THE FIRST AMENDMENT AND RELATED STATUTES

PROBLEMS, CASES AND POLICY ARGUMENTS

ONLINE SUPPLEMENT

CONTAINING (1) NEW CASES,
(2) SUPPLEMENTARY MATERIAL TO CASES IN THE CASEBOOK, AND
(3) CASES FROM FORMER EDITIONS OF THE CASEBOOK

by

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2. Public Officials/Public Concern

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate the document which the whole world looks upon as setting the pattern for modern freedom....

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and huddled into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter... even as they fear the upwelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it is this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South. Their strategy is to beset this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is our America as well as theirs....

We must heed their rising voices—yes—but we must add our own. We must extend ourselves above and beyond...
II. RESTRICTIONS BASED ON COMMUNICATIVE IMPACT

ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American teenagers, in face of the entire weight of official state authority and police power, have boldly stepped forth as answer Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "seditious"—"seditious" and similar "offenses." And now they have charged him with "perjury"—a felony under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions moral support and render the material help so urgently
needed by those who are taking the ride, facing jail,
and even death in a glorious re-affirmation of our
Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help Is Urgently Needed... NOW!!

We in the south who are struggling daily for dignity and freedom warmly endorse this appeal

Rev. Ralph B. Abernathy
( Birmingham, Ala.)

Rev. Fred L. Shuttlesworth
(Birmingham, Al.)

Rev. Kelly Miller Smith
(Nashville, Tenn.)

Rev. W. A. Dumas
(Chattanooga, Tenn.)

Rev. C. R. Steele
(Tallahassee, Fla.)

Rev. Martin Luther King, Jr.
(Atlanta, Ga.)

Rev. Robert L. Williams
(Atlanta, Ga.)

Rev. Michael D. McKinnon
(Columbia, S.C.)

Rev. J. L. Farmer, Jr.
(Columbia, S.C.)

Rev. Henry C. Reimert
(Atlanta, Ga.)

Rev. S. S. Copeland, Jr.
(Montgomery, Ala.)

Rev. Samuel W. Wilcox
(Atlanta, Ga.)

Rev. Walter L. Hamilton
(Pittsburgh, Pa.)

Rev. A. L. Davis
(New Orleans, La.)

Ms. Katie L. Wildeman
(Montgomery, Ala.)

Rev. W. F. H. Hall
(Albany, Ga.)

Rev. Dr. E. D. Nixon
(Rock Hill, S.C.)

Committee To Defend Martin Luther King and the Struggle for Freedom in the South
321 West 125th Street, New York 27, N. Y. University 6-1700

Chairmen: A. Philip Randolph, Dr. Gardner C. Taylor; Chairmen of Cultural Division: Harry Belafonte, Sidney Poitier; Treasurer: Nat King Cole; Executive Director: Bayard Rustin; Chairmen of Church Division: Father George B. Ford, Rev. Harry Emerson Fosdick, Rev. Thomas Kilgore, Jr., Rabbi E. E. Klein; Chairmen of Labor Division: Morris Lushowitz

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[Additional text not legible]
C. EXCEPTIONS FROM PROTECTION—OBScenity

2B. OBSCenity, DEPICTIons OF VIOLENCE, AND SPEECH TO CHILdREN


Justice Scalia delivered the opinion of the Court....

Cal. Civ. Code Ann. §§ 1746–1746.5 [which the Court calls “the Act”—ed.] prohibits the sale or rental of “violent video games” to minors, and requires their packaging to be labeled “18.” The Act covers games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,‖ that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”

Violation of the Act is punishable by a civil fine of up to $1,000. Respondents, representing the video-game and software industries, brought a preenforcement challenge to the Act....

[A.] [V]ideo games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. “Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.” Winters v. New York, 333 U.S. 507 (1948).

Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution, “esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”

And whatever the challenges of applying the Constitution to ever-advancing technology, “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary” when a new and different medium for communication appears. The most basic of those principles is this: “[A]s a general matter, ... government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”

There are of course exceptions. “From 1791 to the present, ... the First Amendment has permitted restrictions upon the content of speech in a few limited areas,” and has never “include[d] a freedom to disregard these traditional limitations.” These limited areas—such as obscenity, incitement, and fighting words—represent “well-defined and narrowly limited classes
of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."

Last Term, in United States v. Stevens, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated... [Courts may not] apply[] a “simple balancing test” that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test... [W]ithout persuasive evidence that a novel restriction on content is part of a long... tradition of proscription, a legislature may not revise the “judgment [of] the American people,” embodied in the First Amendment, “that the benefits of its restrictions on the Government outweigh the costs.”

That holding controls this case... California has tried to make violent-speech regulation look like obscenity regulation by appending a saving clause required for the latter. That does not suffice... [T]he obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of “sexual conduct.”...

In Winters, we considered a New York criminal statute “forbid[ding] the massing of stories of bloodshed and lust in such a way as to incite to crime against the person... “[T]here can be no more precise test of written indecency or obscenity,” [the lower court had] said, “than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order.”... [But we concluded] that violence is not part of the obscenity that the Constitution permits to be regulated. The speech reached by the statute contained “no indecency or obscenity in any sense heretofore known to the law.”

[B.] Because speech about violence is not obscene, it is of no consequence that California’s statute mimics the New York statute regulating obscenity-for-minors that we upheld in Ginsberg v. New York, 390 U.S. 629 (1968). That case approved a prohibition on the sale to minors of sexual material that would be obscene from the perspective of a child—[certain depictions of “nudity, sexual conduct, sexual excitement, or sadomasochistic abuse,” that... “predominantly appeal[] to the prurient, shameful or morbid interests of minors, and [are] patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and [are] utterly without redeeming social importance for minors.”] We held that the legislature could “adjus[t] the definition of obscenity ‘to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests...’ of... minors.” And because “obscenity is not protected expression,” the New York statute could be sustained so long as the legislature’s judgment that the proscribed materials were harmful to children “was not irrational.”

The California Act is something else entirely. It does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children. Cali-
California does not argue that it is empowered to prohibit selling offensively violent works to adults—and it is wise not to, since that is but a hair’s breadth from the argument rejected in Stevens. Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. “[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.” No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed. “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.”

California’s argument would fare better if there were a longstanding tradition in this country of specially restricting children’s access to depictions of violence, but there is none. Certainly the books we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm’s Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers “till she fell dead on the floor, a sad example of envy and jealousy.” Cinderella’s evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

High-school reading lists are full of similar fare. Homer’s Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake.... “Even so did we seize the fiery-pointed brand and whirled it round in his eye, and the blood flowed about the heated bar. And the breath of the flame singed his eyelids and brows all about, as the ball of the eye burnt away, and the roots thereof crackled in the flame[.]” In the Inferno, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. And Golding’s Lord of the Flies recounts how a schoolboy called Piggy is savagely murdered by other children while marooned on an island.

{[P]laying violent video ... is indeed “different in ‘kind’” from reading violent literature ..., but not in a way that causes the provision and viewing of violent video games, unlike the provision and reading of books, not to be expressive activity and hence not to enjoy First Amendment protection. Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not constitutional ones. Crudely violent video games, tawdry TV shows, and cheap novels and magazines are no less forms of speech than The Divine Comedy, and restrictions upon them must survive strict scrutiny—a question to which we devote our attention [below]. Even if we can see in them “nothing of any possible value to society ..., they are as much entitled to the protection of free speech as the best of literature.”}
This is not to say that minors’ consumption of violent entertainment has never encountered resistance. In the 1800’s, dime novels depicting crime and “penny dreadfuls” (named for their price and content) were blamed in some quarters for juvenile delinquency. When motion pictures came along, they became the villains instead. For a time [starting 1915], our Court did permit broad censorship of movies because of their capacity to be “used for evil,” but we eventually reversed course [in 1952], Radio dramas were next, and then came comic books. Many in the late 1940’s and early 1950’s blamed comic books for fostering a “preoccupation with violence and horror” among the young, leading to a rising juvenile crime rate. But efforts to convince Congress to restrict comic books failed. And, of course, after comic books came television and music lyrics.

California claims that video games present special problems because they are “interactive,” in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of The Adventures of You: Sugarcane Island in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner has observed, all literature is interactive. “[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader’s own.” ...

Justice Alito recounts [various] disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito’s description of those video games he has discovered that have a racial or ethnic motive for their violence—“ethnic cleansing” [of] ... African Americans, Latinos, or Jews.” ... [I]ronically, Justice Alito’s argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

[C.] {Justice Thomas argues} that parents have traditionally had the power to control what their children hear and say. This is true enough. And it perhaps follows from this that the state has the power to enforce parental prohibitions—to require, for example, that the promoters of a rock concert exclude those minors whose parents have advised the promoters that their children are forbidden to attend.

But it does not follow that the state has the power to prevent children from hearing or saying anything without their parents’ prior consent. The latter would mean, for example, that it could be made criminal to admit persons under 18 to a political rally without their parents’ prior written consent—even a political rally in support of laws against corporal punishment of children, or laws in favor of greater rights for minors. And what is good for First Amendment rights of speech must be good for First Amend-
C. EXCEPTIONS FROM PROTECTION—OBScenity

ment rights of religion as well: It could be made criminal to admit a person under 18 to church, or to give a person under 18 a religious tract, without his parents’ prior consent....

[Yet such laws would be] obviously an infringement upon the religious freedom of young people and those who wish to proselytize young people. Such laws do not enforce parental authority over children’s speech and religion; they impose governmental authority, subject only to a parental veto. In the absence of any precedent for state control, uninvited by the parents, over a child’s speech and religion (Justice Thomas cites none), and in the absence of any justification for such control that would satisfy strict scrutiny, those laws must be unconstitutional.]

[D.] [Sections D through F, and much of Justice Breyer’s dissent, are cast in terms of “strict scrutiny,” a First Amendment test that will be discussed in much more detail in Part II.I of the casebook. These sections’ application of strict scrutiny should be self-explanatory enough to be understandable, but if you want to know more, you can just read the summary of that section.—ed.]

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an “actual problem” in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. “It is rare that a regulation restricting speech because of its content will ever be permissible.”

California cannot meet that standard. At the outset, it acknowledges that it cannot show a direct causal link between violent video games and harm to minors. Rather, relying upon our decision in Turner Broadcasting System, Inc. v. FCC, the State claims that it need not produce such proof because the legislature can make a predictive judgment that such a link exists, based on competing psychological studies. But reliance on Turner Broadcasting is misplaced. That decision applied intermediate scrutiny to a content-neutral regulation. California’s burden is much higher, and because it bears the risk of uncertainty, ambiguous proof will not suffice.

The State’s evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively (which would at least be a beginning).

Instead, “[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.” They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children’s feeling more aggressive or making louder noises in the few
minutes after playing a violent game than after playing a nonviolent game. {One study, for example, found that children who had just finished playing violent video games were more likely to fill in the blank letter in “explo_e” with a “d” (so that it reads “explode”) than with an “r” (“explore”). The prevention of this phenomenon, which might have been anticipated with common sense, is not a compelling state interest.}

Even taking for granted Dr. Anderson’s conclusions that violent video games produce some effect on children’s feelings of aggression, those effects are both small and indistinguishable from effects produced by other media. In his testimony in a similar lawsuit, Dr. Anderson admitted that the “effect sizes” of children’s exposure to violent video games are “about the same” as that produced by their exposure to violence on television. And he admits that the same effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like Sonic the Hedgehog that are rated “E” (appropriate for all ages), or even when they “vie[w] a picture of a gun.”

{Justice Alito is mistaken in thinking that we fail to take account of “new and rapidly evolving technology.” The studies in question pertain to that new and rapidly evolving technology, and fail to show, with the degree of certitude that strict scrutiny requires, that this subject-matter restriction on speech is justified.}

Nor is Justice Alito correct in attributing to us the view that “violent video games really present no serious problem.” Perhaps they do present a problem, and perhaps none of us would allow our own children to play them. But there are all sorts of “problems”—some of them surely more serious than this one—that cannot be addressed by governmental restriction of free expression: for example, the problem of encouraging anti-Semitism (National Socialist Party of America v. Skokie, 432 U.S. 43 (1977)), the problem of spreading a political philosophy hostile to the Constitution (Noto v. United States, 367 U.S. 290 (1961)), or the problem of encouraging disrespect for the Nation’s flag (Texas v. Johnson).}

Justice Breyer would hold that California has satisfied strict scrutiny based upon his own research into the issue of the harmfulness of violent video games. The vast preponderance of this research is outside the record—and in any event we do not see how it could lead to Justice Breyer’s conclusion, since he admits he cannot say whether the studies on his side are right or wrong. Similarly, Justice Alito says he is not “sure” whether there are any constitutionally dispositive differences between video games and other media. If that is so, then strict scrutiny plainly has not been satisfied.

[E.] Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes,
rather than disfavoring a particular speaker or viewpoint. Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect—and a respect that renders irrelevant the contentions of the concurrence and the dissents that video games are qualitatively different from other portrayals of violence. The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child’s or putative parent’s, aunt’s, or uncle’s say-so suffices. That is not how one addresses a serious social problem.

[F.] California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. At the outset, we note our doubts that punishing third parties for conveying protected speech to children just in case their parents disapprove of that speech is a proper governmental means of aiding parental authority. Accepting that position would largely vitiate the rule that “only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors].”

But leaving that aside, California cannot show that the Act’s restrictions meet a substantial need of parents who wish to restrict their children’s access to violent video games but cannot do so. The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-only games to minors; and to rent or sell “M” rated games to minors only with parental consent.

In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, “the video game industry outpaces the movie and music industries” in “(1) restricting target-marketing of mature-rated products to children; (2) clearly and prominently disclosing rating information; and (3) restricting children’s access to mature-rated products at retail.” This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.

{Justice Breyer concludes that the remaining gap is compelling because, according to the FTC’s report, some “20% of those under 17 are still
able to buy M-rated games.” But some gap in compliance is unavoidable. The sale of alcohol to minors, for example, has long been illegal, but a 2005 study suggests that about 18% of retailers still sell alcohol to those under the drinking age. Even if the sale of violent video games to minors could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced.\}

And finally, the Act’s purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games. While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents ought to want. This is not the narrow tailoring to “assisting parents” that restriction of First Amendment rights requires.

[G.] California’s effort to regulate violent video games is the latest episode in a long series of failed attempts to censor violent entertainment for minors. While we have pointed out above that some of the evidence brought forward to support the harmfulness of video games is unpersuasive, we do not mean to demean or disparage the concerns that underlie the attempt to regulate them—concerns that may and doubtless do prompt a good deal of parental oversight. ... Our task is only to say whether or not such works constitute a “well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,” Chaplinsky (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply.

California’s legislation straddles the fence between (1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive. As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. And the overbreadth in achieving one goal is not cured by the underbreadth in achieving the other....

Justice Alito, with whom the Chief Justice joins, concurring in the judgment....

[A.] [The] California statute[s] ... terms are not framed with the precision that the Constitution demands, and I therefore agree with the Court
that this particular law cannot be sustained. [See p. 25 below.—ed.]

I disagree, however, with the approach taken in the Court’s opinion....

[T]he experience of playing video games (and the effects on minors of playing violent video games) may be very different from anything that we have seen before. (The Court acts prematurely in dismissing this possibility out of hand.)...

Today’s most advanced video games create [strikingly] realistic alternative worlds in which millions of players immerse themselves for hours on end... [I]n the near future video-game graphics may be virtually indistinguishable from actual video footage... [and before long] will be seen in three dimensions...

It is also forecast that video games will soon provide sensory feedback. By wearing a special vest or other device, a player will be able to experience physical sensations supposedly felt by a character on the screen. Some amici who support respondents foresee the day when “virtual-reality shoot-'em-ups” will allow children to “actually feel the splatting blood from the blown-off head” of a victim.

Persons who play video games also have an unprecedented ability to participate in the events that take place in the virtual worlds that these games create. Players can create their own video-game characters and can use photos to produce characters that closely resemble actual people. A person playing a sophisticated game can make a multitude of choices and can thereby alter the course of the action in the game....

[And in some of these games, the violence is astounding. Victims by the dozens are killed with every imaginable implement, including machine guns, shotguns, clubs, hammers, axes, swords, and chainsaws. Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. They cry out in agony and beg for mercy. Blood gushes, splatters, and pools. Severed body parts and gobs of human remains are graphically shown. In some games, points are awarded based, not only on the number of victims killed, but on the killing technique employed.

It also appears that there is no antisocial theme too base for some in the video-game industry to exploit. There are games in which a player can take on the identity and reenact the killings carried out by the perpetrators of the murders at Columbine High School and Virginia Tech. The objective of one game is to rape a mother and her daughters; in another, the goal is to rape Native American women. There is a game in which players engage in “ethnic cleansing” and can choose to gun down African-Americans, Latinos, or Jews. In still another game, players attempt to fire a rifle shot into the head of President Kennedy as his motorcade passes by the Texas School Book Depository.

If the technological characteristics of the sophisticated games that are likely to be available in the near future are combined with the characteristics of the most violent games already marketed, the result will be games that allow troubled teens to experience in an extraordinarily personal and vivid way what it would be like to carry out unspeakable acts of violence.
The Court is untroubled by this possibility. According to the Court, the “interactive” nature of video games is “nothing new” because “all literature is interactive.” ... [But] video games are “far more concretely interactive.” ... [O]nly an extraordinarily imaginative reader who reads a description of a killing in a literary work will experience that event as vividly as he might if he played the role of the killer in a video game.

To take an example, think of a person who reads the passage in Crime and Punishment in which Raskolnikov kills the old pawn broker with an axe. Compare that reader with a video-game player who creates an avatar that bears his own image; who sees a realistic image of the victim and the scene of the killing in high definition and in three dimensions; who is forced to decide whether or not to kill the victim and decides to do so; who then pretends to grasp an axe, to raise it above the head of the victim, and then to bring it down; who hears the thud of the axe hitting her head and her cry of pain; who sees her split skull and feels the sensation of blood on his face and hands. For most people, the two experiences will not be the same. ([T]here are a few children’s books that ask young readers to step into the shoes of a character and to make choices that take the stories along one of a very limited number of possible lines. But the very nature of the print medium makes it impossible for a book to offer anything like the same number of choices as those provided by a video game.) ... 

[B.] [The California law ... is limited to the sale or rental of violent video games to minors ... [and] does not prevent parents and certain other close relatives from buying or renting violent games for their children or other young relatives if they see fit.... Instead, the California law reinforces parental decisionmaking in exactly the same way as the New York statute upheld in Ginsberg. Under both laws, minors are prevented from purchasing certain materials; and under both laws, parents are free to supply their children with these items if that is their wish.

[C.] Citing the video-game industry’s voluntary rating system, the Court argues that the California law does not “meet a substantial need of parents who wish to restrict their children’s access to violent video games but cannot do so.” ... [But] the industry adopted this system in response to the threat of federal regulation, a threat that the Court’s opinion may now be seen as largely eliminating.... [C]ompliance with this system at the time of the enactment of the California law left much to be desired—[and] future enforcement may decline if the video-game industry perceives that any threat of government regulation has vanished. {A 2004 Federal Trade Commission Report showed that 69 percent of unaccompanied children ages 13 to 16 were able to buy M-rated games and that 56 percent of 13-year-olds were able to buy an M-rated game.} ... [And] many parents today are simply not able to monitor their children’s use of computers and gaming devices.)

For all these reasons, I would hold only that the particular law at issue here fails to provide the clear notice that the Constitution requires. I would not squelch legislative efforts to deal with what is perceived by some to be a significant and developing social problem....
C. EXCEPTIONS FROM PROTECTION—OBSCENITY

Justice Thomas, dissenting.

The Court’s decision today does not comport with the original public understanding of the First Amendment.... The practices and beliefs of the founding generation establish that “the freedom of speech,” as originally understood, does not include a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents or guardians....

In the Puritan tradition common in the New England Colonies, fathers ruled families with absolute authority.... Part of the father’s absolute power was the right and duty “to fill his children’s minds with knowledge and ... make them apply their knowledge in right action.” ... This conception of parental authority was reflected in laws at that time. In the Massachusetts Colony, for example, it was unlawful for tavern keepers (or anyone else) to entertain children without their parents’ consent. And a “stubborn or rebellious son” of 16 years or more committed a capital offense if he disobeyed “the voice of his Father, or the voice of his Mother.”

In the decades leading up to and following the Revolution, ... the same overarching principles remained. Parents ... exercised significant authority over their children, including control over the books that children read. And laws at the time continued to reflect strong support for parental authority and the sense that children were not fit to govern themselves....

[Americans of the Framing era had] great concern about influences on children[, including the books they read]. (“Vice always spreads by being published,” Noah Webster observed. “[Y]oung people are taught many vices by fiction, books, or public exhibitions, vices which they never would have known had they never read such books or attended such public places.” Prominent children’s authors harshly criticized fairy tales and the use of anthropomorphic animals. See, e.g., S. Goodrich, 2 Recollections of a Lifetime 320, n.* (1856) (describing fairy tales as “calculated to familiarize the mind with things shocking and monstrous; to cultivate a taste for tales of bloodshed and violence; to teach the young to use coarse language, and cherish vulgar ideas; ... and to fill [the youthful mind] with the horrors of a debased and debauched fancy”).]

{[One writer wrote,] “[c]hildren ... should not read anything without a mother’s knowledge and sanction; this is particularly necessary between the ages of twelve and sixteen.”} [Further historical evidence on these points, which the majority did not disagree with, omitted.—ed.] Based on these views of childhood, the founding generation understood parents to have a right and duty to govern their children’s growth....

The law at the time reflected the founding generation’s understanding of parent-child relations.... [P]arents were responsible for maintaining, protecting, and educating their children, and therefore had “power” over their children.... The law entitled parents to “the custody of their [children],” “the value of [t]he [children’s] labor and services,” and the “right to the exercise of such discipline as may be requisite for the discharge of their sacred trust.” ... Laws also set age limits restricting marriage without pa-
rental consent. For example, from 1730 until at least 1849, Pennsylvania law required parental consent for the marriage of anyone under the age of 21. The history clearly shows a founding generation that believed parents to have complete authority over their minor children and expected parents to direct the development of those children.

In light of this history, the founding generation would not have understood “the freedom of speech” to include a right to speak to children without going through their parents. As a consequence, I do not believe that laws limiting such speech—for example, by requiring parental consent to speak to a minor—“abridg[e] the freedom of speech” within the original meaning of the First Amendment.

The notion that parents have authority over their children and that the law can support that authority persists today. For example, at least some States make it a crime to lure or entice a minor away from the minor’s parent. Every State in the Union still establishes a minimum age for marriage without parental or judicial consent. Individuals less than 18 years old cannot enlist in the military without parental consent. And minors remain subject to curfew laws across the country, and cannot unilaterally consent to most medical procedures.

This Court has never held, until today, that “the freedom of speech” includes a right to speak to minors (or a right of minors to access speech) without going through the minors’ parents. The Court’s constitutional jurisprudence “historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.” Under that case law, “legislature[s] can properly conclude that parents and others, teachers for example, who have ... primary responsibility for children’s well-being are entitled to the support of laws designed to aid discharge of that responsibility.”

This is because “the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.” “Legal restrictions on minors, especially those supportive of the parental role, may be important to the child’s chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.”

Justice Breyer, dissenting...

[A.] Like the majority, I believe that the California law must be “narrowly tailored” to further a “compelling interest,” without there being a “less restrictive” alternative that would be “at least as effective.” I would not apply this strict standard “mechanically.” Rather, in applying it, I would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying “compelling interests,” the degree to which the statute furthers that interest, the nature and effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, “the statute works speech-related harm ... out of proportion to the benefits that the statute seeks to provide.” First Amendment standards applied in this way are difficult but not impossible to satisfy.
[B.] [Justice Breyer, argued, for reasons similar to those in Part B of Justice Alito’s opinion, that the law only modestly burdened speech. He added:—ed.] Nor is the statute, if upheld, likely to create a precedent that would adversely affect other media, say films, or videos, or books. A typical video game involves a significant amount of physical activity. And pushing buttons that achieve an interactive, virtual form of target practice (using images of human beings as targets), while containing an expressive component, is not just like watching a typical movie.

