times our polling places were frequently, to quote the litany, "scenes of battle, murder, and sudden death." This also has come to an end, and our election days are now as peaceful as our Sabbaths. The new legislation has also rendered impossible the old methods of straightforward and shameless bribery of voters at the polls.

The triumphs of 1888 set off a rapid and widespread adoption of the Australian system in the United States. By 1896, almost 90 percent of the States had adopted the Australian system. This accounted for 92 percent of the national electorate.

The roots of Tennessee's regulation can be traced back to two provisions passed during this period of rapid reform. Tennessee passed the first relevant provision in 1890 as part of its switch to an Australian system. In its effort to "secur[e] the purity of elections," Tennessee provided that only voters and certain election officials were permitted within the room where the election was held or within 50 feet of the entrance. The Act did not provide any penalty for violation and applied only in the more highly populated counties and cities.

The second relevant provision was passed in 1901 as an amendment to Tennessee's "Act to preserve the purity of elections, and define and punish offenses against the elective franchise." The original Act, passed in 1897, made it a misdemeanor to commit various election offenses, including the use of bribery, violence, or intimidation in order to induce a person to vote or refrain from voting for any particular person or measure. The 1901 amendment made it a misdemeanor for any person, except the officers holding the elections, to approach nearer than 30 feet to any voter or ballot box. This provision applied to all Tennessee elections.

These two laws remained relatively unchanged until 1967, when Tennessee added yet another proscription to its secret ballot law. This amendment prohibited the distribution of campaign literature "on the same floor of a building, or within one hundred (100) feet thereof, where an election is in progress."

In 1972, the State enacted a comprehensive code to regulate the conduct of elections. The code included a section that proscribed the display and the distribution of campaign material and the solicitation of votes within 100 feet of the entrance to a polling place. The 1972 "campaign-free zone" is the precursor of the restriction challenged in the present litigation.

Today, all 50 States limit access to the areas in or around polling places. The National Labor Relations Board also limits activities at or near polling places in union-representation elections.

In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other

Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments. We find that this widespread and time-tested consensus demonstrates that some restricted zone is necessary in order to serve the States' compelling interests in preventing voter intimidation and election fraud.

Respondent and the dissent advance three principal challenges to this conclusion. First, respondent argues that restricted zones are overinclusive because States could secure these same compelling interests with statutes that make it a misdemeanor to interfere with an election or to use violence or intimidation to prevent voting. We are not persuaded. Intimidation and interference laws fall short of serving a State's compelling interests because they "deal with only the most blatant and specific attempts" to impede elections. Moreover, because law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process, see Tenn. Code Ann. § 2-7—103 (1985), many acts of interference would go undetected. These undetected or less than blatant acts may nonetheless drive the voter away before remedial action can be taken.

Second, respondent and the dissent argue that Tennessee's statute is underinclusive because it does not restrict other types of speech, such as charitable and commercial solicitation or exit polling, within the 100-foot zone. We agree that distinguishing among types of speech requires that the statute be subjected to strict scrutiny. We do not, however, agree that the failure to regulate all speech renders the statute fatally underinclusive. In fact, as one early commentator pointed out, allowing members of the general public access to the polling place makes it more difficult for political machines to buy off all the monitors. But regardless of the need for such additional monitoring, there is, as summarized above, ample evidence that political candidates have used campaign workers to commit voter intimidation or electoral fraud. In contrast, there is simply no evidence that political candidates have used other forms of solicitation or exit polling to commit such electoral abuses. 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.

Finally, the dissent argues that we confuse history with necessity. Yet the dissent concedes that a secret ballot was necessary to cure electoral abuses. Contrary to the dissent's contention, the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing—it is common sense. The only way to preserve the secrecy of the ballot is to limit access to the area around the voter. Accordingly, we hold that some restricted zone around the voting area is necessary to secure the State's compelling interest.

The real question then is how large a restricted zone is permissible or sufficiently tailored. Respondent and the dissent argue that Tennessee's 100-foot boundary is not narrowly drawn to achieve the State's compelling interest in protecting the right to vote. We disagree.

As a preliminary matter, the long, uninterrupted, and prevalent use of these statutes makes it difficult for States to come forward with the sort of proof the dissent wishes to require. The majority of these laws were adopted originally in the 1890's, long before States engaged in extensive legislative hearings on election regulations. The fact that these laws have been in effect for a long period of time also makes it difficult for the States to put on witnesses who

can testify as to what would happen without them. Finally, it is difficult to isolate the exact effect of these laws on voter intimidation and election fraud. Voter intimidation and election fraud are successful precisely because they are difficult to detect.

Furthermore, because a government has such a compelling interest in securing the right to vote freely and effectively, this Court never has held a State "to the burden of demonstrating empirically the objective effects on political stability that [are] produced" by the voting regulation in question. Elections vary from year to year, and place to place. It is therefore difficult to make specific findings about the effects of a voting regulation. Moreover, the remedy for a tainted election is an imperfect one. Rerunning an election would have a negative impact on voter turnout. Thus, requiring proof that a 100-foot boundary is perfectly tailored to deal with voter intimidation and election fraud

> would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986).

We do not think that the minor geographic limitation prescribed by § 2-7-111(b) constitutes such a significant impingement. Thus, we simply do not view the question whether the 100-foot boundary line could be somewhat tighter as a question of "constitutional dimension." Reducing the boundary to 25 feet, as suggested by the Tennessee Supreme Court, is a difference only in degree, not a less restrictive alternative in kind. As was pointed out in the dissenting opinion in the Tennessee Supreme Court, it "takes approximately 15 seconds to walk 75 feet." The State of Tennessee has decided that these last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible. We do not find that this is an unconstitutional choice.

At some measurable distance from the polls, of course, governmental regulation of vote solicitation could effectively become an impermissible burden. In reviewing challenges to specific provisions of a State's election laws, however, this Court has not employed any "'litmus-paper test' that will separate valid from invalid restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Accordingly, it is sufficient to say that in establishing a 100-foot boundary, Tennessee is on the constitutional side of the line.

In conclusion, we reaffirm that it is the rare case in which we have held that a law survives strict scrutiny. This, however, is such a rare case. Here, the State has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary to protect that fundamental right. Given the conflict between these two rights, we hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.

Justice Scalia, concurring in the judgment.

If the category of "traditional public forum" is to be a tool of analysis rather than a conclusory label, it must remain faithful to its name and derive its content from tradition. Because restrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot, Tenn. Code Ann. § 2-7-111 (Supp. 1991) does not restrict speech in a traditional public forum, and the "exacting scrutiny" that the plurality purports to apply is inappropriate. Instead, I believe that § 2-7-111, though content based, is constitutional because it is a reasonable, viewpoint-neutral regulation of a nonpublic forum. I therefore concur in the judgment of the Court.

For the reasons that the plurality believes § 2-7-111 survives exacting scrutiny, I believe it is at least reasonable; and respondent does not contend that it is viewpoint discriminatory. I therefore agree with the judgment of the Court that § 2-7-111 is constitutional.

JUSTICE STEVENS, with whom JUSTICES O'CONNOR and SOUTER join, dissenting.

The speech and conduct prohibited in the campaign-free zone created by Tenn. Code Ann. § 2-7-111 (Supp. 1991) is classic political expression. Therefore, I fully agree with the plurality that Tennessee must show that its "'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" I do not agree, however, that Tennessee has made anything approaching such a showing.

Tennessee's statutory "campaign-free zone" raises constitutional concerns of the first magnitude. The statute directly regulates political expression and thus implicates a core concern of the First Amendment. Moreover, it targets only a specific subject matter (campaign speech) and a defined class of speakers (campaign workers) and thus regulates expression based on its content. In doing so, the Tennessee statute somewhat perversely disfavors speech that normally is accorded greater protection than the kinds of speech that the statute does not regulate. For these reasons, Tennessee unquestionably bears the heavy burden of demonstrating that its silencing of political expression is necessary and narrowly tailored to serve a compelling state interest.

Campaign-free zones are noteworthy for their broad, antiseptic sweep. The Tennessee zone encompasses at least 30,000 square feet around each polling place; in some States, such as Kentucky and Wisconsin, the radius of the restricted zone is 500 feet—silencing an area of over 750,000 square feet. Even under the most sanguine scenario of participatory democracy, it is difficult to imagine voter turnout so complete as to require the clearing of hundreds of thousands of square feet simply to ensure that the path to the polling place door remains open and that the curtain that protects the secrecy of the ballot box remains closed.

Moreover, the Tennessee statute does not merely regulate conduct that might inhibit voting; it bars the "display of campaign posters, signs, or other campaign materials." Bumper stickers on parked cars and lapel buttons on pedestrians are taboo. The notion that such sweeping restrictions on speech are necessary to maintain the freedom to vote and the integrity of the ballot box borders on the absurd.

The evidence introduced at trial to demonstrate the necessity for Tennessee's campaign-free zone was exceptionally thin. Perhaps in recognition of the poverty of the record, the plurality looks to history to assess whether Tennessee's statute is in fact necessary to serve the State's interests. This analysis is deeply flawed; it confuses history with necessity, and mistakes the traditional for the indispensable. The plurality's reasoning combines two logical errors: First, the plurality assumes that a practice's long life itself establishes its necessity; and second, the plurality assumes that a practice that was once necessary remains necessary until it is ended. We have never regarded tradition as a proxy for necessity.

Even if we assume that campaign-free zones were once somehow "necessary," it would not follow that, 100 years later, those practices remain necessary. Although the plurality today blithely dispenses with the need for factual findings to determine the necessity of "traditional" restrictions on speech, courts that have made such findings with regard to other campaign-free zones have, without exception, found such zones unnecessary.

In addition to sweeping too broadly in its reach, Tennessee's campaign-free zone selectively prohibits speech based on content. Within the zone, § 2-7-111 silences all campaign-related expression, but allows expression on any other subject: religious, artistic, commercial speech, even political debate and solicitation concerning issues or candidates not on the day's ballot.

Tennessee's content-based discrimination is particularly problematic because such a regulation will inevitably favor certain groups of candidates. As the testimony in this case illustrates, several groups of candidates rely heavily on last-minute campaigning. Candidates with fewer resources, candidates for lower visibility offices, and "grassroots" candidates benefit disproportionately from last-minute campaigning near the polling place.

Although the plurality recognizes that the Tennessee statute is content based, it does not inquire into whether that discrimination itself is related to any purported state interest. To the contrary, the plurality makes the surprising and unsupported claim that the selective regulation of protected speech is justified because, "[t]he First Amendment does not require States to regulate for problems that do not exist."

Tennessee's differential treatment of campaign speech furthers no asserted state interest. Access to, and order around, the polls would be just as threatened by the congregation of citizens concerned about a local environmental issue not on the ballot as by the congregation of citizens urging election of their favored candidate. Similarly, assuming that disorder immediately outside the polling place could lead to the commission of errors or the perpetration of fraud, such disorder could just as easily be caused by a religious dispute sparked by a colporteur as by a campaign-related dispute sparked by a campaign worker. In short, Tennessee has failed to point to any legitimate interest that would justify its selective regulation of campaign-related expression.

Although the plurality purports to apply "exacting scrutiny," its three marked departures from that familiar standard may have greater significance for the future than its precise holding about campaign-free zones. First, the plurality declines to take a hard look at whether a state law is in fact "necessary." Under the plurality's analysis, a State need not demonstrate that

contemporary demands compel its regulation of protected expression; it need only show that that regulation can be traced to a longstanding tradition. Second, the plurality lightens the State's burden of proof in showing that a restriction on speech is "narrowly tailored." Third, although the plurality recognizes the problematic character of Tennessee's content-based suppressive regulation, it nonetheless upholds the statute because "there is simply no evidence" that commercial or charitable solicitation outside the polling place poses the same potential dangers as campaigning outside the polling place. This analysis contradicts a core premise of strict scrutiny—namely, that the heavy burden of justification is on the State. The plurality has effectively shifted the burden of proving the necessity of content discrimination from the State to the plaintiff.

In sum, what the plurality early in its opinion calls "exacting scrutiny," appears by the end of its analysis to be neither exacting nor scrutiny. Tennessee must shoulder the burden of demonstrating that its restrictions on political speech are no broader than necessary to protect orderly access to the polls. It has not done so. I therefore respectfully dissent.

3. REED v. TOWN OF GILBERT
135 S. Ct. 2218 (2015)

Justice THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, § 4.402 (2005). The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event," loosely defined as signs directing the public to a meeting of a nonprofit group. The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

I

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

The first is "Ideological Sign[s]." This category includes any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits.

The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." The Code treats these signs less

favorably than ideological signs. The Code allows the placement of political signs up to 16 square feet on residential property and up to 32 square feet on non-residential property, undeveloped municipal property, and "rights-of-way." These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election.

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

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech. The District Court denied the petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. It reasoned that, even though an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it, the "'kind of cursory examination'" that would be necessary to classify it as a temporary directional sign was "not akin to an officer synthesizing the expressive content of the sign." It then remanded for the District Court to determine whether the Sign Code's distinctions among temporary directional

signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech.

The District Court granted summary judgment in favor of the Town. The Court of Appeals affirmed. The Court of Appeals concluded that the Sign Code is content neutral. As the court explained, "Gilbert did not adopt its regulation because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." Accordingly, the court believed that the Code was "content neutral as that term [has been] defined by the Supreme Court." In light of that determination, it applied a lower level of scrutiny and concluded that the law did not violate the First Amendment. We now reverse.

II

A government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95, (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and are subject to strict scrutiny.

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be "`justified without reference to the content of the regulated speech,'" or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." And it defines "Ideological Signs" on the basis of whether a sign "communicat[es] a message or ideas" that do not fit within the Code's other categories. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's

signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive. The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be "'justified without reference to the content of the speech.'"

But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). We have thus made clear that "'[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

That is why we have repeatedly considered whether a law is content neutral on its face before turning to the law's justification or purpose. Because 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, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-neutral ban. In that context, we looked to governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was "'justified without reference to the content of the speech.'" But *Ward*'s framework "applies only if a statute is content neutral." Its rules thus operate "to protect speech," not "to restrict it."

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the "abridg[ement] of speech"—rather than merely the motives of those who enacted them. "'The vice of content-based legislation . . . is

not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.'" *Hill v. Colorado*, 530 U.S. 703, 743 (2000) (SCALIA, J., dissenting).

The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted."

The Town seizes on this reasoning, insisting that "content based" is a term of art that "should be applied flexibly" with the goal of protecting "viewpoints and ideas from government censorship or favoritism." In the Town's view, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content based. The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is "endorsing or suppressing 'ideas or viewpoints,'" and the provisions for political signs and ideological signs "are neutral as to particular ideas or viewpoints" within those categories.

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." But it is well established that "[t]he hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic."

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on "'the content-neutral elements of who is speaking through the sign and whether and when an event is occurring.'" That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code's distinctions were truly speaker based, both types of signs would receive the same treatment.

In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). Characterizing a distinction as speaker based is only the beginning—not the end—of the inquiry.

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

And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature."

III

Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end.

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

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

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

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

IV

Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an "`absolutist'" content-neutrality rule would render "virtually all distinctions in sign laws . . . subject to strict scrutiny," but that is not the case. Not "all distinctions" are subject to strict scrutiny, only content-based ones are. Laws that are content neutral are instead subject to lesser scrutiny.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. See *City Council of Los Angeles v. Taxpayers for Vincent*, 466 US 789, 817 (1984) (upholding content-neutral ban against posting signs on public property). Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects.

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

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

I join the opinion of the Court but add a few words of further explanation. As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. 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. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth.

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

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

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

Rules distinguishing between lighted and unlighted signs.

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

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

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

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

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

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

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-69 (2009). They may put up signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

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

JUSTICE KAGAN, with whom JUSTICES GINSBURG and BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of

signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. In other municipalities, safety signs such as "Blind Pedestrian Crossing" and "Hidden Driveway" can be posted without a permit, even as other permanent signs require one. Elsewhere, historic site markers—for example, "George Washington Slept Here"—are also exempt from general regulations. And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to "scenic and historical attractions" or advertise free coffee.

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

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, I find it challenging to understand why that is so. This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." The second is to ensure that the government has not regulated speech "based on hostility—or favoritism—towards the underlying message expressed." Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over "name and address" signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any "realistic possibility that official suppression of ideas is afoot." That is always the case when the regulation facially differentiates on the basis of viewpoint. It is also the case (except in non-public or limited public forums) when a law restricts "discussion of an entire topic" in public debate. We have stated that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose

'which issues are worth discussing or debating.'" And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may "suggest[ ] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"—we insist that the law pass the most demanding constitutional test.

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

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. In *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating "historical, cultural, or artistic event[s]" from a generally applicable limit on sidewalk signs. After all, we explained, the law's enactment and enforcement revealed "not even a hint of bias or censorship." *Id.* at 804. And another decision involving a similar law provides an alternative model. In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court assumed arguendo that a sign ordinance's exceptions for address signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. We did not need decide the level-of-scrutiny because the law's breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue*'s tack here. The Town of Gilbert's defense of its sign ordinance—most notably, the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable

Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has explained why the First Amendment requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations, I concur only in the judgment.

4. IANCU v. BRUNETTI
139 S. Ct. 2294 (2019)

JUSTICE KAGAN delivered the opinion of the Court joined by THOMAS, GINSBURG, ALITO, GORSUCH, and KAVANAUGH, JJ.

Two Terms ago, in *Matal v. Tam*, 137 S. Ct. 1744, (2017), this Court invalidated the Lanham Act's bar on the registration of "disparaging" trademarks. Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of "immoral or scandalous" trademarks. We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

I

Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT. According to Brunetti, the mark (which functions as the clothing's brand name) is pronounced as four letters, one after the other: F-U-C-T. But you might read it differently and, if so, you would hardly be alone. See Tr. of Oral Arg. 5 (describing the brand name as "the equivalent of [the] past participle form of a well-known word of profanity"). That common perception caused difficulties for Brunetti when he tried to register his mark with the U.S. Patent and Trademark Office (PTO).

Under the Lanham Act, the PTO administers a federal registration system for trademarks. Registration of a mark is not mandatory. The owner of an unregistered mark may still use it in commerce and enforce it against infringers. But registration gives trademark owners valuable benefits. For example, registration constitutes "prima facie evidence" of the mark's validity. And registration serves as "constructive notice of the registrant's claim of ownership," which forecloses some defenses in infringement actions. Generally, a trademark is eligible for registration, and receipt of such benefits, if it is "used in commerce." But the Act directs the PTO to "refuse registration" of certain marks. For instance, the PTO cannot register a mark that "so resembles" another mark as to create a likelihood of confusion. It cannot register a mark that is "merely descriptive" of the goods on which it is used. It cannot register a mark containing the flag or insignia of any nation or State. There are five or ten more (depending on how you count). And until we invalidated the criterion two years ago, the PTO could not register a mark that "disparaged" a "person, living or dead."

This case involves another of the Lanham Act's prohibitions on registration—one applying to marks that "consist of or comprise immoral or scandalous matter." §1052(a). The PTO applies that bar as a "unitary provision," rather than treating the two adjectives in it separately. To

determine whether a mark fits in the category, the PTO asks whether a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety"; "giving offense to the conscience or moral feelings"; "calling out for condemnation"; "disgraceful"; "offensive"; "disreputable"; or "vulgar."

Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board decided that Brunetti's mark flunked that test. The attorney determined that FUCT was "a total vulgar" and "therefore unregistrable." On review, the Board stated that the mark was "highly offensive" and "vulgar," and that it had "decidedly negative sexual connotations." As part of its review, the Board also considered evidence of how Brunetti used the mark. It found that Brunetti's website and products contained imagery, near the mark, of "extreme nihilism" and "anti-social" behavior. In that context, the Board thought, the mark communicated "misogyny, depravity, [and] violence." The Board concluded: "Whether one considers [the mark] as a sexual term, or finds that [Brunetti] has used [the mark] in the context of extreme misogyny, nihilism or violence, we have no question but that [the term is] extremely offensive."

Brunetti then brought a facial challenge to the "immoral or scandalous" bar in the Court of Appeals for the Federal Circuit. That court found the prohibition to violate the First Amendment. We granted certiorari.

II

This Court first considered a First Amendment challenge to a trademark registration restriction in *Tam*, just two Terms ago. There, the Court declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person, living or dead." The eight-Justice Court divided evenly between two opinions and could not agree on the overall framework for deciding the case. But all the Justices agreed on two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. And second, the disparagement bar was viewpoint-based.

The Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys. In Justice Kennedy's explanation, the disparagement bar allowed a trademark owner to register a mark if it was "positive" about a person, but not if it was "derogatory." That was the "essence of viewpoint discrimination," he continued, because "[t]he law thus reflects the Government's disapproval of a subset of messages it finds offensive."

. . . . So the key question becomes: Is the "immoral or scandalous" criterion in the Lanham Act viewpoint-neutral or viewpoint-based?

It is viewpoint-based. The meanings of "immoral" and "scandalous" are not mysterious, but resort to some dictionaries still helps to lay bare the problem. When is expressive material "immoral"? According to a standard definition, when it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." Or again, when it is "opposed to or violating morality"; or "morally evil." So the Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. And when is such material "scandalous"? Says a typical definition, when it "gives offense to the conscience or moral feelings"; "excite[s] reprobation"; or "call[s] out condemnation." Or

again, when it is "shocking to the sense of truth, decency, or propriety"; "disgraceful"; "offensive"; or "disreputable." So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. "Love rules"? "Always be good"? Registration follows. "Hate rules"? "Always be cruel"? Not according to the Lanham Act's "immoral or scandalous" bar.

The facial viewpoint bias in the law results in viewpoint-discriminatory application. Recall that the PTO itself describes the "immoral or scandalous" criterion using much the same language as in the dictionary definitions recited above.

Here are some samples. The PTO rejected marks conveying approval of drug use (YOU CAN'T SPELL HEALTHCARE WITHOUT THC for pain-relief medication, MARIJUANA COLA and KO KANE for beverages) because it is scandalous to "inappropriately glamoriz[e] drug abuse." But at the same time, the PTO registered marks with such sayings as D.A.R.E. TO RESIST DRUGS AND VIOLENCE and SAY NO TO DRUGS—REALITY IS THE BEST TRIP IN LIFE. Similarly, the PTO disapproved registration for the mark BONG HITS 4 JESUS because it "suggests that people should engage in an illegal activity [in connection with] worship" and because "Christians would be morally outraged by a statement that connects Jesus Christ with illegal drug use." And the PTO refused to register trademarks associating religious references with products (AGNUS DEI for safes and MADONNA for wine) because they would be "offensive to most individuals of the Christian faith" and "shocking to the sense of propriety." But once again, the PTO approved marks—PRAISE THE LORD for a game and JESUS DIED FOR YOU on clothing—whose message suggested religious faith rather than blasphemy or irreverence. Finally, the PTO rejected marks reflecting support for al-Qaeda (BABY AL QAEDA and AL-QAEDA on t-shirts) "because the bombing of civilians and other terrorist acts are shocking to the sense of decency and call out for condemnation." Of course, all these decisions are understandable. The rejected marks express opinions offensive to many Americans. But as the Court made clear in *Tam*, a law disfavoring "ideas that offend" discriminates based on viewpoint, in violation of the First Amendment.

How, then, can the Government claim that the "immoral or scandalous" bar is viewpoint-neutral? The Government basically asks us to treat decisions like those described above as PTO examiners' mistakes. Still more, the Government tells us to ignore how the Lanham Act's language, on its face, disfavors some ideas. In urging that course, the Government does not dispute that the statutory language—and words used to define it—have just that effect. At oral argument, the Government conceded: "If you just looked at the words like 'shocking' and 'offensive' on their face and gave them their ordinary meanings, they could easily encompass material that was shocking [or offensive] because it expressed an outrageous point of view or a point of view that most members" of society reject. But no matter, says the Government, because the statute is "susceptible of" a limiting construction that would remove this viewpoint bias. The Government's idea, abstractly phrased, is to narrow the statutory bar

to "marks that are offensive [or] shocking to a substantial segment of the public because of their mode of expression, independent of any views that they may express." More concretely, the Government explains that this reinterpretation would mostly restrict the PTO to refusing marks that are "vulgar"—meaning "lewd," "sexually explicit or profane." Such a reconfigured bar, the Government says, would not turn on viewpoint, and so we could uphold it.

But we cannot accept the Government's proposal, because the statute says something markedly different. This Court, of course, may interpret "ambiguous statutory language" to "avoid serious constitutional doubts." But that canon of construction applies only when ambiguity exists. "We will not rewrite a law to conform it to constitutional requirements." So even assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. The "immoral or scandalous" bar stretches far beyond the Government's proposed construction. The statute as written does not draw the line at lewd, sexually explicit, or profane marks. . . .

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

B. Content Neutral Time, Place, and Manner Regulations

1. HEFFRON v. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS
452 U.S. 640 (1981)

WHITE, J., delivered the opinion of the Court, in which BURGER, C.J., and STEWART, POWELL, and REHNQUIST, JJ., joined.

The question presented for review is whether a State, consistent with the First and Fourteenth Amendments, may require a religious organization desiring to distribute and sell religious literature and to solicit donations at a state fair to conduct those activities only at an assigned

location within the fairgrounds even though application of the rule limits the religious practices of the organization.

Minnesota State Fair Rule 6.05 provides in relevant part that "all persons, groups or firms which desire to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds."Although the Rule does not prevent organizational representatives from walking about the fairgrounds and communicating the organization's views with fair patrons in face-to-face discussions, it does require that any exhibitor conduct its sales, distribution, and fund solicitation operations from a booth. Space in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis with the rental charge based on the size and location of the booth. The Rule applies alike to nonprofit, charitable, and commercial enterprises.

One day prior to the opening of the 1977 Minnesota State Fair, respondents International Society for Krishna Consciousness, Inc. (ISKCON), an international religious society espousing the views of the Krishna religion, and Joseph Beca, head of the Minneapolis ISKCON temple, filed suit seeking a declaration that Rule 6.05 violated respondents' rights under the First Amendment. Specifically, ISKCON asserted that the Rule would suppress the practice of Sankirtan, one of its religious rituals, which enjoins its members to go into public places to distribute or sell religious literature and to solicit donations for the support of the Krishna religion. The Minnesota Supreme Court [held] that Rule 6.05, as applied to respondents, unconstitutionally restricted the Krishnas' religious practice of Sankirtan.

The issue here is whether Rule 6.05 is a permissible restriction on the place and manner of communicating the views of the Krishna religion. A major criterion for a valid time, place, and manner restriction is that the restriction "may not be based upon either the content or subject matter of speech." Rule 6.05 qualifies in this respect, since the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes. Nor does Rule 6.05 suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in governmental authority. The method of allocating space is a first-come, first-served system.

A valid time, place, and manner regulation must also "serve a significant governmental interest." Here, the principal justification asserted by the State in support of Rule 6.05 is the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair. Because the Fair attracts large crowds, the State's interest in the orderly movement and control of such an assembly of persons is a substantial consideration.

We cannot agree with the Minnesota Supreme Court that Rule 6.05 is an unnecessary regulation because the State could avoid the threat to its interest posed by ISKCON by less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of ISKCON's representatives. The inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced with respect to ISKCON. Looked at in this way, it is quite improbable that the alternative means

suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed.

For Rule 6.05 to be valid as a place and manner restriction, it must also be sufficiently clear that alternative forums for the expression of respondents' protected speech exist despite the effects of the Rule. Rule 6.05 is not vulnerable on this ground. First, the Rule does not prevent ISKCON from practicing Sankirtan anywhere outside the fairgrounds. More importantly, the Rule has not been shown to deny access within the forum in question. Here, the Rule does not exclude ISKCON from the fairgrounds, nor does it deny that organization the right to conduct any desired activity at some point within the forum. Its members may mingle with the crowd and orally propagate their views. The organization may also arrange for a booth and distribute and sell literature and solicit funds from that location on the fairgrounds itself.

The judgment of the Supreme Court of Minnesota is reversed.

2. FRISBY v. SCHULTZ
487 U.S. 474 (1988)

JUSTICE O'CONNOR delivered the opinion of the Court, joined by REHNQUIST, C.J., and BLACKMUN, SCALIA, and KENNEDY, JJ.

Brookfield, Wisconsin, has adopted an ordinance that completely bans picketing "before or about" any residence. This case presents a facial First Amendment challenge to that ordinance.

Brookfield is a residential suburb of Milwaukee with a population of approximately 4,300. The appellees, Sandra Schultz and Robert Braun, are individuals strongly opposed to abortion and wish to express their views on the subject by picketing on a public street outside the Brookfield residence of a doctor who performs abortions at two clinics in neighboring towns. Appellees and others engaged in precisely that activity, assembling outside the doctor's home on at least six occasions between April 20 and May 20, 1985, for periods ranging from one to one and a half hours. The size of the group varied from 11 to more than 40. The picketing was generally orderly and peaceful; the town never had occasion to invoke any of its ordinances prohibiting obstruction of the streets, loud and unnecessary noises, or disorderly conduct. Nonetheless, the picketing generated substantial controversy and numerous complaints.

The Town Board therefore passed an ordinance that prohibited all picketing in residential neighborhoods:

> "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield."

The ordinance itself recites the primary purpose of this ban: "the protection and preservation of the home" through assurance "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." The Town Board believed that a ban was necessary because it determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants . . . [and]

has as its object the harassing of such occupants." The ordinance also evinces a concern for public safety, noting that picketing obstructs and interferes with "the free use of public sidewalks and public ways of travel."

Appellees filed this lawsuit in the United States District Court for the Eastern District of Wisconsin on the grounds that the ordinance violated the First Amendment.

The antipicketing ordinance operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern. Because of the importance of "uninhibited, robust, and wide-open" debate on public issues, we have traditionally subjected restrictions on public issue picketing to careful scrutiny. Of course, "[e]ven protected speech is not equally permissible in all places and at all times."

To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property at issue." Specifically, we have identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum."

The relevant forum here may be easily identified: appellees wish to picket on the public streets of Brookfield. Ordinarily, a determination of the nature of the forum would follow automatically from this identification; we have repeatedly referred to public streets as the archetype of a traditional public forum. "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum. Appellants, however, urge us to disregard these "cliches." They argue that the streets of Brookfield should be considered a nonpublic forum. Pointing to the physical narrowness of Brookfield's streets as well as to their residential character, appellants contend that such streets have not by tradition or designation been held open for public communication.

We reject this suggestion. Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. In *Carey v. Brown*, 447 U.S. 455 (1980), we expressly recognized that "public streets and sidewalks in residential neighborhoods," were "public for[a]." This rather ready identification virtually forecloses appellants' argument.

In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliche," but recognition that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. Accordingly, the streets of Brookfield are traditional public fora. The residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test; the antipicketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora:

> In these quintessential public for[a], 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. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

As *Perry* makes clear, the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content. Following our normal practice, "we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." Thus, we accept the lower courts' conclusion that the Brookfield ordinance is content neutral. Accordingly, we turn to consider whether the ordinance is "narrowly tailored to serve a significant government interest" and whether it "leave[s] open ample alternative channels of communication."

Because the last question is so easily answered, we address it first. Of course, before we are able to assess the available alternatives, we must consider more carefully the reach of the ordinance. The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties. Specifically, the use of the singular form of the words "residence" and "dwelling" suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence. The lower courts described the ordinance as banning "all picketing in residential areas." But these general descriptions do not address the exact scope of the ordinance and are in no way inconsistent with our reading of its text. "Picketing," after all, is defined as posting at a particular place, a characterization in line with viewing the ordinance as limited to activity focused on a single residence. Moreover, while we ordinarily defer to lower court constructions of state statutes, we do not invariably do so. We are particularly reluctant to defer when the lower courts have fallen into plain error, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties. Thus, we instead construe the ordinance more narrowly. This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the "picketing" proscribed by the ordinance. Thus, generally speaking, "picketing would be having the picket proceed on a definite course or route in front of a home." The picket need not be carrying a sign, but in order to fall within the scope of the ordinance the picketing must be directed at a single residence. General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

So narrowed, the ordinance permits the more general dissemination of a message. As appellants explain, the limited nature of the prohibition makes it virtually self-evident that

ample alternatives remain:

> "Protestors may enter neighborhoods, alone or in groups, even marching. They may go door-to-door. They may distribute literature in this manner or through the mails. They may contact residents by telephone, short of harassment."

We readily agree that the ordinance preserves ample alternative channels of communication and thus move on to inquire whether the ordinance serves a significant government interest. We find that such an interest is identified within the text of the ordinance itself: the protection of residential privacy.

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order." Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their homes and the government may protect this freedom.

This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas. In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. We have "never intimated that the visitor could insert a foot in the door and insist on a hearing." There simply is no right to force speech into the home of an unwilling listener.

It remains to be considered, however, whether the Brookfield ordinance is narrowly tailored to protect only unwilling recipients of the communications. A statute is narrowly tailored if it targets no more than the exact source of the "evil" it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because "the substantive evil -- visual blight -- [was] created by the medium of expression itself."

The same is true here. The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted

picketing on the quiet enjoyment of the home is beyond doubt.

In this case, for example, appellees subjected the doctor and his family to the presence of a relatively large group of protesters on their doorstep in an attempt to force the doctor to cease performing abortions. But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy. The offensive and disturbing nature of the form of the communication banned by the Brookfield ordinance thus can scarcely be questioned.

The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. The resident is figuratively, and perhaps literally, trapped within the home and left with no ready means of avoiding the speech. Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor," is "created by the medium of expression itself." Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored.

Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance -- to, for example, a particular resident's use of his or her home as a place of business, or to picketers present at a home by invitation of the resident -- may present somewhat different questions. These are, however, questions we need not address today in order to dispose of appellees' facial challenge.

Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored. The ordinance also leaves open ample alternative channels of communication and is content neutral. Largely because of its narrow scope, the facial challenge to the ordinance must fail.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today sets out the appropriate legal tests and standards governing the question presented, and proceeds to apply most of them correctly. Regrettably, the Court errs in the final step of its analysis, and approves an ordinance banning significantly more speech than is necessary to achieve the government's substantial goal. Accordingly, I must dissent.

Without question there are many aspects of residential picketing that, if unregulated, might easily become intrusive or unduly coercive. Indeed, some of these aspects are illustrated by this very case. Before the ordinance took effect up to 40 sign-carrying, slogan shouting protesters regularly converged on Dr. Victoria's home and, in addition to protesting, warned young children not to go near the house because Dr. Victoria was a "baby killer." Further, the throng repeatedly trespassed onto the Victorias' property and at least once blocked the exits to their home. Surely it is within the government's power to enact regulations as necessary to prevent such intrusive and coercive abuses. Thus, for example, the government could constitutionally regulate the number of residential picketers, the hours during which a residential picket may take place, or the noise level of such a picket. In short, substantial regulation is permitted to neutralize the intrusive or unduly coercive aspects of picketing around the home. But to say that picketing may be regulated is not to say that it may be

prohibited. Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive, only the speech itself remains. Such speech, which no longer implicates the heightened governmental interest in residential privacy, is nevertheless banned by the Brookfield law. Therefore, the ordinance is not narrowly tailored.

JUSTICE STEVENS, dissenting.

"GET WELL CHARLIE -- OUR TEAM NEEDS YOU."

In Brookfield, Wisconsin, it is unlawful for a fifth grader to carry such a sign in front of a residence for the time necessary to convey its friendly message to its intended audience.

The Court's analysis of the question whether Brookfield's ban on picketing is constitutional concludes that the total ban on residential picketing is "narrowly tailored" to protect "only unwilling recipients of the communications." The plain language of the ordinance, however, applies to communications to willing and indifferent recipients as well as to the unwilling.

Two characteristics of picketing make this a difficult case. First, it is important to recognize that, "picketing is a mixture of conduct and communication." If we put the speech element to one side, I should think it perfectly clear that the town could prohibit pedestrians from loitering in front of a residence. On the other hand, it seems equally clear that a sign carrier has a right to march past a residence -- and presumably pause long enough to give the occupants an opportunity to read his or her message -- regardless of whether the reader agrees, disagrees, or is simply indifferent to the point of view being expressed. Second, it bears emphasis that: "[A] communication may be offensive in two different ways. Independently of the message the speaker intends to convey, the form of his communication may be offensive." Picketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive irrespective of the substantive message conveyed.

The picketing that gave rise to the ordinance enacted in this case was obviously intended to cause him and his family substantial psychological distress. As the record reveals, the picketers' message was repeatedly redelivered by a relatively large group. As is often the function of picketing, during the periods of protest the doctor's home was held under a virtual siege. I do not believe that picketing for the sole purpose of imposing psychological harm on a family in the shelter of their home is constitutionally protected. I do believe, however, that the picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate that message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family. Thus, I agree that the ordinance may be constitutionally applied to the kind of picketing that gave rise to its enactment.

On the other hand, the ordinance is unquestionably "overbroad." The scope of the ordinance gives the town officials far too much discretion in making enforcement decisions; potential picketers must act at their peril. Second, it is a simple matter for the town to amend its ordinance and to limit the ban to conduct that unreasonably interferes with the privacy of the home and does not serve a reasonable communicative purpose. I respectfully dissent.

Chapter IX: Overbreadth, Vagueness, and Prior Restraints

A. Overbreadth and Vagueness

Overbreadth and vagueness are two defects in the way a statute is drafted that are reasons for striking a statue down under the First Amendment Free Speech Clause. While the two are often both raised by a challenger as alternative grounds for finding a First Amendment violation, they are independent reasons for finding a constitutional violation. Overbreadth can be a form of as applied challenge or a facial challenge. In an as applied challenge, the challenger argues that the law is overbroad as applied to the challenger's conduct since that conduct cannot be punished by the government consistent with the First Amendment. The consequence of a court agreeing with the challenger is only to declare the statute unconstitutional as applied to the challenger's conduct rather than strike it down entirely.

In a facial challenge, by contrast, the analysis does not focus on the challenger's conduct. The statute may be able to be applied to the challenger's conduct without violating the First Amendment. However, the challenger may be permitted to argue that the overbreadth of the law is so substantial that the statute should be struck down in its entirety. In general, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible" to a facial overbreadth challenge. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Instead, the Supreme Court has said that a statute is substantially overbroad if its illegitimate applications represent a significant number of its applications "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

By contrast, vagueness in the drafting of a criminal statute is a due process objection that can be raised outside of the First Amendment area. A statute is vague and violates due process if people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). However, in statutes that regulate speech, vagueness is particularly problematic. A vague statute can have a chilling effect on the willingness of people to speak if they think, but can't be certain, that their words might subject them to criminal penalties. In addition, a vague statute can be used by the government to selectively prosecute speakers based on the government's dislike of the content of their speech.

1. BROADRICK v. OKLAHOMA
413 U.S. 601 (1973)

MR. JUSTICE WHITE delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined.

Section 818 of Oklahoma's Merit System of Personnel Administration Act restricts the political activities of the State's classified civil servants in much the same manner that the Hatch Act proscribes partisan political activities of federal employees. Three employees of the Oklahoma Corporation Commission who are subject to the proscriptions of § 818 seek to have two of its paragraphs declared unconstitutional on their face and enjoined because of

asserted vagueness and overbreadth. After a hearing, the District Court upheld the provisions. We noted probable jurisdiction of the appeal. We affirm the judgment of the District Court.

Section 818 was enacted in 1959 when the State first established its Merit System of Personnel Administration. The section serves roughly the same function as the analogous provisions of the other 49 States, and is patterned on § 9 (a) of the Hatch Act [A federal law regulating activities of employees of the United States government.]. Without question, a broad range of political activities and conduct is proscribed by the section. Paragraph six, one of the contested portions, provides that "[n]o employee in the classified service . . . shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose." Paragraph seven, the other challenged paragraph, provides that no such employee "shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office." That paragraph further prohibits such employees from "tak[ing] part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." As a complementary proscription (not challenged in this lawsuit) the first paragraph prohibits any person from "in any way" being "favored or discriminated against with respect to employment in the classified service because of his political . . . opinions or affiliations."

Appellants do not question Oklahoma's right to place even-handed restrictions on the partisan political conduct of state employees. Appellants freely concede that such restrictions serve valid and important state interests, particularly with respect to attracting greater numbers of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from "political extortion." Rather, appellants maintain that however permissible, even commendable, the goals of § 818 may be, its language is unconstitutionally vague and its prohibitions too broad in their sweep, failing to distinguish between conduct that may be proscribed and conduct that must be permitted. For these and other reasons, appellants assert that the sixth and seventh paragraphs of § 818 are void in toto and cannot be enforced against them or anyone else.

We have held today that the Hatch Act is not impermissibly vague. We have little doubt that § 818 is similarly not so vague that "men of common intelligence must necessarily guess at its meaning." Whatever other problems there are with § 818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it proscribes or fails to set out "explicit standards" for those who must apply it.

Shortly before appellants commenced their action in the District Court, they were charged by the State Personnel Board with patent violations of § 818. According to the Board's charges, appellants actively participated in the 1970 re-election campaign of a Corporation Commissioner, appellants' superior. All three allegedly asked other Corporation Commission employees to do campaign work or to give referrals to persons who might help in the campaign. Most of these requests were made at district offices of the Commission's Oil and Gas Conservation Division. Two of the appellants were charged with soliciting money for the campaign from Commission employees and one was also charged with receiving and distributing campaign posters in bulk. In the context of obviously covered conduct, the

statement of Mr. Justice Holmes is particularly appropriate: "if there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns."

Appellants assert that § 818 has been construed as applying to such allegedly protected political expression as the wearing of political buttons or the displaying of bumper stickers. But appellants did not engage in any such activity. They are charged with actively engaging in partisan political activities - including the solicitation of money - among their coworkers for the benefit of their superior. Appellants concede - and correctly so - that § 818 would be constitutional as applied to this type of conduct. They nevertheless maintain that the statute is overbroad and purports to reach protected, as well as unprotected conduct, and must therefore be struck down on its face and held to be incapable of any constitutional application. We do not believe that the overbreadth doctrine may appropriately be invoked in this manner here.

Embedded in the traditional rules governing constitutional adjudication is the 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 closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court.

In the past, the Court has recognized some limited exceptions to these principles, but only because of the most "weighty countervailing policies." One such exception is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves. Another exception has been carved out in the area of the First Amendment.

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. As a corollary, the Court has altered its traditional rules of standing to permit - in the First Amendment area - "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." Litigants, therefore, are permitted to challenge a statute not because their own right of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate "only spoken words." In such cases, it has been the judgment of this Court that 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 and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of

association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights.

The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner.

It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face. But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that 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 that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect - at best a prediction - cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.

Unlike ordinary breach-of-the-peace statutes or other broad regulatory acts, § 818 is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments. But at the same time, § 818 is not a censorial statute, directed at particular groups or viewpoints. The statute, rather, seeks to regulate political activity in an even-handed and neutral manner. As indicated, such statutes have in the past been subject to a less exacting overbreadth scrutiny. Moreover, the fact remains that § 818 regulates a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace or criminal trespass. There is no question that § 818 is valid at least insofar as it forbids classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of national, state, or local committees of political parties, or officers or committee members in partisan political clubs, or candidates for any paid public office; taking part in the

management or affairs of any political party's partisan political campaign; serving as delegates or alternates to caucuses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a partisan effort to get voters to the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate.

These proscriptions are taken directly from the contested paragraphs of § 818, the Rules of the State Personnel Board and its interpretive circular, and the authoritative opinions of the State Attorney General. Without question, the conduct appellants have been charged with falls squarely within these proscriptions.

Appellants assert that § 818 goes much farther than these prohibitions. According to appellants, the statute's prohibitions are not tied tightly enough to partisan political conduct and impermissibly relegate employees to expressing their political views "privately." The State Personnel Board, however, has construed § 818's explicit approval of "private" political expression to include virtually any expression not within the context of active partisan political campaigning, and the State's Attorney General, in plain terms, has interpreted § 818 as prohibiting "clearly partisan political activity" only. Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute. Appellants further point to the Board's interpretive rules purporting to restrict such allegedly protected activities as the wearing of political buttons or the use of bumper stickers. It may be that such restrictions are impermissible and that § 818 may be susceptible of some other improper applications. But, as presently construed, we do not believe that § 818 must be discarded in toto because some persons' arguably protected conduct may or may not be caught or chilled by the statute. Section 818 is not substantially overbroad and is not, therefore, unconstitutional on its face. The judgment of the District Court is affirmed.

2. VIRGINIA v. HICKS
539 U.S. 113 (2003)

SCALIA, J., delivered the opinion for a unanimous Court.

The issue presented in this case is whether the Richmond Redevelopment and Housing Authority's trespass policy is facially invalid under the First Amendment's overbreadth doctrine.

The Richmond Redevelopment and Housing Authority (RRHA) owns and operates a housing development for low-income residents called Whitcomb Court. Until June 23, 1997, the city of Richmond owned the streets within Whitcomb Court. The city council decided, however, to "privatize" these streets in an effort to combat rampant crime and drug dealing in Whitcomb Court--much of it committed and conducted by nonresidents. The council enacted Ordinance No. 97-181-197, which provided, in part:

> §1. That Carmine Street, Bethel Street, Ambrose Street, Deforrest Street, the 2100-2300 Block of Sussex Street and the 2700-2800 Block of Magnolia Street, in Whitcomb Court . . . be and are hereby closed to public use and travel and

> abandoned as streets of the City of Richmond.

The city then conveyed these streets by a recorded deed to the RRHA (which is a political subdivision of the Commonwealth of Virginia). This deed required the RRHA to "'give the appearance that the closed street, particularly at the entrances, are no longer public streets and that they are in fact private streets.'" To this end, the RRHA posted red-and-white signs on each apartment building--and every 100 feet along the streets--of Whitcomb Court, which state: "'NO TRESPASSING[.] PRIVATE PROPERTY[.] YOU ARE NOW ENTERING PRIVATE PROPERTY AND STREETS OWNED BY RRHA. UNAUTHORIZED PERSONS WILL BE SUBJECT TO ARREST AND PROSECUTION. UNAUTHORIZED VEHICLES WILL BE TOWED AT OWNERS EXPENSE.'" The RRHA also enacted a policy authorizing the Richmond police

> to serve notice, either orally or in writing, to any person who is found on Richmond Redevelopment and Housing Authority property when such person is not a resident, employee, or such person cannot demonstrate a legitimate business or social purpose for being on the premises. Such notice shall forbid the person from returning to the property. Finally, Richmond Redevelopment and Housing Authority authorizes Richmond Police Department officers to arrest any person for trespassing after such person, having been duly notified, either stays upon or returns to Richmond Redevelopment and Housing Authority property.

Persons who trespass after being notified not to return are subject to prosecution under Va. Code Ann. §18.2-119 (1996):

> If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof . . . he shall be guilty of a Class 1 misdemeanor.

Respondent Kevin Hicks, a nonresident of Whitcomb Court, has been convicted on two prior occasions of trespassing there and once of damaging property there. Those convictions are not at issue in this case. While the property-damage charge was pending, the RRHA gave Hicks written notice barring him from Whitcomb Court, and Hicks signed this notice in the presence of a police officer. Twice after receiving this notice Hicks asked for permission to return; twice the Whitcomb Court housing manager said "no." That did not stop Hicks; in January 1999 he again trespassed at Whitcomb Court and was arrested and convicted under §18.2-119.

At trial, Hicks maintained that the RRHA's policy limiting access to Whitcomb Court was both unconstitutionally overbroad and void for vagueness.

II

Hicks does not contend that he was engaged in constitutionally protected conduct when arrested; nor does he challenge the validity of the trespass statute under which he was convicted. Instead he claims that the RRHA policy barring him from Whitcomb Court is overbroad under the First Amendment, and cannot be applied to him--or anyone else. The First Amendment doctrine of overbreadth is an exception to our normal rule regarding the

standards for facial challenges. The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), suffices to invalidate all enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."

We have provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech--especially when the overbroad statute imposes criminal sanctions. Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech.

As we noted in *Broadrick*, however, there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law--particularly a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." For there are substantial social costs created by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct. To ensure that these costs do not swallow the social benefits of declaring a law "overbroad," we have insisted that a law's application to protected speech be "substantial," not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications before applying the "strong medicine" of overbreadth invalidation.

Petitioner asks this Court to impose restrictions on "the use of overbreadth standing," limiting the availability of facial overbreadth challenges to those whose own conduct involved some sort of expressive activity. The United States as amicus curiae makes the same proposal and urges that Hicks' facial challenge to the RRHA trespass policy "should not have been entertained." The problem with these proposals is that we are reviewing here the decision of a State Supreme Court; our standing rules limit only the federal courts' jurisdiction over certain claims. "[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law." Whether Virginia's courts should have entertained this overbreadth challenge is entirely a matter of state law.

This Court may, however, review the Virginia Supreme Court's holding that the RRHA policy violates the First Amendment. We may examine, in particular, whether the claimed overbreadth in the RRHA policy is sufficiently "substantial" to produce facial invalidity. These questions involve not standing, but "the determination of [a] First Amendment challenge on the merits."

The Virginia Supreme Court found that the RRHA policy allowed Gloria S. Rogers, the manager of Whitcomb Court, to exercise "unfettered discretion" in determining who may use the RRHA's property. Specifically, the court faulted an "unwritten" rule that persons wishing to hand out flyers on the sidewalks of Whitcomb Court need to obtain Rogers' permission.

This unwritten portion of the RRHA policy, the court concluded, unconstitutionally allows Rogers to "prohibit speech that she finds personally distasteful or offensive."

Hicks, of course, was not arrested for leafleting or demonstrating without permission. He violated the RRHA's written rule that persons who receive a barment notice must not return to RRHA property. The Virginia Supreme Court, based on its objection to the "unwritten" requirement that demonstrators and leafleters obtain advance permission, declared the entire RRHA trespass policy overbroad and void--including the written rule that those who return after receiving a barment notice are subject to arrest. The Virginia Supreme Court could not properly decree that they fall by reason of the overbreadth doctrine, however, unless the trespass policy, taken as a whole, is substantially overbroad judged in relation to its plainly legitimate sweep. The overbreadth claimant bears the burden of demonstrating, "from the text of [the law] and from actual fact," that substantial overbreadth exists.

Hicks has not made such a showing with regard to the RRHA policy taken as a whole--even assuming, arguendo, the unlawfulness of the policy's "unwritten" rule that demonstrating and leafleting at Whitcomb Court require permission from Gloria Rogers. Consider the "no-return" notice served on nonresidents who have no "legitimate business or social purpose" in Whitcomb Court: Hicks has failed to demonstrate that this notice would even be given to anyone engaged in constitutionally protected speech. Gloria Rogers testified that leafleting and demonstrations are permitted at Whitcomb Court, so long as permission is obtained in advance. Thus, "legitimate business or social purpose" evidently includes leafleting and demonstrating; otherwise, Rogers would lack authority to permit those activities on RRHA property. Hicks has failed to demonstrate that any First Amendment activity falls outside the "legitimate business or social purpose[s]" that permit entry. As far as appears, until one receives a barment notice, entering for a First Amendment purpose is not a trespass.

Neither the basis for the barment sanction (the prior trespass) nor its purpose (preventing future trespasses) has anything to do with the First Amendment. Punishing its violation by a person who wishes to engage in free speech no more implicates the First Amendment than would the punishment of a person who has (pursuant to lawful regulation) been banned from a public park after vandalizing it, and who ignores the ban in order to take part in a political demonstration. Here, as there, it is Hicks' nonexpressive conduct--his entry in violation of the notice-barment rule--not his speech, for which he is punished as a trespasser.

Most importantly, both the notice-barment rule and the "legitimate business or social purpose" rule apply to all persons who enter the streets of Whitcomb Court, not just to those who seek to engage in expression. The rules apply to strollers, loiterers, drug dealers, roller skaters, bird watchers, soccer players, and others not engaged in constitutionally protected conduct--a group that would seemingly far outnumber First Amendment speakers. Even assuming invalidity of the "unwritten" rule that requires leafleters and demonstrators to obtain advance permission from Gloria Rogers, Hicks has not shown, based on the record in this case, that the RRHA trespass policy as a whole prohibits a "substantial" amount of protected speech in relation to its many legitimate applications. That is not surprising, since the overbreadth doctrine's concern with "chilling" protected speech "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward

conduct." Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating). Applications of the RRHA policy that violate the First Amendment can still be remedied through as-applied litigation, but the Virginia Supreme Court should not have used the "strong medicine" of overbreadth to invalidate the entire RRHA trespass policy.

For these reasons, we reverse the judgment of the Virginia Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

3. UNITED STATES v. STEVENS

130 S. Ct. 1577 (2010)

Note: Chapter II included the first part of the *Stevens* opinion (pages 48-50) in which the Court rejected the argument that depictions of animal cruelty should be classified as a new category of unprotected speech. Below is the second part of the opinion addressing the issue of overbreadth.

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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.

Stevens challenged § 48 on its face. To succeed in a facial attack in the First Amendment context, 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. Therefore, the constitutionality of § 48 hinges on how broadly it is construed.

"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." We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the statute's ban on a "depiction of animal cruelty" nowhere requires that the depicted conduct be cruel. That text applies to "any . . . depiction" in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." § 48(c)(1). "[M]aimed, mutilated, [and] tortured" convey cruelty, but "wounded" or "killed" do not suggest any such limitation.

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 "wound[ing] or kill[ing]" of "living animal[s]." Livestock regulations are often designed to protect the health of human beings, and hunting and fishing rules (seasons, licensure, bag limits) 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.

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.

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. Compare Brief for National Rifle Association (estimating that hunting magazines account for $ 135 million in annual retail sales) with Brief for United States (suggesting $ 1 million in crush video sales per year, and noting that Stevens earned $ 57,000 from his videos). 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. Some States permit hunting with crossbows, while others forbid it. 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 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 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).

The only thing standing between defendants who sell such depictions and five years in federal prison 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 anything more than "scant social value" is excluded. But the text says "serious" value. We decline to regard as "serious" anything that is not "scant." "Serious" means a good bit more.