[C.] The interest that California advances in support of the statute is compelling. As this Court has previously described that interest, it consists of both (1) the “basic” parental claim “to authority in their own household to direct the rearing of their children,” which makes it proper to enact “laws designed to aid discharge of [parental] responsibility,” and (2) the State’s “independent interest in the well-being of its youth.” Ginsberg. As to the need to help parents guide their children, the Court noted in 1968 that “parental control or guidance cannot always be provided.” Today, 5.3 million grade-school-age children of working parents are routinely home alone. Thus, it has, if anything, become more important to supplement parents’ authority to guide their children’s development.

As to the State’s independent interest, we have pointed out that juveniles are more likely to show a “lack of maturity” and are “more vulnerable or susceptible to negative influences and outside pressures,” and that their “character ... is not as well formed as that of an adult.” And we have therefore recognized “a compelling interest in protecting the physical and psychological well-being of minors.”

[D.] There is considerable evidence that California’s statute significantly furthers this compelling interest. That is, in part, because video games are excellent teaching tools. Learning a practical task often means developing habits, becoming accustomed to performing the task, and receiving positive reinforcement when performing that task well. Video games can help develop habits, accustom the player to performance of the task, and reward the player for performing that task well. Why else would the Armed Forces incorporate video games into its training?

When the military uses video games to help soldiers train for missions, it is using this medium for a beneficial purpose. But California argues that when the teaching features of video games are put to less desirable ends, harm can ensue. In particular, extremely violent games can harm children by rewarding them for being violently aggressive in play, and thereby often teaching them to be violently aggressive in life. And video games can cause more harm in this respect than can typically passive media, such as books or films or television programs.

There are many scientific studies that support California’s views. Social scientists, for example, have found causal evidence that playing these games results in harm. Longitudinal studies, which measure changes over time, have found that increased exposure to violent video games causes an increase in aggression over the same period. Experimental studies in la-
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Laboratories have found that subjects randomly assigned to play a violent video game subsequently displayed more characteristics of aggression than those who played nonviolent games. Surveys of 8th and 9th grade students have found a correlation between playing violent video games and aggression. Cutting-edge neuroscience has shown that “virtual violence in video game playing results in those neural patterns that are considered characteristic for aggressive cognition and behavior.” And “meta-analyses,” i.e., studies of all the studies, have concluded that exposure to violent video games “was positively associated with aggressive behavior, aggressive cognition, and aggressive affect,” and that “playing violent video games is a causal risk factor for long-term harmful outcomes.”

Some of these studies take care to explain in a commonsense way why video games are potentially more harmful than, say, films or books or television. In essence, they say that the closer a child’s behavior comes, not to watching, but to acting out horrific violence, the greater the potential psychological harm. Video games stimulate more aggression because “[p]eople learn better when they are actively involved,” players are “more likely to identify with violent characters,” and “violent games directly reward violent behavior.”

Experts debate the conclusions of all these studies. Like many, perhaps most, studies of human behavior, each study has its critics, and some of those critics have produced studies of their own in which they reach different conclusions.... I, like most judges, lack the social science expertise to say definitively who is right. But associations of public health professionals who do possess that expertise have reviewed many of these studies and found a significant risk that violent video games, when compared with more passive media, are particularly likely to cause children harm[.] ... “[O]ver 1000 studies ... point overwhelmingly to a causal connection between media violence and aggressive behavior in some children ... [and] the impact of violent interactive entertainment (video games and other interactive media) on young people ... may be significantly more severe than that wrought by television, movies, or music.” “... Recent longitudinal studies ... have revealed that in as little as 3 months, high exposure to violent video games increased physical aggression. Other recent longitudinal studies ... have revealed similar effects across 2 years.” [Similar quotes omitted.—ed.] ...

Unlike the majority, I would find sufficient grounds in these studies and expert opinions for this Court to defer to an elected legislature’s conclusion that the video games in question are particularly likely to harm children. This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts of this kind, particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases. See Holder; Turner Broadcasting System, Inc. v. FCC (II), 520 U.S. 180 (1997) (deferring, while applying intermediate scrutiny, to the Government’s technological judgments). The majority, in reaching its own, opposite conclusion about the validity of the relevant studies, grants the legislature no deference at all.
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[E.] I can find no “less restrictive” alternative to California’s law that would be “at least as effective.” The majority points to a voluntary alternative: The industry tries to prevent those under 17 from buying extremely violent games by labeling those games with an “M” (Mature) and encouraging retailers to restrict their sales to those 17 and older. But this voluntary system has serious enforcement gaps. When California enacted its law, a Federal Trade Commission (FTC) study had found that nearly 70% of unaccompanied 13- to 16-year-olds were able to buy M-rated video games. Subsequently the voluntary program has become more effective. But as of the FTC’s most recent update to Congress, 20% of those under 17 are still able to buy M-rated video games, and, breaking down sales by store, one finds that this number rises to nearly 50% in the case of one large national chain. And the industry could easily revert back to the substantial noncompliance that existed in 2004, particularly after today’s broad ruling reduces the industry’s incentive to police itself.

The industry also argues for an alternative technological solution, namely “filtering at the console level.” But it takes only a quick search of the Internet to find guides explaining how to circumvent any such technological controls. YouTube viewers, for example, have watched one of those guides (called “How to bypass parental controls on the Xbox 360”) more than 47,000 times.

[F.] [And where [the two government] interests work in tandem, it is not fatally “underinclusive” for a State to advance its interests in protecting children against the special harms present in an interactive video game medium through a default rule that still allows parents to provide their children with what their parents wish.]

[G.] I add that the majority’s different conclusion creates a serious anomaly in First Amendment law. [Since the Court in Ginsberg specified that the statute’s prohibition applied to material that was not obscene, I cannot dismiss Ginsberg on the ground that it concerned obscenity.] Ginsberg makes clear that a State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game only when the woman—bound, gagged, tortured, and killed—is also topless?

This anomaly is not compelled by the First Amendment. It disappears once one recognizes that extreme violence, where interactive, and without literary, artistic, or similar justification, can prove at least as, if not more, harmful to children as photographs of nudity. And the record here is more than adequate to support such a view. That is why I believe that Ginsberg controls the outcome here a fortiori. And it is why I believe California’s law is constitutional on its face.
This case is ultimately less about censorship than it is about education. Our Constitution cannot succeed in securing the liberties it seeks to protect unless we can raise future generations committed cooperatively to making our system of government work. Education, however, is about choices. Sometimes, children need to learn by making choices for themselves. Other times, choices are made for children—by their parents, by their teachers, and by the people acting democratically through their governments. In my view, the First Amendment does not disable government from helping parents make such a choice here—a choice not to have their children buy extremely violent, interactive video games, which they more than reasonably fear pose only the risk of harm to those children....

3. THE VAGUENESS DOCTRINE


Chief Justice Burger delivered the opinion of the Court....

The ordinance at issue here, Ordinance No. 598A ... covers persons soliciting for “a recognized charitable cause, or any person desiring to canvass, solicit or call from house to house for a Federal, State, County or Municipal political campaign or cause” ... [and] “representatives of Borough Civic Groups and Organizations and any [honorably discharged veterans].” Those covered by this ordinance are required only to “notify the Police Department, in writing, for identification only.” Once given, the notice is “good for the duration of the campaign or cause.” ...

Edward Hynes, a New Jersey state assemblyman whose district was redrawn in 1973 to include the Borough of Oradell, and three Oradell registered voters [sued to enjoin the enforcement of the ordinance] ....

As a matter of due process, “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” The general test of vagueness applies with particular force in review of laws dealing with speech. “[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.” ... Ordinance No. 598A must fall because in certain respects “men of common intelligence must necessarily guess at its meaning.” ...

First, the coverage of the ordinance is unclear; it does not explain, for example, whether a “recognized charitable cause” means one recognized by the Internal Revenue Service as tax exempt, or recognized by some community agency, or one approved by some municipal official. While it is fairly clear what the phrase “political campaign” comprehends, it is not clear what is meant by a “Federal, State, County or Municipal ... cause.” Finally, it is not clear what groups fall into the class of “Borough Civic Groups and Organizations” that the ordinance also covers.

Second, the ordinance does not sufficiently specify what those within
its reach must do in order to comply. The citizen is informed that before soliciting he must “notify the Police Department, in writing, for identification only.” But he is not told what must be set forth in the notice, or what the police will consider sufficient as “identification.” This is in marked contrast to [another ordinance] which sets out specifically what is required of commercial solicitors ....

The New Jersey Supreme Court construed the ordinance to permit one to send the required identification by mail; a canvasser who used the mail might well find—too late—that the identification he provided by mail was inadequate. In this respect, as well as with respect to the coverage of the ordinance, this law “may trap the innocent by not providing fair warning.” Grayned v. City of Rockford.

Nor does the ordinance “provide explicit standards for those who apply” it. To the extent that these ambiguities and the failure to explain what “identification” is required give police the effective power to grant or deny permission to canvass for political causes, the ordinance suffers in its practical effect from the vice condemned in [the cases striking down discretionary licensing schemes].

The New Jersey Supreme Court undertook to give the ordinance a limiting construction by suggesting that since the identification requirement “may be satisfied in writing, ... resort may be had to the mails,” but this construction of the ordinance does not explain either what the law covers or what it requires; for example, it provides no clue as to what is a “recognized charity”; nor is political “cause” defined. Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out—a matter on which we intimate no view—we are without power to remedy the defects by giving the ordinance constitutionally precise content....

Justice Rehnquist, dissenting....

[Even allowing for the stricter standard which the Court says is appropriate in dealing with laws regulating speech, I fail to see any vagueness in this ordinance which would not inhere in any ordinance or statute which has never been applied.

The first alleged infirmity cited by the Court is that the ordinance’s coverage is unclear. It suggests that this occurs because it is difficult to ascertain precisely what “causes” are covered by the law or what groups come within a general definition found therein....

[But] “[w]ords inevitably contain germs of uncertainty and ... there may be disputes over the meaning of such terms.... But ... ‘there are limitations in the English language with respect to being both specific and manageably brief, and ... although the [definitions] may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.’” ... [There are] inherent limitations upon anticipating and defining away every problem of interpretation which might arise regarding a new statute ....
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The other shortcoming which the Court criticizes is the ordinance’s failure to “sufficiently specify what those within its reach must do in order to comply.” But, as the Court recognizes, the ordinance demands quite plainly that a person such as appellant Hynes who desires to canvass in the borough must “notify the Police Department, in writing, for identification only.” As the chief of police of the borough of Oradell put it in an affidavit submitted to the Superior Court: “All that is asked is that [a political candidate] let us know who he is.” I cannot see how this provision can possibly become the trap for the unwary the Court suggests in its opinion.

Appellant Hynes, for example, knows he is involved in a political campaign and that he must identify himself, in writing, to the Oradell Police Department if he desires to canvass door to door there. Should he have any doubts as to whether his identification is sufficiently detailed, he has simple recourse close at hand; he need only ask the Oradell police: “Is that enough? Do you require anything more?” Persons may thus learn exactly what is required in practice.

The Court hypothesizes that a canvasser who chose to submit the requisite identification to the Oradell police by mail might learn “too late” that his submission was inadequate. Such good-faith attempts at compliance might be found to preclude liability, and the availability of similar narrowing constructions says a good deal about the wisdom of declaring this law unconstitutional before it has ever been applied.

But even apart from these considerations the most that the ordinance imposes upon potential canvassers is the necessity of identifying themselves sufficiently in advance to ensure they have satisfied the law before embarking door to door in Oradell. Such a delay, which can hardly be more than a few days, is surely not an unconstitutional burden upon appellants’ rights.

Surely “the guarantees of freedom of speech and due process of law embodied in the Fourteenth Amendment” do not require that an ordinance validly requiring the identification of citizens must specify every way in which they may satisfactorily provide that information. No constitutional value is served by permitting persons who have avoided any possibility of attempting to ascertain how they may comply with a law to claim that their studied ignorance demonstrates that the law is impermissibly vague.

Finally, I do not understand the Court’s concluding observations regarding the vice of vagueness which it perceives in the ordinance’s compliance directive. The Court suggests that unspecified ambiguities may “give police the effective power to grant or deny permission to canvass for political causes.” But ... it has been authoritatively held as a matter of New Jersey law that this ordinance reposes “no discretion ... in any municipal official to deny the privilege of calling door to door.” Thus the authorities which the Court cites directly before the penultimate paragraph of its opinion afford no support for the result it reaches....
C. EXCEPTIONS FROM PROTECTION—OBSCenity


[Only Justice Alito, Chief Justice Roberts, and Justice Breyer confronted the vagueness issue in this case. The Justices in the majority didn’t reach it, because they thought the law was substantively unconstitutional, and Justice Thomas’s dissent would have left it for lower courts to decide in the first instance.—ed.]

Justice Alito, with whom the Chief Justice joins, concurring in the judgment....

{[From the majority opinion:] Cal. Civ. Code Ann. §§ 1746–1746.5 prohibits the sale or rental of “violent video games” to minors, and requires their packaging to be labeled “18.” The Act covers games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” Violation of the Act is punishable by a civil fine of up to $1,000.} 

[A.] The law’s definition of “violent video game” is impermissibly vague.... The California Legislature modeled its violent video game statute on the New York law that this Court upheld in *Ginsberg v. New York*—a law that prohibited the sale of certain sexually related materials to minors. But the California Legislature departed from the *Ginsberg* model in an important respect, and the legislature overlooked important differences between the materials falling within the scope of the two statutes.

The law at issue in *Ginsberg* prohibited the sale to minors of materials that were deemed “harmful to minors,” and the law defined “harmful to minors” simply by adding the words “for minors” to each element of the definition of obscenity set out in what were then the Court’s leading obscenity decisions. Seeking to bring its violent video game law within the protection of *Ginsberg*, the California Legislature began with the obscenity test adopted in *Miller v. California* .... The legislature then made certain modifications to accommodate the aim of the violent video game law....

The first important difference between the *Ginsberg* law and the California violent video game statute concerns their respective threshold requirements. As noted, the *Ginsberg* law built upon the test for adult obscenity, and the current adult obscenity test, which was set out in *Miller*, requires an obscenity statute to contain a threshold limitation that restricts the statute’s coverage to specifically defined “hard core” depictions. The *Miller* Court gave as an example a statute that applies to only “[p]atently offensive representations or descriptions of ultimate sexual acts,” “masturbation, excretory functions, and lewd exhibition of the genitals.” The *Miller* Court clearly viewed this threshold limitation as serving a vital notice function. “We are satisfied,” the Court wrote, “that these specific prerequisites will provide fair notice to a dealer in such materials that...
his public and commercial activities may bring prosecution.” See also *Reno v. ACLU* (observing that *Miller*‘s threshold limitation “reduces the vagueness inherent in the open-ended term ’patently offensive’”).

By contrast, the threshold requirement of the California law does not perform the narrowing function served by the limitation in *Miller*. At least when *Miller* was decided, depictions of “hard core” sexual conduct were not a common feature of mainstream entertainment. But nothing similar can be said about much of the conduct covered by the California law. It provides that a video game cannot qualify as “violent” unless “the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being.”

For better or worse, our society has long regarded many depictions of killing and maiming[,] ordinarily understood as “the infliction of any serious wound,” as suitable features of popular entertainment, including entertainment that is widely available to minors. The California law’s threshold requirement would more closely resemble the limitation in *Miller* if it targeted a narrower class of graphic depictions.

Because of this feature of the California law’s threshold test, the work of providing fair notice is left in large part to the three requirements that follow, but those elements are also not up to the task. In drafting the violent video game law, the California Legislature could have made its own judgment regarding the kind and degree of violence that is acceptable in games played by minors (or by minors in particular age groups). Instead, the legislature relied on undefined societal or community standards. One of the three elements at issue here refers expressly to “prevailing standards in the community as to what is suitable for minors.” Another element points in the same direction, asking whether “[a] reasonable person, considering [a] game as a whole,” would find that it “appeals to a deviant or morbid interest of minors.” ... The adjective “deviant” ordinarily means “deviating ... from some accepted norm,” and the term “morbid” means “of, relating to, or characteristic of disease.” A “deviant or morbid interest” in violence, therefore, appears to be an interest that deviates from what is regarded—presumably in accordance with some generally accepted standard—as normal and healthy....

The California Legislature seems to have assumed that these standards are sufficiently well known so that a person of ordinary intelligence would have fair notice as to whether the kind and degree of violence in a particular game is enough to qualify the game as “violent.” And because the *Miller* test looks to community standards, the legislature may have thought that the use of undefined community standards in the violent video game law would not present vagueness problems.

There is a critical difference, however, between obscenity laws and laws regulating violence in entertainment. By the time of this Court’s landmark obscenity cases in the 1960’s, obscenity had long been prohibited, and this experience had helped to shape certain generally accepted norms concerning expression related to sex.
There is no similar history regarding expression related to violence. As the Court notes, classic literature contains descriptions of great violence, and even children’s stories sometimes depict very violent scenes. Although our society does not generally regard all depictions of violence as suitable for children or adolescents, the prevalence of violent depictions in children’s literature and entertainment creates numerous opportunities for reasonable people to disagree about which depictions may excite “deviant” or “morbid” impulses.

[B.] Finally, the difficulty of ascertaining the community standards incorporated into the California law is compounded by the legislature’s decision to lump all minors together. The California law draws no distinction between young children and adolescents who are nearing the age of majority.

In response to a question at oral argument, the attorney defending the constitutionality of the California law said that the State would accept a narrowing construction of the law under which the law’s references to “minors” would be interpreted to refer to the oldest minors—that is, those just short of 18. However, “it is not within our power to construe and narrow state laws.” We can only “extrapolate [their] allowable meaning” from the statutory text and authoritative interpretations of similar laws by courts of the State. In this case, California has not provided any evidence that the California Legislature intended the law to be limited in this way, or cited any decisions from its courts that would support an “oldest minors” construction.

For these reasons, I conclude that the California violent video game law fails to provide the fair notice that the Constitution requires. ... I would not express any view on whether a properly drawn statute would or would not survive First Amendment scrutiny....

**Justice Breyer, dissenting.**

In my view, California’s statute provides “fair notice of what is prohibited,” and consequently it is not impermissibly vague. Ginsberg explains why that is so. The Court there [upheld against a vagueness challenge] a New York law that forbade the sale to minors of a “picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity ...,” that “predominately appeals to the prurient, shameful or morbid interest of minors,” and “is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors,” and “is utterly without redeeming social importance for minors.”...

Comparing the language of California’s statute ... with the language of New York’s statute ..., it is difficult to find any vagueness-related difference. Why are the words “kill,” “maim,” and “dismember” any more difficult to understand than the word “nudity?” Justice Alito objects that these words do “not perform the narrowing function” that this Court has required in adult obscenity cases, where statutes can only cover “hard core” depictions. But the relevant comparison is not to adult obscenity cases but
to *Ginsberg*, which dealt with “nudity,” a category no more “narrow” than killing and maiming. And in any event, *narrowness* and *vagueness* do not necessarily have anything to do with one another. All that is required for vagueness purposes is that the terms “kill,” “maim,” and “dismember” give fair notice as to what they cover, which they do.

The remainder of California’s definition copies, almost word for word, the language this Court used in *Miller v. California* in permitting a total ban on material that satisfied its definition (one enforced with *criminal* penalties).... California only departed from the *Miller* formulation in two significant respects: It substituted the word “deviant” for the words “prurient” and “shameful,” and it three times added the words “for minors.” The word “deviant” differs from “prurient” and “shameful,” but it would seem no less suited to defining and narrowing the reach of the statute. And the addition of “for minors” to a version of the *Miller* standard was approved in *Ginsberg*, even though the New York law “drew no distinction between young children and adolescents who are nearing the age of majority.”

Both the *Miller* standard and the law upheld in *Ginsberg* lack perfect clarity. But that fact reflects the difficulty of the Court’s long search for words capable of protecting expression without depriving the State of a legitimate constitutional power to regulate.... [T]he “community standards” tests used in *Miller* and *Ginsberg* ... reflect the fact that sometimes, even when a precise standard proves elusive, it is easy enough to identify instances that fall within a legitimate regulation. And they seek to draw a line, which, while favoring free expression, will nonetheless permit a legislature to find the words necessary to accomplish a legitimate constitutional objective.

What, then, is the difference between *Ginsberg* and *Miller* on the one hand and the California law on the other? It will often be easy to pick out cases at which California’s statute directly aims, involving, say, a character who shoots out a police officer’s knee, douses him with gasoline, lights him on fire, urinates on his burning body, and finally kills him with a gunshot to the head.... As in *Miller* and *Ginsberg*, the California law clearly protects even the most violent games that possess serious literary, artistic, political, or scientific value. And it is easier here than in *Miller* or *Ginsberg* to separate the sheep from the goats at the statute’s border. That is because here the industry itself has promulgated standards and created a review process, in which adults who “typically have experience with children” assess what games are inappropriate for minors.

There is, of course, one obvious difference: The *Ginsberg* statute concerned depictions of “nudity,” while California’s statute concerns extremely violent video games. But for purposes of vagueness, why should that matter? Justice Alito argues that the *Miller* standard sufficed because there are “certain generally accepted norms concerning expression related to sex,” whereas there are no similarly “accepted standards regarding the suitability of violent entertainment.” But there is no evidence that is so. The Court relied on “community standards” in *Miller* precisely because of
the difficulty of articulating “accepted norms” about depictions of sex. I can find no difference—historical or otherwise—that is relevant to the vagueness question.

After all, one can find in literature as many (if not more) descriptions of physical love as descriptions of violence. Indeed, sex “has been a theme in art and literature throughout the ages.” For every Homer, there is a Titian. For every Dante, there is an Ovid. And for all the teenagers who have read the original versions of Grimm’s Fairy Tales, I suspect there are those who know the story of Lady Godiva.

Thus, I can find no meaningful vagueness-related differences between California’s law and the New York law upheld in Ginsberg. And if there remain any vagueness problems, the state courts can cure them through interpretation. Consequently, for purposes of this facial challenge, I would not find the statute unconstitutionally vague.

D. EXCEPTIONS FROM PROTECTION—“INTEGRAL PART” OF CRIMINAL CONDUCT

1. CHILD PORNOGRAPHY

_Justice White delivered the opinion of the Court._

[Ohio law banned the private possession of child pornography, and Osborne was convicted for violating the law.—ed.]

[This case [is] distinct from Stanley [v. Georgia] because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in Stanley....

In Stanley, Georgia primarily sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. We responded that “[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.” The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne’s mind. Rather, Ohio has enacted 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children....

It is ... surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.... Osborne contends that the State should use other measures, besides penalizing possession, to dry up the child pornography market.... Given the importance of the State’s interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. According to the State, since the time of our decision in Ferber, much of the
child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution....

Other interests also support the Ohio law. First, as Ferber recognized, the materials produced by child pornographers permanently record the victim’s abuse. The pornography’s continued existence causes the child victims continuing harm by haunting the children in years to come. The State’s ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity. (The Attorney General’s Commission on Pornography, for example, states: “Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having ‘fun’ participating in the activity.”) ...

Justice Brennan, with whom Justice Marshall and Justice Stevens join, dissenting. [Omitted.—ed.]

F. EXCEPTIONS FROM PROTECTION—THREATS


APPENDIX TO OPINION OF THE COURT

Portions of speech delivered by Charles Evers on April 19, 1969:

“Thank you very much. We want our white friends here to know what we tell them happens to be so. Thank you for having the courage to walk down those streets with us. We thank you for letting our white brethren know that guns and bullets ain't gonna stop us. (No) (No) We thank you for letting our white brothers know that Port Gibson ain't none of their town. (Amen) (Applause) That Port Gibson is all of our town. (Applause) That black folks, red folks, Chinese and Japanese alike (Yeah) (That's right.) that we are going to have our share. (Yeah, we are.) ...