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. Many popular videos "have primarily entertainment value" and are designed to "entertai[n] the viewer, marke[t] hunting equipment, or increas[e] the hunting community." The Government offers no principled explanation why these depictions of hunting 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*, 413 U.S. 15 (1973), which excepted from its definition of obscenity any material with "serious literary, artistic, political, or scientific value." According to the Government, incorporation of the *Miller* standard into § 48 is surely enough to answer any First Amendment objection.

In *Miller* we held that "serious" value shields depictions of sex from regulation as obscenity. We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech. *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 "'[w]holly neutral futilities . . . come under the protection of free speech.'" *Cohen* v. *California*, 403 U.S. 15, 25 (1971). 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).

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. 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. The Government's assurance that it will apply § 48 far more restrictively than its language provides is pertinent only as an implicit acknowledgment of the potential constitutional problems with a more natural reading.

Nor can we rely upon the canon of construction that "ambiguous statutory language [should] be construed to avoid serious constitutional doubts." "[T]his Court may impose a limiting

construction on a statute only if it is 'readily susceptible' to such a construction." 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.

JUSTICE ALITO, dissenting.

The Court strikes down in its entirety a valuable statute 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 is unwarranted. Respondent was convicted under § 48 for selling videos depicting dogfights. On appeal, he argued, among other things, that § 48 is unconstitutional as applied to the facts of this case. The Court of Appeals -- incorrectly, in my view -- declined to decide whether § 48 is unconstitutional as applied to respondent's videos and instead reached out to hold that the statute is facially invalid. Today's decision strikes down § 48 using what has been aptly termed the "strong medicine" of the overbreadth doctrine, a potion that generally should be administered only as "a last resort."

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.

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. 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 is overly broad.

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

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.

I turn first to depictions of hunting. 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 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 exempt lawful hunting activities, so the statutory prohibition in § 48(a) may reasonably be interpreted not to reach most hunting depictions.

Second, even if the hunting of wild animals were otherwise covered by § 48(a), I would hold that hunting depictions fall within the exception in § 48(b) for depictions that have "serious" (*i.e.,* not "trifling") "scientific," "educational," or "historical" value.

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, those isolated applications would hardly show that § 48 bans a substantial amount of protected speech.

Although the Court's overbreadth analysis rests primarily on the proposition that § 48 substantially restricts the sale and possession of hunting depictions, the Court cites a few additional examples, including depictions of methods of slaughter and the docking of the tails of dairy cows. Such examples do not show that the statute is substantially overbroad, for two reasons. First, anti-cruelty laws do not ban the sorts of acts depicted in the Court's hypotheticals. Second, nothing in the record suggests that any one has ever created, sold, or possessed for sale a depiction of the slaughter of food animals or of the docking of the tails of dairy cows that would not easily qualify under the exception set out in § 48(b).

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 statute suffers from *substantial* overbreadth -- judged in relation to the statute's "plainly legitimate sweep." As I explain, § 48 has a substantial core of constitutionally permissible applications.

As the Court of Appeals recognized, "the primary conduct that Congress sought to address was the creation, sale, or possession of 'crush videos.'" A sample crush video, which has been lodged with the Clerk, records the following event:

> [A] kitten, secured to the ground, watches and shrieks in pain as a woman thrusts her high-heeled shoe into its body, slams her heel into the kitten's eye socket and mouth loudly fracturing its skull, and stomps repeatedly on the animal's head. The kitten hemorrhages blood, screams blindly in pain, and is ultimately left dead.

It is undisputed that the *conduct* depicted in crush videos may constitutionally be prohibited. But before the enactment of § 48, the underlying conduct depicted in crush videos was nearly impossible to prosecute. These videos, which "often appeal to persons with a very specific sexual fetish," were made in secret, and "the faces of the women inflicting the torture often were not shown, nor could the location or the date of the activity be ascertained from the depiction." Thus, law enforcement authorities often were not able to identify the parties responsible.

In light of the practical problems thwarting prosecution of the creators of crush videos under state animal cruelty laws, Congress concluded that the only way of stopping the underlying criminal conduct was to prohibit the commercial exploitation of the videos of that conduct. And Congress' strategy appears to have been vindicated. We are told that "[b]y 2007, sponsors of § 48 declared the crush video industry dead. Even overseas Websites shut down in the wake of § 48. Now, after the Third Circuit's decision, crush videos are already back online."

The First Amendment protects freedom of speech, but it does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.

The most relevant of our prior decisions is *Ferber*. The Court there held that child pornography is not protected speech, and I believe that *Ferber*'s reasoning dictates a similar conclusion here. In *Ferber,* an important factor was that child pornography involves the commission of a crime that inflicts severe personal injury to the "children who are made to engage in sexual conduct for commercial purposes.'" The *Ferber* Court repeatedly described the production of child pornography as child "abuse," "molestation," or "exploitation." In *Ferber* "[t]he production of the work, not its content, was the target of the statute."

Second, *Ferber* emphasized the fact that these underlying crimes could not be effectively combated without targeting the distribution of child pornography. Third, the *Ferber* Court noted that the value of child pornography "is exceedingly modest, if not *de minimis,"* and that any such value was "overwhelmingly outweigh[ed]" by "the evil to be restricted."

All three of these characteristics are shared by § 48, as applied to crush videos. First, the conduct depicted in crush videos is criminal in every State and the District of Columbia. Thus, any crush video made in this country records the actual commission of a criminal act that inflicts severe physical injury and excruciating pain and ultimately results in death. Those who record the underlying criminal acts are likely to be criminally culpable, either as aiders and abettors or conspirators. And in the tight and secretive market for these videos, some who sell the videos or possess them with the intent to make a profit may be similarly culpable. To the extent that § 48 reaches such persons, it surely does not violate the First Amendment.

Second, the criminal acts shown in crush videos cannot be prevented without targeting the conduct prohibited by § 48 -- the creation, sale, and possession for sale of depictions of animal torture with the intention of realizing a commercial profit. The evidence presented to Congress posed a stark choice: Either ban the commercial exploitation of crush videos or tolerate a continuation of the criminal acts that they record.

Finally, the harm caused by the underlying crimes vastly outweighs any minimal value that the depictions might conceivably be thought to possess. Section 48 reaches only the actual recording of acts of animal torture; the statute does not apply to verbal descriptions or to simulations. And § 48(b) provides an exception for depictions having any "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

It must be acknowledged that preventing the abuse of children is certainly much more important than preventing the torture of the animals used in crush videos. But the Government also has a compelling interest in preventing the torture depicted in crush videos. The animals used in crush videos are living creatures that experience excruciating pain. Our society has long banned such cruelty, which is illegal throughout the country.

Applying the principles set forth in *Ferber*, I would hold that crush videos are not protected by the First Amendment.

Application of the *Ferber* framework also supports the constitutionality of § 48 as applied to depictions of brutal animal fights. (For convenience, I will focus on videos of dogfights, which appear to be the most common type of animal fight videos.)

First, such depictions, like crush videos, record the actual commission of a crime involving deadly violence. Dogfights are illegal in every State and the District of Columbia, and under federal law constitute a felony punishable by imprisonment for up to five years.

Second, Congress had an ample basis for concluding that the crimes depicted in these videos cannot be controlled without targeting the videos. Like crush videos and child pornography, dogfight videos are very often produced as part of a "clandestine industry," and "the need to market the products requires a visible apparatus of distribution." In such circumstances, Congress had reasonable grounds for concluding that it would be "difficult, if not impossible, to halt" the underlying exploitation of dogs by pursuing only those who stage the fights.

The commercial trade in videos of dogfights is "an integral part of the production of such materials." Some dogfighting videos are made "solely for the purpose of selling the video (and not for a live audience)." In addition, those who stage dogfights profit from the gambling revenue they take in from the fights; the videos "encourage [such] gambling activity because

they allow those reluctant to attend actual fights to still bet on the outcome." Moreover, "[v]ideo documentation is vital to the criminal enterprise because it provides *proof* of a dog's fighting prowess." In short, because videos depicting dogfights are essential to the success of dogfighting, the sale of such videos helps to perpetuate the criminal conduct depicted in them.

Third, depictions of dogfights that fall within § 48's reach have by definition no appreciable social value. As noted, § 48(b) exempts depictions having any appreciable social value, and thus the mere inclusion of a depiction of a live fight in a larger work that aims at communicating an idea or a message with a modicum of social value would not run afoul of the statute.

Finally, the harm caused by the underlying criminal acts greatly outweighs any trifling value that the depictions might be thought to possess.

As with crush videos, the statutory ban on commerce in dogfighting videos is also supported by compelling governmental interests in effectively enforcing the Nation's criminal laws and preventing criminals from profiting from their illegal activities.

In sum, § 48 may validly be applied to at least two broad real-world categories of expression covered by the statute: crush videos and dogfighting videos. Thus, the statute has a substantial core of constitutionally permissible applications. Moreover, the record does not show that § 48, properly interpreted, bans a substantial amount of protected speech. *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.

4. COATES v. CITY OF CINCINNATI
402 U.S. 611 (1971)

MR. JUSTICE STEWART delivered the opinion of the Court joined by DOUGLAS, HARLAN, BRENNAN, and MARSHALL, JJ.

A Cincinnati, Ohio, ordinance makes it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." The issue before us is whether this ordinance is unconstitutional on its face.

The appellants were convicted of violating the ordinance, and the convictions were ultimately affirmed by a closely divided vote in the Supreme Court of Ohio, upholding the constitutional validity of the ordinance. The record brought before the reviewing courts tells us no more than that the appellant Coates was a student involved in a demonstration and the other appellants were pickets involved in a labor dispute. For throughout this litigation it has been the appellants' position that the ordinance on its face violates the First and Fourteenth Amendments of the Constitution.

In rejecting this claim and affirming the convictions the Ohio Supreme Court did not give the ordinance any construction at variance with the apparent plain import of its language. The court simply stated:

> The ordinance prohibits, inter alia, conduct . . . annoying to persons passing by.' The word 'annoying' is a widely used and well understood word; it is not necessary to guess its meaning. 'Annoying' is the present participle of the transitive verb 'annoy' which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate.
>
> We conclude that the ordinance 'clearly and precisely delineates its reach in words of common understanding. It is a "precise and narrowly drawn regulatory statute [ordinance] evincing a legislative judgment that certain specific conduct be . . . proscribed.

Beyond this, the only construction put upon the ordinance by the state court was its unexplained conclusion that "the standard of conduct which it specifies is not dependent upon each complainant's sensitivity." But the court did not indicate upon whose sensitivity a violation does depend - the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.

We are thus relegated, at best, to the words of the ordinance itself. If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.

But the vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms. The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is "annoying" because their ideas, their

lifestyle, or their physical appearance is resented by the majority of their fellow citizens.

The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.

MR. JUSTICE BLACK.

This Court has long held that laws so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face. Likewise, laws which broadly forbid conduct or activities which are protected by the Federal Constitution, such as, for instance, the discussion of political matters, are void on their face. On the other hand, laws which plainly forbid conduct which is constitutionally within the power of the State to forbid but also restrict constitutionally protected conduct may be void either on their face or merely as applied in certain instances. As my Brother WHITE states in his opinion (with which I substantially agree), this is one of those numerous cases where the law could be held unconstitutional because it prohibits both conduct which the Constitution safeguards and conduct which the State may constitutionally punish. Thus, the First Amendment which forbids the State to abridge freedom of speech, would invalidate this city ordinance if it were used to punish the making of a political speech, even if that speech were to annoy other persons. In contrast, however, the ordinance could properly be applied to prohibit the gathering of persons in the mouths of alleys to annoy passersby by throwing rocks or by some other conduct not at all connected with speech. It is a matter of no little difficulty to determine when a law can be held void on its face and when such summary action is inappropriate. This difficulty has been aggravated in this case, because the record fails to show in what conduct these defendants had engaged to annoy other people. In my view, a record showing the facts surrounding the conviction is essential to adjudicate the important constitutional issues in this case. I would therefore vacate the judgment and remand the case with instructions that the trial court give both parties an opportunity to supplement the record so that we may determine whether the conduct actually punished is the kind of conduct which it is within the power of the State to punish.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

The claim in this case, in part, is that the Cincinnati ordinance is so vague that it may not constitutionally be applied to any conduct. But the ordinance prohibits persons from assembling with others and "conduct[ing] themselves in a manner annoying to persons passing by . . . ." Any man of average comprehension should know that some kinds of conduct, such as assault or blocking passage on the street, will annoy others and are clearly covered by the "annoying conduct" standard of the ordinance. It would be frivolous to say

that these and many other kinds of conduct are not within the foreseeable reach of the law.

It is possible that a whole range of other acts, defined with unconstitutional imprecision, is forbidden by the ordinance. But as a general rule, when a criminal charge is based on conduct constitutionally subject to proscription and clearly forbidden by a statute, it is no defense that the law would be unconstitutionally vague if applied to other behavior. Such a statute is not vague on its face. It may be vague as applied in some circumstances, but ruling on such a challenge obviously requires knowledge of the conduct with which a defendant is charged.

Our cases, however, recognize a different approach where the statute at issue purports to regulate or proscribe rights of speech or press protected by the First Amendment. Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights.

Even accepting the overbreadth doctrine with respect to statutes clearly reaching speech, the Cincinnati ordinance does not purport to bar or regulate speech as such. It prohibits persons from assembling and "conduct[ing]" themselves in a manner annoying to other persons. Even if the assembled defendants in this case were demonstrating and picketing, we have long recognized that picketing is not solely a communicative endeavor and has aspects which the State is entitled to regulate even though there is incidental impact on speech.

In the case before us, I would deal with the Cincinnati ordinance as we would with the ordinary criminal statute. The ordinance clearly reaches certain conduct but may be illegally vague with respect to other conduct. The statute is not infirm on its face and since we have no information from this record as to what conduct was charged against these defendants, we are in no position to judge the statute as applied. That the ordinance may confer wide discretion in a wide range of circumstances is irrelevant when we may be dealing with conduct at its core.

B. Prior Restraints

Regulation of speech is divided into techniques that prevent speech from occurring at all, called prior restraints, and techniques that take effect after the speech has occurred such as criminal penalties. Generally, there is stricter review of prior restraints than other forms of regulation. There are a number of reasons for the hostility to the use of prior restraints. One is historical. Prior restraints were used in England as far back as the Star Chamber in 1637 followed by the Licensing of the Press Act of 1662. Among other things, the Act was used to prevent the publication of seditious writings, writings that disagreed with the Parliament and the monarch. The attitude of the British government toward the press found its way to the colonies in an attempt to censor the American media by prohibiting newspapers from publishing unfavorable articles about the British government. A second reason for the negative view of prior restraints is that they are a regulatory technique that deprives the

marketplace of ideas of the benefits of the speech in comparison to after the fact punishment which punishes the speaker, but not until after the audience has heard the speech.

The English history of censorship through the use of a licensor who blocked publications before they occurred and, therefore, operated as a system of prior restraints, was very much on the minds of the framers of the First Amendment. It is the one form of government restraint on speech it is clear the framers meant to restrict. Inevitably, whenever a Supreme Court decision analogizes the current case to the English licensing laws, the restriction on speech is struck down. It's even a comparison the Court made in *Citizens United v. FEC*, 558 U.S. 310 (2010), invalidating restrictions on independent campaign spending by corporations: "These onerous restrictions thus function as the equivalent of prior restraints by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit."

Because of this history and the adverse impact of prior restraints, prior restraints are a less favored technique for regulating speech, but not a prohibited one. While prior restraints are best known for silencing criticism of the government, that isn't their only use and therefore courts don't strike down all uses of prior restraints. For example, cities typically require parade organizers to obtain a permit before they are allowed to hold a parade on city streets. Requiring a permit before speech can occur is a form of prior restraint. Such permitting schemes are upheld if the criteria for granting or denying the permit are constitutional because cities have legitimate reasons for needing to know in advance when parades will be held.

1. NEAR v. MINNESOTA
283 U.S. 697 (1931)

CHIEF JUSTICE HUGHES delivered the opinion of the Court, joined by HOLMES, BRANDEIS, STONE, and ROBERTS, JJ.

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." Section one of the Act is as follows:

Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away

(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or

(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical, is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings, orders and judgments provided for in this Act . . . .

In actions brought under (b) above, there shall be available the defense that the truth was

published with good motives and for justifiable ends.

Section two provides that, whenever any such nuisance is committed or exists, the County Attorney of any county where any such periodical is published or circulated may maintain an action to enjoin perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted.

The action, by section three, is to be "governed by the practice and procedure applicable to civil actions for injunctions," and, after trial, the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation, and, "in and by such judgment, such nuisance may be wholly abated."

Under this statute, clause (b), 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 and 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, 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 then holding office, and other persons, as more fully appeared in exhibits annexed to the complaint, consisting of copies of the articles described and constituting 327 pages of the record. While the complaint did not so allege, it appears from the briefs of both parties that Charles G. Davis was a special law enforcement officer employed by a civic organization, that George E. Leach was Mayor of Minneapolis, that Frank W. Brunskill was its Chief of Police, and that Floyd B. Olson was County Attorney.

The articles charged in substance that a Jewish 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. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. 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, and upon the verified complaint, 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."

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, and it was thus held to be valid over the objection that it violated the Fourteenth Amendment of the Constitution of the United States.

Thereupon, the defendant Near answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. 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 issues of the publication in question. 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 "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." Judgment was thereupon entered adjudging that "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. 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 also not an absolute right, and the State may punish its abuse. 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.

It is thus important to note precisely the purpose and effect of the statute as the state court has construed it. First. The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel, but at an existing business which involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication. In the present action, there was no allegation that the matter published was not true. It is alleged that the publication was "malicious." But there is no requirement of proof by the State of malice in fact, as distinguished from malice inferred from the mere publication of the defamatory matter. The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense not of the truth alone, but only that the truth was published with good motives and for justifiable ends.

Second. The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges, by their very nature, create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers.

Third. The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in addition to being true, the matter was published with good motives and for justifiable ends. This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute.

Fourth. The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to

be "malicious, scandalous, and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling. In the present instance, the judgment restrained the defendants from "publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by the law." The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class.

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."

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 previous 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 byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. 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." 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." These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity.

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. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration.That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct.

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 general principle that the constitutional

guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.

The importance of this immunity has not lessened. 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. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege.

In attempted justification of the statute, it is said that it deals not with publication per se, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

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, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) 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. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected.

The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth.

For these reasons we hold the statute, so far as it authorized the proceedings in this action to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. Judgment reversed.

MR. JUSTICE BUTLER, dissenting.

The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized, and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND concur in this opinion.

2. NEW YORK TIMES v. UNITED STATES
403 U.S. 713 (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."[1]

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[1] Professor's Note: The New York Times began to publish parts of a secret Defense Department study known as the Pentagon Papers on June 13, 1971. The Washington Post followed beginning on June 18, 1971. The 7000 page study commissioned by Secretary of Defense Robert McNamara reviewed the development of American foreign policy in Vietnam, including its military and diplomatic aspects. Daniel Ellsberg turned over copies of most of the study to the two newspapers. Ellsberg had worked at both the Defense Department and the State Department and at the time he copied the top-secret study he was working at the RAND Corporation, a think tank. RAND had been provided with two copies of the study and Ellsberg had access to the study as a result of his work for RAND. After the Nixon Administration learned that the newspapers were planning to publish excerpts from the study, it brought two lawsuits to halt publication. The cases very rapidly moved through the judicial system including the district courts and courts of appeal between June 15 and June 23, 1971. The Supreme Court granted certiorari on June 25. The oral argument took place on June 26 and the decision was handed down on June 30. On December 29, 1971 Ellsberg and Anthony Russo, who had helped Ellsberg photocopy the Pentagon Papers, were indicted and charged with, among other things, violations of the Espionage Act of 1917. The charges were eventually dismissed because of

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *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, 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.

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. 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.

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. 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

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misconduct by the Nixon administration in breaking into the office of Ellsberg's psychiatrist to steal his medical records and illegally wiretapping Ellsberg's conversations.

Founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. 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.

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 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," 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*, 283 U.S. 697 (1931).

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. 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 STEWART, with whom JUSTICE WHITE joins, concurring.

The only effective restraint upon executive policy and power in the areas of national defense

and international affairs may lie in an enlightened citizenry -- in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For, without an informed and free press, there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then, under the Constitution, the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is the constitutional duty of the Executive through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly, Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law, as well as its applicability to the facts proved.

But in the cases before us, we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one resolution of the issues before us. I join the judgments of the Court.

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. 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, at least in the absence of express and appropriately limited

congressional authorization for prior restraints in circumstances such as these.

JUSTICE MARSHALL, concurring.

The Government contends that the only issue in these cases is whether, in a suit by the United States, "the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States.'" With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases, there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority to classify documents and information. Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether, in these particular cases, the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. The Government argues that, in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country.

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if, when the Executive Branch has adequate authority granted by Congress to protect "national security," it can choose, instead, to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct, rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression that, from the time of *Near v. Minnesota* we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these

cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government, and, specifically, the effective exercise of certain constitutional powers of the Executive.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts. Why are we in this posture? I suggest we are in this posture because these cases have been conducted in unseemly haste. The prompt setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases, and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public "right to know." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota*. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably, such exceptions may be lurking in these cases and, would have been flushed had they been properly considered in the trial courts, free from frenetic pressures. An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication.

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper, and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time, and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated instanter.

Would it have been unreasonable, since the newspaper could anticipate the Government's objections to release of secret material, to give the Government an opportunity to review the entire collection and determine whether agreement could be reached on publication? With such an approach -- one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press --the newspapers and Government might well have narrowed the area of disagreement as to what was and was not publishable, leaving the

remainder to be resolved in orderly litigation, if necessary. The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issue. If the action of the judges up to now has been correct, that result is sheer happenstance.

Our grant of the writ of certiorari before final judgment in the Times case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals for the Second Circuit. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. I agree generally with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN, but I am not prepared to reach the merits. We all crave speedier judicial processes, but, when judges are pressured, as in these cases, the result is a parody of the judicial function.

JUSTICE HARLAN, with whom CHIEF JUSTICE BURGER and JUSTICE BLACKMUN join, dissenting.

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases. This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable.

The time which has been available to us, to the lower courts, and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues -- as important as any that have arisen during my time on the Court -- should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form.

It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

> "The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers."

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." This safeguard is required in the analogous area of executive claims of privilege for secrets of state. But, in my judgment, the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

> "[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility, and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) (Jackson, J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative. Pending further hearings conducted under the appropriate ground rules, I would continue the restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the status quo long enough to act responsibly in matters of such national importance as those involved here.

JUSTICE BLACKMUN, dissenting.

I join JUSTICE HARLAN in his dissent. I also am in substantial accord with much that JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.

3. SHUTTLESWORTH v. CITY OF BIRMINGHAM
394 U.S. 147 (1969)

JUSTICE STEWART delivered the opinion of the Court, joined by joined by WARREN, C.J. and BLACK, DOUGLAS, BRENNAN, WHITE, and FORTAS, JJ.

The petitioner stands convicted for violating an ordinance of Birmingham, Alabama, making it an offense to participate in any "parade or procession or other public demonstration" without first obtaining a permit from the City Commission. The question before us is whether that conviction can be squared with the Constitution of the United States.

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a

Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four blocks. The purpose of their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear. As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

At the end of four blocks the marchers were stopped by the Birmingham police, and were arrested for violating § 1159 of the General Code of Birmingham. That ordinance reads as follows:

"It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public demonstration on the streets or other public ways of the city, unless a permit therefor has been secured from the commission.

"To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose for which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

"The two preceding paragraphs, however, shall not apply to funeral processions."

The petitioner was convicted for violation of § 1159 and was sentenced to 90 days' imprisonment at hard labor and an additional 48 days at hard labor in default of payment of a $75 fine and $24 costs. We granted certiorari to consider the petitioner's constitutional claims.

There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint

upon the enjoyment of those freedoms."

It is argued, however, that what was involved here was not "pure speech," but the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true. We have emphasized before this that "the First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). "Governmental authorities have the duty and responsibility to keep their streets open and available for movement." *Id.* at 554-55.

But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection. Accordingly, "[a]lthough this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places." *Kunz v. New York*, 340 U.S. 290, 293-94 (1951). Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community.

Chapter X: Public Forum Doctrine

When First Amendment activities take place on government property, the nature of that property is a crucial element in First Amendment analysis. Government property is divided into three types of property: traditional public forums, designated forums, often referred to as limited public forums, and the remainder, which are classified as nonforums. The right to exercise First Amendment rights varies with the way the government property is classified.

The concept of what are now called traditional public forums was first suggested in *Hague v. CIO*, 307 U.S. 496 (1939), a case involving an effort by labor organizers to provide the public in Jersey City, New Jersey with information about the National Labor Relations Act. The application of local ordinances prevented the organizers from distributing leaflets in public parks and on city streets and holding meetings in public places. In its decision finding the city's actions to be a violation of the constitution and finding the ordinances void on their face, the Court stated:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. *Id.* at 515-16 (Roberts, J.).

After recognizing the importance of the use of the streets and parks, the Supreme Court next considered cases in which it confronted the issue of how to distinguish between constitutional and unconstitutional limits on the use of the streets and parks. Over time, it also addressed the issue of access rights to other types of government property. The Court eventually divided government property into three categories: traditional public forums, such as streets, sidewalks, and parks, designated or limited public forums, and nonforums. It also identified the ways in which each of these categories could be regulated as well as how to identify into which category particular government property belonged.

A. Traditional Public Forums

1. UNITED STATES v. GRACE
461 U.S. 171 (1983)

JUSTICE WHITE delivered the opinion of the Court.

In this case we must determine whether 40 U.S.C. § 13k, which prohibits, among other things, the "display [of] any flag, banner, or device designed or adapted to bring into public notice

any party, organization, or movement" in the United States Supreme Court building and on its grounds, violates the First Amendment.

I

In May 1978 appellee Thaddeus Zywicki, standing on the sidewalk in front of the Supreme Court building, distributed leaflets to passerby. The leaflets were reprints of a letter to the editor of the Washington Post from a United States Senator concerning the removal of unfit judges from the bench. A Supreme Court police officer approached Zywicki and told him, accurately, that Title 40 of the United States Code prohibited the distribution of leaflets on the Supreme Court grounds, which includes the sidewalk. Zywicki left.

In January 1980 Zywicki again visited the sidewalk in front of the Court to distribute pamphlets containing information about forthcoming meetings and events concerning "the oppressed peoples of Central America." Zywicki again was approached by a Court police officer and was informed that the distribution of leaflets on the Court grounds was prohibited by law. The officer indicated that Zywicki would be arrested if the leafletting continued. Zywicki left.

Zywicki reappeared in February 1980 on the sidewalk in front of the Court and distributed handbills concerning oppression in Guatemala. Zywicki had consulted with an attorney concerning the legality of his activities and had been informed that the Superior Court for the District of Columbia had construed the statute that prohibited leafletting, 40 U.S.C. § 13k, to prohibit only conduct done with the specific intent to influence, impede, or obstruct the administration of justice. Zywicki again was told by a Court police officer that he would be subject to arrest if he persisted in his leafletting. Zywicki complained that he was being denied a right that others were granted, referring to the newspaper vending machines located on the sidewalk. Nonetheless, Zywicki left the grounds.

Around noon on March 17, 1980, appellee Mary Grace entered upon the sidewalk in front of the Court and began to display a four foot by two and a half foot sign on which was inscribed the verbatim text of the First Amendment. A Court police officer approached Grace and informed her that she would have to go across the street if she wished to display the sign. Grace was informed that Title 40 of the United States Code prohibited her conduct and that if she did not cease she would be arrested. Grace left the grounds.

On May 13, 1980, Zywicki and Grace filed the present suit in the United States District Court for the District of Columbia. They sought an injunction against continued enforcement of 40 U.S.C. § 13k and a declaratory judgment that the statute was unconstitutional on its face. The District Court dismissed the complaint for failure to exhaust administrative remedies. The Court of Appeals determined that the District Court's dismissal was erroneous and went on to strike down § 13k on its face as an unconstitutional restriction on First Amendment rights in a public place. The Government appealed from the Court of Appeals' judgment. We noted probable jurisdiction.

II

Section 13k prohibits two distinct activities: it is unlawful either "to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds," or "to display therein

any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." Each appellee appeared individually on the public sidewalks to engage in expressive activity, and it goes without saying that the threat of arrest to which each appellee was subjected was for violating the prohibition against the display of a "banner or device." Accordingly, our review is limited to the latter portion of the statute. Likewise, the controversy presented by appellees concerned their right to use the public sidewalks surrounding the Court building for the communicative activities they sought to carry out, and we shall address only whether the proscriptions of § 13k are constitutional as applied to the public sidewalks.

Our normal course is first to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." We agree with the United States that the statute covers the particular conduct of Zywicki or Grace and that it is therefore proper to reach the constitutional question involved in this case.

The statutory ban is on the display of a "flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." 40 U.S.C. § 13k. It is undisputed that Grace's picket sign containing the text of the First Amendment falls within the description of a "flag, banner, or device." Although it is less obvious, it is equally uncontested that Zywicki's leaflets fall within the proscription as well.

We also accept the Government's contention, not contested by appellees, that almost any sign or leaflet carrying a communication, including Grace's picket sign and Zywicki's leaflets, would be "designed or adapted to bring into public notice [a] party, organization or movement."

III

There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving "speech" protected by the First Amendment. It is also true that "public places" historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be "public forums." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.

Publicly owned or operated property does not become a "public forum" simply because members of the public are permitted to come and go at will. Although whether the property has been "generally opened to the public" is a factor to consider in determining whether the government has opened its property to the use of the people for communicative purposes, it is not determinative of the question. We have regularly rejected the assertion that people who wish "to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." There is little doubt that in some circumstances the

government may ban the entry on to public property that is not a "public forum" of all persons except those who have legitimate business on the premises. The government, "no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated."

IV

It is argued that the Supreme Court building and grounds fit neatly within the description of nonpublic forum property. Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities. Property is not transformed into "public forum" property merely because the public is permitted to freely enter and leave the grounds at practically all times and the public is admitted to the building during specified hours. Under this view it would be necessary only to determine that the restrictions imposed by § 13k are reasonable in light of the use to which the building and grounds are dedicated and that there is no discrimination on the basis of content. We need not make that judgment at this time, however, because § 13k covers the public sidewalks as well as the building and grounds inside the sidewalks. As will become evident, we hold that § 13k may not be applied to the public sidewalks.

The prohibitions imposed by § 13k technically cover the entire grounds of the Supreme Court as defined in 40 U.S.C. § 13p. That section describes the Court grounds as extending to the curb of each of the four streets enclosing the block on which the building is located. Included within this small geographical area, therefore, are not only the building, the plaza and surrounding promenade, lawn area, and steps, but also the sidewalks. The sidewalks comprising the outer boundaries of the Court grounds are indistinguishable from any other sidewalks in Washington, D.C., and we can discern no reason why they should be treated any differently. Sidewalks, of course, are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property. In this respect, the present case differs from *Greer v. Spock*, 424 U.S. 828 (1976). In *Greer*, the streets and sidewalks at issue were located within an enclosed military reservation, Fort Dix, N.J., and were thus separated from the streets and sidewalks of any municipality. That is not true of the sidewalks surrounding the Court. There is no separation, no fence, and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the Court grounds that they have entered some special type of enclave. In *United States Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 133 (1981), we stated that "Congress . . . may not by its own ipse dixit destroy the 'public forum' status of streets and parks which have historically been public forums. . . ." The inclusion of the public sidewalks within the scope of § 13k's prohibition, however, results in the destruction of public forum status that is at least presumptively impermissible. Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a nonpublic forum parcel of property. The public sidewalks forming the perimeter of the Supreme Court grounds, in our view, are public forums and should be

treated as such for First Amendment purposes.

V

The Government submits that § 13k qualifies as a reasonable time, place, and manner restriction which may be imposed to restrict communicative activities on public forum property such as sidewalks. The argument is that the inquiry should not be confined to the Supreme Court grounds but should focus on "the vicinity of the Supreme Court" or "the public places of Washington, D.C." Viewed in this light, the Government contends that there are sufficient alternative areas within the relevant forum, such as the streets around the Court or the sidewalks across those streets to permit § 13k to be considered a reasonable "place" restriction having only a minimal impact on expressive activity. We are convinced, however, that the section, which totally bans the specified communicative activity on the public sidewalks around the Court grounds, cannot be justified as a reasonable place restriction primarily because it has an insufficient nexus with any of the public interests that may be thought to undergird § 13k. Our reasons for this conclusion will become apparent below, where we decide that § 13k, insofar as its prohibitions reach to the public sidewalks, is unconstitutional because it does not sufficiently serve those public interests that are urged as its justification.

Section 13k was part of an 11-section statute, enacted in 1949, "[r]elating to the policing of the building and grounds of the Supreme Court of the United States." The occasion for its passage was the termination of the practice by District of Columbia authorities of appointing Supreme Court guards as special policemen for the District. This action left the Supreme Court police force without authority to make arrests and enforce the law in the building and on the grounds of the Court. The Act, which was soon forthcoming, was modeled on the legislation relating to the Capitol grounds. It authorizes the appointment by the Marshal of special officers "for duty in connection with the policing of the Supreme Court Building and grounds and adjacent streets." Sections 2-6 of the Act prohibit certain kinds of conduct in the building or grounds. Section 6, codified as 40 U.S.C. § 13k, is at issue here. Other sections authorize the Marshal to issue regulations, provide penalties for violations of the Act or regulations, and authorize the Court's special police to make arrests for violation of the Act's prohibitions or of any law of the United States occurring within the building and grounds and on the adjacent streets. Section 11 of the Act, 13 U.S.C. § 13p, defines the limits of the Court's grounds as including the sidewalks surrounding the building.

Based on its provisions and legislative history, it is fair to say that the purpose of the Act was to provide for the protection of the building and grounds and of the persons and property therein, as well as the maintenance of proper order and decorum. Section 6, 40 U.S.C. § 13k, was one of the provisions apparently designed for these purposes. At least, no special reason was stated for its enactment.

We do not denigrate the necessity to protect persons and property or to maintain proper order and decorum within the Supreme Court grounds, but we do question whether a total ban on carrying a flag, banner, or device on the public sidewalks substantially serves these purposes. There is no suggestion, for example, that appellees' activities in any way obstructed the sidewalks or access to the building, threatened injury to any person or property, or in any way

interfered with the orderly administration of the building or other parts of the grounds. As we have said, the building's perimeter sidewalks are indistinguishable from other public sidewalks in the city that are normally open to the conduct that is at issue here and that § 13k forbids. A total ban on that conduct is no more necessary for the maintenance of peace and tranquility on the public sidewalks surrounding the building than on any other sidewalks in the city. Accordingly, § 13k cannot be justified on this basis.

The United States offers another justification for § 13k that deserves our attention. It is said that the federal courts represent an independent branch of the Government and that their decisionmaking processes are different from those of the other branches. Court decisions are made on the record before them and in accordance with the applicable law. The views of the parties and of others are to be presented by briefs and oral argument. Courts are not subject to lobbying, judges do not entertain visitors in their chambers for the purpose of urging that cases be resolved one way or another, and they do not and should not respond to parades, picketing, or pressure groups. Neither, the Government urges, should it appear to the public that the Supreme Court is subject to outside influence or that picketing or marching, singly or in groups, is an acceptable or proper way of appealing to or influencing the Supreme Court. Hence, we are asked to hold that Congress was quite justified in preventing the conduct in dispute here from occurring on the sidewalks at the edge of the Court grounds.

As was the case with the maintenance of law and order on the Court grounds, we do not discount the importance of this proffered purpose for § 13k. But, again, we are unconvinced that the prohibitions of § 13k that are at issue here sufficiently serve that purpose to sustain its validity insofar as the public sidewalks on the perimeter of the grounds are concerned. Those sidewalks are used by the public like other public sidewalks. There is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from other public sidewalks in the city. We seriously doubt that the public would draw a different inference from a lone picketer carrying a sign on the sidewalks around the building than it would from a similar picket on the sidewalks across the street.

We thus perceive insufficient justification for § 13k's prohibition of carrying signs, banners, or devices on the public sidewalks surrounding the building. We hold that under the First Amendment the section is unconstitutional as applied to those sidewalks.

JUSTICE MARSHALL, concurring in part and dissenting in part.

I would hold 40 U.S.C. § 13k unconstitutional on its face. The statute in no way distinguishes the sidewalks from the rest of the premises, and excising the sidewalks from its purview does not bring it into conformity with the First Amendment. Visitors to this Court do not lose their First Amendment rights at the edge of the sidewalks. As we stated in *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972), "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."

I see no reason why the premises of this Court should be exempt from this basic principle. It would be ironic indeed if an exception to the Constitution were to be recognized for the very

institution that has the chief responsibility for protecting constitutional rights. I would apply to the premises of this Court the same principle that this Court has applied to other public places.

Viewed in this light, 40 U.S.C. § 13k is plainly unconstitutional on its face. The statute is not a reasonable regulation of time, place, and manner for it applies at all times, covers the entire premises, and, as interpreted by the Court, proscribes even the handing out of a leaflet and, presumably, the wearing of a campaign button as well.

Nor does the statute merely forbid conduct that is incompatible with the primary activity being carried out in this Court. The statute is not limited to expressive activities that are intended to interfere with, obstruct, or impede the administration of justice. The statute at issue imposes a blanket prohibition on the "display" of "any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement." The application of the statute does not depend upon whether the flag, banner, or device in any way concerns a case before this Court. So sweeping a prohibition is scarcely necessary to protect the operations of this Court, and in my view cannot constitutionally be applied either to the Court grounds or to the areas inside the Court building that are open to the public.

I would therefore hold the prohibition unconstitutional on its face. We have repeatedly recognized that a statute which sweeps within its ambit a broad range of expression protected by the First Amendment should be struck down on its face. "The existence of such a statute results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). I would not leave visitors to this Court subject to the continuing threat of imprisonment if they dare to exercise their First Amendment rights once inside the sidewalks.

Note: The next case, *United States v. Kokinda*, 497 U.S. 720 (1990), raises the same issue as in *Grace*: when is a sidewalk not a sidewalk for public forum purposes? While the plurality in *Kokinda* concludes that the sidewalk at issue is not a public forum, the dissent disagrees with that assessment. *Kokinda* is included here even though the sidewalk at issue is treated as a nonforum because it raises the same issue as *Grace*, but reaches a different result.

2. UNITED STATES v. KOKINDA
497 U.S. 720 (1990)

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which CHIEF JUSTICE REHNQUIST and JUSTICES WHITE and SCALIA join.

We are called upon in this case to determine whether a United States Postal Service regulation that prohibits "soliciting alms and contributions" on postal premises violates the First Amendment. We hold the regulation valid as applied.

I

The respondents in this case, Marsha B. Kokinda and Kevin E. Pearl, were volunteers for the National Democratic Policy Committee, who set up a table on the sidewalk near the entrance of the Bowie, Maryland, Post Office to solicit contributions, sell books and subscriptions to

the organization's newspaper, and distribute literature addressing a variety of political issues. The postal sidewalk provides the sole means by which customers of the post office may travel from the parking lot to the post office building and lies entirely on Postal Service property. The District Court for the District of Maryland described the layout of the post office as follows:

"The Bowie post office is a freestanding building, with its own sidewalk and parking lot. It is located on a major highway, Route 197. A sidewalk runs along the edge of the highway, separating the post office property from the street. To enter the post office, cars enter a driveway that traverses the public sidewalk and enter a parking lot that surrounds the post office building. Another sidewalk runs adjacent to the building itself, separating the parking lot from the building. Postal patrons must use the sidewalk to enter the post office. The sidewalk belongs to the post office and is used for no other purpose."

During the several hours that respondents were at the post office, postal employees received between 40 and 50 complaints regarding their presence. The Bowie postmaster asked respondents to leave, which they refused to do. Postal inspectors arrested respondents, seizing their table as well as their literature and other belongings. Respondent Kokinda was fined $50 and sentenced to 10 days' imprisonment; respondent Pearl was fined $100 and received a 30-day suspended sentence under that provision.

Respondents appealed their convictions to the District Court, asserting that application of § 232.1(h)(1) violated the First Amendment. The District Court affirmed their convictions, holding that the postal sidewalk was not a public forum and that the Postal Service's ban on solicitation is reasonable. The United States Court of Appeals for the Fourth Circuit reversed.

II

Solicitation is a recognized form of speech protected by the First Amendment. Under our First Amendment jurisprudence, we must determine the level of scrutiny that applies to the regulation of protected speech at issue.

The Government's ownership of property does not automatically open that property to the public. It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when "the governmental function operating . . . [is] not the power to regulate or license, as lawmaker, but, rather, as proprietor, to manage [its] internal operation[s]."

The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business, but its action is valid in these circumstances unless it is unreasonable, or "arbitrary, capricious, or invidious."

"[T]he Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum."

Respondents contend that although the sidewalk is on Postal Service property, because it is not distinguishable from the municipal sidewalk across the parking lot from the post office's

entrance, it must be a traditional public forum and therefore subject to strict scrutiny. This argument is unpersuasive. The mere physical characteristics of the property cannot dictate forum analysis.

The postal sidewalk at issue does not have the characteristics of public sidewalks traditionally open to expressive activity. The municipal sidewalk that runs parallel to the road in this case is a public passageway. The Postal Service's sidewalk is not such a thoroughfare. Rather, it leads only from the parking area to the front door of the post office. The postal sidewalk was constructed solely to provide for the passage of individuals engaged in postal business. The sidewalk leading to the entry of the post office is not the traditional public forum sidewalk.

The postal sidewalk was constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office, not to facilitate the daily commerce and life of the neighborhood or city. The dissent would designate all sidewalks open to the public as public fora. That, however, is not our settled doctrine. The location and purpose of a publicly owned sidewalk is critical to determining whether such a sidewalk constitutes a public forum.

Postal entryways may be open to the public, but that fact alone does not establish that such areas must be treated as traditional public fora under the First Amendment. The Postal Service has not expressly dedicated its sidewalks to any expressive activity. Indeed, postal property is expressly dedicated to only one means of communication: the posting of public notices on designated bulletin boards. No Postal Service regulation opens postal sidewalks to any First Amendment activity. To be sure, individuals or groups have been permitted to leaflet, speak, and picket on postal premises, but a regulation prohibiting disruption, and a practice of allowing some speech activities on postal property do not add up to the dedication of postal property to speech activities. We have held that "the government does not create a public forum by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." Even conceding that the forum here has been dedicated to some First Amendment uses, regulation of the reserved nonpublic uses would still require application of the reasonableness test.

Thus, the regulation at issue must be analyzed under the standards set forth for nonpublic fora: It must be reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." Indeed, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." "The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation."

III

The Government asserts that it is reasonable to restrict access of postal premises to solicitation, because solicitation is inherently disruptive of the Postal Service's business. We agree. "Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a

hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor."

The dissent avoids determining whether the sidewalk is a public forum because it believes the regulation, does not pass muster even under the reasonableness standard applicable to nonpublic fora. In concluding that § 232.1(h) is unreasonable, the dissent relies heavily on the fact that the Service permits other types of potentially disruptive speech on a case-by-case basis. The dissent's criticism seems to be that solicitation is not receiving the same treatment by the Postal Service that other forms of speech receive. If anything, the Service's generous accommodation of some types of speech testifies to its willingness to provide as broad a forum as possible, consistent with its postal mission. The dissent would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to any speech activities at all. In the end, its approach permits it to sidestep the single issue before us: Is the Government's prohibition of solicitation on postal sidewalks unreasonable?

Whether or not the Service permits other forms of speech, which may or may not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business. Solicitation impedes the normal flow of traffic. Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card. As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation. This description of the disruption and delay caused by solicitation rings of "common-sense," which is sufficient to uphold a regulation under reasonableness review.

Clearly, the regulation does not discriminate on the basis of content or viewpoint. Indeed, "nothing suggests the Postal Service intended to discourage one viewpoint and advance another. By excluding all . . . groups from engaging in [solicitation] the Postal Service is not granting to 'one side of a debatable public question . . . a monopoly in expressing its views.'"

This regulation passes constitutional muster under the Court's usual test for reasonableness. We conclude that the Postal Service's regulation of solicitation is reasonable as applied.

JUSTICE KENNEDY, concurring in the judgment.

I agree that the postal regulation reviewed here does not violate the First Amendment. Because my analysis differs in essential respects from that in JUSTICE O'CONNOR's opinion, a separate statement of my views is required.

It is not necessary to make a precise determination whether this sidewalk and others like it are public or nonpublic forums; in my view, the postal regulation at issue meets the traditional standards we have applied to time, place, and manner restrictions of protected expression.

"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.'" The regulation, in its only part challenged here, goes no further than to prohibit personal solicitations on postal property for the immediate payment of money. The regulation, as the United States concedes, expressly permits the respondents and all others to engage in political speech on topics of their choice and to distribute literature soliciting support, including money contributions, provided there is no in-person solicitation for payments on the premises.

The Government here has a significant interest in protecting the integrity of the purposes to which it has dedicated the property, that is, facilitating its customers' postal transactions. Given the Postal Service's past experience with expressive activity on its property, I cannot reject its judgment that inperson solicitation deserves different treatment from alternative forms of solicitation and expression.

The Postal Service regulation, narrow in its purpose, design, and effect, does not discriminate on the basis of content or viewpoint, is narrowly drawn to serve an important governmental interest, and permits respondents to engage in a broad range of activity to express their views, including the solicitation of financial support. For these reasons, I agree with JUSTICE O'CONNOR that the Postal Service regulation is consistent with the protections of the First Amendment, and concur in the judgment of the Court.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join and with whom JUSTICE BLACKMUN joins as to Part I, dissenting.

Today the Court holds that a United States Postal Service regulation prohibiting persons from "soliciting alms and contributions" on postal premises does not violate the First Amendment as applied to members of a political advocacy group who solicited contributions from a sidewalk outside the entrance to a post office. A plurality finds that the sidewalk is not a public forum and that the Postal Service regulation is valid because it is "reasonable." JUSTICE KENNEDY concludes that although the sidewalk might well be a public forum, the regulation is permissible as applied because it is a content-neutral time, place, or manner restriction on protected speech.

Neither of these conclusions is justified. I think it clear that the sidewalk in question is a "public forum" and that the Postal Service regulation does not qualify as a content-neutral time, place, or manner restriction. Moreover, even if I did not regard the sidewalk in question as a public forum, I could not subscribe to the plurality's position that respondents can validly be excluded from the sidewalk, because I believe that the distinction drawn by the postal regulation between solicitation and virtually all other kinds of speech is not a reasonable one. For these reasons, I respectfully dissent.

I

The plurality begins its analysis with the determination that the sidewalk in question is not a "public forum." Our decisions in recent years have identified three categories of forums in which expression might take place on government property: (1) traditional, "quintessential public forums" -- "places which by long tradition or by government fiat have been devoted to assembly and debate," such as "streets and parks"; (2) "limited-purpose" or state created semipublic forums opened "for use by the public as a place for expressive activity," such as university meeting facilities or school board meetings; and (3) nonpublic forums or public property "which is not by tradition or designation a forum for public communication." Ironically, these public forum categories -- originally conceived of as a way of preserving First Amendment rights-- have been used in some of our recent decisions as a means of upholding restrictions on speech. I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand. Indeed, the Court's contemporary use of public forum doctrine has been roundly criticized by commentators.

Today's decision confirms my doubts about the manner in which we have been using public forum analysis. Although the plurality recognizes that public sidewalks are, as a general matter, public forums, the plurality insists, with logic that is both strained and formalistic, that the specific sidewalk at issue is not a public forum. This conclusion is unsupportable. "Streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" "Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression." It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur, whether that speech is critical of government generally, aimed at the governmental agency housed in the building, or focused upon issues unrelated to the government. No doctrinal pigeonholing or multipart test can obscure this evident conclusion.

The plurality maintains that the postal sidewalk is not a traditional public forum because it "was constructed solely to provide for the passage of individuals engaged in postal business" and "leads only from the parking area to the front door of the post office." This reasoning is flawed.

Quintessential examples of a "public forum" are those open spaces -- streets, parks, and sidewalks -- to which the public generally has unconditional access and 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." Public parks, streets, and sidewalks are public forums because open access by all members of the public is integral to their function as central gathering places and arteries of transportation. Public access is not a matter of grace by government officials but rather is inherent in the open nature of the locations. As a result, expressive activity is compatible with the normal use of a public forum and can be accommodated simply by applying the communication-neutral rules used to regulate other, non-speech-related conduct

on the premises. For the most part, on streets and sidewalks, including the single-purpose sidewalk at issue here, communication between citizens can be permitted according to the principle that "one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion."

The wooden distinctions drawn today by the plurality have no basis in our prior cases and, furthermore, are in apparent contradiction to the plurality's admission that "the mere physical characteristics of the property cannot dictate forum analysis." It is irrelevant that the sidewalk at issue may have been constructed only to provide access to the Bowie Post Office. Public sidewalks, parks, and streets have been reserved for public use as forums for speech even though government has not constructed them for expressive purposes. Parks are usually constructed to beautify a city and to provide opportunities for recreation, rather than to afford a forum for soapbox orators or leafleteers; streets are built to facilitate transportation, not to enable protesters to conduct marches; and sidewalks are created with pedestrians in mind, not solicitors. Hence, why the sidewalk was built is not salient.

Nor is it important that the sidewalk runs only between the parking lot and post office entrance. The existence of a public forum does not turn on a particularized factual inquiry into whether a sidewalk serves one building or many or whether a street is a dead end or a major thoroughfare.

The architectural idiosyncrasies of the Bowie Post Office are thus not determinative of the question whether the public area around it constitutes a public forum. Rather, that the walkway at issue is a sidewalk open and accessible to the general public is alone sufficient to identify it as a public forum.

Content-based restrictions on speech occurring in either a public forum or in a limited-purpose public forum are invalid unless they are narrowly drawn to serve a compelling interest. Government "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." I do not think the postal regulation can pass muster under either standard. Although I agree that the Government has an interest in preventing the obstruction of post office entrances and the disruption of postal functions, there is no indication that respondents interfered with postal business in any way.

I agree with the Court of Appeals that the postal regulation is invalid as applied in this case because it "prohibits all solicitation anywhere on postal service property. It sweeps an entire category of expressive activity off a public forum solely in the interest of administrative convenience. It does not attempt to limit nondisruptive solicitation to a time, place, and manner consistent with post office operations; and it does not require that evidence of disruption be shown."

JUSTICE KENNEDY contends that the postal regulation may be upheld as a content-neutral time, place, or manner regulation. But the regulation is not content neutral; indeed, it is tied explicitly to the content of speech. If a person on postal premises says to members of the public, "Please support my political advocacy group," he cannot be punished. If he says,

"Please contribute $10," he is subject to criminal prosecution. His punishment depends on what he says.

II

Even if I did not believe that the sidewalk outside the Bowie Post Office was a public forum, I nevertheless could not agree with the plurality that the postal regulation at issue today is reasonable as applied to respondents. The Postal Service does not subject to the same categorical prohibition many other types of speech presenting the same risk of disruption as solicitation, such as soapbox oratory, pamphleteering, distributing literature for free, or even flag-burning.

This inconsistent treatment renders the prohibition on solicitation unreasonable. The Postal Service undeniably has a legitimate interest in avoiding disruption of its postal facilities and ensuring that its buildings remain accessible to the public. But the Government interest in preventing disruption of post office business or harassment of postal patrons is addressed by the direct prohibitions on such conduct in existing postal rules and the Service has not explained satisfactorily why these provisions are inadequate to deal with disruption caused by solicitation.

III

Some postal patrons may thank the Court for sparing them the inconvenience of having to encounter solicitors with whose views they do not agree. And postal officials can rest assured in the knowledge that they can silence an entire category of expression without having to apply the existing postal regulations governing disruptive conduct or having to craft more narrow time, place, or manner rules. Perhaps only three groups of people will be saddened by today's decision. The first includes solicitors, who, in a farce of the public forum doctrine, will henceforth be permitted at postal locations to solicit the public only from such inhospitable locations as the busy four-lane highway that runs in front of the Bowie Post Office. The next to be disappointed will be those members of the public who would prefer not to be deprived of the views of solicitors at postal locations. The last group, unfortunately, includes all of us who are conscious of the importance of the First Amendment.

3. FORSYTH COUNTY, GEORGIA v. NATIONALIST MOVEMENT

505 U.S. 123 (1992)

JUSTICE BLACKMUN delivered the opinion of the Court, joined by STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ.

In this case, with its emotional overtones, we must decide whether the free speech guarantees of the First and Fourteenth Amendments are violated by an assembly and parade ordinance that permits a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order.

I

Petitioner Forsyth County is a primarily rural Georgia county approximately 30 miles northeast of Atlanta. It has had a troubled racial history. In 1912, in one month, its entire

African-American population, over 1,000 citizens, was driven systematically from the county in the wake of the rape and murder of a white woman and the lynching of her accused assailant. Seventy-five years later, in 1987, the county population remained 99% white.

Spurred by this history, Hosea Williams, an Atlanta city councilman and civil rights personality, proposed a Forsyth County "March Against Fear and Intimidation" for January 17, 1987. Approximately 90 civil rights demonstrators attempted to parade in Cumming, the county seat. The marchers were met by members of the Forsyth County Defense League (an independent affiliate of respondent, The Nationalist Movement), of the Ku Klux Klan, and other Cumming residents. In all, some 400 counterdemonstrators lined the parade route, shouting racial slurs. Eventually, the counterdemonstrators, dramatically outnumbering police officers, forced the parade to a premature halt by throwing rocks and beer bottles.

Williams planned a return march the following weekend. It developed into the largest civil rights demonstration in the South since the 1960's. On January 24, approximately 20,000 marchers joined civil rights leaders, United States Senators, Presidential candidates, and an Assistant United States Attorney General in a parade and rally. The 1,000 counterdemonstrators on the parade route were contained by more than 3,000 state and local police and National Guardsmen. Although there was sporadic rock throwing and 60 counterdemonstrators were arrested, the parade was not interrupted. The demonstration cost over $670,000 in police protection, of which Forsyth County apparently paid a small portion.