“We are going to beat you because we know you can't trick us no more. (yea) You are not going to be able to fool us by getting somebody to give us a drink of whiskey no more. (Applause) You ain't gonna be able to fool us by somebody giving us a few dollars no more. (Applause) We are gonna take your money and drink with you and then we're gonna (Applause) vote against you. Then we are going to elect a sheriff in this county and a sheriff that is responsible, that won't have to run and grab the telephone and call up the blood-thirsty highway patrol when he gets ready (Yeah) to come in and beat innocent folks down to the ground for no cause. (That's right) (Applause) (Boo) We are going to elect a sheriff that can call his deputies and represent black leaders in the community and stop whatever problem there is. (Yeah) (That's right.)

“Then we are going to do more than that. The white merchants of this
town are so wrapped up in the power structure here, since you love your Police Department so well, since you support them so well (Yeah), we are going to let them buy your dirty clothes and your filthy, rotten groceries.

“Oh, no, white folks, we ain’t going to shoot you with no bullet. (That’s right.) We are going to shoot you with our ballots and with our bucks. (Yea) (That’s right.) We are going to take away from you the thing that you have had over us all these years. (Yeah) Political power and economic power. While you kill our brothers and our sisters and rape our wives and our friends. (Yeah) You’re guilty. You’re guilty because you don’t care a thing about anybody. (Yes.) And when you go and let a big, black burly niggar like you get on the police force (Yea) go down and grab another black brother’s arm and hold it while a white racist stole him from us, and he’s a liar if he says he didn’t hold him....

“We mean what we are saying. We are not playing. (Right) We better not even think one of us is black. You better not even be caught near one of these stores. (Applause)

“We don’t want you caught in Piggly-Wiggly. You remember how he grinned at us four years ago? (Yeah) You know how when he took office he grinned at us? (Yeah) He ain’t hired nobody yet. (That’s right) (No) And you know old Jitney Jungle down there with those funny letters down on the end? (That’s right) (Applause) He haven’t hired nobody in there yet. (No) Do you know poor ole M & M or whatever it stands for, mud and mush, I guess. (Applause) They’re out here on the highway and they haven’t hired none of us yet.

“Do you know Ellis who had a part-time boy all his life? He ain’t hired nobody, is he, yet? (No) Then we got ole Stampley, and ninety-nine and three-fourths of his sales are black folks business. He got the nerve to tell me he ain’t gonna put no nigger ringing his cash register. I got news for you, Brother Stampley. You can ring it your damn self. (Extra loud applause.) I want some of you fat cats after this meeting who wants three of our young boys who ain’t a’ scar’d of white folks (Applause) (Me) and we want you that’s willing to follow the rules now to go down by Brother Stampley’s and serve notice on him with our placards that we ain’t coming no more.

“Then we are going to tell all the young men that drive Piggly-Wiggly trucks now (Yeah) (Be careful, Son.) because the soul brothers and the spirit is watching you. (Extra loud applause.)

“All right, Brother Wolf, you’re next. (Applause) We got a couple of ’em to come down by Brother Wolf’s. We mean business, white folks. We ain’t gonna shoot you all, we are going to hit you where it hurts most. (In the pocketbook) (Applause) In the pocketbook and in the ballot box. (Applause) We may as well tell our friends at Alcorn to stay away from up here. (Yea) Now, you say, “What’s wrong with you niggers?” I’ll tell you what is wrong with us niggers; We are tired of you white folks, you racists and you bigots mistreating us. (Yeah) We are tired of paying you to deny us the right to even exist. (Tell ‘em about it.) And we ain’t coming back, white folks. (We
“You all put a curfew on us at eight o’clock tonight. We are going to do you better than that. We are going to leave at one-thirty. (Loud applause) We are going to leave at one-thirty and we ain’t coming back, white folks....

“We are going to have Brother McCay; we are going to have our newly elected mayor who we elected, we are going to have him around here, too. Come on back, my dear friend. He say, ‘Naw, brother, we ain’t coming.’ ‘Have you got rid of all those bigots you got on your police force?’ ‘No.’ ‘Have you hired Negroes in all them stores?’ ‘No.’ ‘Well, we ain’t coming back.’ (Right) That’s all we gonna do. You know, what they don’t realize is you put on this curfew, that is all we needed. Let me just give them some instructions. We are going to buy gas only from the Negro-owned service stations. We agreed on it, remember? Now, don’t back upon your agreement. (Yea) I don’t care how many Negroes working on it, that’s too bad. We are going only to Negro-owned service stations. And we are going only—the only time you will see us around on this street, now listen good, you are going to Lee’s Grocery and other stores on this end. Is that clear? (Yeah) (Applause)

“We don’t want to go to none of them drugstores. They get us confused. Now, who am I going to get my medicine from? Let us know in time and we will be glad to furnish a car free to carry you anywhere you have to go to get a prescription filled. You can’t beat this. (No) It won’t cost you a dime. You go to any of the local black businessmen and tell them you have got to go to Vicksburg to get your stuff. And then if they don’t carry you, let us know. We’ll take care of them later. (Applause) Now, you know, we have got a little song that says, ‘This is your thing, do what you want to do.’ (Applause) This is our thing, let’s do what we want to do with it. Let’s make sure now—if you be disobedient now you are going to be in trouble. Remember that, now, listen. Listen good. They are going to start saying, ‘You know what, Evers is down there with his goon squad, ...’ Now, we know Claiborne County,—‘with his goon squad harassing poor ole niggers.’

“Well, good white folks you have been harassing us all our lives. (Applause) And if we decided to harass you that’s our business. (That’s right) They are our children and we are going to discipline them the way we want to. Now, be sure you get all this right on all these tape recorders. Whatever I say on this trip I will say it in Jackson. (Amen) (Glory) And I will say it in Washington and New York. White folks ain’t gonna never control us no more. (Applause)....

“Now, my dear friends, the white folks have got the message. I hope you have got the message and tell every one of our black brothers until all these people are gone, you voted on this in the church, don’t let me down, and don’t let yourself down. We agreed in the church that we would vacate this town until they have met those requests, the white folks don’t demand nothing out of us. All right, white folks, we are just saying until you decide when you want to do these little things we beg of you, we are not coming back. (No way)
“None of us better not be caught up here. (Yea) I don’t care how old you are, I don’t care how sick you are, I don’t care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met. (Applause)

“Now, let’s get together. Are you for this or against it? (Applause) (For it.) Remember you voted this. We intend to enforce it. You needn’t go calling the chief of police, he can’t help you none. You needn’t go calling the sheriff, he can’t help you none. (That’s right.) He ain’t going to offer to sleep with none of us men, I can tell you that. (Applause) Let’s don’t break our little rules that you agreed upon here....

“Let’s go to the funeral of our young son whenever the funeral is. I don’t want you to come with hate because that is not going to solve our problems. (No hate.) We don’t want you to hate the white folks here in Port Gibson. That is not going to solve it. If you hate what they have done, I hate to get personal, I hate what they did so much to Medgar, (I know.) I ain’t going to ever stop hating them for that.

“But I am going to chase them in the way what I know is right and just. I am not going to lay out in the bushes and shoot no white folks. That’s wrong. I am not gonna go out here and bomb none of them’s home. (No) That’s not right. But I am going to do everything in my power to take away all the power, political power, legal power that they possess anywhere I live. We are going to compete against them. When we blacks learn to support and respect each other, then and not until then, will white folks respect us. (Applause)

“Now, you know I trust white folks and I mean every word I say. But it comes a time when we got to make up in our mind individually, are we going to make those persons worthwhile. We done talked and raised all kind of sand all day here, now, what is really going to prove it, are we going to live up to what we have said? (Applause) Now if there is any one of us breaks what we agreed upon, you are just as guilty as that little trigger-happy, blood-thirsty rascal. (Tell ‘em about it.) ...

“I go all over this country, and I ought not to tell you white folks this, and I tell other white folks that some day we are going to get together in Mississippi, black and white, and work out our problems. And we are ready to start whenever you are. If you are ready to start, we are. We ain’t going to let you push us, not one inch. (That’s right.) If you come on beating us, we are going to fight back. (Right)

“We got our understanding. We are all God’s children. The same man that brought you all here brought us. You could have been black just like we are. We could have been white and baldheaded just like you are. (Laughter) (Inaudible) We are going to work hard at this, Dan. We are going to be organized this time. We ain’t going to be bought off and talked off. We are going to elect the county sheriff here this next time that don’t need the highway patrol. Now, you see, Dan had a good chance to set himself up right, but he goofed it. He goofed. (Yeah) He blew it. (Laughter) Don’t forget that, heah. (Right) It brings back memories like you know you
remember things we do.

“Now, if you don’t think it is necessary, we don’t have to go back to the church. If you want to go back there, we can. I want you to make sure here that we are going to leave this town to our white brothers and we ain’t coming back no more until all our requests have been met. Is that the common consent of all of you here? (Applause) (Let’s go back to the church.) All right. Are we willing to make sure that everyone of us will be sure that none of the rest of our black brothers violate our ... (Yea) We are all saying it now. Let’s not say it now so much on my part. You know, I’m just sort of leading, you know, how these lawyers are, leading our folks on to say what has to be said. And that’s the case. Let’s make us a white town. We would like for you to start it. Be courteous now. Don’t mistreat nobody. Tell them, in a nice forceful way, the curfew is going to be on until they do what we ask them.”


*Chief Justice Warren delivered the opinion of the Court.*

When [Sinclair’s] president first learned of the Union’s drive in July, he talked with all of his employees in an effort to dissuade them from joining a union. He particularly emphasized the results of the long 1952 strike, which he claimed “almost put our company out of business,” and expressed worry that the employees were forgetting the “lessons of the past.” He emphasized, secondly, that the Company was still on “thin ice” financially, that the Union’s “only weapon is to strike,” and that a strike “could lead to the closing of the plant,” since the parent company had ample manufacturing facilities elsewhere.

He noted, thirdly, that because of their age and the limited usefulness of their skills outside their craft, the employees might not be able to find re-employment if they lost their jobs as a result of a strike. Finally, he warned those who did not believe that the plant could go out of business to “look around Holyoke and see a lot of them out of business.” The president sent letters to the same effect to the employees in early November, emphasizing that the parent company had no reason to stay in Massachusetts if profits went down.

During the two or three weeks immediately prior to the election on December 9, the president sent the employees a pamphlet captioned: “Do you want another 13-week strike?” stating, *inter alia*, that: “We have no doubt that the Teamsters Union can again close the Wire Weaving Department and the entire plant by a strike. We have no hopes that the Teamsters Union Bosses will not call a strike.... The Teamsters Union is a strike happy outfit.” Similar communications followed in late November, including one stressing the Teamsters’ “hoodlum control.”

Two days before the election, the Company sent out another pamphlet that was entitled: “Let’s Look at the Record,” and that purported to be an obituary of companies in the Holyoke-Springfield, Massachusetts, area that had allegedly gone out of business because of union demands, elimi-
nating some 3,500 jobs; the first page carried a large cartoon showing the preparation of a grave for the Sinclair Company and other headstones containing the names of other plants allegedly victimized by the unions.

Finally, on the day before the election, the president made another personal appeal to his employees to reject the Union. He repeated that the Company’s financial condition was precarious; that a possible strike would jeopardize the continued operation of the plant; and that age and lack of education would make re-employment difficult. The Union lost the election 7–6, and then filed both objections to the election and unfair labor practice charges which were consolidated for hearing before the trial examiner.

The Board agreed with the trial examiner that the president’s communications with his employees, when considered as a whole, “reasonably tended to convey to the employees the belief or impression that selection of the Union in the forthcoming election could lead [the Company] to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers.” Thus, the Board found that under the “totality of the circumstances” petitioner’s activities [violated the National Labor Relations Act].

The Board further agreed with the trial examiner that petitioner’s activities, because they “also interfered with the exercise of a free and untrammeled choice in the election,” and “tended to foreclose the possibility” of holding a fair election, required that the election be set aside.... Consequently, the Board set the election aside, entered a cease-and-desist order, and ordered the Company to bargain on request....

[A]n employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. [The Act] merely implements the First Amendment by requiring that the expression of “any views, argument, or opinion” shall not be “evidence of an unfair labor practice,” so long as such expression contains “no threat of reprisal or force or promise of benefit”....

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer’s rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [the Act]. And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation whereby that relationship is ultimately defined and where the independent voter may be freer to listen more objectively and employers as a class freer to talk. Cf. New York Times v. Sullivan.

Within this framework, we must reject the Company’s challenge to the
II. Restrictions Based on Communicative Impact

decision below and the findings of the Board on which it was based.... [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a “threat of reprisal or force or promise of benefit.” He may even make a prediction as to the precise effects he believes unionization will have on his company.

In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

We therefore agree with the court below that “[c]onveyance of the employer’s belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.” As stated elsewhere, an employer is free only to tell “what he reasonably believes will be the likely economic consequences of unionization that are outside his control,” and not “threats of economic reprisal to be taken solely on his own volition.”

Equally valid was the finding by the court and the Board that petitioner’s statements and communications were not cast as a prediction of “demonstrable ‘economic consequences,’ ” but rather as a threat of retaliatory action. The Board found that petitioner’s speeches, pamphlets, leaflets, and letters conveyed the following message: that the company was in a precarious financial condition; that the “strike-happy” union would in all likelihood have to obtain its potentially unreasonable demands by striking, the probable result of which would be a plant shutdown, as the past history of labor relations in the area indicated; and that the employees in such a case would have great difficulty finding employment elsewhere.

In carrying out its duty to focus on the question: “[W]hat did the speaker intend and the listener understand?,” the Board could reasonably conclude that the intended and understood import of that message was not to predict that unionization would inevitably cause the plant to close but to threaten to throw employees out of work regardless of the economic realities. In this connection, we need go no further than to point out (1) that petitioner had no support for its basic assumption that the union, which had not yet even presented any demands, would have to strike to be heard, and that it admitted at the hearing that it had no basis for attributing other plant closings in the area to unionism; and (2) that the Board has often found that employees, who are particularly sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts.
IV. SPECIAL BURDENS ON FREE SPEECH

B. COERCED DISCLOSURE OF SPEAKERS’ AND MEMBERS’ IDENTITIES

1. GOVERNMENT INVESTIGATIONS


Justice Harlan delivered the opinion of the Court....

Pursuant to a subpoena, ... petitioner on June 28, 1954, appeared as a witness before [a Subcommittee of the House Committee on Un-American Affairs].... [P]etitioner objected generally to the right of the Subcommittee to inquire into his “political” and “religious” beliefs or any “other personal and private affairs” or “associational activities,” ... [and] specifically declined to answer ... the following ...:

Are you now a member of the Communist Party? ...
Have you ever been a member of the Communist Party? ...
Were you ever a member of the Haldane Club of the Communist Party while at the University of Michigan? ...

[Petitioner was prosecuted for contempt of Congress and sentenced to] six months’ imprisonment and a fine of $250 ....

Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the protections of the First Amendment, unlike a proper claim of the privilege against self-incrimination ..., do not afford a witness the right to resist inquiry in all circumstances.

Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.... [I]n NAACP v. Alabama, we ... stated that the “subordinating interest of the State must be compelling” in order to overcome the individual constitutional rights at stake....

The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose....

Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof .... Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here.

In the last analysis this power rests on the right of self-preservation, “the ultimate value of any society.” Justification for its exercise in turn
rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld ... legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character.... To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II ... and to the vast burdens which these conditions have entailed for the entire Nation.

We think that investigatory power in this domain is not to be denied Congress solely because the field of education is involved. Nothing in the prevailing opinions in Sweezy v. State of New Hampshire, 354 U.S. 234 (1957), stands for a contrary view.... [T]he questioning of Sweezy, who had not been shown ever to have been connected with the Communist Party, as to the contents of a lecture he had given at the University of New Hampshire, and as to his connections with the Progressive Party, then on the ballot as a normal political party in some 26 States, was too far removed from the premises on which the constitutionality of the State’s investigation had to depend .... This is a very different thing from inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow....

[Petitioner's] position is in effect that this particular investigation was aimed not at the revolutionary aspects but at the theoretical classroom discussion of communism.... [But a]n investigation of advocacy of or preparation for overthrow certainly embraces the right to identify a witness as a member of the Communist Party, and to inquire into the various manifestations of the Party’s tenets. The strict requirements of a prosecution under the Smith Act, see Dennis v. United States and Yates v. United States, are not the measure of the permissible scope of a congressional investigation into “overthrow,” for of necessity the investigatory process must proceed step by step.

Nor can it fairly be concluded that this investigation was directed at controlling what is being taught at our universities rather than at overthrow. The statement of the Subcommittee Chairman at the opening of the investigation evinces no such intention, and so far as this record reveals nothing thereafter transpired which would justify our holding that the thrust of the investigation later changed. The record discloses considerable testimony concerning the foreign domination and revolutionary purposes and efforts of the Communist Party. That there was also testimony on the abstract philosophical level does not detract from the dominant theme of
this investigation—Communist infiltration furthering the alleged ultimate purpose of overthrow....

Finally, the record is barren of other factors which in themselves might sometimes lead to the conclusion that the individual interests at stake were not subordinate to those of the state. There is no indication in this record that the Subcommittee was attempting to pillory witnesses. Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee. And the relevancy of the questions put to him by the Subcommittee is not open to doubt.

We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended...

Justice Black, with whom ... Chief Justice [Warren] and Justice Douglas concur, dissenting....

The First Amendment says in no equivocal language that Congress shall pass no law abridging freedom of speech, press, assembly or petition. The activities of this Committee, authorized by Congress, do precisely that, through exposure, obloquy and public scorn. The Court does not really deny this fact but relies on a combination of three reasons for permitting the infringement: (A) The notion that despite the First Amendment's command Congress can abridge speech and association if this Court decides that the governmental interest in abridging speech is greater than an individual's interest in exercising that freedom, (B) the Government's right to "preserve itself," (C) the fact that the Committee is only after Communists or suspected Communists in this investigation.

(A) I do not agree that laws directly abridging First Amendment freedoms can be justified by a congressional or judicial balancing process.... But even assuming what I cannot assume, that some balancing is proper in this case, I feel that the Court after stating the test ignores it completely. At most it balances the right of the Government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations. Such a balance, however, mistakes the factors to be weighed.

In the first place, it completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political "mistakes" without later being subjected to governmental penalties for having dared to think for themselves. It is this right, the right to err politically, which keeps us strong as a Nation. For no number of laws against communism can have as much effect as the personal conviction which comes from having heard its arguments and rejected them, or from having once accepted its tenets and later recognized their worthlessness.

Instead, the obloquy which results from investigations such as this not only stifles "mistakes" but prevents all but the most courageous from hazarding any views which might at some later time become disfavored. This
result, whose importance cannot be overestimated, is doubly crucial when it affects the universities, on which we must largely rely for the experimentation and development of new ideas essential to our country’s welfare. It is these interests of society, rather that Barenblatt’s own right to silence, which I think the Court should put on the balance against the demands of the Government, if any balancing process is to be tolerated. Instead they are not mentioned, while on the other side the demands of the Government are vastly overstated and called “self preservation.”...

[T]his Committee can only seek information for the purpose of suggesting laws, and ... Congress’ power to make laws in the realm of speech and association is quite limited, even on the Court’s test. Its interest in making such laws in the field of education, primarily a state function, is clearly narrower still. Yet the Court styles this attenuated interest self-preservation and allows it to overcome the need our country has to let us all think, speak, and associate politically as we like and without fear of reprisal. Such a result reduces “balancing” to a mere play on words ....

(B) Moreover, I cannot agree with the Court’s notion that First Amendment freedoms must be abridged in order to “preserve” our country. That notion rests on the unarticulated premise that this Nation’s security hangs upon its power to punish people because of what they think, speak or write about, or because of those with whom they associate for political purposes....

I agree that despotic governments cannot exist without stifling the voice of opposition to their oppressive practices. The First Amendment means to me, however, that the only constitutional way our Government can preserve itself is to leave its people the fullest possible freedom to praise, criticize or discuss, as they see fit, all governmental policies and to suggest, if they desire, that even its most fundamental postulates are bad and should be changed ....

(C) The Court implies, however, that the ordinary rules and requirements of the Constitution do not apply because the Committee is merely after Communists and they do not constitute a political party but only a criminal gang.... [But t]o attribute to [all Communists], and to those who have left the Party, the taint of the group is to ignore both our traditions that guilt like belief is “personal and not a matter of mere association” and the obvious fact that “men adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles.” ... [I]n times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out....

[See also Justice Black’s slippery slope argument about how restrictions on Communists can lead to restrictions on others, p. 55 of the casebook.—ed.]

Justice Brennan, dissenting....

[N]o purpose for the investigation of Barenblatt is revealed by the
B. Coerced Disclosure of Speakers' and Members' Identities

record except exposure purely for the sake of exposure. This is not a purpose to which Barenblatt’s rights under the First Amendment can validly be subordinated. An investigation in which the processes of law-making and law-evaluating are submerged entirely in exposure of individual behavior—in adjudication, of a sort, through the exposure process—is outside the constitutional pale of congressional inquiry.


Justice Goldberg delivered the opinion of the Court....

[A.] The petitioner, then president of the Miami branch of the NAACP, was ordered to appear before the respondent Committee [and] ... to bring with him records of the association which were in his possession or custody and which pertained to the identity of members of, and contributors to, the Miami and state NAACP organizations.... [The Committee hearings were to] be “concerned with the activities of various organizations which have been or are presently operating in this State in the fields of, first, race relations; second, the coercive reform of social and educational practices and mores by litigation and pressured administrative action; third, of labor; fourth, of education; fifth, and other vital phases of life in this State.” The chairman also stated that the inquiry would be directed to Communists and Communist activities, including infiltration of Communists into organizations operating in the described fields....

The petitioner told the Committee that ... he would not produce [the membership lists] .... [T]he petitioner was ... adjudged in contempt [by a court], and sentenced to six months’ imprisonment and fined $1,200 ....

[B.] [T]he State has power adequately to inform itself—through legislative investigation, if it so desires—in order to act and protect its legitimate and vital interests.... “The power ... to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the [legislature] to remedy them.” ....

[But] the legislative power to investigate, broad as it may be, is not without limit. The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information.... [I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling

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a [The lineups in this case and in Barenblatt were identical, except that (1) Justice Whitaker had been replaced by Justice White, who took the same pro-investigation view, and (2) Justice Frankfurter, who took the pro-investigation view in Barenblatt, was replaced by Justice Goldberg, who took a pro-expressive-association-claimant view.—ed.]
state interest [sometimes called the “nexus” requirement—ed.]....

In *Barenblatt v. United States* [and similar cases], ... it was a refusal to answer a question or questions concerning the witness’ own past or present membership in the Communist Party which supported his conviction.... [T]he necessary preponderating governmental interest and, in fact, the very result in those cases were founded on the holding that the Communist Party is not an ordinary or legitimate political party, as known in this country, and that, because of its particular nature, membership therein is itself a permissible subject of regulation and legislative scrutiny. Assuming the correctness of the premises on which those cases were decided, no further demonstration of compelling governmental interest was deemed necessary, since the direct object of the challenged questions there was discovery of membership in the Communist Party, a matter held pertinent to a proper subject then under inquiry.

Here, however, it is not alleged Communists who are the witnesses before the Committee and it is not discovery of their membership in that party which is the object of the challenged inquiries. Rather, it is the NAACP itself which is the subject of the investigation .... There is no suggestion that the Miami branch of the NAACP or the national organization with which it is affiliated was, or is, itself a subversive organization. Nor is there any indication that the activities or policies of the NAACP were either Communist dominated or influenced. In fact, this very record indicates that the association was and is against communism and has voluntarily taken steps to keep Communists from being members.