"As a direct result" of these two demonstrations, the Forsyth County Board of Commissioners enacted Ordinance 34. The ordinance recites that it is "to provide for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes." Ordinance 34 was amended to provide that every permit applicant "'shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place.'" In addition, the county administrator was empowered to "'adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed.'"

In January 1989, respondent The Nationalist Movement proposed to demonstrate in opposition to the federal holiday commemorating the birthday of Martin Luther King, Jr. In Forsyth County, the Movement sought to "conduct a rally and speeches for one and a half to two hours" on the courthouse steps on a Saturday afternoon. The county imposed a $100 fee. The fee did not include any calculation for expenses incurred by law enforcement authorities, but was based on 10 hours of the county administrator's time in issuing the permit. The county administrator testified that the cost of his time was deliberately undervalued and that he did not charge for the clerical support involved in processing the application.

The Movement did not pay the fee and did not hold the rally. Instead, it instituted this action in the United States District Court for the Northern District of Georgia. We granted certiorari to resolve a conflict among the Courts of Appeals concerning the constitutionality of charging a fee for a speaker in a public forum.

II

Respondent mounts a facial challenge to the Forsyth County ordinance. It is well established that in the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation, even though its application in the case under consideration may be constitutionally unobjectionable. This exception from general standing rules is based on an appreciation that the very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court. Thus, the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.

The Forsyth County ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in "the archetype of a traditional public forum" is a prior restraint on speech. Although there is a "heavy presumption" against the validity of a prior restraint, the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally. Such a scheme, however, must meet certain constitutional requirements. It may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.

Respondent contends that the county ordinance is facially invalid because it does not prescribe adequate standards for the administrator to apply when he sets a permit fee. A government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." To curtail that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." The reasoning is simple: If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted.

In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it. The ordinance can apply to any activity on public property -- from parades, to street corner speeches, to bike races -- and the fee assessed may reflect the county's police and administrative costs. Whether or not, in any given instance, the fee would include any or all of the county's administrative and security expenses is decided by the county administrator.

In this case, according to testimony at the District Court hearing, the administrator based the fee on his own judgment of what would be reasonable. Although the county paid for clerical support and staff as an "expense incident to the administration" of the permit, the administrator testified that he chose in this instance not to include that expense in the fee. The

administrator also attested that he had deliberately kept the fee low by undervaluing the cost of the time he spent processing the application. Even if he had spent more time on the project, he claimed, he would not have charged more. He further testified that, in this instance, he chose not to include any charge for expected security expense.

The administrator also explained that the county had imposed a fee pursuant to a permit on two prior occasions. The year before, the administrator had assessed a fee of $100 for a permit for the Movement. The administrator testified that he charged the same fee the year in question here, although he did not state that the Movement was seeking the same use of county property or that it required the same amount of administrative time to process. The administrator also once charged bike-race organizers $25 to hold a race on county roads, but he did not explain why processing a bike-race permit demanded less administrative time than processing a parade permit or why he had chosen to assess $25 in that instance. At oral argument in this Court, counsel for Forsyth County stated that the administrator had levied a $5 fee on the Girl Scouts for an activity on county property. Finally, the administrator testified that in other cases the county required neither a permit nor a fee for activities in other county facilities or on county land.

Based on the county's implementation and construction of the ordinance, it simply cannot be said that there are any "narrowly drawn, reasonable and definite standards," guiding the hand of the Forsyth County administrator. The decision how much to charge for police protection or administrative time -- or even whether to charge at all -- is left to the whim of the administrator. There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.

The Forsyth County ordinance contains more than the possibility of censorship through uncontrolled discretion. As construed by the county, the ordinance often requires that the fee be based on the content of the speech. The county envisions that the administrator, in appropriate instances, will assess a fee to cover "the cost of necessary and reasonable protection of persons participating in or observing said . . . activity." In order to assess accurately the cost of security for parade participants, the administrator "'must necessarily examine the content of the message that is conveyed,'" estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit.

Although petitioner agrees that the cost of policing relates to content, it contends that the ordinance is content neutral because it is aimed only at a secondary effect -- the cost of maintaining public order. It is clear, however, that, in this case, it cannot be said that the fee's justification "'has nothing to do with content.'"

The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation. Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.

CHIEF JUSTICE REHNQUIST, with whom WHITE, SCALIA, and THOMAS, JJ., join, dissenting.

In *Cox v. New Hampshire*, 312 U.S. 569 (1941), we confronted a state statute which required payment of a license fee of up to $300 to local governments for the right to parade in the public streets. The Supreme Court of New Hampshire had construed the provision as requiring that the amount of the fee be adjusted based on the size of the parade, as the fee "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession." Under the state court's construction, the fee provision was "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." This Court, in a unanimous opinion by Chief Justice Hughes, upheld the statute, saying: "There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated."

I believe that the decision in *Cox* squarely controls the disposition of the question presented in this case, and I therefore would explicitly hold that the Constitution does not limit a parade license fee to a nominal amount.

Instead of deciding the question on which we granted certiorari, the Court concludes that the county ordinance is facially unconstitutional because it places too much discretion in the hands of the county administrator and forces parade participants to pay for the cost of controlling those who might oppose their speech. But the lower courts did not pass on these issues. The Court unnecessarily reaches out to interpret the ordinance on its own at this stage, even though there are no lower court factual findings on the scope or administration of the ordinance. Because there are no factual findings, I would not decide at this point whether the ordinance fails for lack of adequate standards to guide discretion or for incorporation of a "heckler's veto," but would remand the case to the lower courts to consider these issues.

B. Designated Public Forums and Nonforums

1. LEHMAN v. CITY OF SHAKER HEIGHTS
418 U.S. 298 (1974)

JUSTICE BLACKMUN announced the judgment of the Court and an opinion joined by BURGER, C.J. and WHITE and REHNQUIST, JJ.

This case presents the question whether a city which operates a public rapid transit system and

sells advertising space for car cards on its vehicles is required by the First and Fourteenth Amendments to accept paid political advertising on behalf of a candidate for public office.

In 1970, petitioner Harry J. Lehman was a candidate for the office of State Representative to the Ohio General Assembly for District 56. The district includes the city of Shaker Heights. On July 3, 1970, petitioner sought to promote his candidacy by purchasing car card space on the Shaker Heights Rapid Transit System for the months of August, September, and October. The general election was scheduled for November 3. Petitioner's proposed copy contained his picture and read:

"HARRY J. LEHMAN IS OLD-FASHIONED! ABOUT HONESTY, INTEGRITY AND GOOD GOVERNMENT
"State Representative - District 56 [X] Harry J. Lehman."

Advertising space on the city's transit system is managed by respondent Metromedia, Inc., as exclusive agent under contract with the city. The agreement between the city and Metromedia provides:

> "15. . . . The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in, upon or about any other additional and further space granted hereunder."

When petitioner applied for space, he was informed by Metromedia that, although space was then available, the management agreement with the city did not permit political advertising. The system, however, accepted ads from cigarette companies, banks, savings and loan associations, liquor companies, retail and service establishments, churches, and civic and public-service oriented groups. There was uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system, pursuant to city council action, had not accepted or permitted any political or public issue advertising on its vehicles.

When petitioner did not succeed in his effort to have his copy accepted, he sought declaratory and injunctive relief in the state courts of Ohio without success. We granted certiorari in order to consider the important First and Fourteenth Amendment question the case presented.

It is urged that the car cards here constitute a public forum protected by the First Amendment, and that there is a guarantee of nondiscriminatory access to such publicly owned and controlled areas of communication "regardless of the primary purpose for which the area is dedicated."

We disagree. In *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), Mr. Justice Brandeis, in speaking for a unanimous Court, recognized that "there is a difference which justifies the classification between display advertising and that in periodicals or newspapers." In *Packer* the Court upheld a Utah statute that made it a misdemeanor to advertise cigarettes on "'any bill board, street car sign, street car, placard,'" but exempted dealers' signs on their places of business and cigarette advertising "'in any newspaper, magazine, or periodical.'" *Id.* at 107. The Court found no equal protection violation. It reasoned that viewers of billboards and streetcar signs had no "choice or volition" to observe such advertising and had the message "thrust upon them by all the arts and devices that skill can produce. . . . The radio can be

turned off, but not so the billboard or street car placard." *Id.* at 110. "The streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (DOUGLAS, J., dissenting). In such situations, "[t]he legislature may recognize degrees of evil and adapt its legislation accordingly."

These situations are different from the traditional settings where First Amendment values inalterably prevail. Lord Dunedin, in *M'Ara v. Magistrates of Edinburgh*, 1913. Sess. Cas. 1059, 1073-1074, said: "[T]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place." Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question.

Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. In making these choices, this Court has held that a public utility "will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety." *Public Utilities Comm'n v. Pollak*, 343 U.S. at 464-65.

Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. Here, the city has decided that "[p]urveyors of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers." This decision is little different from deciding to impose a 10-, 25-, or 35-cent fare, or from changing schedules or the location of bus stops. Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of

favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.

MR. JUSTICE DOUGLAS, concurring in the judgment.

If the streetcar or bus were a forum for communication akin to that of streets or public parks, considerable problems would be presented. But a streetcar or bus is plainly not a park or sidewalk or other meeting place for discussion. It is only a way to get to work or back home. The fact that it is owned and operated by the city does not without more make it a forum.

In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

Buses are not recreational vehicles used for Sunday chautauquas as a public park might be used on holidays for such a purpose; they are a practical necessity in our urban centers. I have already stated this view in my dissent in *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 469 (1952), involving the challenge by some passengers to the practice of broadcasting radio programs over loudspeakers in buses and streetcars: "One who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and to try not to listen." There is no difference when the message is visual. In each the viewer or listener is captive.

Since I do not believe that petitioner has any constitutional right to spread his message before this captive audience, I concur in the Court's judgment.

JUSTICE BRENNAN, with whom JUSTICES STEWART, MARSHALL, and POWELL join, dissenting.

In my view, the city created a forum for the dissemination of information and expression of ideas when it accepted and displayed commercial and public service advertisements on its rapid transit vehicles. Having opened a forum for communication, the city is barred by the First and Fourteenth Amendments from discriminating among forum users solely on the basis of message content.

The message Lehman sought to convey concerning his candidacy for public office was unquestionably protected by the First Amendment. "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The fact that the message is proposed as a paid advertisement does not

diminish the impregnable shelter afforded by the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

Of course, not even the right of political self-expression is completely unfettered. Accordingly, we have repeatedly recognized the constitutionality of reasonable "time, place and manner" regulations which are applied in an evenhanded fashion.

Focusing upon the propriety of regulating "place," the city of Shaker Heights attempts to justify its ban against political advertising by arguing that the interior advertising space of a transit car is an inappropriate forum for political expression and debate. To be sure, there are some public places which are so clearly committed to other purposes that their use as public forums for communication is anomalous. For example, "[t]here may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one . . . would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put." The determination of whether a particular type of public property or facility constitutes a "public forum" requires the Court to strike a balance between the competing interests of the government, on the one hand, and the speaker and his audience, on the other. Thus, the Court must assess the importance of the primary use to which the public property or facility is committed and the extent to which that use will be disrupted if access for free expression is permitted.

Applying these principles, the Court has long recognized the public's right of access to public streets and parks for expressive activity. More recently, the Court has added state capitol grounds to the list of public forums compatible with free speech, free assembly, and the freedom to petition for redress of grievances, but denied similar status to the curtilage of a jailhouse, on the ground that jails are built for security and thus need not be opened to the general public, *Adderley v. Florida*, 385 U.S. 39 (1966).

In the circumstances of this case, however, we need not decide whether public transit cars must be made available as forums for the exercise of First Amendment rights. By accepting commercial and public service advertising, the city effectively waived any argument that advertising in its transit cars is incompatible with the rapid transit system's primary function of providing transportation. A forum for communication was voluntarily established when the city installed the physical facilities for the advertisements and, by contract with Metromedia, created the necessary administrative machinery for regulating access to that forum.

The plurality opinion, however, contends that as long as the city limits its advertising space to "innocuous and less controversial commercial and service oriented advertising," no First Amendment forum is created. I find no merit in that position. Certainly, noncommercial public service advertisements convey messages of public concern and are clearly protected by the First Amendment. And while it is possible that commercial advertising may be accorded less First Amendment protection than speech concerning political and social issues, it is "speech" nonetheless, often communicating information and ideas found by many persons to

be controversial. There can be no question that commercial advertisements, when skillfully employed, are powerful vehicles for the exaltation of commercial values. Once such messages have been accepted and displayed, the existence of a forum for communication cannot be gainsaid. To hold otherwise, and thus sanction the city's preference for bland commercialism and noncontroversial public service messages over "uninhibited, robust, and wide-open" debate on public issues, would reverse the traditional priorities of the First Amendment.

Once a public forum for communication has been established, both free speech and equal protection principles prohibit discrimination based solely upon subject matter or content. *See, e.g.*, *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

"Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.* at 96.

That the discrimination is among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden.

To insure that subject matter or content is not the sole basis for discrimination among forum users, all selective exclusions from a public forum must be closely scrutinized and countenanced only in cases where the government makes a clear showing that its action was taken pursuant to neutral "time, place and manner" regulations, narrowly tailored to protect the government's substantial interest in preserving the viability and utility of the forum itself. The city has failed to discharge that heavy burden in the present case.

The Court's special vigilance is triggered in this case because of the city's undisputed ban against political advertising in its transit cars. Commercial and public service advertisements are routinely accepted for display, while political messages are absolutely prohibited. Few examples are required to illustrate the scope of the city's policy and practice. For instance, a commercial advertisement peddling snowmobiles would be accepted, while a counter-advertisement calling upon the public to support legislation controlling the environmental destruction and noise pollution caused by snowmobiles would be rejected. Alternatively, a public service ad by the League of Women Voters would be permitted, advertising the existence of an upcoming election and imploring citizens to vote, but a candidate, such as Lehman, would be barred from informing the public about his candidacy, qualifications for office, or position on particular issues. These, and other examples, make perfectly clear that the selective exclusion of political advertising is not the product of evenhanded application of neutral "time, place, and manner" regulations. Rather, the operative - and constitutionally impermissible - distinction is the message on the sign. That conclusion

is not dispelled by any of the city's justifications for selectively excluding political advertising.

The city contends that its ban against political advertising is bottomed upon its solicitous regard for "captive riders" of the rapid transit system, who are "forced to endure the advertising thrust upon [them]." Whatever merit the city's argument might have in other contexts, it has a hollow ring in the present case, where the city has voluntarily opened its rapid transit system as a forum for communication.

The line between ideological and nonideological speech is impossible to draw with accuracy. By accepting commercial and public service advertisements, the city opened the door to "sometimes controversial or unsettling speech" and determined that such speech does not unduly interfere with the rapid transit system's primary purpose of transporting passengers. In the eyes of many passengers, certain commercial or public service messages are as profoundly disturbing as some political advertisements might be to other passengers.

Moreover, even if it were possible to draw a manageable line between controversial and noncontroversial messages, the city's practice of censorship for the benefit of "captive audiences" still would not be justified. This is not a case where an unwilling or unsuspecting rapid transit rider is powerless to avoid messages he deems unsettling. The advertisements accepted by the city and Metromedia are not broadcast over loudspeakers in the transit cars. Rather, all advertisements accepted for display are in written form. Transit passengers are not forced or compelled to read any of the messages. Should passengers chance to glance at advertisements they find offensive, they can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v. California*, 403 U.S. 15, 21 (1971).

The city's remaining justification is equally unpersuasive. The city argues that acceptance of "political advertisements would suggest, on the one hand, some political favoritism is being granted to candidates who advertise, or, on the other hand, that the candidate so advertised is being supported or promoted by the government of the City." Clearly, such ephemeral concerns do not provide the city with carte blanche authority to exclude an entire category of speech from a public forum. "The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board." The city has introduced no evidence demonstrating that its rapid transit passengers would naively think otherwise.

Moreover, neutral regulations, which do not distinguish among advertisements on the basis of subject matter, can be narrowly tailored to allay the city's fears. The impression of city endorsement can be dispelled by requiring disclaimers to appear prominently on the face of every advertisement. And while problems of accommodating all potential advertisers may be vexing at times, the appearance of favoritism can be avoided by the evenhanded regulation of time, place, and manner for all advertising, irrespective of subject matter.

2. PERRY EDUCATION ASSN. v. PERRY LOCAL EDUCATORS' ASSN.

460 U.S. 37 (1983)

JUSTICE WHITE delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined.

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 mail-boxes 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" - a term of art defined by Indiana law to mean "any organization which has school employees as members and one of whose primary purposes is representing school employees in dealing with their school employer." The PEA contract with these provisions was renewed in 1980 and is presently in force.

The exclusive-access policy applies only to use of the mail-boxes 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 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 acknowledged that PEA had "legal duties to the teachers that PLEA does not have" but reasoned that "[w]ithout 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." PEA now seeks review of this judgment.

III

The primary question presented is whether the First 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, 506 (1969). The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school and on sidewalks outside, *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). 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. "[N]owhere [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." *Grayned v. City of Rockford*, 408 U.S. 104, 117-18 (1972). 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.

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly

drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981).

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. 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." *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. at 129. In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* at 129-30.

The school mail facilities at issue here fall within this third category. The Court of Appeals recognized that Perry School District's interschool mail system is not a traditional public forum: "We do not hold that a school's internal mail system is a public forum in the sense that a school board may not close it to all but official business if it chooses." 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 the 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 *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (opinion of BLACKMUN, J.), a plurality of the Court concluded that a city transit system's rental of space in its vehicles for commercial advertising did not require it to accept partisan political advertising.

Moreover, even if we assume that by granting access to the Cub Scouts, YMCA's, 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.

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 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 inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

The differential access provided PEA and PLEA is reasonable because it is wholly consistent with the District's legitimate interest in "preserv[ing] the property . . . for the use to which it is lawfully dedicated." Use of school mail facilities enables PEA to perform effectively its obligations as exclusive representative of all Perry Township teachers. Conversely, PLEA

does not have any official responsibility in connection with the School District and need not be entitled to the same rights of access to school mailboxes. We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector. We have previously noted that the "designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 221 (1977). Moreover, exclusion of the rival union may reasonably be considered a means of insuring labor peace within the schools. The policy "serves to prevent the District's schools from becoming a battlefield for inter-union squabbles."

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.

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 nonpublic forum cases where we have upheld restrictions on access. *See, e.g.*, *Pell v. Procunier*, 417 U.S. 817, 827 -28 (1974) (prison inmates may communicate with media by mail and through visitors).

IV

When speakers and subjects are similarly situated, the State may not pick and choose. Conversely on government property that has not been made a public forum, not all speech is equally situated, and the State may draw distinctions which relate to the special purpose for which the property is used. As we have explained above, for a school mail facility, the difference in status between the exclusive bargaining representative and its rival is such a distinction. The judgment of the Court of Appeals is Reversed.

JUSTICE BRENNAN, with whom MARSHALL, POWELL, and STEVENS, JJ., join, dissenting.

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

I

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.

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. 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.

We have invoked the prohibition against content discrimination to invalidate government restrictions on access to public forums. We also have relied on this prohibition to strike down restrictions on access to a limited public forum. Finally, we have applied the doctrine of content neutrality to government regulation of protected speech in cases in which no restriction of access to public property was involved.

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*, 418 U.S. 298 (1974), in *Greer v. Spock*, 424 U.S. 828 (1976), and in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977). 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. 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.

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. This prohibition is implicit in the *Mosley* line of cases and in those cases in which we have approved content-based restrictions on access to government property that is not a public forum. 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."

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 "[i]mplicit 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, "[t]hese 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.

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

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 "[t]he access policy adopted by the Perry schools 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. In this light, the policy can survive only if the petitioner can justify it.

III

In assessing the validity of the exclusive-access policy, the Court of Appeals subjected it to rigorous scrutiny. The court pursued this course after a determination that "no case has applied any but the most exacting scrutiny to a content or speaker restriction that substantially tended to favor the advocacy of one point of view on a given issue." The Court of Appeals' analysis is persuasive. In light of the fact that viewpoint discrimination implicates core First Amendment values, the exclusive-access policy can be sustained "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."

The petitioner attempts to justify the exclusive-access provision based on its status as the exclusive bargaining representative for the teachers and on the State's interest in efficient communication between collective-bargaining representatives and the members of the unit. The petitioner's status and the State's interest in efficient communication are important

considerations. They are not sufficient, however, to sustain the exclusive-access policy.

As the Court of Appeals pointed out, the exclusive-access policy is both "overinclusive and underinclusive" as a means of serving the State's interest in the efficient discharge of the petitioner's legal duties to the teachers. The policy is overinclusive because it does not strictly limit the petitioner's use of the mail system to performance of its special legal duties and underinclusive because the Board permits outside organizations with no special duties to the teachers, or to the students, to use the system. The Court of Appeals also suggested that even if the Board had attempted to tailor the policy more carefully by denying outside groups access to the system and by expressly limiting the petitioner's use of the system to messages relating to its official duties, "the fit would still be questionable, for it might be difficult - both in practice and in principle - effectively to separate 'necessary' communications from propaganda." The Court of Appeals was justly concerned with this problem, because the scope of the petitioner's "legal duties" might be difficult, if not impossible, to define with precision.

Putting aside the difficulties with the fit between this policy and the asserted interests, the policy is invalid "because it furthers no discernible state interest." While the Board may have a legitimate interest in granting the petitioner access to the system, it has no legitimate interest in making that access exclusive by denying access to the respondents. As the Court of Appeals stated: "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." In this case, for the reasons discussed below, there is no independent reason for denying access to the respondents.

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

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

Because the grant to the petitioner of exclusive access to the internal school mail system amounts to viewpoint discrimination that infringes the respondents' First Amendment rights and because the petitioner has failed to show that the policy furthers any substantial state interest, the policy must be invalidated as violative of the First Amendment.

IV

In order to secure the First Amendment's guarantee of freedom of speech and to prevent

distortions of "the market-place of ideas," see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), governments generally are prohibited from discriminating among viewpoints on issues within the realm of protected speech. In this case the Board has infringed the respondents' First Amendment rights by granting exclusive access to an effective channel of communication to the petitioner and denying such access to the respondents. In view of the petitioner's failure to establish even a substantial state interest that is advanced by the exclusive-access policy, the policy must be held to be constitutionally infirm.

3. CORNELIUS v. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
473 U.S. 788 (1985)

JUSTICE O'CONNOR delivered the opinion of the Court, in which BURGER, C.J., and WHITE and REHNQUIST JJ., joined.

This case requires us to decide whether the Federal Government violates the First Amendment when it excludes legal defense and political advocacy organizations from participation in the Combined Federal Campaign (CFC or Campaign), a charity drive aimed at federal employees.

I

The CFC is an annual charitable fundraising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees. At all times relevant to this litigation, participating organizations confined their fundraising activities to a 30-word statement submitted by them for inclusion in the Campaign literature. Volunteer federal employees distribute to their co-workers literature describing the Campaign and the participants along with pledge cards. Contributions may take the form of either a payroll deduction or a lump-sum payment made to a designated agency or to the general Campaign fund. Undesignated contributions are distributed on the local level by a private umbrella organization to certain participating organizations. Designated funds are paid directly to the specified recipient. Through the CFC, the Government employees contribute in excess of $100 million to charitable organizations each year.

The CFC is a relatively recent development. Prior to 1957, charitable solicitation in the federal workplace occurred on an ad hoc basis. Federal managers received requests from dozens of organizations seeking endorsements and the right to solicit contributions from federal employees at their worksites. Eventually, the increasing number of entities seeking access to federal buildings and the multiplicity of appeals disrupted the work environment and confused employees who were unfamiliar with the groups seeking contributions.

In 1957, President Eisenhower established the forerunner of the Combined Federal Campaign to bring order to the solicitation process and to ensure truly voluntary giving by federal employees. One of the principal goals of the plan was to minimize the disturbance of federal employees while on duty.

Four years after this initial effort, President Kennedy abolished the advisory committee and ordered the Chairman of the Civil Service Commission to oversee fundraising by "national voluntary health and welfare agencies and such other national voluntary agencies as may be

appropriate" in the solicitation of contributions from all federal employees. Only tax-exempt, nonprofit charitable organizations that were supported by contributions from the public and that provided direct health and welfare services to individuals were eligible to participate in the CFC.

Respondents in this case are the NAACP Legal Defense and Educational Fund, Inc., the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal Defense and Education Fund, the Indian Law Resource Center, the Lawyers' Committee for Civil Rights under Law, and the Natural Resources Defense Council. Each of the respondents attempts to influence public policy through one or more of the following means: political activity, advocacy, lobbying, or litigation on behalf of others.

President Reagan took several steps to restore the CFC to what he determined to be its original purpose. In 1982, the President issued Executive Order No. 12353 to replace the 1961 Executive Order which had established the CFC. The new Order retained the original limitation to "national voluntary health and welfare agencies and such other national voluntary agencies as may be appropriate," and delegated to the Director of the Office of Personnel Management the authority to establish criteria for determining appropriateness. Shortly thereafter, the President amended Executive Order No. 12353 to specify the purposes of the CFC and to identify groups whose participation would be consistent with those purposes. Exec. Order No. 12404 (1984). The Order limited participation to "voluntary, charitable, health and welfare agencies that provide or support direct health and welfare services to individuals or their families," and specifically excluded those "[agencies] that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying, or litigation on behalf of parties other than themselves."

Respondents brought this action challenging their threatened exclusion under the new Executive Order. They argued that the denial of the right to seek designated funds violates their First Amendment right to solicit charitable contributions.

II

The issue presented is whether respondents have a First Amendment right to solicit contributions that was violated by their exclusion from the CFC. To resolve this issue we must first decide whether solicitation in the context of the CFC is speech protected by the First Amendment, for, if it is not, we need go no further. Assuming that such solicitation is protected speech, we must identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic. Finally, we must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard. Applying this analysis, we find that respondents' solicitation is protected speech occurring in the context of a nonpublic forum and that the Government's reasons for excluding respondents from the CFC appear, at least facially, to satisfy the reasonableness standard. We express no opinion on the question whether petitioner's explanation is merely a pretext for viewpoint discrimination. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Charitable solicitation of funds has been recognized by this Court as a form of protected

speech. Notwithstanding the significant distinctions between inperson solicitation and solicitation in the abbreviated context of the CFC, we find that the latter deserves First Amendment protection. The brief statements in the CFC literature directly advance the speaker's interest in informing readers about its existence and its goals. Moreover, an employee's contribution in response to a request for funds functions as a general expression of support for the recipient and its views. Although Government restrictions on the length and content of the request are relevant to ascertaining the Government's intent as to the nature of the forum created, they do not negate the finding that the request implicates interests protected by the First Amendment.

The conclusion that the solicitation which occurs in the CFC is protected speech merely begins our inquiry. Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities. Recognizing that the Government, "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," *Greer v. Spock*, 424 U.S. 828, 836 (1976), the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Similarly, when the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest. Access to a nonpublic forum, however, can be restricted as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."