Each year since 1950, the NAACP has adopted resolutions barring Communists from membership in the organization. Moreover, the petitioner testified that all prospective officers of the local organization are thoroughly investigated for Communist or subversive connections and, though subversive activities constitute grounds for termination of association membership, no such expulsions from the branch occurred during the five years preceding the investigation.

Thus, unlike ... in *Barenblatt* ..., the Committee was not here seeking ... any information as to whether [petitioner] ... or even other persons were members of the Communist Party, Communist front or affiliated organizations, or other allegedly subversive groups; instead, the entire thrust of the demands on the petitioner was that he disclose whether other persons were members of the NAACP, itself a concededly legitimate and nonsubversive organization.... The prior holdings that [the] governmental interest in controlling subversion and the particular character of the Communist Party and its objectives outweigh the right of individual Communists to conceal party membership or affiliations by no means require the wholly different conclusion that other groups—concededly legitimate—automatically forfeit their rights to privacy of association simply because the general subject matter of the legislative inquiry is Communist subversion or infiltration....

[C.] [T]he record in this case is insufficient to show a substantial con-
nection between the Miami branch of the NAACP and Communist activities which the respondent Committee itself concedes is an essential prerequisite to demonstrating the immediate, substantial, and subordinating state interest necessary to sustain its right of inquiry into the membership lists of the association.

Basically, the evidence relied upon by the respondent to demonstrate the necessary foundation consists of the testimony of R. J. Strickland, an investigator for the Committee and its predecessors, and Arlington Sands, a former association official. Strickland identified by name some 14 persons whom he said either were or had been Communists or members of Communist “front” or “affiliated” organizations. His description of their connection with the association was simply that “each of them has been a member of and/or participated in the meetings and other affairs of the NAACP in Dade County, Florida.” In addition, one of the group was identified as having made, at an unspecified time, a contribution of unspecified amount to the local organization.

We do not know from this ambiguous testimony how many of the 14 were supposed to have been NAACP members.... [T]he named persons may have attended no more than one or two wholly public meetings of the NAACP, and such attendance, like their membership, to the extent it existed, in the association, may have been wholly peripheral and begun and ended many years prior even to commencement of the present investigation in 1956.

In addition, it is not clear whether the asserted Communist affiliations and the association with the NAACP, however slight, coincided in time. Moreover, except for passing reference to participation in annual elections, there is no indication that membership carried with it any right to control over policy or activities, much less that any was sought. The reasoning which would find support for the challenged inquiries in Communist attendance at meetings from which no member of the public appears to have been barred is even more attenuated, since the only prerogative seemingly attaching to such attendance was the right to listen to the scheduled speaker or program. Mere presence at a public meeting or bare membership—without more—is not infiltration of the sponsoring organization....

[T]here was no claim made at the hearings, or since, that the NAACP or its Miami branch was engaged in any subversive activities or that its legitimate activities have been dominated or influenced by Communists. Without any indication of present subversive infiltration in, or influence on, the Miami branch of the NAACP, and without any reasonable, demonstrated factual basis to believe that such infiltration or influence existed in the past, or was actively attempted or sought in the present—in short without any showing of a meaningful relationship between the NAACP, Miami branch, and subversives or subversive or other illegal activities—we are asked to find the compelling and subordinating state interest which must exist if essential freedoms are to be curtailed or inhibited. This we cannot do....
Of course, a legislative investigation—as any investigation—must proceed “step by step,” but step by step or in totality, an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights.... We hold ... that groups which themselves are neither engaged in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities are to be protected in their rights of free and private association....

Justice Harlan, whom Justice Clark, Justice Stewart, and Justice White join, dissenting....

[None of our precedents suggest] any difference in the degree of governmental investigatory interest as between Communist infiltration of organizations and Communist activity by organizations.... [T]he sensitive area of race relations has long been a prime target of Communist efforts at infiltration.... [U]nless “nexus” requires an investigating agency to prove in advance the very things it is trying to find out, I do not understand how it can be said that the information preliminarily developed by the Committee’s investigator was not sufficient to satisfy, under any reasonable test, the requirement of “nexus.” [And a]part from this, the issue of “nexus” is surely laid at rest by the NAACP’s own “Anti-Communism” resolution, first adopted in 1950, which petitioner had voluntarily furnished the Committee before the curtain came down on his examination:

ANTI-COMMUNISM

Whereas, certain branches of the National Association for the Advancement of Colored People are being rocked by internal conflicts between groups who follow the Communist line and those who do not, which threaten to destroy the confidence of the public in the Association and which will inevitably result in its eventual disruption; and

Whereas, it is apparent from numerous attacks by Communists in their official organs ‘The Daily Worker’ and ‘Political Affairs’ upon officials of the Association that there is a well-organized, nationwide conspiracy by Communists either to capture or split and wreck the NAACP; therefore be it

Resolved, that this Forty-First Convention of the National Association for the Advancement of Colored People go on record as unequivocally condemning attacks by Communists and their fellow-travelers upon the Association and its officials, and in order to safeguard the good-name of the Association, promote and develop unity, eliminate internal ideological friction, increase the membership and build the necessary power to wage the fight for civil rights, herewith, call upon, direct and instruct the National Board of Directors to appoint a committee to investigate and study the ideological composition and trends of the membership and leadership of the local units with a view to determining causes of the aforementioned conflicts, confusion and loss of membership; be it further

Resolved, that this Convention go on record as directing and instructing the Board of Directors to take the necessary action to eradicate such infiltration, and if necessary to suspend and reorganize, or lift the charter
and expel any unit, which, in the judgment of the Board of Directors, upon a basis of the findings of the aforementioned investigation and study of local units comes under Communist or other political control and combination. (Emphasis added.)

It hardly meets the point at issue to suggest, as the Court does, that the resolution only serves to show that the Miami Branch was in fact free of any Communist influences—unless self-investigation is deemed constitutionally to block official inquiry....

Justice White, dissenting....

The net effect of the Court’s decision is ... to insulate from effective legislative inquiry and preventive legislation the time-proven skills of the Communist Party in subverting and eventually controlling legitimate organizations. Until such a group, chosen as an object of Communist Party action, has been effectively reduced to vassalage, legislative bodies may seek no information from the organization under attack by duty-bound Communists. When the job has been done and the legislative committee can prove it, it then has the hollow privilege of recording another victory for the Communist Party, which both Congress and this Court have found to be an organization under the direction of a foreign power, dedicated to the overthrow of the Government if necessary by force and violence....

D. RESTRICTIONS ON SPEECH-RELATED SPENDING AND CONTRIBUTIONS

[A.] Section 54(1) of the Michigan Campaign Finance Act prohibits corporations from making ... “a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a [state] candidate.” ... The Act exempts from this general prohibition ... any expenditure made from a segregated fund. A corporation may solicit contributions to its political fund only from an enumerated list of persons associated with the corporation....

The Chamber [a nonprofit corporation] comprises more than 8,000 members, three-quarters of whom are for-profit corporations. The Chamber’s general treasury is funded through annual dues required of all members. Its purposes, as set out in the bylaws, are[, among other things,] to promote economic conditions favorable to private enterprise; ... [and] to receive contributions and to make expenditures for political purposes and to perform any other lawful political activity .... [T]he Chamber [sued] ... for injunctive relief against enforcement of the Act, arguing that the restriction on expenditures is unconstitutional ....

[B.] [I]ndependent campaign expenditures constitute “political expression ‘at the core of our electoral process and of the First Amendment free-
doms.” The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment. ... [And d]espite the Chamber’s success in administering its separate political fund, Michigan’s segregated fund requirement still burdens the Chamber’s exercise of expression because “the corporation is not free to use its general funds for campaign advocacy purposes.” ... [Besides some other administrative requirements,] a nonprofit corporation like the Chamber may solicit contributions to its political fund only from members, stockholders of members, officers or directors of members, and the spouses of any of these persons.

Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. Thus, they must be justified by a compelling state interest. ... 

[C.] State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders’ investments. These state-created advantages not only allow corporations to play a dominant role in the Nation’s economy, but also permit them to use “resources amassed in the economic marketplace” to obtain “an unfair advantage in the political marketplace.” ...

Although this Court has distinguished expenditures from direct contributions in the context of federal laws regulating individual donors, it has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections. Regardless of whether this danger of “financial quid pro quo” corruption may be sufficient to justify a restriction on independent expenditures, Michigan’s regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas. The Act does not attempt “to equalize the relative influence of speakers on elections”; rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations.

We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.

[D.] We next turn to the question whether the Act is sufficiently narrowly tailored to achieve its goal. We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allow-
ing corporations to express their political views....

The Act does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds. Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors’ support for the corporation’s political views.

The Chamber argues that § 54(1) is substantially overinclusive, because it includes within its scope closely held corporations that do not possess vast reservoirs of capital.... [But a]lthough some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies § 54(1)’s general applicability to all corporations....

The Chamber also attacks § 54(1) as underinclusive because it does not regulate the independent expenditures of unincorporated labor unions. Whereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure .... The desire to counterbalance those advantages unique to the corporate form is the State’s compelling interest in this case; thus, excluding from the statute’s coverage unincorporated entities that also have the capacity to accumulate wealth “does not undermine its justification for regulating corporations.”

Moreover, ... [a]n employee who objects to a union’s political activities ... can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union’s performance of its duties as the exclusive representative of the bargaining unit on labor-management issues. As a result, the funds available for a union’s political activities more accurately reflects members’ support for the organization’s political views than does a corporation’s general treasury. Michigan’s decision to exclude unincorporated labor unions from the scope of § 54(1) is therefore justified by the crucial differences between unions and corporations....

[E.] Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest.... [T]he State’s decision to regulate only corporations [and not unincorporated associations] is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political “war chests” amassed with the aid of the legal advantages given to corporations....

The Chamber [also] ... contends that the State should also restrict the ... expenditures ... of corporations engaged in the media business. [T]he “media exception” [in the statute] excludes from the definition of “expenditure” any “expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editori-
IV. SPECIAL BURDENS ON FREE SPEECH

al in support of or opposition to a candidate for elective office ... in the regular course of publication or broadcasting.”)

Although all corporations enjoy the same state-conferred benefits inherent in the corporate form, media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in “informing and educating the public, offering criticism, and providing a forum for discussion and debate.”

The Act’s definition of “expenditure” conceivably could be interpreted to encompass election-related news stories and editorials. The Act’s restriction on ... expenditures therefore might discourage incorporated news broadcasters or publishers from serving their crucial societal role. The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.... Although the press’ unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations....

Justice Brennan, concurring....

The Michigan statute ... prevent[s] both the Chamber and other business corporations from using the funds of other persons for purposes that those persons may not support. First, the state law protects the small businessperson who does not wish his or her dues to be spent in support of political candidates, but who nevertheless wishes to maintain an association with the Chamber because of the myriad benefits it provides that are unrelated to its political activities.... In addition, the Michigan law protects dissenting shareholders of business corporations that are members of the Chamber to the extent that such shareholders oppose the use of their money, paid as dues to the Chamber out of general corporate treasury funds, for political campaigns....

Of course, a member could resign from the Chamber and a stockholder could divest from a business corporation that used the Chamber as a conduit, but these options would impose a financial sacrifice on those objecting to political expenditures.... While the State may have no constitutional duty to protect the objecting Chamber member and corporate shareholder in the absence of state action, the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber’s political message....

The Michigan law is concededly “underinclusive” insofar as it does not ban other types of political expenditures to which a dissenting Chamber member or corporate shareholder might object.... A corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum.

I do not find this underinclusiveness fatal, for several reasons. First, ... discussions on candidate elections lie “at the heart of political debate.” But
just as speech interests are at their zenith in this area, so too are the interests of unwilling Chamber members and corporate shareholders forced to subsidize that speech. The State’s decision to focus on this especially sensitive context is a justifiable one.

Second, in light of ... First National Bank of Boston v. Bellotti ..., a State cannot prohibit corporations from making many other types of political expenditures. One purpose of the underinclusiveness inquiry is to ensure that the proffered state interest actually underlies the law. But to the extent that the Michigan statute is “underinclusive” only because it does not regulate corporate expenditures in referenda or other corporate expression (besides merely commercial speech), this reflects the requirements of our decisions rather than the lack of an important state interest on the part of Michigan in regulating expenditures in candidate elections. In this sense, the Michigan law is not “underinclusive” at all.

Finally, the provision in Michigan corporate law authorizing shareholder actions against corporate waste might serve as a remedy for other types of political expenditures that have no legitimate connection to the corporation’s business....

Justice Scalia, dissenting.

“Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: _______." In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the “fairness” of political debate....

[A.] Those individuals who form that type of voluntary association known as a corporation are, to be sure, given special advantages—notably, the immunization of their personal fortunes from liability for the actions of the association—that the State is under no obligation to confer. But so are other associations and private individuals given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights. {And it is not just that portion of the corporation’s assets attributable to the gratuitously conferred “special advantages” that is prohibited from being used for political endorsements, but all of the corporation’s assets.} ...

[T]he Court ... [also argues] that corporations “amas[s] large treasuries.” But that ... is also not sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political
candidates."

Independent advocacy, moreover, unlike contributions, "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive," thus reducing the danger that it will be exchanged "as a quid pro quo for improper commitments from the candidate." [This] seems even more plainly true with respect to corporate advocates than it is with respect to individuals. I expect I could count on the fingers of one hand the candidates who would generally welcome, much less negotiate for, a formal endorsement by AT&T or General Motors. The advocacy of such entities that have "amassed great wealth" will be effective only to the extent that it brings to the people's attention ideas which—despite the invariably self-interested and probably uncongenial source—strike them as true.

[B.] The Court does not try to defend the proposition that independent advocacy poses a substantial risk of political "corruption," as English speakers understand that term. Rather, it asserts that "Michigan's regulation ... aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." Under this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically "corrosive," which is close enough to "corruptive" to qualify....

The Court's opinion ultimately rests upon that proposition whose violation constitutes the "New Corruption": Expenditures must "reflect actual public support for the political ideas espoused." This illiberal free-speech principle of "one man, one minute" was proposed and soundly rejected in Buckley ....

But it can be said that I have not accurately quoted today's decision. It does not endorse the proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused," but only the more limited proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused by corporations."

The limitation is of course entirely irrational. Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with "actual public support" for his positions? There is no explanation, except the effort I described at the outset of this discussion to make one valid proposition out of two invalid ones: When the vessel labeled "corruption" begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship "special privilege"; and when that in turn begins to go down, it returns to "corruption." ...

[C.] Justice Brennan's concurrence would have us believe that the prohibition adopted by Michigan and approved by the Court is a paternalistic measure to protect the corporate shareholders of America ... [from
having their investments] used on behalf of a political candidate [they oppose]. But such solicitude is a most implausible explanation for the Michigan statute, inasmuch as it permits corporations to take as many ideological and political positions as they please, so long as they are not “in assistance of, or in opposition to, the nomination or election of a candidate.” ... The Michigan law appears to be designed, in other words, neither to protect shareholders, nor even (impermissibly) to “balance” general political debate, but to protect political candidates....

But even if the object of the prohibition could plausibly be portrayed as the protection of shareholders ..., that would not suffice as a “compelling need” to support this blatant restriction upon core political speech.... [In joining such [a for-profit] corporation], the shareholder knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit....

The corporate actions to which the shareholder exposes himself, therefore, include many things that he may find politically or ideologically uncongenial: investment in South Africa, operation of an abortion clinic, publication of a pornographic magazine, or even publication of a newspaper that adopts absurd political views and makes catastrophic political endorsements. His only protections against such assaults upon his ideological commitments are (1) his ability to persuade a majority (or the requisite minority) of his fellow shareholders that the action should not be taken, and ultimately (2) his ability to sell his stock.... It seems to me entirely fanciful, in other words, to suggest that the Michigan statute makes any significant contribution toward insulating the exclusively profit-motivated shareholder from the rude world of politics and ideology....

[There is also no] difference between for-profit and not-for-profit corporations insofar as the need for protection of the individual member’s ideological psyche is concerned. Would it be any more upsetting to a shareholder of General Motors that it endorsed the election of Henry Wallace (to stay comfortably in the past) than it would be to a member of the American Civil Liberties Union that it endorsed the election of George Wallace? I should think much less so. Yet in the one case as in the other, the only protection against association-induced trauma is the will of the majority and, in the last analysis, withdrawal from membership....

[D.] [The Court upholds the] exception for “media corporations” ... because of “the unique role that the press plays in informing and educating the public, offering criticism, and providing a forum for discussion and debate.” But if one believes in the Court’s rationale of “compelling state need” to prevent amassed corporate wealth from skewing the political debate, surely that “unique role” of the press does not give Michigan justification for excluding media corporations from coverage, but provides especially strong reason to include them. Amassed corporate wealth that regularly sits astride the ordinary channels of information is much more likely to produce the New Corruption (too much of one point of view) than amassed corporate wealth that is generally busy making money elsewhere.
Such media corporations not only have vastly greater power to perpetrate the evil of overinforming, they also have vastly greater opportunity. General Motors, after all, will risk a stockholder suit if it makes a political endorsement that is not plausibly tied to its ability to make money for its shareholders. But media corporations make money by making political commentary, including endorsements. For them, ... the whole world of politics and ideology is fair game. Yet the Court tells us that it is reasonable to exclude media corporations, rather than target them specially.

Members of the institutional press, ... will find little reason for comfort in today’s decision.... The Court today holds merely that media corporations may be excluded from the Michigan law, not that they must be.

We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers. Thus, the Court’s holding on this point must be put in the following unencouraging form: “Although the press’ unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations.” One must hope, I suppose, that Michigan will continue to provide this generous and voluntary exemption....

[E.] The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan Legislature was genuinely trying to assure a “balanced” presentation of political views; on the other hand, perhaps it was trying to give unincorporated unions (a not insubstantial force in Michigan) political advantage over major employers. Or perhaps it was trying to assure a “balanced” presentation because it knows that with evenly balanced speech incumbent officeholders generally win.

The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech “for fairness’ sake” simply out of bounds. I doubt that those who framed and adopted the First Amendment would agree that avoiding the New Corruption, that is, calibrating political speech to the degree of public opinion that supports it, is even a desirable objective, much less one that is important enough to qualify as a compelling state interest. Those Founders designed, of course, a system in which popular ideas would ultimately prevail; but also, through the First Amendment, a system in which true ideas could readily become popular. For the latter purpose, the calibration that the Court today endorses is precisely backwards: To the extent a valid proposition has scant public support, it should have wider rather than narrower public circulation....

Ah, but then there is the special element of corporate wealth: What would the Founders have thought of that? They would have endorsed, I think, what Tocqueville wrote in 1835:

“... No sooner does a government attempt to go beyond its political sphere and to enter upon this new track [of adopting a new opinion or conceiving...
a new sentiment] than it exercises, even unintentionally, an insupportable tyranny.... Worse still will be the case if the government really believes itself interested in preventing all circulation of ideas; it will then stand motionless and oppressed by the heaviness of voluntary torpor. Governments, therefore, should not be the only active powers; associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away.”

While Tocqueville was discussing “circulation of ideas” in general, what he wrote is also true of candidate endorsements in particular. To eliminate voluntary associations—not only including powerful ones, but especially including powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish the public debate. The case at hand is a good enough example. Why should the Michigan voters ... be deprived of the information that private associations owning and operating a vast percentage of the industry of the State, and employing a large number of its citizens, believe that the election of a particular candidate is important to their prosperity?

Contrary to the Court’s suggestion, the same point cannot effectively be made through corporate PACs to which individuals may voluntarily contribute. It is important to the message that it represents the views of Michigan’s leading corporations as corporations ...—not just the views of some other voluntary associations to which some of the corporations’ shareholders belong....

[T]he object of the law we have approved today is not to prevent wrongdoing but to prevent speech. Since those private associations known as corporations have so much money, they will speak so much more, and their views will be given inordinate prominence in election campaigns. This is not an argument that our democratic traditions allow—neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be “unduly” extensive (because they are rich) or “unduly” persuasive (because they are movie stars) or “unduly” respected (because they are clergymen).

The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff.... [T]hat premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise the Court today embraces: that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not....

Justice Kennedy, with whom Justice O'Connor and Justice Scalia join, dissenting. [Omitted—ed.]


[In this case, which occupies 272 pages of the U.S. Reports, the Court upheld most parts of the Bipartisan Campaign Reform Act, also known as BCRA or McCain-Feingold. Because this case is so long, because the Cam-
campaign Speech and Money chapter in the casebook is so long, and because
the case mostly extends the logic of Buckley v. Valeo and Austin v. Cham-
ber of Commerce, it won’t be excerpted at length here. Still, BCRA is a very
important statute; here are some brief excerpts that describe BCRA’s op-
eration, and that summarize the Court’s holding and rationale.—ed.]

Justices Stevens and O’Connor delivered the opinion of the
Court [in relevant part, in which Justices Souter, Ginsburg, and
Breyer joined.

[A.] Under FECA [the Federal Election Campaign Act, which was con-
sidered by the Court in Buckley], “contributions” must be made with funds
that are subject to the Act’s disclosure requirements and source and
amount limitations. Such funds are known as “federal” or “hard” money.

FECA defines the term “contribution,” however, to include only the gift
or advance of anything “made by any person for the purpose of in-
fluencing any election for Federal office.” Donations made solely for the
purpose of influencing state or local elections are therefore unaf
ected by
FECA’s requirements and prohibitions. As a result, prior to the enactment
of BCRA, federal law permitted corporations and unions, as well as indi-
viduals who had already made the maximum permissible contributions to
federal candidates, to contribute ... [so-called] “soft money” ... to political
parties for activities intended to influence state or local elections.

Shortly after Buckley was decided, questions arose concerning the
treatment of contributions intended to influence both federal and state
elections.... [T]he FEC ruled that political parties could fund mixed-
purpose activities—including get-out-the-vote drives and generic party ad-
vertising—in part with soft money. In 1995 the FEC concluded that the
parties could also use soft money to defray the costs of “legislative advoca-
cy media advertisements,” even if the ads mentioned the name of a federal
candidate, so long as they did not expressly advocate the candidate’s ele-
cition or defeat....

Title I [of BCRA] prohibits national party committees and their agents
from soliciting, receiving, directing, or spending any soft money[... prohibit[s] state and local party committees from using such funds for activities
that affect federal elections[... prohibit[s political parties from soliciting
and donating funds to tax-exempt organizations that engage in electio-
neering activities[... restricts federal candidates and officeholders from
receiving, spending, or soliciting soft money in connection with federal
elections and limits their ability to do so in connection with state and local
elections[... [and] prohibit[s] state and local candidates from raising and
spending soft money to fund advertisements and other public communica-
tions that promote or attack federal candidates....

[The Court upheld the restrictions on soft money, generally reasoning
that soft money could have the same quid pro quo corrupting effect that
hard money did.—ed.] [C]orporate, union, and wealthy individual donors
have been free to contribute substantial sums of soft money to the national
parties, which the parties can spend for the specific purpose of influencing
a particular candidate’s federal election. It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude....

[B.] [In Buckley we construed FECA’s disclosure and reporting requirements, as well as its expenditure limitations, “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” As a result of that strict reading of the statute, the use or omission of “magic words” such as “Elect John Smith” or “Vote Against Jane Doe” marked a bright statutory line separating “express advocacy” from “issue advocacy.”

Express advocacy was subject to FECA’s limitations and could be financed only using hard money. The political parties, in other words, could not use soft money to sponsor ads that used any magic words, and corporations and unions could not fund such ads out of their general treasuries. So-called issue ads, on the other hand, not only could be financed with soft money, but could be aired without disclosing the identity of, or any other information about, their sponsors....

[But in practice, little difference existed, for example, between an [express advocacy] ad that urged viewers to “vote against Jane Doe” and [an “issue” advocacy ad] that condemned Jane Doe’s record on a particular issue before exhorting viewers to “call Jane Doe and tell her what you think.” Indeed, campaign professionals testified that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words.]

[BCRA] coins a new term, “electioneering communication” [that goes beyond “express advocacy”].... [It] is defined to encompass any “broadcast, cable, or satellite communication” that

(I) refers to a clearly identified candidate for Federal office;   
(II) is made within—   
(aa) 60 days before a general ... election for the office ...; or   
(bb) 30 days before a primary ... election [or caucus] ... for the office ...; and   
(III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate[,] [i.e., it ‘can be received by 50,000 or more persons’ in the district or State the candidate seeks to represent]....

[The definition, though, excludes “communication[s] appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate.”—ed.] BCRA[] ... [(1)] specifies significant disclosure requirements for persons who fund electioneering communications ... [and (2)] restricts corporations’ and labor un-

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* [FECA also barred individuals from spending more than $1000 on express advocacy; but Buckley struck down that limitation, and the Court in McConnell wasn’t asked to reconsider that holding.—ed.]
ions’ funding of electioneering communications.

The major premise of plaintiffs’ challenge to BCRA’s use of the term “electioneering communication” is that Buckley drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech. Thus, plaintiffs maintain, Congress cannot constitutionally require disclosure of, or regulate expenditures for, “electioneering communications” without making an exception for those “communications” that do not meet Buckley’s definition of express advocacy.

[But] a plain reading of Buckley makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command. In narrowly reading the FECA provisions in Buckley to avoid problems of vagueness and overbreadth, we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.

Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. [The presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. Buckley’s express advocacy line ... has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.

Finally we observe that ... definition of “electioneering communication” raises none of the vagueness concerns that drove our analysis in Buckley. [The Court therefore upheld the restriction on electioneering communications against a facial challenge.—ed.]

[C.] Since our decision in Buckley, Congress’ power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law. The ability to form and administer separate segregated funds authorized by FECA has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. [See the discussion in Austin v. Michigan Chamber of Commerce of a similar Michigan scheme.—ed.] BCRA ... extend[s] this rule, which previously applied only to express advocacy, to all “electioneering communications” .... [The Court generally upheld this rule, relying on Austin. But it read the ban on “electioneering communications” by corporations as excluding “MCFL organizations,” see p. 446 of the casebook.—ed.]


[Campaign finance law treats regulable and restrictable “candidate advocacy” differently from fully protected “issue advocacy.” Unions and corporations—including nonprofits that don’t fit within the MCFL exception, see p. 251, item 3—may be barred from spending general treasury
D. **Restrictions on Speech-Related Spending and Contributions**

Funds on candidate advocacy. *Austin v. Michigan Chamber of Commerce.* Even individuals and *MCFL* corporations may be required to record and disclose their spending on candidate advocacy. *Buckley v. Valeo.*


First Amendment law must thus draw the line between candidate advocacy and issue advocacy, though the two kinds of advocacy are often connected. Consider, for instance, five different ads, and think about how the law should classify each and distinguish among them. Ads B, D, and E are particularly important because they are discussed in this case.

A. **An Ad That Doesn’t Mention a Candidate’s Name:** A candidate who is known as strongly pro-life is running for office. A pro-choice group in his district puts out a highly effective ad that supports abortion rights and criticizes pro-life arguments, but doesn’t mention the candidate.

B. **The Wisconsin Right to Life “Wedding” Ad:** This ad, together with two similar ads, was the subject of *FEC v. WRTL:*

   - **Pastor:** And who gives this woman to be married to this man?
   - **Bride’s Father:** Well, as father of the bride, I certainly could. But instead, I’d like to share a few tips on how to properly install drywall. Now you put the drywall up ...
   - **Voice-Over:** Sometimes it’s just not fair to delay an important decision. But in Washington it’s happening. A group of Senators is using the filibuster delay tactic to block federal judicial nominees from a simple “yes” or “no” vote. So qualified candidates don’t get a chance to serve. It’s politics at work, causing gridlock and backing up some of our courts to a state of emergency.
   - Contact Senators Feingold and Kohl and tell them to oppose the filibuster.
   - Visit: BeFair.org
   - Paid for by Wisconsin Right to Life (befair.org), which is responsible for the content of this advertising and not authorized by any candidate or candidate’s committee....

C. **A Pressure Ad:** Imagine an ad that runs October 1, 2008 and says,

   - **Senator Schmoe** is on the wrong side of the Common-Sense Gun Control Act of 2008, which the Senate is considering this month. Yet America needs the Act because [imagine the details here—ed.] .... Call Senator Schmoe and tell him you’ll vote against him in November unless he comes around to supporting the Act.

D. **The Yellowtail Ad:** This ad “ran during a Montana congressional race between Republican Rick Hill and Democrat Bill Yellowtail in 1996”:

   - Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail’s response? He only slapped her. But “her nose was not broken.” He talks law and order ... but is himself a convicted
felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

E. The Jane Doe Ad: This hypothetical ad was referred to by the McConnell v. FEC majority opinion, which said, “[l]ittle difference existed ... between an ad that urged viewers to ‘vote against Jane Doe’ and one that condemned Jane Doe’s record on a particular issue before exhorting viewers to ‘call Jane Doe and tell her what you think.’”

Here are the rival tests that have been discussed the most:

1. The purpose test: The Federal Election Campaign Act of 1971 (FECA), as amended in 1974, regulated spending “for the purpose of influencing” the nomination or election of federal candidates. This would have covered even speech such as ad A, which didn’t mention a candidate by name, so long as the speaker intended to influence an election.

2. The “express words of advocacy” test (the “magic words” test to its critics): Buckley upheld the disclosure and recordkeeping requirements in FECA against a vagueness challenge. But it did so only by limiting the FECA definition to expenditures for “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ reject.’”

3. The named candidate test: Many ads don’t use “express words of advocacy” but still seemed hard to see as anything but calls to elect or defeat a candidate. The ads’ critics dubbed these ads “sham issue advocacy.” Partly in reaction to the growth of these ads, the Bipartisan Campaign Reform Act of 2002 (BCRA) covered the much broader category of “electioneering communications,” defined in § 203 of BCRA as

   [a] any broadcast, cable, or satellite communication which ...  
   [b] refers to a clearly identified candidate for Federal office ...  
   [c] is made within 60 days before a general ... election for the office ... or 30 days before a primary ... and  
   [d] in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

The Act required disclosure and recordkeeping of electioneering communications even by individuals or PACs, and banned such communications when they were paid for by union or corporate general treasury funds.

In McConnell v. FEC (2003), a 5-Justice majority (Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer) rejected an overbreadth challenge to BCRA’s ban on corporations’ and unions’ electioneering communications. The Court ruled that speech that is “the functional equivalent of express advocacy” may be regulated just like express advocacy.

The Court also rejected a facial challenge to the BCRA prohibition. The Court concluded that even if some of the corporate and union ads restricted by BCRA were constitutionally protected, this “would not justify
prohibiting all enforcement’ of the law unless its application to protected speech is substantial, ‘not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications.’ And the Court held that “[f]ar from establishing that BCRA’s application to pure issue ads is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion.” But this left room for as-applied challenges arguing that some particular ads were indeed constitutionally protected, and thus couldn’t be constrained by BCRA.

4. The “[unambiguous] appeal to vote for or against a specific candidate” test: FEC v. WRTL (2007) came up with another test, which was similar to a backup test that BCRA provided in case its main test were struck down: Corporate and union speech was constitutionally protected unless it was “the functional equivalent of express advocacy,” defined as speech that is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”

The controlling opinion came from two Justices who joined the Court since McConnell: Chief Justice Roberts and Justice Alito, who replaced Chief Justice Rehnquist and Justice O’Connor. The three remaining McConnell dissenters would have returned to the Buckley “express words of advocacy” test, thus reversing McConnell in relevant part. Naturally, there was much debate in the opinions about whether WRTL was a faithful application of McConnell, but the excerpt below focuses solely on the substantive discussion of what the law ought to be.—ed.]

Chief Justice Roberts ... delivered ... an opinion ... in which Justice Alito joins....

[A.] WRTL [a nonprofit ideological advocacy corporation] rightly concedes that its ads [the “Wedding” ad and two others] are prohibited by BCRA §203. Each ad clearly identifies Senator Feingold, who was running (unopposed) in the Wisconsin Democratic primary ... and each ad would have been “targeted to the relevant electorate,” during the BCRA blackout period.... The only question, then, is whether it is consistent with the First Amendment for BCRA §203 to prohibit WRTL from running these three ads....

Under strict scrutiny, the [Government] must prove that applying BCRA to WRTL’s ads furthers a compelling interest and is narrowly tailored to achieve that interest.... [In McConnell, t]his Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent.... [The question, then, is whether] the ads in these cases fit this description ....

[B.] The FEC ... [argues that] the constitutional test for determining if an ad is the functional equivalent of express advocacy [should be] whether the ad is intended to influence elections and has that effect....

[W]e decline to adopt a test for as-applied challenges turning on the speaker’s intent to affect an election. The test to distinguish constitutionally protected political speech from speech that BCRA may proscribe
should provide a safe harbor for those who wish to exercise First Amendment rights. The test should also "reflect[t] our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’" A test turning on the intent of the speaker does not remotely fit the bill....

[A]n intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of §203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by BCRA if its only defense to a criminal prosecution would be that its motives were pure. An intent-based standard "blankets with uncertainty whatever may be said," and "offers no security for free discussion."

{Consider what happened in these cases. The District Court permitted extensive discovery on the assumption that WRTL's intent was relevant. As a result, the defendants deposed WRTL's executive director, its legislative director, its political action committee director, its lead communications consultant, and one of its fundraisers. WRTL also had to turn over many documents related to its operations, plans, and finances. Such litigation constitutes a severe burden on political speech.}

A test focused on the speaker's intent could [also] lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another. .... "[U]nder well-accepted First Amendment doctrine, a speaker’s motivation is entirely irrelevant to the question of constitutional protection.” ... “First Amendment freedoms need breathing space to survive.” An intent test provides none....

[A] test based on the actual effect speech will have on an election or on a particular segment of the target audience ... "puts the speaker ... wholly at the mercy of the varied understanding of his hearers." It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech.

[C.] [1.] "The freedom of speech ... guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.” To safeguard this liberty, the proper standard for an as-applied challenge to BCRA §203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect. It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. And it must eschew "the open-ended rough-and-tumble of factors,” which "invit[es] complex argument in a trial court and a virtually inevitable appeal.”

In short, it must give the benefit of any doubt to protecting rather than
stifling speech. In light of these considerations, a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

[2.] Under this test, WRTL’s three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.

Despite these characteristics, appellants assert that the content of WRTL’s ads alone betrays their electioneering nature. Indeed, the FEC suggests that any ad covered by §203 that includes “an appeal to citizens to contact their elected representative” is the “functional equivalent” of an ad saying defeat or elect that candidate.

We do not agree. To take just one example, during a blackout period the House considered the proposed Universal National Service Act. There would be no reason to regard an ad supporting or opposing that Act, and urging citizens to contact their Representative about it, as the equivalent of an ad saying vote for or against the Representative. Issue advocacy conveys information and educates. An issue ad’s impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions....

[Appellants—the FEC and intervening members of Congress including Sen. John McCain—argue] “that the most effective campaign ads, like the most effective commercials for products ... avoid the [Buckley] magic words [expressly advocating the election or defeat of a candidate],” and that advertisers “would seldom choose to use such words even if permitted.” An expert for the FEC in these cases relied on those observations to argue that WRTL’s ads are especially effective electioneering ads because they are “subtl[e],” focusing on issues rather than simply exhorting the electorate to vote against Senator Feingold.

Rephrased a bit, the argument perversely maintains that the less an issue ad resembles express advocacy, the more likely it is to be the functional equivalent of express advocacy. This “heads I win, tails you lose” approach cannot be correct. It would effectively eliminate First Amendment protection for genuine issue ads .... Under appellants’ view, there can be no such thing as a genuine issue ad during the blackout period—it is simply a very effective electioneering ad.

[3.] Looking beyond the content of WRTL’s ads, the FEC and intervenors argue that several “contextual” factors prove that the ads are the equivalent of express advocacy. First, appellants cite evidence that during the same election cycle, WRTL and its Political Action Committee (PAC) actively opposed Senator Feingold’s reelection and identified filibusters as
a campaign issue. This evidence goes to WRTL’s subjective intent in running the ads, and we have already explained that WRTL’s intent is irrelevant in an as-applied challenge. Evidence of this sort is therefore beside the point, as it should be—WRTL does not forfeit its right to speak on issues simply because in other aspects of its work it also opposes candidates who are involved with those issues.

Next, [appellants] seize on the timing of WRTL’s ads. They observe that the ads were to be aired near elections but not near actual Senate votes on judicial nominees, and that WRTL did not run the ads after the elections. To the extent this evidence goes to WRTL’s subjective intent, it is again irrelevant. To the extent it nonetheless suggests that the ads should be interpreted as express advocacy, it falls short.... Every ad covered by BCRA §203 will by definition air just before [an election]....

The last piece of contextual evidence the [appellants] highlight is the ads’ “specific and repeated cross-reference” to a website. In the middle of the website’s homepage, in large type, were the addresses, phone numbers, fax numbers, and email addresses of Senators Feingold and Kohl. Wisconsinites who viewed [the ads] and wished to contact their Senators—as the ads requested—would be able to obtain the pertinent contact information immediately upon visiting the website. This is fully consistent with viewing WRTL’s ads as genuine issue ads.

The website also stated both Wisconsin Senators’ positions on judicial filibusters, and allowed visitors to sign up for “e-alerts,” some of which contained exhortations to vote against Senator Feingold. These details lend the electioneering interpretation of the ads more credence, but again, WRTL’s participation in express advocacy in other aspects of its work is not a justification for censoring its issue-related speech. Any express advocacy on the website, already one step removed from the text of the ads themselves, certainly does not render an interpretation of the ads as genuine issue ads unreasonable.

Given the standard we have adopted for determining whether an ad is the “functional equivalent” of express advocacy, contextual factors of the sort invoked by appellants should seldom play a significant role in the inquiry. Courts need not ignore basic background information that may be necessary to put an ad in context—such as whether an ad “describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future”—but the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns.

[D.] At best, appellants have shown ... that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” ... [But] discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.
We confronted a similar issue in *Ashcroft v. Free Speech Coalition*, in which the Government argued that virtual images of child pornography could be banned because they were difficult to distinguish from real images. [We held,] “The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.”

Because WRTL’s ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, we hold they are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell*’s holding.

[E.] BCRA §203 can be constitutionally applied to WRTL’s ads only if it is narrowly tailored to further a compelling interest. This Court has never recognized a compelling interest in regulating ads, like WRTL’s, that are neither express advocacy nor its functional equivalent....

[1.] [W]e reject the contention that issue advocacy may be regulated because express election advocacy may be, and “the speech involved in so-called issue advocacy is [not] any more core political speech than are words of express advocacy.” ... Such a greater-includes-the-lesser argument would dictate that virtually all corporate speech can be suppressed [contrary to *Bellotti*], since few kinds of speech can lay claim to being as central to the First Amendment as campaign speech. ([Instead, a] court applying strict scrutiny must ensure that a compelling interest supports each application of a statute restricting speech.) ...

[2.] This Court has long recognized “the governmental interest in preventing corruption and the appearance of corruption” in election campaigns. This interest has been invoked as a reason for upholding contribution limits.... We have suggested that this interest might also justify limits on electioneering expenditures because it may be that, in some circumstances, “large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions.”

*McConnell* arguably applied this interest—which this Court had only assumed could justify regulation of express advocacy—to ads that were the “functional equivalent” of express advocacy. But to justify regulation of WRTL’s ads, this interest must be stretched yet another step to ads that are not the functional equivalent of express advocacy.

Enough is enough. Issue ads like WRTL’s are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them. To equate WRTL’s ads with contributions is to ignore their value as political speech.

Appellants argue that an expansive definition of “functional equivalent” is needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions. But such a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny. “[T]he desire for a bright-line rule ... hardly constitutes the com-
pelling state interest necessary to justify any infringement on First Amendment freedom." See Free Speech Coalition ("The Government may not suppress lawful speech as the means to suppress unlawful speech"); Buckley (expenditure limitations "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations")....

[3.] [The interest] in addressing ... " ... the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," Austin, [does not extend] beyond campaign speech.... Two of the Justices who joined the 6-to-3 majority in Austin relied, in upholding the constitutionality of the ban on campaign speech [using corporate treasury funds], on the fact that corporations retained freedom to speak on issues as distinct from election campaigns. See Austin (Brennan, J., concurring) (describing fact that campaign speech ban "does not regulate corporate expenditures in referenda or other corporate expression" as "reflect[ing] the requirements of our decisions" [citing Bellotti]); id. (Stevens, J., concurring) ("[T]here is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other")....

It would be a constitutional "bait and switch" to conclude that corporate campaign speech may be banned in part because corporate issue advocacy is not, and then assert that corporate issue advocacy may be banned as well, pursuant to the same asserted compelling interest, through a broad conception of what constitutes the functional equivalent of campaign speech, or by relying on the inability to distinguish campaign speech from issue advocacy....

Because WRTL's ads are not express advocacy or its functional equivalent, and because appellants identify no interest sufficiently compelling to justify burdening WRTL's speech, we hold that BCRA §203 is unconstitutional as applied to WRTL's ... ads.

[4.] The importance of [this case] ... is reflected in the number of diverse organizations that have joined in supporting WRTL: the ACLU, the NRA, the AFL-CIO, the Chamber of Commerce, and others] ....

Our jurisprudence over the past 216 years has rejected an absolutist interpretation of ["Congress shall make no law ... abridging the freedom of speech"], but when it comes to drawing difficult lines in the area of pure political speech—between what is protected and what the Government may ban—it is worth recalling the language we are applying. McConnell held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that determination today. But when it comes to defining what speech qualifies as the functional equivalent of express advocacy subject to such a ban—the issue we do have to decide—we give the benefit of the doubt to speech, not censorship....
Justice Alito, concurring....

Because §203 is unconstitutional as applied to the advertisements before us, it is unnecessary to go further and decide whether §203 is unconstitutional on its face. If it turns out that the implementation of the as-applied standard set out in the principal opinion impermissibly chills political speech, we will presumably be asked in a future case to reconsider the holding in McConnell that §203 is facially constitutional.5

Justice Scalia, with whom Justice Kennedy and Justice Thomas join, concurring in part and concurring in the judgment.

[A.] A Moroccan cartoonist once defended his criticism of the Moroccan monarch (lèse majesté being a serious crime in Morocco) as follows: “I’m not a revolutionary, I’m just defending freedom of speech.... I never said we had to change the king—no, no, no, no! But I said that some things the king is doing, I do not like. Is that a crime?”

Well, in the United States (making due allowance for the fact that we have elected representatives instead of a king) it is a crime, at least if the speaker is a union or a corporation (including not-for-profit public-interest corporations) and if the representative is identified by name within a certain period before a primary or congressional election in which he is running. That is the import of §203, the constitutionality of which we upheld three Terms ago in McConnell.

As an element essential to that determination of constitutionality, our opinion left open the possibility that a corporation or union could establish that, in the particular circumstances of its case, the ban was unconstitutional because it was (to pursue the analogy) only the king’s policies and not his tenure in office that was criticized. Today’s cases present the question of what sort of showing is necessary for that purpose....

[B.] [Yet] no test for such a showing can both (1) comport with the requirement of clarity that unchilled freedom of political speech demands, and (2) be compatible with the facial validity of §203 (as pronounced in McConnell). I would therefore reconsider the decision that sets us the unsavory task of separating issue-speech from election-speech with no clear criterion....

Consider the application of [the various suggested] tests to WRTL’s ads.... The “functional equivalent [of express advocacy]” test [set forth in McConnell] does nothing more than restate the question (and make clear that the electoral advocacy need not be express). The [intervenors’] test which asks how the ad’s audience “would reasonably understand the ad” provides ample room for debate and uncertainty.

The District Court’s five-factor test [whether the ad under review “(1)
IV. SPECIAL BURdens ON FREE SPEECH

describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future; (2) refers to the prior voting record or current position of the named candidate on the issue described; (3) exhorts the listener to do anything other than contact the candidate about the described issue; (4) promotes, attacks, supports, or opposes the named candidate; and (5) refers to the upcoming election, candidacy, and/or political party of the candidate”) does not (and could not possibly) specify how much weight is to be given to each factor—and includes the inherently vague factor of whether the ad “promotes, attacks, supports, or opposes the named candidate.” (Does attacking the king’s position attack the king?)

The [lead opinion’s test.] which look[s] to whether the ad is ... “susceptible of no reasonable interpretation” other than an exhortation to vote for or against a specific candidate[,] seem[s] tighter. [It] ultimately depend[s], however, upon a judicial judgment (or is it—worse still—a jury judgment?) concerning “reasonable” ... import that is far from certain, that rests upon consideration of innumerable surrounding circumstances which the speaker may not even be aware of, and that lends itself to distortion by reason of the decisionmaker’s subjective evaluation of the importance or unimportance of the challenged speech.

In this critical area of political discourse, the speaker cannot be compelled to risk felony prosecution with no more assurance of impunity than his prediction that what he says will be found susceptible of some “reasonable interpretation other than as an appeal to vote for or against a specific candidate.” Under these circumstances, “[m]any 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.”

[C.] It will not do to say that this burden must be accepted—that WRTL’s antifilibustering, constitutionally protected speech can be constrained—in the necessary pursuit of electoral “corruption.” We have rejected the “can’t-make-an-omelet-without-breaking-eggs” approach to the First Amendment [citing the Ashcroft v. Free Speech Coalition virtual child pornography case, discussed in the lead opinion—ed.].... “[T]hat protected speech may be banned as a means to ban unprotected speech,” it said, “turns the First Amendment upside down.”

The same principle must be applied here. Indeed, it must be applied a fortiori, since laws targeting political speech are the principal object of the First-Amendment guarantee. The fact that the line between electoral advocacy and issue advocacy dissolves in practice is an indictment of the statute, not a justification of it....

[D.] I recognize the practical reality that corporations can evade the express-advocacy standard. I share the instinct that “[w]hat separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.” But the way to indulge that instinct consistently with the First
Amendment is either to eliminate restrictions on independent expenditures altogether or to confine them to one side of the traditional line—the express-advocacy line, set in concrete on a calm day by Buckley, several decades ago. Section 203’s line is bright, but it bans vast amounts of political advocacy indistinguishable from hitherto protected speech....

[E.] There is wondrous irony to be found ... in the fact that the institutions [BCRA] was designed to muzzle—unions and nearly all manner of corporations—for all the “corrosive and distorting effects” of their “immense aggregations of wealth,” were utterly impotent to prevent the passage of this legislation that forbids them to criticize candidates (including incumbents). In the fact that the effect of BCRA has been to concentrate more political power in the hands of the country’s wealthiest individuals and their so-called 527 organizations, unregulated by §203. (In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142 million to 527s.) And in the fact that while these wealthy individuals dominate political discourse, it is this small, grass-roots organization of Wisconsin Right to Life that is muzzled....

Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting....

[A.] The indispensable ingredient of a political candidacy is money for advertising.... In the 2005-2006 election cycle, the expenditure of more than $2 billion on television shattered the previous record, even without a presidential contest....

The indispensability of these huge sums has two significant consequences for American Government .... [First,] special access [for big contributors] to the officials they help elect, and with it a disproportionate influence on those in power... [And second,] pervasive public cynicism. A 2002 poll found that 71 percent of Americans think Members of Congress cast votes based on the views of their big contributors, even when those views differ from the Member’s own beliefs [or constituents’ views] ....