To determine whether the First Amendment permits the Government to exclude respondents from the CFC, we must first decide whether the forum consists of the federal workplace, as petitioner contends, or the CFC, as respondents maintain. Having defined the relevant forum, we must then determine whether it is public or nonpublic in nature.

We agree with respondents that the relevant forum for our purposes is the CFC. In defining the forum we have focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property. For example, *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), examined the access sought by the speaker and defined the forum as a school's internal mail system and the teachers' mailboxes, notwithstanding that an "internal mail system" lacks a physical situs. Here, as in *Perry Education Assn.*, respondents seek access to a particular means of communication. Consistent with the approach taken in prior cases, we find that the CFC, rather than the federal

workplace, is the forum.

Having identified the forum as the CFC, we must decide whether it is nonpublic or public in nature. The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. Accordingly, the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), we found that a state university that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use. The policy evidenced a clear intent to create a public forum. Additionally, we noted that a university campus, at least as to its students, possesses many of the characteristics of a traditional public forum. Similarly, the Court found a public forum where a municipal auditorium and a city-leased theater were designed for and dedicated to expressive activities. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

Not every instrumentality used for communication, however, is a traditional public forum or a public forum by designation. We will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. In *Perry Education Assn.*, we found that the School District's internal mail system was not a public forum. In contrast to the general access policy in *Widmar*, school board policy did not grant general access to the school mail system. The practice was to require permission from the individual school principal before access to the system to communicate with teachers was granted. Similarly, the evidence in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), revealed that the city intended to limit access to the advertising spaces on city transit buses. In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum. Accordingly, we have held that military reservations and jailhouse grounds do not constitute public fora.

Here the parties agree that neither the CFC nor the federal workplace is a traditional public forum. Respondents argue, however, that the Government created a limited public forum for use by all charitable organizations to solicit funds from federal employees. Petitioner contends, and we agree, that neither its practice nor its policy is consistent with an intent to designate the CFC as a public forum open to all tax-exempt organizations. In 1980, an estimated 850,000 organizations qualified for tax-exempt status. In contrast, only 237 organizations participated in the 1981 CFC of the National Capital Area. The Government's consistent policy has been to limit participation in the CFC to "appropriate" voluntary agencies and to require agencies seeking admission to obtain permission from federal and local Campaign officials. Although the record does not show how many organizations have been denied permission throughout the 24-year history of the CFC, there is no evidence suggesting that the granting of the requisite permission is merely ministerial. Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a

public forum.

Nor does the history of the CFC support a finding that the Government was motivated by an affirmative desire to provide an open forum for charitable solicitation in the federal workplace when it began the Campaign. The historical background indicates that the Campaign was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation activities by lessening the amount of expressive activity occurring on federal property. The Government did not create the CFC for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes.

In light of the Government policy in creating the CFC and its practice in limiting access, we conclude that the CFC is a nonpublic forum.

Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Petitioner maintains that the purpose of the CFC is to provide a means for traditional health and welfare charities to solicit contributions in the federal workplace, while at the same time maximizing private support of social programs that would otherwise have to be supported by Government funds and minimizing costs to the Federal Government by controlling the time that federal employees expend on the Campaign. Petitioner posits that excluding agencies that attempt to influence the outcome of political elections or the determination of public policy is reasonable in light of this purpose. First, petitioner contends that there is likely to be a general consensus among employees that traditional health and welfare charities are worthwhile, as compared with the more diverse views concerning the goals of organizations like respondents. Limiting participation to widely accepted groups is likely to contribute significantly to employees' acceptance of the Campaign and consequently to its ultimate success. In addition, because the CFC is conducted largely through the efforts of federal employees during their working hours, any controversy surrounding the CFC would produce unwelcome disruption. Finally, the President determined that agencies seeking to affect the outcome of elections or the determination of public policy should be denied access to the CFC in order to avoid the reality and the appearance of Government favoritism or entanglement with particular viewpoints. In such circumstances, petitioner contends that the decision to deny access to such groups was reasonable.

In respondents' view, the reasonableness standard is satisfied only when there is some basic incompatibility between the communication at issue and the principal activity occurring on the Government property. Respondents contend that the purpose of the CFC is to permit solicitation by groups that provide health and welfare services. By permitting such solicitation to take place in the federal workplace, respondents maintain, the Government has concluded

that such activity is consistent with the activities usually conducted there. Because respondents are seeking to solicit such contributions and their activities result in direct, tangible benefits to the groups they represent, the Government's attempt to exclude them is unreasonable. Respondents reject petitioner's justifications on the ground that they are unsupported by the record.

Based on the present record, we conclude that respondents may be excluded from the CFC. The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is not mandated. Even if some incompatibility with general expressive activity were required, the CFC would meet the requirement because it would be administratively unmanageable if access could not be curtailed in a reasonable manner. Nor is there a requirement that the restriction be narrowly tailored or that the Government's interest be compelling. The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message. Rarely will a nonpublic forum provide the only means of contact with a particular audience. Here the speakers have access to alternative channels, including direct mail and in-person solicitation outside the workplace, to solicit contributions from federal employees.

The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances. Here the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy. Moreover, avoiding the appearance of political favoritism is a valid justification for limiting speech in a nonpublic forum.

On this record, the Government's posited justifications for denying respondents access to the CFC appear to be reasonable in light of the purpose of the CFC. The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination. While we accept the reasonableness of the justifications offered by petitioner for excluding advocacy groups from the CFC, those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view.

Petitioner contends that controversial groups must be eliminated from the CFC to avoid disruption and ensure the success of the Campaign. As noted, we agree that these are facially neutral and valid justifications for exclusion from the nonpublic forum created by the CFC. Nonetheless, the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers. In addition, petitioner maintains that limiting CFC participation to organizations that provide direct health and welfare services to needy persons is necessary to achieve the goals of the CFC as set forth in Executive Order 12404. Although this concern is also sufficient to provide reasonable grounds for excluding certain groups from the CFC, respondents offered some evidence to cast doubt on its genuineness. Organizations that do not provide direct health and welfare services, such

as the World Wildlife Fund, the Wilderness Society, and the United States Olympic Committee, have been permitted to participate in the CFC. Although there is no requirement that regulations limiting access to a nonpublic forum must be precisely tailored, the issue whether the Government excluded respondents because it disagreed with their viewpoints was neither decided below nor fully briefed before this Court. We decline to decide in the first instance whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view. Respondents are free to pursue this contention on remand.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, dissenting.

I agree with the Court that the Combined Federal Campaign (CFC) is not a traditional public forum. I also agree with the Court that our precedents indicate that the Government may create a "forum by designation" (or, to use the term our cases have adopted, a "limited public forum") by allowing public property that traditionally has not been available for assembly and debate to be used as a place for expressive activity by certain speakers or about certain subjects. I cannot accept, however, the Court's circular reasoning that the CFC is not a limited public forum because Government intended to limit the forum to a particular class of speakers. Nor can I agree with the Court's conclusion that distinctions the Government makes between speakers in defining the limits of a forum need not be narrowly tailored and necessary to achieve a compelling governmental interest. Finally, I would hold that the exclusion of the several respondents from the CFC was, on its face, viewpoint-based discrimination. Accordingly, I dissent.

The Court recognizes that its decisions regarding the right of a citizen to engage in expressive activity on public property generally have divided public property into three categories -- public forums, limited public forums, and nonpublic forums. The Court also concedes, as it must, that "a public forum created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects" is a limited public forum. It nevertheless goes on to find that the CFC is not a limited public forum precisely because the "Government's consistent policy has been to limit participation in the CFC" to certain speakers. Because the Government intended to exclude some speakers from the CFC, the Court continues, the Government may exclude any speaker from the CFC on any "reasonable" ground, except viewpoint discrimination. In essence, the Court today holds that the First Amendment's guarantee of free speech and assembly, a "fundamental principle of the American government," reduces to this: when the Government acts as the holder of public property other than streets, parks, and similar places, the Government may do whatever it reasonably intends to do, so long as it does not intend to suppress a particular viewpoint.

The Court's analysis transforms the First Amendment into a mere ban on viewpoint censorship, ignores the principles underlying the public forum doctrine, flies in the face of the decisions in which the Court has identified property as a limited public forum, and empties the limited-public-forum concept of all its meaning.

Not only does the Court err in labeling the CFC a nonpublic forum without first engaging in a

compatibility inquiry, but it errs as well in reasoning that the CFC is not a limited public forum because the Government permitted only "limited discourse," rather than "intentionally opening" the CFC for "public discourse." That reasoning is at odds with the cases in which the Court has found public property to be a limited public forum. Just as the Government's "consistent policy has been to limit participation in the CFC to 'appropriate' voluntary agencies and to require agencies seeking admission to obtain permission" from the relevant officials, the theater in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), limited the use of its facilities to "clean, healthful entertainment which will make for the upbuilding of a better citizenship" and required productions wishing to use the theater to obtain permission of the relevant officials. Under the Court's reasoning, therefore, the theater in *Southeastern Promotions* would not have been a limited public forum. Similarly, the university meeting rooms in *Widmar v. Vincent*, 454 U.S. 263 (1981), despite the Court's disclaimer, would not have been a limited public forum by the Court's reasoning, because the University had a policy of "selective access" whereby only registered nonreligious student groups, not religious student groups or the public at large, were allowed to meet in the rooms.

Nor does the Court's reasoning find support in those cases where the Court has rejected the claim that a particular property was a limited public forum. In *Perry*, for example, the Court assumed, arguendo, that by allowing groups such as the Cub Scouts to use its mail system, the school might have created a limited public forum for such organizations, even though the school clearly had no intent to open up the mail system for general "public discourse."

The Court's analysis empties the limited-public-forum concept of meaning and collapses the three categories of public forum, limited public forum, and nonpublic forum into two. The Court makes it virtually impossible to prove that a forum restricted to a particular class of speakers is a limited public forum.

Even if I were to agree with the Court's determination that the CFC is a nonpublic forum, or even if I thought that the Government's exclusion of respondents from the CFC was necessary and narrowly tailored to serve a compelling governmental interest, I still would disagree with the Court's disposition, because I think the eligibility criteria, which exclude charities that "seek to influence . . . the determination of public policy," is on its face viewpoint based. Petitioner contends that the criteria are viewpoint neutral because they apply equally to all "advocacy" groups regardless of their "political or philosophical leanings." The relevant comparison, however, is not between the individual organizations that make up the group excluded, but between those organizations allowed access to the CFC and those denied such access.

By devoting its resources to a particular activity, a charity expresses a view about the manner in which charitable goals can best be achieved. Charities working toward the same broad goal, such as "improved health," may have a variety of views about the path to that goal. Some of the "health services" charities participating in the 1982 National Capital Area CFC, for example, obviously believe that they can best achieve "improved health care" through medical research; others obviously believe that their resources are better spent on public education; others focus their energies on detection programs; and still others believe the goal is best achieved through direct care for the sick. Those of the respondents concerned with the goal of

improved health, on the other hand, obviously think that the best way to achieve that goal is by changing social policy, creating new rights for various groups in society, or enforcing existing rights through litigation, lobbying, and political activism. That view cannot be communicated through the CFC, according to the Government's eligibility criteria. Instead, Government employees may hear only from those charities that think that charitable goals can best be achieved within the confines of existing social policy and the status quo. The distinction is blatantly viewpoint based, so I see no reason to remand for a determination of whether the eligibility criteria are a "facade" for viewpoint-based discrimination.

JUSTICE STEVENS, dissenting.

The scholarly debate between JUSTICE O'CONNOR and JUSTICE BLACKMUN concerning the categories of public and quasi-public fora is an appropriate sequel to many of the First Amendment cases decided during the past decade. I am somewhat skeptical about the value of this analytical approach in the actual decisional process. At least in this case, I do not find the precise characterization of the forum particularly helpful in reaching a decision.

Everyone on the Court agrees that the exclusion of "advocacy" groups from the Combined Federal Campaign (CFC) is prohibited by the First Amendment if it is motivated by a bias against the views of the excluded groups. Moreover, everyone also recognizes that the evidence in the record gives rise to at least an inference that "the purported concern to avoid controversy excited by particular groups may conceal a bias against the viewpoint advanced by the excluded speakers." The problem presented by the case is whether that inference is strong enough to support the entry of a summary judgment in favor of respondents.

My study of the case has persuaded me that the Court of Appeals correctly affirmed the entry of summary judgment in favor of respondents. I am persuaded that each of the three reasons advanced in support of denying advocacy groups a right to participate in a request for designated contributions is wholly without merit. In sum, the reasoning set forth in JUSTICE BLACKMUN's dissenting opinion persuades me that the judgment should be affirmed.

4. MINNESOTA VOTERS ALLIANCE v. MANSKY
138 S. Ct. 1876 (2018)

Chief Justice Roberts delivered the opinion of the Court joined by KENNEDY, THOMAS, GINSBURG, ALITO, KAGAN, and GORSUCH, JJ.

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

Today, Americans going to their polling places on Election Day expect to wait in a line, briefly interact with an election official, enter a private voting booth, and cast an anonymous ballot. Little about this ritual would have been familiar to a voter in the mid-to-late nineteenth century. For one thing, voters typically deposited privately prepared ballots at the polls instead

of completing official ballots on-site. These pre-made ballots often took the form of "party tickets" — printed slates of candidate selections, often distinctive in appearance, that political parties distributed to their supporters and pressed upon others around the polls. The physical arrangement confronting the voter was also different. The polling place often consisted simply of a "voting window" through which the voter would hand his ballot to an election official situated in a separate room with the ballot box. As a result of this arrangement, "the actual act of voting was usually performed in the open," frequently within view of interested onlookers. The room containing the ballot boxes was "usually quiet and orderly," but "[t]he public space outside the window ... was chaotic." Electioneering of all kinds was permitted.

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

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

There is no dispute that the political apparel ban applies only within the polling place, and covers articles of clothing and accessories with "political insignia" upon them. Minnesota election judges—temporary government employees working the polls on Election Day—have the authority to decide whether a particular item falls within the ban. If a voter shows up wearing a prohibited item, the election judge is to ask the individual to conceal or remove it. If the individual refuses, the election judge must allow him to vote, while making clear that the incident "will be recorded and referred to appropriate authorities." Violators are subject to an administrative process before the Minnesota Office of Administrative Hearings, which may issue a reprimand or impose a civil penalty. The maximum penalty is a $300 fine.

Petitioner Minnesota Voters Alliance (MVA) is a nonprofit organization that "seeks better government through election reforms." Petitioner Andrew Cilek is a registered voter in Hennepin County and the executive director of MVA; petitioner Susan Jeffers served in 2010 as a Ramsey County election judge. Five days before the November 2010 election, MVA, Jeffers, and other like-minded groups and individuals filed a lawsuit in Federal District Court challenging the political apparel ban on First Amendment grounds. The groups—calling themselves "Election Integrity Watch" (EIW)—planned to have supporters wear buttons to the polls printed with the words "Please I. D. Me," a picture of an eye, and a telephone number

and web address for EIW. (Minnesota law does not require individuals to show identification to vote.) One of the individual plaintiffs also planned to wear a "Tea Party Patriots" shirt.

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

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

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

Back in court, MVA and the other plaintiffs (now joined by Cilek) argued that the ban was unconstitutional both on its face and as applied to their apparel. MVA, Cilek, and Jeffers (hereinafter MVA) petitioned for review of their facial First Amendment claim only. We granted certiorari.

Minnesota's ban on wearing any "political badge, political button, or other political insignia" plainly restricts a form of expression within the protection of the First Amendment. But the ban applies only in a specific location: the interior of a polling place. It therefore implicates our "'forum based' approach for assessing restrictions that the government seeks to place on the use of its property." Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have "not traditionally been regarded as a public forum" but which the government has "intentionally opened up for that purpose." In a nonpublic forum, on the other hand—a space that "is not by tradition or designation a forum for public communication"—the government has much more flexibility to craft rules limiting speech. The government may reserve such a forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the

speaker’s view."

This Court employs a distinct standard of review to assess speech restrictions in nonpublic forums because the government, "no less than a private owner of property," retains the "power to preserve the property under its control for the use to which it is lawfully dedicated." "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." Accordingly, our decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.

A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. The space is "a special enclave, subject to greater restriction." Rules strictly govern who may be present, for what purpose, and for how long.

We therefore evaluate MVA's First Amendment challenge under the nonpublic forum standard. The text of the apparel ban makes no distinction based on the speaker's political persuasion, so MVA does not claim that the ban discriminates on the basis of viewpoint on its face. The question accordingly is whether Minnesota's ban on political apparel is "reasonable in light of the purpose served by the forum."

We first consider whether Minnesota is pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place. The natural starting point is this Court's decision in *Burson*, which upheld a Tennessee law imposing a 100-foot campaign-free zone around polling place entrances. Under the Tennessee law—much like Minnesota's buffer-zone provision—no person could solicit votes for or against a candidate, party, or ballot measure, distribute campaign materials, or "display . . . campaign posters, signs or other campaign materials" within the restricted zone.

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

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

To be sure, our decisions have noted the "nondisruptive" nature of expressive apparel in more mundane settings. But those observations do not speak to the unique context of a polling place on Election Day. Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their

government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.

Thus, in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand. But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. Here, the unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.

Again, the statute prohibits wearing a "political badge, political button, or other political insignia." It does not define the term "political." And the word can be expansive. It can encompass anything "of or relating to government, a government, or the conduct of governmental affairs." Under a literal reading of those definitions, a button or T-shirt merely imploring others to "Vote!" could qualify.

The State argues that the apparel ban should not be read so broadly. According to the State, the statute does not prohibit "any conceivably 'political' message" or cover "all 'political' speech, broadly construed." Instead, the State interprets the ban to proscribe "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place."

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

We consider a State's "authoritative constructions" in interpreting a state law. But far from clarifying the indeterminate scope of the political apparel provision, the State's "electoral choices" construction introduces confusing line-drawing problems.

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

But the next example—"[i]ssue oriented material designed to influence or impact voting"—raises more questions than it answers. What qualifies as an "issue"? The answer, as far as we can tell from the State's briefing and argument, is any subject on which a political candidate or party has taken a stance. For instance, the Election Day Policy specifically notes

that the "Please I. D. Me" buttons are prohibited. But a voter identification requirement was not on the ballot in 2010, so a Minnesotan would have had no explicit "electoral choice" to make in that respect. The buttons were nonetheless covered, the State tells us, because the Republican candidates for Governor and Secretary of State had staked out positions on whether photo identification should be required.

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

The next broad category in the Election Day Policy—any item "promoting a group with recognizable political views"—makes matters worse. The State construes the category as limited to groups with "views" about "the issues confronting voters in a given election." The State does not, however, confine that category to groups that have endorsed a candidate or taken a position on a ballot question. Any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an "issue[ ] confronting voters in a given election." For instance, the American Civil Liberties Union, the World Wildlife Fund, and Ben & Jerry's all have stated positions on matters of public concern. If the views of those groups align or conflict with the position of a candidate or party on the ballot, does that mean that their insignia are banned? Take another example: In the 2012 election, Presidential candidates of both major parties issued public statements regarding the then-existing policy of the Boy Scouts of America to exclude members on the basis of sexual orientation. Should a Scout leader in 2012 stopping to vote on his way to a troop meeting have been asked to cover up his uniform?

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

The State's "electoral choices" standard, considered together with the nonexclusive examples in the Election Day Policy, poses riddles that even the State's top lawyers struggle to solve. A shirt declaring "All Lives Matter," we are told, could be "perceived" as political. How about a shirt bearing the name of the National Rifle Association? Definitely out. That said, a shirt displaying a rainbow flag could be worn "unless there was an issue on the ballot" that "related somehow . . . to gay rights." A shirt simply displaying the text of the Second Amendment? Prohibited. But a shirt with the text of the First Amendment? "It would be allowed."

"[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." But the State's difficulties with its restriction go beyond close

calls on borderline or fanciful cases. And that is a serious matter when the whole point of the exercise is to prohibit the expression of political views.

It is "self-evident" that an indeterminate prohibition carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." Election judges "have the authority to decide what is political" when screening individuals at the entrance to the polls. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as "political." And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.

That is not to say that Minnesota has set upon an impossible task. Other States have laws proscribing displays (including apparel) in more lucid terms. We do not suggest that such provisions set the outer limit of what a State may proscribe, and do not pass on the constitutionality of laws that are not before us. But we do hold that if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here.

Chapter XI: Speaker and Medium Based Distinctions

In some circumstances, First Amendment analysis varies with the identity of the speaker or the medium used to communicate. The First Amendment does not apply at all to government speech, speech by government employees and public school students receives only limited protection, and the amount of protection speech receives can vary depending on the nature of the media responsible for the speech. For example, speech published in a newspaper is fully protected, whereas speech broadcast on radio and television receives less protection and can be more heavily regulated.

A. Government Speech

PLEASANT GROVE CITY, UTAH v. SUMMUM
555 U.S. 460 (2009)

JUSTICE ALITO delivered the opinion of the Court, joined by ROBERTS, C.J., and STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ.

This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

I

Pioneer Park (or Park) is a 2.5 acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays, at least 11 of which were donated by private groups or individuals. These include an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two occasions in 2003, Summum's president wrote to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM"[1] and be similar in size and nature to the Ten Commandments

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[1]Respondent's brief describes the church and the Seven Aphorisms as follows:

"The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.'

monument. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics. In 2005, respondent's president again wrote to the mayor asking to erect a monument. The city council rejected this request.

Respondent filed this action asserting that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument.

II

No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park, and the parties disagree sharply about the line of precedents that governs this situation. Petitioners contend that the pertinent cases are those concerning government speech. Respondent, on the other hand, agrees with the Court of Appeals panel that the applicable cases are those that analyze private speech in a public forum. The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct or were they providing a forum for private speech?

If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to "speak for itself." "[I]t is entitled to say what it wishes," *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995), 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. "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."

A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. See *Rosenberger*, *supra* at 833 (a government entity may "regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message").

This does not mean that there are no restraints on government speech. For example,

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"Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai . . . . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments.

government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately "accountable to the electorate for its advocacy."

While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks. In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." Reasonable time, place, and manner restrictions are allowed, but any restriction based on the content of the speech must satisfy strict scrutiny.

With the concept of the traditional public forum as a starting point, this Court has recognized that members of the public have free speech rights on other types of government property. We have held that a government entity may create "a designated public forum" if government property is intentionally opened up for that purpose. Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum. The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral.

III

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When 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. Neither the Court of Appeals nor respondent disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech.

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly 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. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely -- and reasonably -- interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to

appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

We think it is fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity. A great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties. Sites managed by the National Park Service contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial. States and cities likewise have received thousands of donated monuments. By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own.

But while government entities regularly accept privately donated monuments, they have exercised selectivity. Across the country, "municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals."

Public parks are often closely identified in the public mind with the government unit that owns the land. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decisionmakers select the monuments that they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

IV

In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection. The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument; and the City has now expressly set forth the criteria it will use in making future selections.

Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Respondent's suggested solution is to require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing "the message" that the monument conveys.

We see no reason for imposing a requirement of this sort. The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required. Requiring all of these jurisdictions to go back and proclaim formally that

they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.

In this case, for example, although respondent argues that Pleasant Grove City has not adequately "controll[ed] the message" of the Ten Commandments monument, the City took ownership of that monument and put it on permanent display in a park that it owns and manages and that is linked to the City's identity. All rights previously possessed by the monument's donor have been relinquished. The City's actions provided a more dramatic form of adoption than the sort of formal endorsement that respondent would demand, unmistakably signifying to all Park visitors that the City intends the monument to speak on its behalf. And the City has made no effort to abridge the traditional free speech rights -- the right to speak, distribute leaflets, etc. -- that may be exercised by respondent and others in Pioneer Park.

What respondent demands, however, is that the City "adopt" or "embrace" "the message" that it associates with the monument. Respondent seems to think that a monument can convey only one "message" -- which is, presumably, the message intended by the donor -- and that, if a government entity that accepts a monument for placement on its property does not formally embrace *that* message, then the government has not engaged in expressive conduct.

This argument fundamentally misunderstands the way monuments convey meaning. The meaning conveyed by a monument is generally not a simple one. Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways. Monuments called to our attention by the briefing in this case illustrate this phenomenon.

What, for example, is "the message" of the Greco-Roman mosaic of the word "Imagine" that was donated to New York City's Central Park in memory of John Lennon? Some observers may "imagine" the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that inspired the mosaic and may "imagine" a world without religion, countries, possessions, greed, or hunger. Or, to take another example, what is "the message" of the "large bronze statue displaying the word 'peace' in many world languages" that is displayed in Fayetteville, Arkansas?

These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable. Consider the statue of Pancho Villa that was given to the city of Tucson, Arizona, in 1981 by the Government of Mexico with, according to a Tucson publication, "a wry sense of irony." Does this statue commemorate a "revolutionary leader who advocated for agrarian reform and the poor" or "a violent bandit"?

Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.

The message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the vicinity. For example, following controversy over the design of the Vietnam Veterans Memorial, a compromise was reached that called for the nearby addition of a flagstaff and bronze Three Soldiers statue, which many believed changed the overall effect of the memorial.

The "message" conveyed by a monument may change over time. A study of war memorials found that "people reinterpret" the meaning of these memorials as "historical interpretations" and "the society around them changes." A striking example of how the interpretation of a monument can evolve is provided by the Statue of Liberty. The statue was given to this country by the Third French Republic to express republican solidarity and friendship between the two countries. At the inaugural ceremony, President Cleveland saw the statue as an emblem of international friendship and the influence of American ideals. Only later did the statue come to be viewed as a beacon welcoming immigrants to a land of freedom.

Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles . . . are out of place in the context of this case." The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. A public university's buildings may offer meeting space for hundreds of student groups.

By contrast, public parks can accommodate only a limited number of permanent monuments. Public parks have been used, "'time out of mind, . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions,'" but "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments."

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators -- often, for all who want to speak -- but it is 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.

Respondent contends that this issue "can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays." On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.*, a Statue of Autocracy offered by, say, the German Empire or Imperial Russia).

While respondent and some of its *amici* deride the fears expressed about the consequences of the Court of Appeals holding in this case, those concerns are well founded. If government

entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. If public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. Where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument -- for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

V

In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause. We therefore reverse.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if its acceptance of the monument, instead of being characterized as "government speech," had merely been deemed an implicit endorsement of the donor's message. To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. The Court's opinion in this case signals no expansion of that doctrine. And by joining the Court's opinion, I do not mean to indicate agreement with our earlier decisions.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

As framed and argued by the parties, this case presents a question under the Free Speech Clause of the First Amendment. I agree with the Court's analysis of that question and join its opinion in full. But it is also obvious that from the start, the case has been litigated in the shadow of the First Amendment's *Establishment* Clause: the city wary of associating itself too closely with the Ten Commandments monument displayed in the park, lest that be deemed a breach in the so-called "wall of separation between church and State;" respondent exploiting that hesitation to argue that the monument is not government speech because the city has not sufficiently "adopted" its message. Respondent menacingly observed that while the city could have formally adopted the monument as its own, that "might of course raise Establishment Clause issues."