The danger [that the purchase of influence and the cynicism of voters threaten the integrity and stability of democratic government] has traditionally seemed at its apex when no reasonable limits constrain the campaign activities of organizations whose “unique legal and economic characteristics” are tailored to “facilitat[e] the amassing of large treasuries,” Austin.... [T]he same characteristics that have made [corporations] engines of the Nation’s extraordinary prosperity have given them the financial muscle to gain “advantage in the political marketplace” when they turn from core corporate activity to electioneering, and in “Congress’ judgment” the same concern extends to labor unions as to corporations ....

[Justice Souter goes on to discuss the history of restrictions on corporate and union speech, including restrictions on independent expenditures by corporations and unions. He then concludes:—ed.] [S]pending on issue ads ... climbed to $500 million in the 2000 cycle.... “By the last two months before the election almost all televised issue spots made a case for or against a candidate.” They were worth the money of those who ulti-
mately paid for them. According to one former Senator, “Members will ... be favorably disposed to those who finance” interest groups that run “issue ads” when those financiers “later seek access to discuss pending legislation.” The congressional response was §203 ....

[B.] In 2004, WRTL accepted over $315,000 in corporate donations, and of its six general fund contributions of $50,000 or more between 2002 and 2005, three, including the largest (for $140,000), came from corporate donors. [The bills for [the ads in this case] were [paid partly out of corporate donations] ...; in fact, corporations earmarked more than $50,000 specifically to pay for the ads.]

WRTL also runs a PAC, funded by individual donations, which has been active over the years in making independent campaign expenditures .... During the 1998 campaign, for example, WRTL's PAC spent $60,000 to oppose [Senator Feingold]. In 2004, however, despite a sharp nationwide increase in PAC receipts, WRTL focused its fundraising on its corporate treasury, not the PAC, and took in only $17,000 in PAC contributions, as against over $150,000 during 2000.

Throughout the 2004 senatorial campaign, WRTL made no secret of its views about who should win the election and explicitly tied its position to the filibuster issue. Its PAC issued at least two press releases saying that its “Top Election Priorities” were to “Re-elect George W. Bush” and “Send Feingold Packing!” In one of these, the Chair of WRTL’s PAC was quoted as saying, “We do not want Russ Feingold to continue to have the ability to thwart President Bush’s judicial nominees.” ...

It was under these circumstances that WRTL ran the three television and radio ads in question.... Each one criticized an unnamed “group of Senators” ... for “using the filibuster delay tactic to block federal judicial nominees from a simple ‘yes’ or ‘no’ vote,” and described the Senators’ actions as “politics at work, causing gridlock and backing up some of our courts to a state of emergency.”

They exhorted viewers and listeners to “[c]ontact Senators Feingold and Kohl and tell them to oppose the filibuster,” but instead of providing a phone number or e-mail address, they told the audience to go to BeFair.org, a website set up by WRTL. A visit to this website would erase any doubt a listener or viewer might have as to whether Senators Feingold and Kohl were part of the “group” condemned in the ads: it displayed a document that criticized the two Senators for voting to filibuster “16 out of 16 times” and accused them of “putting politics into the court system, creating gridlock, and costing taxpayers money.”

WRTL’s planned airing of the ads had no apparent relation to any Senate filibuster vote but was keyed to the timing of the senatorial election. WRTL began broadcasting the ads on July 26, 2004, four days after the Senate recessed for the summer, and although the filibuster controversy raged on through 2005, WRTL did not resume running the ads after the
election. During the campaign period that the ads did cover, Senator Feingold's support of the filibusters was a prominent issue. His position was well known, and his Republican opponents, who vocally opposed the filibusters, made the issue a major talking point in their campaigns against him.

The WRTL ads were [thus] indistinguishable from the Jane Doe ad: they “condemned [Senator Feingold’s] record on a particular issue” and exhorted the public to contact him and “tell [him] what you think.” And just as anyone who heard the Jane Doe ad would understand that the point was to defeat Doe, anyone who heard the Feingold ads (let alone anyone who went to the website they named) would know that WRTL’s message was to vote against Feingold.² If it is now unconstitutional to restrict WRTL’s Feingold ads, then it follows that §203 can no longer be applied constitutionally to McConnell’s Jane Doe paradigm [or even to the actual Yellowtail ad] .... [On the principal opinion’s] reasoning it is possible that even some ads with magic words could not be regulated.

[C.] [T]he proper way to determine whether §203 is constitutional as applied to a given ad ... [is to focus] on a “reasonable” person’s understanding of the ads’ apparent purpose [which will be objectively apparent from those ads’ content and context (as this case readily shows)'].
step removed from the text of the ads themselves.” But these questions are central to the meaning of the ads, and any reasonable person would take account of circumstances in coming to understand the object of WRTL’s ad. And why not? Each of the contextual facts here can be established by an objective look at a public record; none requires a voter (or a litigant) to engage in discovery of evidence about WRTL’s operations or internal communications, and none goes to a hidden state of mind....

Although the Chief Justice ostensibly stops short of categorically foreclosing consideration of context, the application of his test here makes it difficult to see how relevant contextual evidence could ever be taken into account ..., and it is hard to imagine the Chief Justice would ever find an ad to be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” unless it contained words of express advocacy. The Chief Justice thus effectively reinstates the same toothless “magic words” criterion of regulable electioneering that led Congress to enact BCRA in the first place....

[D.] [It is also] “simply wrong’ to view [§203] as a ‘complete ban’ on expression,” because PAC financing provides corporations “with a constitutionally sufficient opportunity to engage in express advocacy.”... [T]he PAC structure does not impose excessive burdens, and WRTL has a particularly weak position on this point: it set up its own PAC long before the 2004 election, used it to campaign openly against Senator Feingold in the past, and could have raised noncorporate donations to it in the 2004 election cycle....

For that matter, even without the PAC alternative, ... WRTL’s ads could have been broadcast lawfully in the runup to the election ... if Senator Feingold’s name had been omitted and the Senator not otherwise singled out. Since members of today’s majority apparently view WRTL’s broadcasts either as “genuine issue ad[s],” or as “lobby[ing] Wisconsin voters concerning the filibustering of the President’s judicial nominees,” ... substituting the phrase “Contact your Senators” for the phrase “Contact Senators Feingold and Kohl” would [not] have denied WRTL a constitutionally sufficient ... alternative way to send its message.3 ...

[T]he suggestion that §203 is a ban on political speech is [also] belied by MCFL’s safe harbor for nonprofit advocacy corporations: under that rule, WRTL would have been free to attack Senator Feingold by name at any time with ads funded from its corporate treasury, if it had not also chosen to serve as a funnel for hundreds of thousands of dollars from other corporations. Thus, what is called a “ban” on speech is a limit on the financing of electioneering broadcasts by entities that refuse to take advantage of the PAC structure but insist on acting as conduits from the cam-

3 [Justice Scalia responds:—ed.] ... The purpose of the ad was to put political pressure upon Senator Feingold to change his position on the filibuster—not only through the constituents who accepted the invitation to contact him, but also through the very existence of an ad bringing to the public’s attention that he, Senator Feingold, stood athwart the allowance of a vote on judicial nominees....
F. RESTRICTIONS THAT AFFECT NEWSGATHERING


Chief Justice Burger delivered the opinion of the Court.

We granted certiorari to decide whether petitioner has a First Amendment right of access to the transcript of a preliminary hearing growing out of a criminal prosecution.

[A.] Robert Diaz, a nurse, was charged with murdering 12 patients by administering massive doses of the heart drug lidocaine. Diaz moved to exclude the public from the [preliminary hearing] proceedings under Cal. Penal Code § 868, which requires such proceedings to be open unless “exclusion of the public is necessary in order to protect the defendant’s right to a fair and impartial trial.” The Magistrate granted the unopposed motion, finding that closure was necessary because the case had attracted national publicity and “only one side may get reported in the media.”

The preliminary hearing continued for 41 days. Diaz did not introduce any evidence, but his counsel subjected most of the witnesses to vigorous cross-examination. Diaz was held to answer on all charges.

[About five months later], the State moved ... to have the transcript of the preliminary hearing released to the public; petitioner later joined in support of the motion. Diaz opposed the motion, contending that release of the transcript would result in prejudicial pretrial publicity. The Superior Court found that the information in the transcript was “as factual as it could be,” and ... neither “inflammatory” nor “exciting,” but that there was, nonetheless, “a reasonable likelihood that release of all or any part of the transcripts might prejudice defendant’s right to a fair and impartial trial.” ... [The Superior Court refused to release the transcript; but then, after Diaz waived his right to a jury trial, the Superior Court did release the

4 [Chief Justice Roberts responds—ed.] ... First, ... PACs impose well-documented and onerous burdens, particularly on small nonprofits. Second, ... [e]ven assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech, newspaper ads and websites are not reasonable alternatives to broadcast speech in terms of impact and effectiveness. Third, [arguing] that corporations can still speak by changing what they say to avoid mentioning candidates ... is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says “I disagree with the draft,” or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices.... “... [U]nder the First Amendment, ... a speaker has the autonomy to choose the content of his own message.”
IV. SPECIAL BURDENS ON FREE SPEECH

transcript. The California Supreme Court eventually held that a First Amendment right of access applied only to actual criminal trials, and not preliminary hearings.—ed.]

[B.] It is important to identify precisely what the California Supreme Court decided: “[W]e conclude that the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice which would impinge upon the right to a fair trial. Penal code section 868 makes clear that the primary right is the right to a fair trial and that the public’s right of access must give way when there is conflict.” ...

The First Amendment question cannot be resolved solely on the label we give the event, i.e., “trial” or otherwise, particularly where the preliminary hearing functions much like a full-scale trial. In cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations. First, because a “tradition of accessibility implies the favorable judgment of experience,” we have considered whether the place and process have historically been open to the press and general public....

Second, ... [we have] considered whether public access plays a significant positive role in the functioning of the particular process in question. Some kinds of government operations [such as grand jury proceedings] ... would be totally frustrated if conducted openly.... Other proceedings plainly require public access.... Openness in criminal trials, including the selection of jurors, Press-Enterprise Co. v. Superior Court (I), 464 U.S. 501 (1984), “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” ...

If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.... [But w]hile open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity. {Among other things], the interests of those other than the accused may be implicated. The protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding.} ... “[T]he presumption [of openness] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.” ...

[C.] [W]e conclude that the right of access applies to preliminary hearings as conducted in California. First, there has been a tradition of accessibility to preliminary hearings of the type conducted in California. Although grand jury proceedings have traditionally been closed ..., preliminary hearings conducted before neutral and detached magistrates have been open to the public.... [T]he near uniform practice of state and federal courts has been to conduct preliminary hearings in open court. {The vast
majority of States considering the issue have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary proceedings. [Historical discussion omitted.—ed.] ...

The second question is whether public access to preliminary hearings as they are conducted in California plays a particularly significant positive role in the actual functioning of the process. We have already determined that public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system. California preliminary hearings are sufficiently like a trial to justify the same conclusion.

In California, ... [the accused] has an absolute right to an elaborate preliminary hearing before a neutral magistrate. The accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence. If the magistrate determines that probable cause exists, the accused is bound over for trial; such a finding leads to a guilty plea in the majority of cases.

It is true that unlike a criminal trial, the California preliminary hearing cannot result in the conviction of the accused and the adjudication is before a magistrate or other judicial officer without a jury. But these features, standing alone, do not make public access any less essential to the proper functioning of the proceedings in the overall criminal justice process. Because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding. [The preliminary hearing in many cases provides “the sole occasion for public observation of the criminal justice system.”]

Similarly, the absence of a jury, long recognized as “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,” makes the importance of public access to a preliminary hearing even more significant. “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”

Denying the transcript of a 41-day preliminary hearing would frustrate what we have characterized as the “community therapeutic value” of openness. Criminal acts, especially certain violent crimes, provoke public concern, outrage, and hostility. “When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions.” In sum:

“The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” We therefore conclude that the qualified First Amendment
right of access to criminal proceedings applies to preliminary hearings as they are conducted in California....

[D.] [T]he proceedings [thus] cannot be closed unless specific, on the record findings are made demonstrating that “closure is essential to preserve higher values and is narrowly tailored to serve that interest.” If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.

The California Supreme Court ... concluded that “the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice.” As the court itself acknowledged, the “reasonable likelihood” test places a lesser burden on the defendant than the “substantial probability” test which we hold is called for by the First Amendment.

Moreover, that court failed to consider whether alternatives short of complete closure would have protected the interests of the accused.... “... Publicity concerning the proceedings at a pretrial hearing ... could influence public opinion against a defendant and inform potential jurors of inculpator[y] information wholly inadmissible at the actual trial.” But this risk of prejudice does not automatically justify refusing public access to hearings on every motion to suppress. Through voir dire, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.

And even if closure were justified for the hearings on a motion to suppress, closure of an entire 41-day proceeding would rarely be warranted. The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [his fair trial] right. And any limitation must be “narrowly tailored to serve that interest.” ...

Justice Stevens, with whom Justice Rehnquist joins as to Part [B], dissenting....

[A.] [T]he accused, the prosecutor, and the trial judge have all agreed to the sealing of the transcript in order to assure a fair trial.... The transcript, in the words of the Magistrate, revealed “only one side of the story.” The transcript also contained the Magistrate’s characterization of Mr. Diaz as “the most dangerous type of individual there is.” ...

The Superior Court trial judge ... found—and the finding is amply supported by the record—that “there is a reasonable likelihood that making all or any part of the transcripts public might prejudice the defendant’s right to a fair and impartial trial.” The Magistrate had earlier rejected less restrictive alternatives to sealing the transcript, concluding that “the only way to protect” the defendant’s “[fair trial] right would be to seal the transcript.” [The state Court of Appeal and the state Supreme Court agreed.] ...
In view of the above, the trial judge had an obvious and legitimate reason for refusing to make the transcript public any sooner than he did....

[T]he freedom to obtain information that the government has a legitimate interest in not disclosing is far narrower than the freedom to disseminate information, which is “virtually absolute” in most contexts. In this case, the risk of prejudice to the defendant’s right to a fair trial is perfectly obvious. For me, that risk is far more significant than the countervailing interest in publishing the transcript of the preliminary hearing sooner rather than later. The interest in prompt publication ... is no greater than the interest in prompt publication of grand jury transcripts....

[B.] The Court nevertheless reaches the opposite conclusion by applying the “two complementary considerations” of “experience and logic.” ... [But t]he historical evidence proffered in this case is far less probative than the evidence adduced in prior cases granting public access to criminal proceedings.

In those cases, a common-law tradition of openness at the time the First Amendment was ratified suggested an intention and expectation on the part of the Framers and ratifiers that those proceedings would remain presumptively open.... History was relevant because it demonstrated that “[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself.” ...

In this case, however, it is uncontroverted that a common-law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted, and that the Framers and ratifiers of that provision could not have intended such proceedings to remain open.... [T]he Court’s ... historical disquisition demonstrates only that in many States preliminary proceedings are generally open to the public. In other States, numbering California and Michigan among them, such proceedings have been closed....

“[T]he fact that the States” have adopted different rules regarding the openness of preliminary proceedings “is merely a reflection of our federal system, which demands ‘tolerance for a spectrum of state procedures dealing with a common problem of law enforcement.’ That [California’s] particular approach has been adopted in few other States does not render [its] choice unconstitutional.” ... The recent common-law developments reported by the Court are relevant, if at all, only insofar as they suggest that preliminary proceedings merit the “beneficial effects of public scrutiny.” The Court’s historical crutch cannot carry the weight of opening a preliminary proceeding that the State has ordered closed; that determination must stand or fall on whether it satisfies the second component of the Court’s test.

If the Court’s historical evidence proves too little, the “value of openness” on which it relies proves too much, for this measure would open to public scrutiny far more than preliminary hearings .... [The Court’s] reasoning applies to the traditionally secret grand jury with as much force as
it applies to California preliminary hearings. A grand jury indictment is just as likely to be the “final step” in a criminal proceeding and the “sole occasion” for public scrutiny as is a preliminary hearing. Moreover, many critics of the grand jury maintain that the grand jury protects the accused less well than does a legally knowledgeable judge who personally presides over a preliminary hearing. Finally, closure of grand juries denies an outlet for community rage. (To the extent that it matters that in California “[t]he accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence,” it bears mention that many other States have reformed their grand juries to include one or more of these procedural reforms.)

The Court’s reasoning—if carried to its logical outcome—thus contravenes the “long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts” and in the courts of 19 States.... This Court has previously described grand jury secrecy as “indispensable,” and has remarked that “the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.” (Five reasons are commonly given for the policy of grand jury secrecy: “(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.”) ...

The presence of a legitimate reason for closure in this case requires an affirmance. The constitutionally grounded fair trial interests of the accused if he is bound over for trial, and the reputational interests of the accused if he is not, provide a substantial reason for delaying access to the transcript for at least the short time before trial....
V. GOVERNMENT ACTING IN SPECIAL CAPACITIES

A. GOVERNMENT AS EMPLOYER

The civil service humbug is underminin’ our institutions and if a halt ain’t called soon this great republic will tumble down like a Park-avenue house when they were buildin’ the subway, and on its ruins will rise another Russian government.

This is an awful serious proposition... Let me argue it out for you. I ain’t up on sillygisms, but I can give you some arguments that nobody can answer.

First this great and glorious country was built up by political parties; second, parties can’t hold together if their workers don’t get the offices when they win; third, if the parties go to pieces, the government they built up must go to pieces, too; fourth, then there’ll be h— to pay...

Let me tell you that patriotism has been dying out fast for the last twenty years. Before then when a party won, its workers got everything in sight. That was somethin’ to make a man patriotic. Now, when a party wins and its men come forward and ask for their reward, their reply is, “Nothin’ doin’, unless you can answer a list of questions about Egyptian mummies and how many years it will take for a bird to wear out a mass of iron as big as the earth by steppin’ on it once in a century?”

—George Washington Plunkitt (a Tammany Hall political boss of the late 1800s / early 1900s), The Curse of Civil Service Reform, printed in William L. Riordon, Plunkitt of Tammany Hall

g. Problem: Clerkship

You apply for a clerkship with Judge Megan Gray. Judge Gray declines to hire you, in part because you are a member of the Libertarian Party (something you revealed at your interview). You sue Judge Gray for discriminating against you based on your party affiliation. What result?


Justice Brennan ... delivered an opinion in which Justice White and Justice Marshall joined....

[A.] In December 1970, the Sheriff of Cook County, a Republican, was replaced by Richard Elrod, a Democrat. At that time, respondents, all Republicans, were employees of the Cook County Sheriff’s Office. They were non-civil-service employees and, therefore, not covered by any statute, ordinance, or regulation protecting them from arbitrary discharge.

One respondent, John Burns, was Chief Deputy of the Process Division and supervised all departments of the Sheriff’s Office working on the seventh floor of the building housing that office. Frank Vargas was a bailiff and security guard at the Juvenile Court of Cook County. Fred L. Buckley was employed as a process server in the office. Joseph Dennard was an
employee in the office.

It has been the practice of the Sheriff of Cook County ... to replace non-
civil-service employees of the Sheriffs’ Office with members of his own party
when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party.... [This] is but one form of the
general practice of political patronage. The practice also includes placing
loyal supporters in government jobs that may or may not have been made
available by political discharges. Nonofficeholders may be the beneficiaries
of lucrative government contracts for highway construction, buildings, and
supplies. Favored wards may receive improved public services.... Although
political patronage comprises a broad range of activities, we are here con-
cerned only with the constitutionality of dismissing public employees for
partisan reasons.

Patronage practice ... has existed at the federal level at least since the
Presidency of Thomas Jefferson, although its popularization and legiti-
amation primarily occurred later, in the Presidency of Andrew Jackson.... More
recent times have witnessed a strong decline in its use, particularly with
respect to public employment.... The decline of patronage employment is
not, of course, relevant to the question of its constitutionality.... Our in-
quiry does not begin with the judgment of history, though the actual ope-
ration of a practice viewed in retrospect may help to assess its workings
with respect to constitutional limitations....

[B.] The cost of the practice of patronage is the restraint it places on
freedoms of belief and association. In order to maintain their jobs, respon-
dents were required to pledge their political allegiance to the Democratic
Party, work for the election of other candidates of the Democratic Party,
contribute a portion of their wages to the Party, or obtain the sponsorship
of a member of the Party, usually at the price of one of the first three al-
ternatives....

[A] member of the out-party maintains affiliation with his own party at
the risk of losing his job. He works for the election of his party’s candidates
and espouses its policies at the same risk. The financial and campaign as-
sistance that he is induced to provide to another party furthers the ad-
vancement of that party’s policies to the detriment of his party’s views and
ultimately his own beliefs, and any assessment of his salary is tantamount
to coerced belief.

Even a pledge of allegiance to another party, however ostensible, only
serves to compromise the individual’s true beliefs. Since the average public
employee is hardly in the financial position to support his party and
another, or to lend his time to two parties, the individual’s ability to act
according to his beliefs and to associate with others of his political persua-
sion is constrained, and support for his party is diminished.

It is not only belief and association which are restricted where political
patronage is the practice. The free functioning of the electoral process also
suffers. Conditioning public employment on partisan support prevents
support of competing political interests. Existing employees are deterred
from such support, as well as the multitude seeking jobs.

As government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice’s scope is substantial relative to the size of the electorate, the impact on the process can be significant.

[C.] Although the practice of patronage dismissals clearly infringes First Amendment interests, ... the prohibition on encroachment of First Amendment protections is not an absolute. Restraints are permitted ... [if they] further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

[1.] One interest which has been offered in justification of patronage is the need to insure effective government and the efficiency of public employees. It is argued that employees of political persuasions not the same as that of the party in control of public office will not have the incentive to work effectively and may even be motivated to subvert the incumbent administration’s efforts to govern effectively.

We are not persuaded. The inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands belies this justification. And the prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work.

Further, it is not clear that dismissal in order to make room for a patronage appointment will result in replacement by a person more qualified to do the job since appointment often occurs in exchange for the delivery of votes, or other party service, not job capability. More fundamentally, however, ... it is doubtful that the mere difference of political persuasion motivates poor performance; nor do we think it legitimately may be used as a basis for imputing such behavior.

[2.] Even if the first argument that patronage serves effectiveness and efficiency be rejected, it still may be argued that patronage serves those interests by giving the employees of an incumbent party the incentive to perform well in order to insure their party’s incumbency and thereby their jobs. Patronage, according to the argument, thus makes employees highly accountable to the public.

But the ability of officials more directly accountable to the electorate to discharge employees for cause and the availability of merit systems, growth in the use of which has been quite significant, convince us that means less intrusive than patronage still exist for achieving accountability in the public work force and, thereby, effective and efficient government. The greater effectiveness of patronage over these less drastic means, if any, is at best marginal, a gain outweighed by the absence of intrusion on protected interests under the alternatives.
[3.] A second interest advanced in support of patronage is the need for political loyalty of employees, not to the end that effectiveness and efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration, policies presumably sanctioned by the electorate. The justification is not without force, but is nevertheless inadequate to validate patronage wholesale.

Limiting patronage dismissals to policymaking positions is sufficient to achieve this governmental end. Nonpolicymaking individuals usually have only limited responsibility and are therefore not in a position to thwart the goals of the in-party.

No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals.

Thus, the political loyalty “justification is a matter of proof, or at least argument, directed at particular kinds of jobs.” Since, as we have noted, it is the government’s burden to demonstrate an overriding interest in order to validate an encroachment on protected interests, the burden of establishing this justification as to any particular respondent will rest on the petitioners on remand, cases of doubt being resolved in favor of the particular respondent.

[4.] It is argued that a third interest supporting patronage dismissals is the preservation of the democratic process. According to petitioners, “we have contrived no system for the support of party that does not place considerable reliance on patronage. The party organization makes a democratic government work and charges a price for its services.” The argument is thus premised on the centrality of partisan politics to the democratic process.

Preservation of the democratic process is certainly an interest protection of which may in some instances justify limitations on First Amendment freedoms. [See, e.g., Buckley v. Valeo.] But ... we are not persuaded that ... the interdiction of patronage dismissals[] will bring about the demise of party politics. Political parties existed in the absence of active patronage practice prior to the administration of Andrew Jackson, and they have survived substantial reduction in their patronage power through the establishment of merit systems.

Patronage dismissals thus are not the least restrictive alternative to achieving the contribution they may make to the democratic process. The
process functions as well without the practice, perhaps even better, for patronage dismissals clearly also retard that process. Patronage can result in the entrenchment of one or a few parties to the exclusion of others. Patronage is [also] a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government. Thus, if patronage contributes at all to the elective process, that contribution is diminished by the practice’s impairment of the same. 

Justice Stewart, with whom Justice Blackmun joins, concurring in the judgment.

[I intimate no views on] the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular political party .... The single substantive question involved in this case is whether a non policymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot. See Perry v. Sindermann, 408 U.S. 593 [(1972) (an early case holding that a government employee may not fired based on his speech)—ed.].

Justice Stevens did not participate ....

Justice Powell, with whom ... Chief Justice [Burger] and Justice Rehnquist join, dissenting....

The plurality seriously underestimates the strength of the government interest—especially at the local level—in allowing some patronage hiring practices, and it exaggerates the perceived burden on First Amendment rights. 

“[P]atronage hiring practices have contributed to American democracy by stimulating political activity and by strengthening parties, thereby helping to make government accountable....” We ... have recognized the strong government interests in encouraging stable political parties and avoiding excessive political fragmentation. Through the medium of established parties the “people ... are presented with understandable choices and the winner in the general election with sufficient support to govern effectively,” while “splintered parties and unrestrained factionalism [might] do significant damage to the fabric of government.” ...

Without analysis, however, the plurality opinion disparages the contribution of patronage hiring practices in advancing these state interests.... Despite the importance of elective offices to the ongoing work of local governments, election campaigns for lesser offices [often including that of sheriff] usually attract little attention from the media, with consequent disinterest and absence of intelligent participation on the part of the public. Unless the candidates for these offices are able to dispense the traditional patronage that has accrued to the offices, they also are unlikely to attract donations of time or money from voluntary groups. In short, the resource pools that fuel the intensity of political interest and debate in “important” elections frequently “could care less” about who fills the offices deemed to be relatively unimportant.
Long experience teaches that at this local level traditional patronage practices contribute significantly to the democratic process. The candidates for these offices derive their support at the precinct level, and their modest funding for publicity, from cadres of friends and political associates who hope to benefit if their “man” is elected. The activities of the latter are often the principal source of political information for the voting public. The “robust” political discourse that the plurality opinion properly emphasizes is furthered—not restricted—by the time-honored system.

{Former Senator Paul H. Douglas (D. Ill.) said ...: “... [C]onsider just how long most liberals would be able to last in Congress if you stripped us of all patronage, as you desire. We who try to defend the interests of the people, the consumers and the taxpayers commonly face the powerful opposition of the special-interest groups which will spend enormous sums of money to defeat us.... If we are to survive we need some support rooted in gratitude for material favors which at the same time do not injure the general public.”}

Patronage hiring practices also enable party organizations to persist and function at the local level. Such organizations become visible to the electorate at large only at election time, but the dull periods between elections require ongoing activities: precinct organizations must be maintained; new voters registered; and minor political “chores” performed for citizens who otherwise may have no practical means of access to officeholders.... For the most part, ... the hope of some reward generates a major portion of the local political activity supporting parties.

It is difficult to overestimate the contributions to our system by the major political parties, fortunately limited in number compared to the fractionalization that has made the continued existence of democratic government doubtful in some other countries. Parties generally are stable, high-profile, and permanent institutions. When the names on a long ballot are meaningless to the average voter, party affiliation affords a guidepost by which voters may rationalize a myriad of political choices. Voters can and do hold parties to long-term accountability, and it is not too much to say that, in their absence, responsive and responsible performance in low-profile offices, particularly, is difficult to maintain.

It is against decades of experience to the contrary, then, that the plurality opinion concludes that patronage hiring practices interfere with the “free functioning of the electoral process.” This ad hoc judicial judgment runs counter to the judgments of the representatives of the people in state and local governments, representatives who have chosen, in most instances, to retain some patronage practices in combination with a merit-oriented civil service.

One would think that elected representatives of the people are better equipped than we to weigh the need for some continuation of patronage practices in light of the interests above identified, and particularly in view of local conditions. Against this background, the assertion in the plurality opinion that “[p]atronage dismissals ... are not the least restrictive alter-
native to achieving [any] contribution they may make to the democratic process” is unconvincing, especially since no alternative to some continuation of patronage practices is suggested....

This case differs materially from previous cases involving the imposition of political conditions on employment, cases where there was an attempt to exclude “a minority group ... odious to the majority.” In that context there was a danger that governmental action was directed toward the elimination of political beliefs by penalizing adherents to them. But patronage hiring practices have been consistent historically with vigorous ideological competition in the political “marketplace.”

And even after one becomes a beneficiary, the system leaves significant room for individual political expression. Employees, regardless of affiliation, may vote freely and express themselves on some political issues.

The principal intrusion of patronage hiring practices on First Amendment interests thus arises from the coercion on associational choices that may be created by one’s desire initially to obtain employment. This intrusion, while not insignificant, must be measured in light of the limited role of patronage hiring in most government employment. The pressure to abandon one’s beliefs and associations to obtain government employment especially employment of such uncertain duration does not seem to me to assume impermissible proportions in light of the interests to be served....


**Justice Stevens delivered the opinion of the Court....**

Respondents ... commenced this action ... to [prevent their being fired, solely based on their being Republicans, from their jobs as assistant public defenders in Rockland County, New York] ....

[P]arty affiliation may be an acceptable requirement for some types of government employment. Thus, if an employee’s private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State’s vital interest in maintaining governmental effectiveness and efficiency.... {[A] Governor ... may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments.}

Under some circumstances, a position may be appropriately considered political even though it is neither confidential nor policymaking in character. As one obvious example, if a State’s election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration....

It is equally clear that party affiliation is not necessarily relevant to every policymaking or confidential position. The coach of a state university’s football team formulates policy, but no one could seriously claim that
Republicans make better coaches than Democrats, or vice versa, no matter which party is in control of the state government.... In sum, the ultimate inquiry is not whether the label “policymaker” or “confidential” fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved....

[T]he continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State.... Thus, whatever policymaking occurs in the public defender’s office must relate to the needs of individual clients and not to any partisan political interests. [This is in contrast to the broader public responsibilities of an official such as a prosecutor. We express no opinion as to whether the deputy of such an official could be dismissed on grounds of political party affiliation or loyalty.]

Similarly, although an assistant is bound to obtain access to confidential information arising out of various attorney-client relationships, that information has no bearing whatsoever on partisan political concerns. Under these circumstances, it would undermine, rather than promote, the effective performance of an assistant public defender’s office to make his tenure dependent on his allegiance to the dominant political party.

{[P]etitioner attempts to justify the discharges in this case on the ground that he needs to have absolute confidence in the loyalty of his subordinates.... Justice Stewart makes the same point, relying on an “analogy to a firm of lawyers in the private sector.” We cannot accept the proposition, however, that there cannot be “mutual confidence and trust” between attorneys, whether public defenders or private practitioners, unless they are both of the same political party. To the extent that petitioner lacks confidence in the assistants he has inherited from the prior administration for some reason other than their political affiliations, he is, of course, free to discharge them.} ...  

[Justice Stewart, dissenting.]

I joined the judgment of the Court in Elrod v. Burns because it is my view that ... “a nonpolicymaking, nonconfidential government employee can[not] be discharged ... from a job that he is satisfactorily performing upon the sole ground of his political beliefs.” ...

[But] respondents here clearly are not “nonconfidential” employees.... [They] are lawyers, and the employment positions involved are those of assistants in the office of the Rockland County Public Defender. The analogy to a firm of lawyers in the private sector is a close one, and I can think of few occupational relationships more [imbued] with the necessity of mutual confidence and trust than that kind of professional association. I believe that the petitioner, upon his appointment as Public Defender, was not constitutionally compelled to enter such a close professional and necessarily confidential association with the respondents if he did not wish to do so.
Justice Powell with whom Justice Rehnquist joins, and with whom Justice Stewart joins as to Part [A], dissenting....

[A.] The standard articulated by the Court is ... certain to create vast uncertainty.... [Officials] who now receive guidance from civil service laws, no longer will know when political affiliation is an appropriate consideration in filling a position.... Prudent individuals requested to accept a public appointment must consider whether their predecessors will threaten to oust them through legal action.

[Consider one example ...:] The President customarily has considered political affiliation in removing and appointing United States attorneys. Given the critical role that these key law enforcement officials play in the administration of the Department of Justice, both Democratic and Republican Attorneys General have concluded, not surprisingly, that they must have the confidence and support of the United States attorneys. And political affiliation has been used as one indicator of loyalty.

Yet, it would be difficult to say, under the Court’s standard, that “partisan” concerns properly are relevant to the performance of the duties of a United States attorney. This Court has noted that “[t]he office of public prosecutor is one which must be administered with courage and independence.” Nevertheless, I believe that the President must have the right to consider political affiliation when he selects top ranking Department of Justice officials. The President and his Attorney General, not this Court, are charged with the responsibility for enforcing the laws and administering the Department of Justice. The Court’s vague, overbroad decision may cast serious doubt on the propriety of dismissing United States attorneys, as well as thousands of other policymaking employees at all levels of government, because of their membership in a national political party.

[Like wise, t]he rationale for the Court’s conclusion that election judges may be partisan appointments is not readily apparent. The Court states that “if a State’s election laws require that precincts be supervised by two election judges of different parties, a Republican judge could be legitimately discharged solely for changing his party registration.” If the mere presence of a state law mandating political affiliation as a requirement for public employment were sufficient, then the Legislature of Rockland County could reverse the result of this case merely by passing a law mandating that political affiliation be considered when a public defender chooses his assistants. Moreover, it is not apparent that a State could demonstrate, under the standard approved today, that only a political partisan is qualified to be an impartial election judge.

A constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel. Federal judges will now be the final arbiters as to who federal, state, and local governments may employ.... [T]he Court is not justified in removing decisions so essential to responsible and efficient governance from the discretion of legislative and executive officials....

[B.] [T]he Court’s decision well may impair the right of local voters to
structure their government.... The voters of [Rockland County] elect a legislative body. Among the responsibilities that the voters give to the legislature is the selection of a county public defender. In 1972, when the county voters elected a Republican majority in the legislature, a Republican was selected as Public Defender. The Public Defender retained one respondent and appointed the other as Assistant Public Defenders. Not surprisingly, both respondents are Republican.

In 1976, the voters elected a majority of Democrats to the legislature. The Democratic majority, in turn, selected a Democratic Public Defender who replaced both respondents with Assistant Public Defenders approved by the Democratic legislators.

The voters of Rockland County are free to elect their public defender and assistant public defenders instead of delegating their selection to elected and appointed officials. [In Florida, for example, the local public defender is elected.] ... The voters’ choice of public officials on the basis of political affiliation is not yet viewed as an inhibition of speech; it is democracy.... In other words, the operation of democratic government depends upon the selection of elected officials on precisely the basis rejected by the Court today.

Although the voters of Rockland County could have elected both the public defender and his assistants, they have given their legislators a representative proxy to appoint the public defender. And they have delegated to the public defender the power to choose his assistants. Presumably the voters have adopted this course in order to facilitate more effective representative government. Of course, the voters could have instituted a civil service system that would preclude the selection of either the public defender or his assistants on the basis of political affiliation. But the continuation of the present system reflects the electorate’s decision to select certain public employees on the basis of political affiliation.

The Court’s decision today thus limits the ability of the voters of a county to structure their democratic government in the way that they please. Now those voters must elect both the public defender and his assistants if they are to fill governmental positions on a partisan basis. [The Court’s description of the policymaking functions of a public defender’s office suggests that the public defender [himself] may no longer be chosen by the County Legislature on a partisan basis.] Because voters certainly may elect governmental officials on the basis of party ties, it is difficult to perceive a constitutional reason for prohibiting them from delegating that same authority to legislators and appointed officials....

G. GOVERNMENT AS REGULATOR OF THE BAR

b. Problem: Criticism of Judges

Kanbraska Rule of Professional Conduct 8.2(a) says:

A lawyer shall not make a statement that the lawyer knows to be false or
with negligence as to its truth or falsity concerning the qualifications or integrity of a judge ... or of a candidate for election or appointment to judicial ... office.

(This Rule is based on Model Rule of Professional Conduct 8.2(a), but with “negligence” substituted for the Model Rule’s phrase “reckless disregard.” Many courts have indeed interpreted Model Rule 8.2(a) as applying a negligence standard, despite its textual reference to reckless disregard. See, e.g., United States District Court v. Sandlin, 12 F.3d 861, 867 (9th Cir. 1993); In re Westfall, 808 S.W.2d 829 (Mo. 1991).)

Jack Schaedel is an elected prosecutor in Kanbraska, and Lauren Teukolsky is an elected state Supreme Court Justice. Schaedel had secured a conviction of John Doe for producing child pornography, under a statute which holds producers strictly liable for filming sexual acts involving children who are under 18, even if the producer doesn’t know or have reason to know that the actor is a child. Justice Teukolsky authored a 4-3 state supreme court opinion setting aside Doe’s conviction, on the grounds that such strict liability statutes are unconstitutional.

Schaedel was quite upset by Justice Teukolsky’s opinion, and made the following statement at a press conference:

For reasons that I find somewhat illogical, and I think even a little bit less than honest, Justice Teukolsky has said today that we cannot prosecute scum like Doe. She has readily distorted the constitutional doctrine and I think convoluted logic to arrive at a decision that she personally likes. I think that she made up her mind before she wrote the decision, and just reached the conclusion that she wanted to reach.

See Westfall (involving a statement on which this one is based). The State Bar formally reprimands Schaedel, and suspends him from the practice of law for six months, arguing that his statement violated Rule 8.2(a). Is this constitutional? Should it be?


Chief Justice Rehnquist delivered the opinion of the Court [as to these sections—ed.].

[A.] Petitioner’s client [Grady Sanders] was the subject of a highly publicized case, and in response to adverse publicity about his client, Gentile [whose last name is pronounced like the word “genteel”—ed.] held a press conference on the day after Sanders was indicted. At the press conference, petitioner made, among others, the following statements:

When this case goes to trial, ... you’re going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the [property] is Detective Steve Scholl....

... the so-called other victims, as I sit here today I can tell you that one, two—four of them are known drug dealers and convicted money launderers and drug dealers; three of whom didn’t say a word about anything un-
til after they were approached by Metro and after they were already in trouble and are trying to work themselves out of something.

Now, up until the moment, of course, that they started going along with what detectives from Metro wanted them to say, these people were being held out as being incredible and liars by the very same people who are going to say now that you can believe them.

The following statements were in response to questions from members of the press:

... I know I represent an innocent man .... The last time I had a conference with you, was with a client and I let him talk to you and I told you that that case would be dismissed and it was. Okay?

I don’t take cheap shots like this. I represent an innocent guy....

[The police] were playing very fast and loose.... We’ve got some video tapes that if you take a look at them, I’ll tell you what, [Detective Scholl] either had a hell of a cold or he should have seen a better doctor.

Articles appeared in the local newspapers describing the press conference and petitioner’s statements. The trial took place approximately six months later, and although the trial court succeeded in empaneling a jury that had not been affected by the media coverage and Sanders was acquitted on all charges, the state bar disciplined petitioner for his statements.

The Southern Nevada Disciplinary Board found that petitioner knew the detective he accused of perpetrating the crime and abusing drugs would be a witness for the prosecution. It also found that petitioner believed others whom he characterized as money launderers and drug dealers would be called as prosecution witnesses.

Petitioner’s admitted purpose for calling the press conference was to counter public opinion which he perceived as adverse to his client, to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and to publicly present his client’s side of the case.... The Nevada Supreme Court ... [found] by clear and convincing evidence that petitioner [violated Nevada Supreme Court Rule 177 because he] “knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client’s case.” The court noted that the case was “highly publicized”; that the press conference, held the day after the indictment ..., was “timed to have maximum impact”; and that petitioner’s comments “related to the character, credibility, reputation or criminal record of the police detective and other potential witnesses.” The court concluded that the “absence of actual prejudice does not establish that there was no substantial likelihood of material prejudice.”...

[B.] In the United States, the courts have historically regulated admission to the practice of law before them and exercised the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards. “Membership in the bar is a privilege burdened with conditions,” to use the oft-repeated statement of [Justice Cardozo]. [Historical examples of restrictions similar to the Nevada one omitted.—ed.]
Currently, 31 States in addition to Nevada have adopted—either verbatim or with insignificant variations—Rule 3.6 of the ABA’s Model Rules, which bans lawyer speech that poses a substantial likelihood of materially prejudicing the trial—ed]. Eleven States have adopted [another model rule] ..., which is less protective of lawyer speech than Model Rule 3.6, in that it applies a “reasonable likelihood of prejudice” standard. Only one State, Virginia, has explicitly adopted a clear and present danger standard, while four States and the District of Columbia have adopted standards that arguably approximate “clear and present danger.” ...

[T]he theory upon which our criminal justice system is founded[is that] the outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them .... Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and ex parte statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.

At the same time, however, the criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system. The way most of them acquire information is from the media.

The First Amendment protections of speech and press have been held[ in cases such as Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976),] to require a showing of “clear and present danger” that a malfunction in the criminal justice system will be caused before a State may prohibit media speech or publication about a particular pending trial. The question we must answer in this case is whether a lawyer who represents a defendant involved with the criminal justice system may insist on the same standard before he is disciplined for public pronouncements about the case ....

We [have] expressly contemplated that the speech of those participating before the courts could be limited.... [Thus, in] Seattle Times Co. v. Rihnehart, 467 U.S. 20 (1984)[,] ... we unanimously held that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery. In that case we said that “[a]lthough litigants do not ‘surrender their First Amendment rights at the courthouse door,’ those rights may be subordinated to other interests that arise in this setting” ....

Even in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer’s right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses. See, e.g., Peel v. Attorney Reg. & Discip. Comm’n; Ohrlik v. Ohio State Bar Assn. In each of these cases, we engaged in a balancing process, weighing the State’s interest in the regulation of a specialized profession against a lawyer’s First
Amendment interest in the kind of speech that was at issue.

The speech of lawyers representing clients in pending cases may [thus] be regulated under a less demanding standard than that established for regulation of the press in Nebraska Press .... Lawyers representing clients in pending cases are key participants in the criminal justice system, and the State may demand some adherence to the precepts of that system in regulating their speech as well as their conduct. As noted by Justice Brennan in his concurring opinion in Nebraska Press, ... “[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice.”

Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as especially authoritative. We agree with the majority of the States that the “substantial likelihood of material prejudice” standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials. When a state regulation implicates First Amendment rights, the Court must balance those interests against the State’s legitimate interest in regulating the activity in question.

The “substantial likelihood” test embodied in Rule 177 is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State’s judicial system, and it imposes only narrow and necessary limitations on lawyers’ speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by “impartial” jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.

Even if a fair trial can ultimately be ensured through voir dire, change of venue, or some other device, these measures entail serious costs to the system. Extensive voir dire may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner.

The State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs on the judicial system and on the litigants. The restraint on speech is narrowly tailored to achieve those objectives. The regulation of attorneys’ speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys’ comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a
duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding.

{The Nevada Supreme Court has consistently read ... Rule 177 as applying only to lawyers in pending cases .... We express no opinion on the constitutionality of a rule regulating the statements of a lawyer who is not participating in the pending case about which the statements are made.} ...

[A majority of the Court—Justice O’Connor plus the four dissenters—ultimately held that Gentile was improperly punished, because the rule was vague as applied to him. But a majority of the Court (Chief Justice Rehnquist, plus Justices White, O’Connor, Scalia, and Souter) signed on to the opinion above.—ed.]

Justice Kennedy ... [joined by] Justice Marshall, Justice Blackmun, and Justice Stevens join[, dissenting on this question]....

[A.] At issue here is the constitutionality of a ban on political speech critical of the government and its officials....

The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations.... Public vigilance serves us well, for “[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.... Without publicity, all other checks are insufficient: in comparison [to] publicity, all other checks are of small account.” ... [And] limits upon public comment about pending cases are “likely to fall not only at a crucial time but upon the most important topics of discussion....” ...

“[T]he press ... guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption, or ... question] the judgment of an elected public prosecutor. Our system grants prosecutors vast discretion at all stages of the criminal process. The public has an interest in its responsible exercise....

[B.] Wide-open balancing of interests is not appropriate in this context.... Respondent would justify a substantial limitation on speech by attorneys because “lawyers have special access to information, including confidential statements from clients and information obtained through pretrial discovery or plea negotiations,” and so lawyers’ statements “are likely to be received as especially authoritative.” Rule 177, however, does not reflect concern for the attorney’s special access to client confidences, material gained through discovery, or other proprietary or confidential information.

We have upheld restrictions upon the release of information gained “only by virtue of the trial court’s discovery processes.” Seattle Times.... Similar rules require an attorney to maintain client confidences.... [But] Rule 177 ... is neither limited to nor even directed at preventing release of
information received through court proceedings or special access afforded attorneys....

[C.] Even if respondent is correct, and as in *Seattle Times* we must balance ‘whether the ‘practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression’ and whether ‘the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved,”’ the Rule as interpreted by Nevada [is unconstitutional] ....

[1.] Only the occasional case presents a danger of prejudice from pretrial publicity. Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial publicity, they are able to disregard it and base their verdict upon the evidence presented in court. *Voir dire* can play an important role in reminding jurors to set aside out-of-court information and to decide the case upon the evidence presented at trial....

[Moreover, the Bar presents] not a single example where a defense attorney has managed by public statements to prejudice the prosecution of the State’s case. Even discounting the obvious reason for a lack of appellate decisions on the topic—the difficulty of appealing a verdict of acquittal—the absence of anecdotal or survey evidence in a much-studied area of the law is remarkable....

The police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information adverse to a criminal defendant, many of which are not within the scope of Rule 177 or any other regulation. By contrast, a defendant cannot speak without fear of incriminating himself and prejudicing his defense, and most criminal defendants have insufficient means to retain a public relations team apart from defense counsel for the sole purpose of countering prosecution statements. These factors underscore my conclusion that blanket rules restricting speech of defense attorneys should not be accepted without careful First Amendment scrutiny....

[2.] One may concede the proposition that an attorney’s speech about pending cases may present dangers that could not arise from statements by a nonparticipant, and that an attorney’s duty to cooperate in the judicial process may prevent him or her from taking actions with an intent to frustrate that process. The role of attorneys in the criminal justice system subjects them to fiduciary obligations to the court and the parties.

An attorney’s position may result in some added ability to obstruct the proceedings through well-timed statements to the press .... A court can require an attorney’s cooperation to an extent not possible of nonparticipants. A proper weighing of dangers might consider the harm that occurs when speech about ongoing proceedings forces the court to take burdensome steps such as sequestration, continuance, or change of venue.

If as a regular matter speech by an attorney about pending cases raised real dangers of this kind, then a substantial governmental interest
might support additional regulation of speech.... [But given the facts we know,] the Rule which punished petitioner’s statements represents a limitation of First Amendment freedoms greater than is necessary ... to the protection of the particular governmental interest, and does not protect against a danger of the necessary gravity, imminence, or likelihood....

A profession which takes just pride in [the legal system’s traditions of rationally determining disputes] may consider [the traditions] disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases. And in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts. It cannot be said that petitioner’s conduct demonstrated any real or specific threat to the legal process, and his statements have the full protection of the First Amendment....