The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, there are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment. The city can safely exhale. Its residents and visitors can now return to enjoying

Pioneer Park's wishing well, its historic granary -- and, yes, even its Ten Commandments monument -- without fear that they are complicit in an establishment of religion.

JUSTICE BREYER, concurring.

I agree with the Court and join its opinion. I do so, however, on the understanding that the "government speech" doctrine is a rule of thumb, not a rigid category. Were the City to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say solely on political grounds, its action might well violate the First Amendment.

In my view, courts must apply categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums" with an eye towards their purposes -- lest we turn "free speech" doctrine into a jurisprudence of labels. Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective.

Were we to do so here, we would find that the City's action, while preventing Summum from erecting its monument, does not disproportionately restrict Summum's freedom of expression. The City has not closed off its parks to speech; no one claims that the City prevents Summum's members from engaging in speech in a form more transient than a permanent monument. Rather, the City has simply reserved some space in the park for projects designed to further other than free-speech goals. And that is perfectly proper. After all, parks do not serve speech-related interests alone. Cities use park space to further a variety of recreational, historical, educational, aesthetic, and other civic interests. To reserve to the City the power to choose among proposed monuments according to criteria reasonably related to one or more of these legitimate ends restricts Summum's expression, but, given the impracticality of alternatives and viewed in light of the City's legitimate needs, the restriction is not disproportionate.

JUSTICE SOUTER, concurring in the judgment.

I agree with the Court that the Ten Commandments monument is government speech. I have qualms, however, about accepting the position that public monuments are government speech categorically.

Because the government speech doctrine is "recently minted," it would do well for us to go slow in setting its bounds, which will affect existing doctrine in ways not yet explored. Even though, for example, Establishment Clause issues have been neither raised nor briefed, there is no doubt that this case and its government speech claim has been litigated with one eye on the Establishment Clause. The interaction between the "government speech doctrine" and Establishment Clause principles has not, however, begun to be worked out.

It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate. It is an occasion, however, to recognize that there are circumstances in which government maintenance of monuments does not look like government speech at all.

Sectarian identifications on markers in Arlington Cemetery come to mind. And to recognize that is to forgo any categorical rule at this point.

To avoid relying on a *per se* rule to say when speech is governmental, the best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech. This reasonable observer test is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases. The adoption of it would make sense of our common understanding that some monuments on public land display religious symbolism that clearly does not express a government's chosen views. Application of this observer test provides the reason I find the monument here to be government expression.

Note: In 2015, the Court again addressed the government speech doctrine. In *Walker v. Texas Division, Sons of Confederate Veterans*, 576 U.S. 200 (2015), a 5-4 decision with a majority opinion written by Justice Breyer joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan, the Court applied the government speech doctrine to the speciality license plate system in Texas. Under that system, special interest groups could request that the government issue license plates that the group designed to promote their views so that their members could buy the plates. The case arose when Texas rejected a speciality license plate with a confederate flag design. Because the government had to approve the design of the plate and the plate was an official state license plate that operated like an official state ID, the majority concluded that the specialty plates were government speech, thereby allowing Texas to reject the confederate flag design even though the state's decision was based on viewpoint discrimination. Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Kennedy, however, dissented in *Walker*, arguing that the expansion of the government speech doctrine had the potential to significantly weaken First Amendment protections.

B. Government Employee Speech

1. PICKERING v. BOARD OF EDUC. OF TOWNSHIP HIGH SCHOOL DIST. 205
391 U.S. 563 (1968)

MR. JUSTICE MARSHALL delivered the opinion of the Court, joined by WARREN, C.J., and HARLAN, BRENNAN, STEWART, and FORTAS, JJ.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district" and hence, under the relevant Illinois statute that "interests of the school require[d] [his dismissal]."

Appellant's claim that his writing of the letter was protected by the First and Fourteenth

Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overrode appellant's First Amendment rights. On appeal, the Supreme Court of Illinois affirmed the judgment of the Circuit Court. For the reasons detailed below 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. 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. The letter constituted 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 from opposing or criticizing the proposed bond issue. The Board dismissed Pickering for writing and publishing the letter.[1]

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. 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.

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

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[1] Professor's Note: Pickering's dismissal was also based on the claim that the letter he wrote contained falsehoods. Material related to that aspect of the case has been deleted.

superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

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.

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 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 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 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.

What we do have before us is a case in which a teacher has made public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

2. CONNICK v. MYERS

461 U.S. 138 (1983)

JUSTICE WHITE delivered the opinion of the Court, joined by BURGER, C.J. and POWELL, REHNQUIST, and O'CONNOR, JJ.

In *Pickering v. Board of Education*, 391 U.S. 563 (1968), we stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue

of government employment. We also recognized that the State's interests as an employer in regulating the speech of its employees "differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." The problem, we thought, was arriving "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." We return to this problem today and consider whether the First and Fourteenth Amendments prevent the discharge of a state employee for circulating a questionnaire concerning internal office affairs.

I

The respondent, Sheila Myers, was employed as an Assistant District Attorney in New Orleans for five and a half years. She served at the pleasure of petitioner Harry Connick, the District Attorney for Orleans Parish. During this period Myers competently performed her responsibilities of trying criminal cases.

In the early part of October 1980, Myers was informed that she would be transferred to prosecute cases in a different section of the criminal court. Myers was strongly opposed to the proposed transfer and expressed her view to several of her supervisors, including Connick. Despite her objections, on October 6 Myers was notified that she was being transferred. Myers again spoke with Dennis Waldron, one of the First Assistant District Attorneys, expressing her reluctance to accept the transfer. A number of other office matters were discussed and Myers testified that, in response to Waldron's suggestion that her concerns were not shared by others in the office, she informed him that she would do research on the matter.

That night Myers prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Early the following morning, Myers typed and copied the questionnaire. She also met with Connick who urged her to accept the transfer. She said she would "consider" it. Connick then left the office. Myers then distributed the questionnaire to 15 Assistant District Attorneys. Shortly after noon, Dennis Waldron learned that Myers was distributing the survey. He immediately phoned Connick and informed him that Myers was creating a "mini-insurrection" within the office. Connick returned to the office and told Myers that she was being terminated because of her refusal to accept the transfer. She was also told that her distribution of the questionnaire was considered an act of insubordination. Connick particularly objected to the question which inquired whether employees "had confidence in and would rely on the word" of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.

Myers filed suit under contending that her employment was wrongfully terminated because she had exercised her constitutionally protected right of free speech. The District Court agreed, ordered Myers reinstated, and awarded backpay, damages, and attorney's fees. Connick appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed. Connick then sought review in this Court by way of certiorari, which we granted.

II

For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. Our task, as we defined it in *Pickering*, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." The District Court, and thus the Court of Appeals as well, misapplied our decision in *Pickering* and consequently, in our view, erred in striking the balance for respondent.

The District Court got off on the wrong foot in this case by initially finding that, "[taken] as a whole, the issues presented in the questionnaire relate to the effective functioning of the District Attorney's Office and are matters of public importance and concern." Connick contends at the outset that no balancing of interests is required in this case because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of "public concern," as the term was used in *Pickering*. Although we do not agree that Myers' communication in this case was wholly without First Amendment protection, there is much force to Connick's submission. The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering*'s progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that government offices could not function if every employment decision became a constitutional matter.

The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the heirarchy of First Amendment values,'" and is entitled to special protection.

Pickering v. Board of Education followed from this understanding of the First Amendment. In *Pickering*, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. *Pickering*'s subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate."

Pickering, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not

subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable.

We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "[The] First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'" We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction. For example, an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street. We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State.

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. In this case, with but one exception, the questions posed by Myers to her co-workers do not fall under the rubric of matters of "public concern." We view the questions pertaining to the confidence and trust that Myers' co-workers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court. Unlike the dissent, we do not believe these questions are of public import in evaluating the performance of the District Attorney as an elected official. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.

To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark -- and certainly every criticism directed at a public official -- would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.

One question in Myers' questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates." We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights. Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory

dismissal.

Because one of the questions in Myers' survey touched upon a matter of public concern and contributed to her discharge, we must determine whether Connick was justified in discharging Myers. The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. We agree with the District Court that there is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities. The District Court was also correct to recognize that "it is important to the efficient and successful operation of the District Attorney's office for Assistants to maintain close working relationships with their superiors." Connick's judgment, and apparently also that of his first assistant Dennis Waldron, who characterized Myers' actions as causing a "mini-insurrection," was that Myers' questionnaire was an act of insubordination which interfered with working relationships. When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

III

Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment.

JUSTICE BRENNAN, with whom MARSHALL, BLACKMUN, and STEVENS, JJ., join, dissenting.

Sheila Myers was discharged for circulating a questionnaire to her fellow Assistant District Attorneys seeking information about the effect of petitioner's personnel policies on employee morale and the overall work performance of the District Attorney's Office. The Court concludes that her dismissal does not violate the First Amendment, primarily because the questionnaire addresses matters that, in the Court's view, are not of public concern. It is hornbook law, however, that speech about "the manner in which government is operated or should be operated" is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment. Because the questionnaire addressed such matters and its distribution did not adversely affect the operations of the District Attorney's Office or interfere with Myers' working relationship with her fellow employees, I dissent.

Based on its own narrow conception of which matters are of public concern, the Court implicitly determines that information concerning employee morale at an important government office will not inform public debate. To the contrary, the First Amendment

protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness. The proper means to ensure that the courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is not to restrict artificially the concept of "public concern," but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to achieve that end.

Although the Court finds most of Myers' questionnaire unrelated to matters of public interest, it does hold that one question -- asking whether Assistants felt pressured to work in political campaigns on behalf of office-supported candidates -- addressed a matter of public importance and concern. The Court also recognizes that this determination of public interest must weigh heavily in the balancing of competing interests required by *Pickering*. Having gone that far, however, the Court misapplies the *Pickering* test and holds that a public employer's mere apprehension that speech will be disruptive justifies suppression of that speech when all the objective evidence suggests that those fears are essentially unfounded.

The Court's decision today inevitably will deter public employees from making critical statements about the manner in which government agencies are operated for fear that doing so will provoke their dismissal. As a result, the public will be deprived of valuable information with which to evaluate the performance of elected officials. Because protecting the dissemination of such information is an essential function of the First Amendment, I dissent.

3. GARCETTI v. CEBALLOS
547 U.S. 410 (2006)

Justice KENNEDY delivered the opinion of the Court, joined by ROBERTS, C.J., and SCALIA, THOMAS, and ALITO, JJ.

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 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. 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. 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. 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 Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. 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." We granted certiorari, and we now reverse.

II.

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," 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 government entity had an adequate justification for treating the employee differently from any other member of the 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.

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. 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.

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. 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."

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," 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. . . . . 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. 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 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.

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 or discussing politics with a co-worker. When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees.

IV.

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick*, 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.

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.

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

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.

I.

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.

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties. Nothing, then, accountable on the individual and public side of the *Pickering* balance changes when an employee speaks "pursuant" to public duties.

C. Public School Student Speech

MAHANOY AREA SCHOOL DISTRICT v. B.L.
141 S. Ct. 2038 (2021)

JUSTICE BREYER delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, SOTOMAYOR, KAGAN, GORSUCH, KAVANAUGH and BARRETT, JJ., joined.

A public high school student used, and transmitted to her Snapchat friends, vulgar language and gestures criticizing both the school and the school's cheerleading team. The student's speech took place outside of school hours and away from the school's campus. In response, the school suspended the student for a year from the cheerleading team. We must decide whether the Court of Appeals for the Third Circuit correctly held that the school's decision violated the First Amendment. Although we do not agree with the reasoning of the Third Circuit, we do agree with its conclusion that the school's disciplinary action violated the First Amendment.

I

B.L. was a student at Mahanoy Area High School, a public school in Mahanoy City, Pennsylvania. At the end of her freshman year, B.L. tried out for a position on the school's varsity cheerleading squad and for right fielder on a private softball team. She did not make the varsity cheerleading team or get her preferred softball position, but she was offered a spot on the cheerleading squad's junior varsity team. B.L. did not accept the coach's decision with good grace, particularly because the coaches placed an entering freshman on the varsity team.

That weekend, B.L. and a friend visited the Cocoa Hut, a local convenience store. There, B.L. used her smartphone to post two photos on Snapchat, a social media application that allows users to post photos and videos that disappear after a set period of time. B.L. posted the images to her Snapchat "story," a feature of the application that allows any person in the user's "friend" group (B.L. had about 250 "friends") to view the images for a 24 hour period.

The first image B.L. posted showed B.L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." The second image was blank but for a caption, which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smiley face emoji.

B.L.'s Snapchat "friends" included other Mahanoy Area High School students, some of whom also belonged to the cheerleading squad. At least one of them, using a separate cellphone, took pictures of B.L.'s posts and shared them with other members of the cheerleading squad. One of the students who received these photos showed them to her mother (who was a cheerleading squad coach), and the images spread. That week, several cheerleaders and other students approached the cheerleading coaches "visibly upset" about B.L.'s posts. Questions about the posts persisted during an Algebra class taught by one of the two coaches.

After discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules. As a result, the coaches suspended B.L. from the junior varsity cheerleading squad for the upcoming year. B.L.'s subsequent apologies did not move school officials. The school's athletic director, principal, superintendent, and school board, all affirmed B.L.'s suspension from the team. In response, B.L., together with her parents, filed this lawsuit in Federal District Court.

The District Court found in B.L.'s favor. It first granted a preliminary injunction ordering the school to reinstate B.L. to the cheerleading team. In granting B.L.'s subsequent motion for summary judgment, the District Court found that B.L.'s Snapchats had not caused substantial disruption at the school. Cf. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). Consequently, the District Court declared that B.L.'s punishment violated the First Amendment, and it awarded B.L. nominal damages and attorneys' fees and ordered the school to expunge her disciplinary record.

On appeal, a panel of the Third Circuit affirmed the District Court's conclusion. In so doing, the majority noted that this Court had previously held in *Tinker* that a public high school could not constitutionally prohibit a peaceful student political demonstration consisting of "'pure speech'" on school property during the school day. In reaching its conclusion in *Tinker*, this Court emphasized that there was no evidence the student protest would "substantially interfere with the work of the school or impinge upon the rights of other students." But here, the panel majority held that this additional freedom did "not apply to off-campus speech," which it defined as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." Because B.L.'s speech took place off campus, the panel concluded that the *Tinker* standard did not apply and the school consequently could not discipline B.L. for engaging in a form of pure speech. A concurring member of the panel agreed with the majority's result but wrote that the school had not sufficiently justified disciplining B.L. because, whether the *Tinker* standard did or did not apply, B.L.'s speech was not substantially disruptive.

The school district filed a petition for certiorari in this Court, asking us to decide "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially

and substantially disrupt the work and discipline of the school, applies to student speech that occurs off campus." We granted the petition.

II

We have made clear that students do not "shed their constitutional rights to freedom of speech or expression," even "at the school house gate." But we have also made clear that courts must apply the First Amendment "in light of the special characteristics of the school environment." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988). One such characteristic, which we have stressed, is the fact that schools at times stand in loco parentis, i.e., in the place of parents. See *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds, see *id.* at 685; (2) speech, uttered during a class trip, that promotes "illegal drug use," see *Morse v. Frederick*, 551 U.S. 393, 409 (2007); and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper, see *Kuhlmeier*. Finally, in *Tinker*, we said schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." These special characteristics call for special leeway when schools regulate speech that occurs under its supervision.

Unlike the Third Circuit, we do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school's regulatory interests remain significant in some off-campus circumstances. The parties' briefs, and those of amici, list several types of off-campus behavior that may call for school regulation. These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

Even B.L. herself and the amici supporting her would redefine the Third Circuit's off-campus/on-campus distinction, treating as on campus: all times when the school is responsible for the student; the school's immediate surroundings; travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts or phones. And it may be that speech related to extracurricular activities, such as team sports, would also receive special treatment under B.L.'s proposed rule.

We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts to the Third Circuit majority's rule. That rule, basically, if not entirely, would deny the off-campus applicability of *Tinker's* highly general statement about the nature of a school's special interests. Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related off-campus activities belong on such a list.

Neither do we now know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do

not now set forth a broad, highly general First Amendment rule stating just what counts as "off-campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, *e.g.*, substantial disruption of learning-related activities or the protection of those who make up a school community.

We can, however, mention three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.

First, a school, in relation to off-campus speech, will rarely stand in loco parentis. The doctrine of in loco parentis treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them. Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility.

Second, from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day. That means courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all. When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention.

Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the "marketplace of ideas." This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. That protection must include the protection of unpopular ideas, for popular ideas have less need for protection. Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, "I disapprove of what you say, but I will defend to the death your right to say it." (Although this quote is often attributed to Voltaire, it was likely coined by an English writer, Evelyn Beatrice Hall.)

Given the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway, we can, as a general matter, say little more than this: Taken together, these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished. We leave for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference. This case can, however, provide one example.

III

Consider B.L.'s speech. Putting aside the vulgar language, the listener would hear criticism, of the team, the team's coaches, and the school—in a word or two, criticism of the rules of a community of which B.L. forms a part. This criticism did not involve features that would place it outside the First Amendment's ordinary protection. B.L.'s posts, while crude, did not

amount to fighting words. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). And while B.L. used vulgarity, her speech was not obscene as this Court has understood that term. See *Cohen v. California*, 403 U.S. 15, 19–20 (1971). To the contrary, B.L. uttered the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection. cf. *Snyder v. Phelps*, 562 U.S. 443, 461 (2011).

Consider too when, where, and how B.L. spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school or target any member of the school community with vulgar or abusive language. B.L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless (for reasons we have just explained) diminish the school's interest in punishing B.L.'s utterance.

But what about the school's interest, here primarily an interest in prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty? We can break that general interest into three parts.

First, we consider the school's interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community. The strength of this anti-vulgarity interest is weakened considerably by the fact that B.L. spoke outside the school on her own time. See *Morse*, 551 U.S. at 405 (clarifying that although a school can regulate a student's use of sexual innuendo in a speech given within the school, if the student "delivered the same speech in a public forum outside the school context, it would have been protected").

B.L. spoke under circumstances where the school did not stand in loco parentis. And there is no reason to believe B.L.'s parents had delegated to school officials their own control of B.L.'s behavior at the Cocoa Hut. Moreover, the vulgarity in B.L.'s posts encompassed a message, an expression of B.L.'s irritation with, and criticism of, the school and cheerleading communities. Further, the school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom. Together, these facts convince us that the school's interest in teaching good manners is not sufficient, in this case, to overcome B.L.'s interest in free expression.

Second, the school argues that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity. But we can find no evidence in the record of the sort of "substantial disruption" of a school activity or a threatened harm to the rights of others that might justify the school's action. *Tinker*, 393 U.S. at 514. Rather, the record shows that discussion of the matter took, at most, 5 to 10 minutes of an Algebra class "for just a couple of days" and that some members of the cheerleading team were "upset" about the content of B.L.'s Snapchats. But when one of B.L.'s coaches was asked directly if she had "any reason to think that this particular incident would disrupt class or school activities other than the fact that kids kept asking . . . about it," she responded simply, "No." As we said in *Tinker*, "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." The alleged disturbance here does not meet *Tinker's* demanding standard.

Third, the school presented some evidence that expresses (at least indirectly) a concern for team morale. There is little that suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion. As we have said, simple "undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508.

It might be tempting to dismiss B.L.'s words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary. "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." *Cohen*, 403 U.S. at 25.

Although we do not agree with the reasoning of the Third Circuit's panel majority, for the reasons expressed above, we nonetheless agree that the school violated B.L.'s First Amendment rights. The judgment of the Third Circuit is therefore affirmed.

JUSTICE THOMAS, dissenting.

B.L., a high school student, sent a profanity-laced message to hundreds of people, including classmates and teammates. The Court overrides that decision—without even mentioning the 150 years of history supporting the coach. Using broad brushstrokes, the majority outlines the scope of school authority. When students are on campus, the majority says, schools have authority *in loco parentis*—that is, as substitutes of parents—to discipline speech and conduct. Off campus, the authority of schools is somewhat less. At that level of generality, I agree. But the majority omits important detail. What authority does a school have when it operates *in loco parentis*? How much less authority do schools have over off-campus speech and conduct? And how does a court decide if speech is on or off campus?

Disregarding these important issues, the majority simply posits three vague considerations and reaches an outcome. A more searching review reveals that schools historically could discipline students in circumstances like those presented here. Because the majority does not attempt to explain why we should not apply this historical rule and does not attempt to tether its approach to anything stable, I respectfully dissent.

While the majority entirely ignores the relevant history, I would begin the assessment of the scope of free-speech rights incorporated against the States by looking to "what 'ordinary citizens' at the time of [the Fourteenth Amendment's] ratification would have understood" the right to encompass. Cases and treatises from that era reveal that public schools retained substantial authority to discipline students. As I have previously explained, that authority was near plenary while students were at school. Authority also extended to when students were traveling to or from school. See, *e.g., Lander v. Seaver*, 32 Vt. 114, 120 (1859). And, although schools had less authority after a student returned home, it was well settled that they still could discipline students for off-campus speech or conduct that had a proximate tendency to harm the school environment.

Perhaps the most familiar example applying this rule is a case where a student, after returning home from school, used "disrespectful language" against a teacher—he called the teacher "old"—"in presence of the [teacher] and of some of his fellow pupils." The Vermont Supreme Court held that the teacher could discipline a student for this speech because the speech had "a direct and immediate tendency to injure the school, to subvert the master's authority, and to beget disorder and insubordination." The court distinguished the speech at issue from speech "in no ways connected with or affecting the school" and speech that has "merely a remote and indirect tendency to injure."

If there is a good constitutional reason to depart from this historical rule, the majority and the parties fail to identify it. I would thus apply the rule. Assuming that B.L.'s speech occurred off campus, the purpose and effect of B.L.'s speech was "to degrade the [program and cheerleading staff]" in front of "other pupils," thus having "a direct and immediate tendency to . . . subvert the [coach's] authority." As a result, the coach had authority to discipline B.L.

Perhaps there are good constitutional reasons to depart from the historical rule, and perhaps this Court and lower courts will identify and explain these reasons in the future. But because the Court does not do so today, and because it reaches the wrong result under the appropriate historical test, I respectfully dissent.

D. Medium of Communication

1. MIAMI HERALD PUBLISHING CO. v. TORNILLO

418 U.S. 241 (1974)

CHIEF JUSTICE BURGER delivered the opinion for a unanimous Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.

I

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy.[2] In response to these editorials appellee demanded

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[2] The text of the September 20, 1972, editorial is as follows:

"The State's Laws And Pat Tornillo

"LOOK who's upholding the law!

"Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking 'the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law.'

"Czar Tornillo calls 'violation of this law inexcusable.'

that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County. The action was premised on Florida Statute § 104.38, a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.

Appellant sought a declaration that § 104.38 was unconstitutional. The Florida Supreme Court [held] that § 104.38 did not violate constitutional guarantees. It held that free speech was enhanced and not abridged by the Florida right-of-reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public."

III

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913, and this is only the second recorded case decided under its provisions.

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that government has an obligation to ensure that a wide variety of views

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"This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.
"We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives."

The text of the September 29, 1972, editorial is as follows:
"FROM the people who brought you this -- the teacher strike of '68 -- come now instructions on how to vote for responsible government, i. e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us -- what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic proxy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule."

reach the public. It is urged that at the time the First Amendment to the Constitution was ratified in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the specter of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated "interpretive reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise

it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.

The Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "'reason' tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the Miami Herald from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the

decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials -- whether fair or unfair -- constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only "right of reply" statutes and implies no view upon the constitutionality of "retraction" statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction.

MR. JUSTICE WHITE, concurring.

The Court today holds that the First Amendment bars a State from requiring a newspaper to print the reply of a candidate for public office whose personal character has been criticized by that newspaper's editorials. According to our accepted jurisprudence, the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

2. RED LION BROADCASTING CO., INC. v. FCC
395 U.S. 367 (1969)

MR. JUSTICE WHITE delivered the opinion of the Court, joined by WARREN, C.J. AND BLACK, HARLAN, BRENNAN, STEWART, and MARSHALL, JJ.

The Federal Communications Commission has for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage. This is known as the fairness doctrine, which originated very early in the history of broadcasting and has maintained its present outlines for some time. It is an obligation whose content has been defined in a long series of FCC rulings in particular cases, and which is distinct from the statutory requirement of § 315 of the Communications Act that equal time be allotted all qualified candidates for public office. Two aspects of the fairness doctrine, relating to personal attacks in the context of controversial public issues and to political editorializing, were codified more precisely in the form of FCC regulations in 1967. The two cases before us

now, which were decided separately below, challenge the constitutional and statutory bases of the doctrine and component rules. Red Lion involves the application of the fairness doctrine to a particular broadcast, and RTNDA arises as an action to review the FCC's 1967 promulgation of the personal attack and political editorializing regulations, which were laid down after the Red Lion litigation had begun.

I

The Red Lion Broadcasting Company is licensed to operate a Pennsylvania radio station, WGCB. On November 27, 1964, WGCB carried a 15-minute broadcast by the Reverend Billy James Hargis as part of a "Christian Crusade" series. A book by Fred J. Cook entitled "Goldwater -- Extremist on the Right" was discussed by Hargis, who said that Cook had been fired by a newspaper for making false charges against city officials; that Cook had then worked for a Communist-affiliated publication; that he had defended Alger Hiss and attacked J. Edgar Hoover and the Central Intelligence Agency; and that he had now written a "book to smear and destroy Barry Goldwater." When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. After an exchange of letters among Cook, Red Lion, and the FCC, the FCC declared that the Hargis broadcast constituted a personal attack on Cook; that Red Lion had failed to meet its obligation under the fairness doctrine to send a tape, transcript, or summary of the broadcast to Cook and offer him reply time; and that the station must provide reply time whether or not Cook would pay for it. On review in the Court of Appeals for the District of Columbia Circuit, the FCC's position was upheld as constitutional and otherwise proper.

Not long after the Red Lion litigation was begun, the FCC issued a Notice of Proposed Rule Making with an eye to making the personal attack aspect of the fairness doctrine more precise and more readily enforceable, and to specifying its rules relating to political editorials. After considering written comments supporting and opposing the rules, the FCC adopted them substantially as proposed. As they now stand amended, the regulations read as follows:

"Personal attacks; political editorials.

"(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than 1 week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

Believing that the specific application of the fairness doctrine in Red Lion, and the promulgation of the regulations in RTNDA, are both authorized by Congress and enhance rather than abridge the freedoms of speech and press, we hold them valid and constitutional.

II

The history of the emergence of the fairness doctrine and of the related legislation shows that the Commission's action in the Red Lion case did not exceed its authority, and that in adopting the new regulations the Commission was implementing congressional policy rather than embarking on a frolic of its own. The statutory authority of the FCC to promulgate these

regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires" to promulgate "such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter."

We cannot say that the FCC's declaratory ruling in Red Lion, or the regulations at issue in RTNDA, are beyond the scope of the congressionally conferred power to assure that stations are operated by those whose possession of a license serves "the public interest."

III

The broadcasters challenge the fairness doctrine and its specific manifestations in the personal attack and political editorial rules on conventional First Amendment grounds, alleging that the rules abridge their freedom of speech and press. Their contention is that the First Amendment protects their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency. No man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents. This right, they say, applies equally to broadcasters.

Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them. For example, the ability of new technology to produce sounds more raucous than those of the human voice justifies restrictions on the sound level, and on the hours and places of use, of sound trucks so long as the restrictions are reasonable and applied without discrimination.

Just as the Government may limit the use of sound-amplifying equipment potentially so noisy that it drowns out civilized private speech, so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others.

When two people converse face to face, both should not speak at once if either is to be clearly understood. But the range of the human voice is so limited that there could be meaningful communications if half the people in the United States were talking and the other half listening. Just as clearly, half the people might publish and the other half read. But the reach of radio signals is incomparably greater than the range of the human voice and the problem of interference is a massive reality. The lack of know-how and equipment may keep many from the air, but only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology.

It was this fact, and the chaos which ensued from permitting anyone to use any frequency at whatever power level he wished, which made necessary the enactment of the Radio Act of 1927 and the Communications Act of 1934, as the Court has noted at length before. It was this reality which at the very least necessitated first the division of the radio spectrum into portions reserved respectively for public broadcasting and for other important radio uses such as amateur operation, aircraft, police, defense, and navigation; and then the subdivision of each portion, and assignment of specific frequencies to individual users or groups of users.

Beyond this, however, because the frequencies reserved for public broadcasting were limited in number, it was essential for the Government to tell some applicants that they could not broadcast at all because there was room for only a few.

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.

This has been the consistent view of the Court. Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations. No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because "the public interest" requires it "is not a denial of free speech."

By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.

This is not to say that the First Amendment is irrelevant to public broadcasting. On the contrary, it has a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with "the right of free speech by means of radio communication." Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Rather than confer frequency monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week. The ruling and regulations at issue here do not go quite so far. They assert that under specified circumstances, a licensee must offer to make available

a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station. The expression of a political endorsement, or of a personal attack while dealing with a controversial public issue, simply triggers this time sharing. As we have said, the First Amendment confers no right on licensees to prevent others from broadcasting on "their" frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use.

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

It is strenuously argued, however, that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative. The communications industry, and in particular the networks, have taken pains to present controversial issues in the past, and even now they do not assert that they intend to abandon their efforts. It would be better if the FCC's encouragement were never necessary to induce the broadcasters to meet their responsibility. And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications. The fairness doctrine in the past has had no such overall effect.

That this will occur now seems unlikely, however, since if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues. It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.

The litigants embellish their First Amendment arguments with the contention that the regulations are so vague that their duties are impossible to discern. Judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech. Past adjudications by the FCC give added precision to the

regulations; there was nothing vague about the FCC's specific ruling in Red Lion that Fred Cook should be provided an opportunity to reply. The regulations at issue in RTNDA could be employed in precisely the same way as the fairness doctrine was in Red Lion.

We need not and do not now ratify every past and future decision by the FCC with regard to programming. There is no question here of the Commission's refusal to permit the broadcaster to carry a particular program or to publish his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to § 326; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues. But we do hold that the Congress and the Commission do not violate the First Amendment when they require a radio or television station to give reply time to answer personal attacks and political editorials.

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.

3. FCC v. PACIFICA FOUNDATION
438 U.S. 726 (1978)

JUSTICE STEVENS delivered the opinion of the Court (Parts I, II, III, and IV-C) and an opinion in which CHIEF JUSTICE BURGER and JUSTICE REHNQUIST joined (Parts IV-A and IV-B).

This case requires that we decide whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.

A satiric humorist named George Carlin recorded a 12-minute monologue entitled "Filthy Words" before a live audience in a California theater. He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." He proceeded to list those words and repeat them over and over again in a variety of colloquialisms. The transcript of the recording, which is appended to this opinion, indicates frequent laughter from the audience.

At about 2 o'clock in the afternoon on Tuesday, October 30, 1973, a New York radio station, owned by respondent Pacifica Foundation, broadcast the "Filthy Words" monologue. A few weeks later a man, who stated that he had heard the broadcast while driving with his young son, wrote a letter complaining to the Commission. He stated that, although he could perhaps understand the "record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control."

The complaint was forwarded to the station for comment. In its response, Pacifica explained that the monologue had been played during a program about contemporary society's attitude toward language and that, immediately before its broadcast, listeners had been advised that it included "sensitive language which might be regarded as offensive to some." Pacifica characterized George Carlin as "a significant social satirist" who "like Twain and Sahl before

him, examines the language of ordinary people. . . . Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." Pacifica stated that it was not aware of any other complaints about the broadcast.

On February 21, 1975, the Commission issued a declaratory order granting the complaint and holding that Pacifica "could have been the subject of administrative sanctions." The Commission did not impose formal sanctions, but it did state that the order would be "associated with the station's license file, and in the event that subsequent complaints are received, the Commission will then decide whether it should utilize any of the sanctions it has been granted by Congress."

In its memorandum opinion the Commission stated that it intended to "clarify the standards which will be utilized in considering" the growing number of complaints about indecent speech on the airwaves. Advancing several reasons for treating broadcast speech differently from other forms of expression, the Commission found a power to regulate indecent broadcasting in two statutes: 18 U.S.C. § 1464, which forbids the use of "any obscene, indecent, or profane language by means of radio communications," and 47 U.S.C. § 303 (g), which requires the Commission to "encourage the larger and more effective use of radio in the public interest."

The Commission characterized the language used in the Carlin monologue as "patently offensive," though not necessarily obscene, and expressed the opinion that it should be regulated by principles analogous to those found in the law of nuisance where the "law generally speaks to channeling behavior more than actually prohibiting it. . . . [The] concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."

Applying these considerations to the language used in the monologue as broadcast by respondent, the Commission concluded that certain words depicted sexual and excretory activities in a patently offensive manner, noted that they "were broadcast at a time when children were undoubtedly in the audience (*i.e.*, in the early afternoon)," and that the prerecorded language, with these offensive words "repeated over and over," was "deliberately broadcast." In summary, the Commission stated: "We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. § 1464."

After the order issued, the Commission was asked to clarify its opinion by ruling that the broadcast of indecent words as part of a live newscast would not be prohibited. The Commission issued another opinion in which it pointed out that it "never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it." The Commission noted that its "declaratory order was issued in a specific factual context," and declined to comment on various hypothetical situations presented by the petition.

The United States Court of Appeals for the District of Columbia Circuit reversed.

Having granted the Commission's petition for certiorari, we must decide: . . . (3) whether the broadcast was indecent within the meaning of § 1464; and (4) whether the order violates the

First Amendment of the United States Constitution. . . .

III

Because neither our prior decisions nor the language or history of § 1464 supports the conclusion that prurient appeal is an essential component of indecent language, we reject Pacifica's construction of the statute. When that construction is put to one side, there is no basis for disagreeing with the Commission's conclusion that indecent language was used in this broadcast.

IV

Pacifica makes two constitutional attacks on the Commission's order. First, it argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required even if Pacifica's broadcast of the "Filthy Words" monologue is not itself protected by the First Amendment. Second, Pacifica argues that inasmuch as the recording is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio.

A

The first argument fails because our review is limited to the question whether the Commission has the authority to proscribe this particular broadcast. As the Commission itself emphasized, its order was "issued in a specific factual context." That approach is appropriate for courts as well as the Commission when regulation of indecency is at stake, for indecency is largely a function of context -- it cannot be adequately judged in the abstract.

It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort." We decline to administer that medicine to preserve the vigor of patently offensive sexual and excretory speech.

B

When the issue is narrowed to the facts of this case, the question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances. For if the government has any such power, this was an appropriate occasion for its exercise.

The words of the Carlin monologue are unquestionably "speech" within the meaning of the First Amendment. It is equally clear that the Commission's objections to the broadcast were based in part on its content. The order must therefore fall if, as Pacifica argues, the First Amendment prohibits all governmental regulation that depends on the content of speech. Our past cases demonstrate, however, that no such absolute rule is mandated by the Constitution.

The government may forbid speech calculated to provoke a fight. It may pay heed to the "'commonsense differences' between commercial speech and other varieties." It may treat libels against private citizens more severely than libels against public officials. Obscenity may be wholly prohibited.

The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards. But the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content -- or even to the fact that it satirized contemporary attitudes about four-letter words -- First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[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."

Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected. Indeed, we may assume, arguendo, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another. To paraphrase Mr. Justice Harlan, one occasion's lyric is another's vulgarity.

In this case it is undisputed that the content of Pacifica's broadcast was "vulgar," "offensive," and "shocking." Because content of that character is not entitled to absolute constitutional protection under all circumstances, we must consider its context in order to determine whether the Commission's action was constitutionally permissible.

C

We have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism.

The reasons for these distinctions are complex, but two have relevance to the present case. First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to

be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not avoid a harm that has already taken place.

Second, broadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York*, 390 U.S. 629 (1968), that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which context is all-important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a "nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard." We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins, concurring in part and concurring in the judgment.

I join Parts I, II, III, and IV-C of JUSTICE STEVENS' opinion. The Court today reviews only the Commission's holding that Carlin's monologue was indecent "as broadcast" at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion. In addition to being consistent with our settled practice of not deciding constitutional issues unnecessarily, this narrow focus also is conducive to the orderly development of this relatively new and difficult area of law, in the first instance by the Commission, and then by the reviewing courts.

I do not think Carlin, consistently with the First Amendment, could be punished for delivering the same monologue to a live audience composed of adults who, knowing what to expect, chose to attend his performance. And I would assume that an adult could not constitutionally

be prohibited from purchasing a recording or transcript of the monologue and playing or reading it in the privacy of his own home.

But it also is true that the language employed is, to most people, vulgar and offensive. It was chosen specifically for this quality, and it was repeated over and over as a sort of verbal shock treatment. The Commission did not err in characterizing the narrow category of language used here as "patently offensive" to most people regardless of age.

The issue, however, is whether the Commission may impose civil sanctions on a licensee radio station for broadcasting the monologue at two o'clock in the afternoon. The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to "channel" the monologue to hours when the fewest unsupervised children would be exposed to it. In my view, this consideration provides strong support for the Commission's holding.

The Court has recognized society's right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." This recognition stems in large part from the fact that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." Thus, children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult. For these reasons, society may prevent the general dissemination of such speech to children, leaving to parents the decision as to what speech of this kind their children shall hear and repeat.

It is argued that despite society's right to protect its children from this kind of speech, and despite everyone's interest in not being assaulted by offensive speech in the home, the Commission's holding in this case is impermissible because it prevents willing adults from listening to Carlin's monologue over the radio in the early afternoon hours. It is said that this ruling will have the effect of "[reducing] the adult population . . . to [hearing] only what is fit for children." This argument is not without force. The Commission certainly should consider it as it develops standards in this area. But it is not sufficiently strong to leave the Commission powerless to act in circumstances such as those in this case.

The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion. On its face, it does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience, nor from broadcasting discussions of the contemporary use of language at any time during the day. The Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here. In short, I agree that on the facts of this case, the Commission's order did not violate respondent's First Amendment rights.

As the foregoing demonstrates, my views are generally in accord with what is said in Part

IV-C of MR. JUSTICE STEVENS' opinion. I therefore join that portion of his opinion. I do not join Part IV-B, however, because I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most "valuable" and hence deserving of the most protection, and which is less "valuable" and hence deserving of less protection. In my view, the result in this case does not turn on whether Carlin's monologue, viewed as a whole, or the words that constitute it, have more or less "value" than a candidate's campaign speech. This is a judgment for each person to make, not one for the judges to impose upon him.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.

I

The Court refuses to embrace the notion, completely antithetical to basic First Amendment values, that the degree of protection the First Amendment affords protected speech varies with the social value ascribed to that speech by five Members of this Court. Moreover, all Members of the Court agree that the Carlin monologue aired by Station WBAI does not fall within one of the categories of speech, such as "fighting words," or obscenity, that is totally without First Amendment protection. This conclusion, of course, is compelled by our cases expressly holding that communications containing some of the words found condemnable here are fully protected by the First Amendment in other contexts. Yet despite the Court's refusal to create a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content, and despite our unanimous agreement that the Carlin monologue is protected speech, a majority of the Court nevertheless finds that, on the facts of this case, the FCC is not constitutionally barred from imposing sanctions on Pacifica for its airing of the Carlin monologue. This majority apparently believes that the FCC's disapproval of Pacifica's afternoon broadcast of Carlin's "Dirty Words" recording is a permissible time, place, and manner regulation. Both the opinion of my Brother STEVENS and the opinion of my Brother POWELL rely principally on two factors in reaching this conclusion: (1) the capacity of a radio broadcast to intrude into the unwilling listener's home, and (2) the presence of children in the listening audience. Dispassionate analysis starkly reveals that these justifications, whether individually or together, simply do not support even the professedly moderate degree of governmental homogenization of radio communications -- if, indeed, such homogenization can ever be moderate given the pre-eminent status of the right of free speech in our constitutional scheme -- that the Court today permits.

Without question, the privacy interests of an individual in his home are substantial and deserving of significant protection. In finding these interests sufficient to justify the content regulation of protected speech, however, the Court commits two errors. First, it misconceives the nature of the privacy interests involved where an individual voluntarily chooses to admit radio communications into his home. Second, it ignores the constitutionally protected interests of both those who wish to transmit and those who desire to receive broadcasts that many -- including the FCC and this Court -- might find offensive.

"The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . 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." I am in wholehearted agreement with my Brethren that an individual's right "to be let alone" when engaged in private activity within the confines of his own home is encompassed within the "substantial privacy interests" to which Mr. Justice Harlan referred in *Cohen*, and is entitled to the greatest solicitude. However, I believe that an individual's actions in switching on and listening to communications transmitted over the public airways and directed to the public at large do not implicate fundamental privacy interests, even when engaged in within the home. Instead, because the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse. Although an individual's decision to allow radio communications into his home undoubtedly does not abrogate all of his privacy interests, the residual privacy interests he retains vis-a-vis the communication he voluntarily admits into his home are surely no greater than those of the people in the corridor of the Los Angeles courthouse in *Cohen* who bore witness to the words "Fuck the Draft" emblazoned across Cohen's jacket. Their privacy interests were held insufficient to justify punishing Cohen for his offensive communication.

Even if an individual who voluntarily opens his home to radio communications retains privacy interests of sufficient moment to justify a ban on protected speech if those interests are "invaded in an essentially intolerable manner," the very fact that those interests are threatened only by a radio broadcast precludes any intolerable invasion of privacy; for unlike other intrusive modes of communication, such as sound trucks, "[the] radio can be turned off," -- and with a minimum of effort. Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection. To reach a contrary balance, as does the Court, is clearly to follow MR. JUSTICE STEVENS' reliance on animal metaphors, "to burn the house to roast the pig."

The Court's balance, of necessity, fails to accord proper weight to the interests of listeners who wish to hear broadcasts the FCC deems offensive. It permits majoritarian tastes completely to preclude a protected message from entering the homes of a receptive, unoffended minority. No decision of this Court supports such a result. Where the individuals constituting the offended majority may freely choose to reject the material being offered, we have never found their privacy interests of such moment to warrant the suppression of speech on privacy grounds.

Most parents will undoubtedly find understandable as well as commendable the Court's sympathy with the FCC's desire to prevent offensive broadcasts from reaching the ears of unsupervised children. Unfortunately, the facial appeal of this justification for radio censorship masks its constitutional insufficiency. Although the government unquestionably has a special interest in the well-being of children and consequently "can adopt more stringent controls on communicative materials available to youths than on those available to adults,"

the Court has accounted for this societal interest by adopting a "variable obscenity" standard that permits the prurient appeal of material available to children to be assessed in terms of the sexual interests of minors.

Because the Carlin monologue is obviously not an erotic appeal to the prurient interests of children, the Court, for the first time, allows the government to prevent minors from gaining access to materials that are not obscene, and are therefore protected, as to them. It thus ignores our recent admonition that "[speech] that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). The Court's refusal to follow its own pronouncements is especially lamentable since it has the subsidiary effect, at least in the radio context, of making unavailable to adults material which may not constitutionally be kept even from children.

In concluding that the presence of children in the listening audience provides an adequate basis for the FCC to impose sanctions for Pacifica's broadcast of the Carlin monologue, the opinions of my Brother POWELL and my Brother STEVENS, both stress the time honored right of a parent to raise his child as he sees fit -- a right this Court has consistently been vigilant to protect. Yet this principle supports a result directly contrary to that reached by the Court. As surprising as it may be to individual Members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that.

As demonstrated above, neither of the factors relied on by both the opinion of my Brother POWELL and the opinion of my Brother STEVENS -- the intrusive nature of radio and the presence of children in the listening audience -- can, when taken on its own terms, support the FCC's disapproval of the Carlin monologue. These two asserted justifications are further plagued by a common failing: the lack of principled limits on their use as a basis for FCC censorship. No such limits come readily to mind, and neither of the opinions constituting the Court serve to clarify the extent to which the FCC may assert the privacy and children-in-the-audience rationales as justification for expunging from the airways protected communications the Commission finds offensive. Taken to their logical extreme, these rationales would support the cleansing of public radio of any "four-letter words" whatsoever, regardless of their context. The rationales could justify the banning from radio of a myriad of literary works, novels, poems, and plays by the likes of Shakespeare, Joyce, Hemingway, Ben Jonson, Henry Fielding, Robert Burns, and Chaucer; they could support the suppression of a good deal of political speech, such as the Nixon tapes; and they could even provide the basis for imposing sanctions for the broadcast of certain portions of the Bible.

In order to dispel the specter of the possibility of so unpalatable a degree of censorship, and to defuse Pacifica's overbreadth challenge, the FCC insists that it desires only the authority to reprimand a broadcaster on facts analogous to those present in this case, which it describes as

involving "broadcasting for nearly twelve minutes a record which repeated over and over words which depict sexual or excretory activities and organs in a manner patently offensive by its community's contemporary standards in the early afternoon when children were in the audience." The opinions of both my Brother POWELL and my Brother STEVENS take the FCC at its word, and consequently do no more than permit the Commission to censor the afternoon broadcast of the "sort of verbal shock treatment" involved here. To insure that the FCC's regulation of protected speech does not exceed these bounds, my Brother POWELL is content to rely upon the judgment of the Commission while my Brother STEVENS deems it prudent to rely on this Court's ability accurately to assess the worth of various kinds of speech. For my own part, even accepting that this case is limited to its facts, I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand.

II

I find the reasoning by which my Brethren conclude that the FCC censorship they approve will not significantly infringe on First Amendment values both disingenuous as to reality and wrong as a matter of law.

My Brother STEVENS, in reaching a result apologetically described as narrow takes comfort in his observation that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication," and finds solace in his conviction that "[there] are few, if any, thoughts that cannot be expressed by the use of less offensive language." The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. A speaker's choice of words cannot surgically be separated from the ideas he desires to express. Moreover, even if an alternative phrasing may communicate a speaker's abstract ideas as effectively as those words he is forbidden to use, it is doubtful that the sterilized message will convey the emotion that is an essential part of so many communications.

My Brother STEVENS also finds relevant to his First Amendment analysis the fact that "[adults] who feel the need may purchase tapes and records or go to theaters and nightclubs to hear [the tabooed] words." My Brother POWELL agrees: "The Commission's holding does not prevent willing adults from purchasing Carlin's record, from attending his performances, or, indeed, from reading the transcript reprinted as an appendix to the Court's opinion." The opinions of my Brethren display both a sad insensitivity to the fact that these alternatives involve the expenditure of money, time, and effort that many of those wishing to hear Mr. Carlin's message may not be able to afford, and a naive innocence of the reality that in many cases, the medium may well be the message.

It is doubtful that even those frustrated listeners in a position to follow my Brother POWELL's gratuitous advice and attend one of Carlin's performances or purchase one of his records would receive precisely the same message Pacifica's radio station sent its audience. The airways are capable not only of carrying a message, but also of transforming it. A

satirist's monologue may be most potent when delivered to a live audience; yet the choice whether this will in fact be the manner in which the message is delivered and received is one the First Amendment prohibits the government from making.

III

It is quite evident that I find the Court's attempt to unstitch the warp and woof of First Amendment law in an effort to reshape its fabric to cover the patently wrong result the Court reaches in this case dangerous as well as lamentable. Yet there runs throughout the opinions of my Brothers POWELL and STEVENS another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain.

Today's decision will thus have its greatest impact on broadcasters desiring to reach, and listening audiences composed of, persons who do not share the Court's view as to which words or expressions are acceptable and who, for a variety of reasons, including a conscious desire to flout majoritarian conventions, express themselves using words that may be regarded as offensive by those from different socio-economic backgrounds. In this context, the Court's decision may be seen for what, in the broader perspective, it really is: another of the dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting, and speaking.

Pacifica, in response to an FCC inquiry about its broadcast of Carlin's satire on "'the words you couldn't say on the public . . . airways,'" explained that "Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words." In confirming Carlin's prescience as a social commentator by the result it reaches today, the Court evidences an attitude toward the "seven dirty words" that many others besides Mr. Carlin and Pacifica might describe as "silly." Whether today's decision will similarly prove "harmless" remains to be seen. One can only hope that it will.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL join, dissenting.

The Court today recognizes the wise admonition that we should "avoid the unnecessary decision of [constitutional] issues." But it disregards one important application of this salutary principle -- the need to construe an Act of Congress so as to avoid, if possible, passing upon its constitutionality. It is apparent that the constitutional questions raised by the order of the Commission in this case are substantial. Before deciding them, we should be certain that it is necessary to do so.

The statute pursuant to which the Commission acted makes it a federal offense to utter "any obscene, indecent, or profane language by means of radio communication." The Commission held, and the Court today agrees, that "indecent" is a broader concept than "obscene" as the latter term was defined in *Miller v. California*, 413 U.S. 15 (1973), because language can be "indecent" although it has social, political, or artistic value and lacks prurient appeal. But this construction of § 1464, while perhaps plausible, is by no means compelled. To the contrary, I

think that "indecent" should properly be read as meaning no more than "obscene." Since the Carlin monologue concededly was not "obscene," I believe that the Commission lacked statutory authority to ban it. Under this construction of the statute, it is unnecessary to address the difficult and important issue of the Commission's constitutional power to prohibit speech that would be constitutionally protected outside the context of electronic broadcasting.

I would hold, therefore, that Congress intended, by using the word "indecent" in § 1464, to prohibit nothing more than obscene speech. Under that reading of the statute, the Commission's order in this case was not authorized, and on that basis I would affirm the judgment of the Court of Appeals.

4. RENO v. ACLU
521 U.S. 844 (1977)

JUSTICE STEVENS delivered the opinion of the Court, joined by SCALIA, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ.

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.

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, 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. About 100,000 new messages are posted every day. 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 by typing messages to one another. 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. In concrete terms, the Web consists of a vast number of documents stored in different computers all over the world.

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 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 world-wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. 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 the Web, nor is there any centralized point from which Web sites 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."

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, block designated sites, or 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."

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 fora 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.

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." 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.A. § 223(a) (Supp. 1997), 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, 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.

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

On February 8, 1996, immediately after the President signed the statute, 20 plaintiffs filed suit challenging the constitutionality of §§ 223(a)(1) and 223(d).

In its appeal, the Government argues that the District Court erred in holding that the CDA violated both the First Amendment because it is overbroad and the Fifth Amendment because it is vague. While we discuss the vagueness of the CDA because of its relevance to the First

Amendment overbreadth inquiry, we conclude that the judgment should be affirmed without reaching the Fifth Amendment issue. We begin our analysis by reviewing the principal authorities on which the Government relies. Then, after describing the overbreadth of the CDA, we consider the Government's specific contentions, including its submission that we save portions of the statute either by severance or by fashioning judicial limitations on its coverage.

IV

In arguing for reversal, the Government contends that the CDA is plainly constitutional under three of our prior decisions: (1) *Ginsberg v. New York*, 390 U.S. 629 (1968); (2) *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); and (3) *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). 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." 390 U.S. at 639. 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 respondent contended that it was not "indecent" within the meaning of the relevant statutes because it contained no prurient appeal. After rejecting respondent's statutory arguments, we confronted its two constitutional arguments: (1) that the Commission's construction of its authority to ban indecent speech was so broad that its order

had to be set aside even if the broadcast at issue was unprotected; and (2) that since the recording was not obscene, the First Amendment forbade any abridgement of the right to broadcast it on the radio.

In the portion of the lead opinion not joined by Justices Powell and Blackmun, the plurality 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 Court concluded that the ease with which children may obtain access to broadcasts, "coupled with the concerns recognized in *Ginsberg*," 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 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 theatres 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 the 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 "analyzed as a form of time, place, and manner 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.

V

In *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), we observed that "each medium of expression may present its own problems." Thus, some of our cases have

recognized special justifications for regulation of the broadcast media that are not applicable to other speakers, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. Pacifica Foundation*. In these cases, the Court relied on the history of government regulation of the broadcast medium, the scarcity of available frequencies at its inception, and its "invasive" nature.

Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as "invasive" as radio or television. The District Court specifically found that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" It also found that "almost all sexually explicit images are preceded by warnings as to the content," and cited testimony that "'odds are slim' that a user would come across a sexually explicit sight by accident."

Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.

VI

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. Could a speaker confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment issues raised by the Appendix to our Pacifica opinion, 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. The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images. The CDA's burden on protected speech cannot be justified if it could be avoided by a more carefully drafted statute.

VII

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 clear that "sexual expression which is indecent but not obscene is protected by the First Amendment." 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."

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 nation-wide audience will be judged by the standards of the community most likely to be offended by the message. The regulated subject matter includes any of the seven "dirty words" used in the *Pacifica* monologue, the use of which the Government's expert acknowledged could constitute a felony. It may also extend to discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalogue of the Carnegie Library.

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. 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.

We agree with the District Court's conclusion that the CDA places an unacceptably heavy burden on protected speech, and that the defenses do not constitute the sort of "narrow tailoring" that will save an otherwise patently invalid unconstitutional provision.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in the judgment in part and dissenting in part.

I write separately to explain why I view the Communications Decency Act of 1996 (CDA) as little more than an attempt by Congress to create "adult zones" on the Internet. Our precedent indicates that the creation of such zones can be constitutionally sound. Despite the soundness of its purpose, however, portions of the CDA are unconstitutional because they stray from the

blueprint our prior cases have developed for constructing a "zoning law" that passes constitutional muster.

Thus, the constitutionality of the CDA as a zoning law hinges on the extent to which it substantially interferes with the First Amendment rights of adults. Because the rights of adults are infringed only by the "display" provision and by the "indecency transmission" and "specific person" provisions as applied to communications involving more than one adult, I would invalidate the CDA only to that extent. Insofar as the "indecency transmission" and "specific person" provisions prohibit the use of indecent speech in communications between an adult and one or more minors, however, they can and should be sustained. The Court reaches a contrary conclusion, and from that holding that I respectfully dissent.