H. GOVERNMENT AS CONTROLLER OF THE MILITARY

b. Problem: Designing a Rule

Design what you think is the proper First Amendment substantive rule for speech by members of the military (setting aside the vagueness issue). What are the most interesting test cases for this rule? What sort of speech (if any) do you think should be more restrictable by the military than in civilian life, and why?


Justice Rehnquist delivered the opinion of the Court....

[A.] Howard Levy, a physician, was a captain in the Army stationed at Fort Jackson, South Carolina. He had entered the Army under the so-called “Berry Plan,” under which he agreed to serve for two years in the Armed Forces if permitted first to complete his medical training.... On June 2, 1967, appellee was convicted by a general court-martial of violations of Arts. 90, 133, and 134 of the Uniform Code of Military Justice, and sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor....

[O]ne of the functions of the hospital to which appellee was assigned was that of training Special Forces aide men.... [Discussion of the nonspeech-based charges against Levy under art. 90—refusal to obey orders—omitted.—ed.] During [this] time, appellee made several public statements to enlisted personnel at the post, of which the following is representative:

The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don’t see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and
discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children....

Article 133 provides for the punishment of “conduct unbecoming an officer and a gentleman,” while Art. 134 proscribes, *inter alia*, “all disorders and neglects to the prejudice of good order and discipline in the armed forces.” The specification under Art. 134 alleged that appellee “did, at Fort Jackson, South Carolina, ... with design to promote disloyalty and disaffection among the troops, publicly utter [certain] statements to divers enlisted personnel at divers times ....” The specification under Art. 133 alleged that appellee did “while in the performance of his duties at the United States Army Hospital ... wrongfully and dishonorably” make statements variously described as intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful to Special Forces personnel and to enlisted personnel who were patients or under his supervision. [The alleged statements were the ones quoted earlier, said “to enlisted personnel, both patients and those performing duty under his immediate supervision and control,” plus:—ed.] {“I will not train special forces personnel because they are ‘liars and thieves,’ ‘killers of peasants,’ and ‘murderers of women and children,’” or words to that effect; ... “The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey,” or words to that effect; ... “I hope when you get to Vietnam something happens to you and you are injured,” or words to that effect ....}

[B.] [T]he military is, by necessity, a specialized society separate from civilian society[, which has] developed laws and traditions of its own during its long history.... “An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.” ... “[T]he military constitutes a specialized community governed by a separate discipline from that of the civilian,” and ... “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty ....” ... [And] a military officer holds a particular position of responsibility and command in the Armed Forces ....

Just as military society has been a society apart from civilian society, so “[m]ilitary law ... is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.” And to maintain the discipline essential to perform its mission effectively, the military has developed ... “... customary military law” or “general usage of the military service.” ...

“... Courts Martial ... are bound to execute their duties ... in the absence of positive enactments[,] ... for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them.” [Discussion of the history of Arts. 133 and 134 omitted.—ed.] ... [C]ases involving “conduct to the prejudice of good order and military discipline,” as
opposed to conduct unbecoming an officer, “are still further beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties.” ...

[C.] While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community. In civilian life there is no legal sanction—civil or criminal—for failure to behave as an officer and a gentleman; in the military world, Art. 133 imposes such a sanction on a commissioned officer. The Code likewise imposes other sanctions for conduct that in civilian life is not subject to criminal penalties: disrespect toward superior commissioned officers; cruelty toward, or oppression or maltreatment of subordinates; negligent damaging, destruction, or wrongful disposition of military property of the United States; improper hazarding of a vessel; drunkenness on duty; and malingering....

At the same time the enforcement of that Code in the area of minor offenses is often by sanctions which are more akin to administrative or civil sanctions [such as suspension of duty, reduction of pay grade, and forfeiture of pay—ed.] than to civilian criminal ones. The availability of these lesser sanctions is not surprising in view of the different relationship of the Government to members of the military. It is not only that of lawgiver to citizen ... [but of] employer, landlord, provisioner, and lawgiver rolled into one.

That relationship also reflects the different purposes of the two communities.... [T]he military “is the executive arm” whose “law is that of obedience.” While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community....

Perhaps because of the broader sweep of the Uniform Code, the military makes an effort to advise its personnel of the contents of the Uniform Code, rather than depending on the ancient doctrine that everyone is presumed to know the law. Article 137 of the Uniform Code requires that the provisions of the Code be “carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter” and that they be “explained again after he has completed six months of active duty ....”

Thus the numerically largest component of the services, the enlisted personnel, who might be expected to be a good deal less familiar with the Uniform Code than commissioned officers, are required by its terms to receive instructions in its provisions. Article 137 further provides that a complete text of the Code and of the regulations prescribed by the President “shall be made available to any person on active duty, upon his request, for his personal examination.” ...
[D.] Appellee urges that both Art. 133 and Art. 134 are “void for vagueness” under the Due Process Clause ... and overbroad in violation of the First Amendment. We have recently said of the vagueness doctrine:

The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent “arbitrary and discriminatory enforcement.” Where a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

Each of these articles has been construed by the United States Court of Military Appeals or by other military authorities in such a manner as to at least partially narrow its otherwise broad scope.... Article 134 does not make “every irregular, mischievous, or improper act a court-martial offense,” but its reach is limited to conduct that is “directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline.” It applies only to calls for active opposition to the military policy of the United States, and does not reach all “[d]isagreement with, or objection to, a policy of the Government.”

The Manual for Courts-Martial restates these limitations on the scope of Art. 134. It goes on to say that “[c]ertain disloyal statements by military personnel” may be punishable under Art. 134. “Examples are utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government.” Extensive additional interpretative materials are contained in the portions of the Manual devoted to Art. 134, which describe more than sixty illustrative offenses.

The Court of Military Appeals has likewise limited the scope of Art. 133.... [T]hat court has stated: “... To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.”

The effect of these constructions of Arts. 133 and 134 by the Court of Military Appeals and by other military authorities has been twofold: It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover....

Even though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative military sources, further content may be supplied even in these areas by less formalized custom and usage. And there also cannot be the slightest doubt under the military precedents that there is a substantial range of conduct to which both articles clearly apply without vagueness or imprecision. It is
within that range that appellee’s conduct squarely falls ...:

“[T]he Manual for Courts-Martial offers as an example of an offense under Article 134, ‘praising the enemy, attacking the war aims of the United States, or denouncing our form of government.’ With the possible exception of the statement that ‘Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children,’ it would appear that each statement for which [Levy] was court-martialed could fall within the example given in the Manual.” ...

Because of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs [rather than First Amendment cases—ed.].... “... [S]tatutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.... Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.”

Since appellee could have had no reasonable doubt that his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so were both “unbecoming an officer and a gentleman,” and “to the prejudice of good order and discipline in the armed forces,” in violation of the provisions of Arts. 133 and 134, respectively, his challenge to them as unconstitutionally vague ... must fail.

We likewise reject appellee’s contention that Arts. 133 and 134 are facially invalid because of their “overbreadth.” ... The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it. Doctrines of First Amendment overbreadth asserted in support of challenges to imprecise language like that contained in Arts. 133 and 134 are not exempt from the operation of these principles....

“... Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action.... [But t]he armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.” ...

[Levy’s] conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment. Articles 133 and 134 may constitutionally prohibit that con-
duct, and a sufficiently large number of similar or related types of conduct so as to preclude their invalidation for overbreadth.

Justice Douglas, dissenting....

[T]he only express exemption of a person in the Armed Services from ... the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need for “a presentment or indictment” of a grand jury “in cases arising in the land or naval forces ....” ...

The power to draft an army includes, of course, the power to curtail considerably the “liberty” of the people who make it up. But Congress in these articles has not undertaken to cross the forbidden First Amendment line. Making a speech or comment on one of the most important and controversial public issues of the past two decades cannot by any stretch of dictionary meaning be included in “disorders and neglects to the prejudice of good order and discipline in the armed forces.”

Nor can what Captain Levy said possibly be “conduct of a nature to bring discredit upon the armed forces.” ... This was no mere ploy to perform a “subversive” act. Many others who loved their country shared his views. They were not saboteurs. Uttering one’s beliefs is sacrosanct under the First Amendment. Punishing the utterances is an “abridgment” of speech in the constitutional sense.

Justice Stewart, with whom Justice Douglas and Justice Brennan join, dissenting....

The question before us is not whether the military may adopt substantive rules different from those that govern civilian society, but whether the serviceman has the same right as his civilian counterpart to be informed as to precisely what conduct those rules proscribe before he can be criminally punished for violating them. More specifically, the issue is whether the vagueness of the general articles is required to serve a genuine military objective. [Argument as to why the general articles are indeed vague omitted.—ed.]

The Solicitor General suggests that a certain amount of vagueness in the general articles is necessary in order to maintain high standards of conduct in the military, since it is impossible to predict in advance every offense that might serve to affect morale or discredit the service.... [But] “[w]hat high standard of conduct is served by convicting an individual of conduct he did not reasonably perceive to be criminal? Is not the essence of high standards in the military, first, knowing one’s duty, and secondly, executing it? ... [W]ould not an even higher standard be served by delineation of the various offenses under Article 134, followed by obedience to these standards?” ...

I should suppose that vague laws, with their serious capacity for arbitrary and discriminatory enforcement, can in the end only hamper the military’s objectives of high morale and esprit de corps. In short, I think no case has been made for finding that there is any legitimate military necessity for perpetuation of the vague and amorphous general articles.
I. GOVERNMENT AS PRISON WARDEN

b. Problem: Designing a Rule

Design what you think is the proper First Amendment substantive rule for speech by and to prisoners. What are the most interesting test cases for this rule? What sort of speech (if any) do you think should be more restric

table in prison than outside it, and why? Should the same rule apply to pretrial detainees? To parolees?


Justice Blackmun delivered the opinion of the Court.

[A.] Regulations promulgated by the Federal Bureau of Prisons broadly permit federal prisoners to receive publications from the “outside,” but authorize prison officials to reject incoming publications found to be detrimental to institutional security. [R]ejection of a publication is authorized “only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.” References in the text to “prison security” are intended, for the sake of convenience, to refer more broadly to this range of concerns.

[The regulations] generally permit an inmate to subscribe to, or to receive, a publication without prior approval, but authorize the warden to reject a publication “only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.” The warden, however, may not reject a publication “solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant.”

The regulations contain a nonexhaustive list of criteria which may support rejection of a publication[.] (“... Publications which may be rejected ... include but are not limited to publications which meet one of the following criteria: (1) It ... describes procedures for the construction or use of weapons ...; (2) It ... encourages[] or describes methods of escape, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions; (3) It ... describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs; (4) It is written in code; (5) It ... describes or encourages activities which may lead to ... physical violence or group disruption; (6) It encourages or instructs in the commission of criminal activity; (7) It is sexually explicit material which ... poses a threat to
the security, good order, or discipline of the institution, or facilitates criminal activity.

[A supplementary regulation provides that] a warden may reject the following types of sexually explicit material ...: “(1) Homosexual (of the same sex as the institution population). (2) Sado-masochistic. (3) Bestiality. (4) Involving children.” Material in categories (1), (2), and (3) may be admitted if the warden determines it “not to pose a threat at the local institution.” Explicit heterosexual material ordinarily will be admitted. Other explicit material may be admitted if it has scholarly, or general social or literary, value. Homosexual material that is not sexually explicit is to be admitted ....

The warden is prohibited from establishing an excluded list of publications: each issue of a subscription publication is to be reviewed separately.... {[I]t is the practice of the Bureau to withhold in its entirety any publication containing excludable material. This practice, referred to by the parties as the “all-or-nothing rule,” is also at issue in this case.}

{We [hold] ... that the proper inquiry in this case is whether the regulations are “reasonably related to legitimate penological interests,” Turner v. Safley, 482 U.S. 78 (1987), and we conclude that under this standard the regulations are facially valid.} ...

[B.] “[P]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,” nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the “inside.” ... Access [to prisoners] is essential to lawyers and legal assistants ..., to journalists seeking information about prison conditions, and to families and friends of prisoners ....

[Y]et prison officials may well conclude that certain proposed interactions ... have potentially significant implications for the order and security of the prison. Acknowledging the expertise of these officials and that the judiciary is “ill equipped” to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world....

[P]ublishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners. The question ... is what standard of review this Court should apply to prison regulations limiting that access....

[In Procunier v. Martinez, 416 U.S. 396 (1974),] the Court struck down California regulations concerning personal correspondence between inmates and noninmates, regulations that provided for censorship of letters that “unduly complain,” “magnify grievances,” or “express[s] inflammatory political, racial, religious or other views or beliefs.” We reviewed these regulations under the following standard:

First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expres-
I. GOVERNMENT AS PRISON WARDEN

... an interest in security, order, and rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved, rather than unnecessarily broad.

[But as] recently explained in *Turner*, [recent decisions] ... adopted a standard of review that focuses on the reasonableness of prison regulations: the relevant inquiry is whether the actions of prison officials were "reasonably related to legitimate penological interests." The Court ruled that "such a standard is necessary if 'prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations." ... 9

[The *Turner* Court held that the Constitution did not] require a strict "least restrictive alternative" analysis, [which might be applied] without sufficient sensitivity to the need for discretion in meeting legitimate prison needs. The Court expressed concern that "every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand," and rejected the costs of a "least restrictive alternative" rule as too high.

[The regulated activity centrally at issue in *Martinez*—outgoing personal correspondence from prisoners—did not, by its very nature, pose a serious threat to prison order and security.... In addition, the implications for security [of outgoing material] are far more predictable. Dangerous outgoing correspondence is more likely to fall within readily identifiable categories[, such as] ... escape plans, plans relating to ongoing criminal activity, and threats of blackmail or extortion.... Where, as in *Martinez*, the nature of the asserted governmental interest is such as to require a lesser degree of case-by-case discretion, a closer fit between the regulation and the purpose it serves may safely be required.

Categorically different considerations—considerations far more typical of the problems of prison administration—apply to [the current case] .... We deal here with incoming publications, material requested by an individual inmate but targeted to a general audience.

Once in the prison, material of this kind reasonably may be expected to circulate among prisoners, with the concomitant potential for coordinated disruptive conduct. Furthermore, prisoners may observe particular material in the possession of a fellow prisoner, draw inferences about their fellow’s beliefs, sexual orientation, or gang affiliations from that material, and cause disorder by acting accordingly. See generally Prisoners and the Law 3-14 (1988) (noting that possession of homosexuality explicit material may identify the possessor as homosexual and target him for assault).

"The problem is not ... in the individual reading the materials in most cases. The problem is in the material getting into the prison." In the vola-

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9 We do not think it sufficient to focus, as respondents urge, on the identity of the individuals whose rights allegedly have been infringed. [The Court cited cases where speech by nonprisoners to prisoners was restricted.—ed.]
tile prison environment, it is essential that prison officials be given broad discretion to prevent such disorder....

We now hold that regulations affecting the sending of a “publication” ... to a prisoner ... are “valid if [they are] reasonably related to legitimate penological interests.” ... [We limit Procunier] to regulations concerning outgoing correspondence.... The implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials. Any attempt to justify a similar categorical distinction between incoming correspondence from prisoners (to which we applied a reasonableness standard in Turner) and incoming correspondence from nonprisoners would likely prove futile, and we do not invite it.... We adopt the Turner standard ... with confidence that, as petitioners here have asserted, “a reasonableness standard is not toothless.”

[C.] The Court in Turner identified several factors that are relevant to, and that serve to channel, the reasonableness inquiry.

The first Turner factor is multifold: we must determine whether the governmental objective underlying the regulations at issue is [(1)] legitimate and [(2)] neutral, and that the regulations are [(3)] rationally related to that objective.... The legitimacy of the Government’s purpose in promulgating these regulations is beyond question. The regulations are expressly aimed at protecting prison security ....

As to neutrality, “[w]e have found it important to inquire whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion, without regard to the content of the expression.” ... [T]he regulations distinguish between rejection of a publication “solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant” (prohibited) and rejection because the publication is detrimental to security (permitted). Both determinations turn, to some extent, on content.

But the Court’s reference to “neutrality” in Turner was intended to go no further than ... that “the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression.” {Indeed, the Court upheld content distinctions in Jones v. North Carolina Prisoners’ Labor Union, Inc., 433 U.S. 119 (1977), where internal distribution of a prisoners’ union’s materials was prohibited while distribution of materials from the Jaycees and Alcoholics Anonymous was permitted.... [T]he distinctions had a rational basis in the legitimate penological interests of the prisons: in contrast with the prisoners’ union, the Jaycees and Alcoholics Anonymous “were seen as serving a rehabilitative purpose, working in harmony with the goals and desires of the prison administrators, and both had been determined not to pose any threat to the order or security of the institution.”}

Where, as here, prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are “neutral” in the technical sense in which we meant and used that term in Turner. {In contrast, the censorship at issue
in *Martinez* closely resembled the kind of censorship which is expressly prohibited by the regulations presently at issue. In *Martinez*, the regulations barred writings that “unduly complain” or “magnify grievances,” express “inflammatory political, racial, religious or other views,” or are “defamatory” or “otherwise inappropriate.” ... “[T]hese regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship,” and that the purpose of the regulations had not been found “unrelated to the suppression of expression.” The regulations at issue in *Martinez*, therefore, were decidedly not “neutral” in the relevant sense.

We also conclude that the broad discretion accorded prison wardens by the regulations here at issue is rationally related to security interests. We reach this conclusion for two reasons.

The first has to do with the kind of security risk presented by incoming publications.... [The District Court properly found that] ... a more closely tailored standard [than that in the regulations] “could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder.” Where the regulations at issue concern the entry of materials into the prison, ... a regulation which gives prison authorities broad discretion is appropriate.

Second, we are comforted by the individualized nature of the determinations required by the regulation. Under the regulations, no publication may be excluded unless the warden himself makes the determination that it is “detrimental to the security, good order, or discipline of the institution or ... might facilitate criminal activity.” ... Indeed, the regulations expressly reject certain shortcuts that would lead to needless exclusions[, for instance by barring delegation] of power to reject publications[, and prohibiting the establishment of] an excluded list of publications .... [I]t is rational for the Bureau to exclude materials that, although not necessarily “likely” to lead to violence, are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time.

[The second *Turner* factor] ... “is whether there are alternative means of exercising the right that remain open to prison inmates.” ... “[T]he right” in question must be viewed sensibly and expansively. The Court in *Turner*, which upheld restrictions on correspondence between inmates at different prisons[,] did not require that prisoners be afforded other means of communicating with inmates at other institutions .... Rather, it held ... that it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available .... As the regulations at issue in the present case permit a broad range of publications to be sent, received, and read, this factor is clearly satisfied.

The third factor ... is the impact that accommodation of the asserted constitutional right will have on others (guards and inmates) in the prison. Here, the class of publications to be excluded is limited to those found po-
tentially detrimental to order and security; the likelihood that such material will circulate within the prison raises the prospect of [a] “ripple effect.” [Where] the right in question “can be exercised only at the cost of significantly less liberty and safety for ... guards and other prisoners ....,” the courts should defer to the “informed discretion of corrections officials.”

Finally, *Turner* held: “[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.... [I]f an inmate claimant can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.” ... [T]hese regulations, on their face, are not an “exaggerated response” to the problem at hand: no obvious, easy alternative has been established.

Regarding the all-or-nothing rule, we analyze respondents’ proposed alternatives to that rule as alternative means of accommodating respondents’ asserted rights. The District Court ... found, on the basis of testimony in the record, that petitioners’ fear that tearing out the rejected portions and admitting the rest of the publication would create more discontent than the current practice was “reasonably founded.” ...

When prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an “exaggerated response” under *Turner*. Furthermore, the administrative inconvenience of this proposed alternative is also a factor to be considered and adds additional support to the District Court’s conclusion that petitioners were not obligated to adopt it....

[We] hold that ... [the] regulations are facially valid .... [We] remand for examination of the validity of the regulations as applied to any of the 46 publications ... as to which there remains a live controversy.

**Justice Stevens, with whom Justice Brennan and Justice Marshall join, concurring in part and dissenting in part.**

[A.] An article in Labyrinth, a magazine published by the Committee for Prisoner Humanity & Justice [described an asthmatic prisoner’s death, and concluded that it was the result of prison neglect—ed.] .... The incident ... eventually came to the attention of this Court, which allowed [the prisoner’s] mother to pursue her civil rights action against prison officials. Clearly the Labyrinth article’s report of inadequate medical treatment of federal prisoners raised “a matter that is both newsworthy and of great public importance.” As the Court concedes, both publishers and recipients of such criticism ordinarily enjoy the fullest First Amendment protections.

Yet Labyrinth’s efforts to disseminate the article to its subscribers at Marion Federal Penitentiary met Government resistance. Marion officials, acting within ... [federal] regulations, returned the magazine on the ground that “the article entitled ‘Medical Murder’ would be detrimental to the good order and discipline of this institution.... [T]his type of philosophy could guide inmates in this institution into situations which could cause
themselves and other inmates problems with the Medical Staff.” Two years after publication a Marion official testified that he believed the article had posed no threat.... I cannot agree ... with [the Court’s] holding that [a] finding of “reasonableness” will justify [such] censorship ....

[B.] [The dissent endorsed the Procunier standard, described by the majority, as the proper test for all cases where prisoners communicate with outsiders. It went on to say:—ed.] ... [The Court’s] bifurcation of the constitutional standard governing [incoming and outgoing] communications between inmates and outsiders is unjustified.... “Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, ... the latter’s interest is grounded in the ... guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter ....” ...

[C.] [The Court’s] “open-ended ‘reasonableness’ standard makes it much too easy to uphold restrictions on prisoners’ First Amendment rights on the basis of administrative concerns and speculation about possible security risks rather than on the basis of evidence that the restrictions are needed to further an important governmental interest.”

To be sure, courts must give prison administrators some berth to combat the “Herculean obstacles” blocking their efforts to maintain security and prevent escapes or other criminal conduct, and I do not object to those regulations clearly targeted at such interests. [It is undisputed that a warden may exclude an incoming publication if: “(1) It ... describes procedures for the construction or use of weapons ...; (2) It ... contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions; (3) It ... describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs; [or] (4) It is written in code....”] Nevertheless, ... provisions allowing prison officials to reject a publication if they find its contents are “detrimental” to “security, good order, or discipline” or “might facilitate criminal activity” are impermissibly ambiguous. The term “detrimental” invites so many interpretations that it scarcely checks administrators' actions. Similarly, “might facilitate”—in contrast with “encourage” or “advocate”—so attenuates the causal connection between expression and proscribed conduct that the warden has virtually free rein to censor incoming publications....

The feeble protection provided by a “reasonableness” standard applied within the framework of these regulations is apparent in this record. Like the Labyrinth issue, many of the 46 rejected publications criticized prison conditions or otherwise presented viewpoints that prison administrators likely would not welcome. [While publications like Labyrinth reported on prison conditions and legal matters, other rejected publications discussed or depicted sexual activity, martial arts, and electronics, and advocated homosexual rights, neo-Nazism, and left-wing politics.] Testimony by one mail clerk14 and the rote explanations for deci-

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14 Asked in a deposition to describe her method for reviewing publications, the clerk replied: “A. I have a standard.... Sex is a standard. Radical is a standard. I will go out on a limb and say Communism and fascism is a standard I would use. It is more of a political-sexual (Footnote continued on the next page.)
sions suggest that rejections were based on personal prejudices or categorical assumptions rather than individual assessments of risk. These circumstances belie the Court’s interpretation of these regulations as “content-neutral” and its assertion that rejection decisions are made individually. Some of the rejected publications may represent the sole medium for conveying ... a particular unconventional message; thus it is irrelevant that the regulations permit many other publications to be delivered ....

No evidence supports the Court’s assumption that, unlike personal letters, these publications will circulate within the prison and cause ripples of disruption. Nor is there any evidence that an incoming publication ever caused a disciplinary or security problem; indeed, some of the rejected publications were delivered to inmates in other prisons without incident. In sum, the record convinces me that under either the Martinez standard or the more deferential “reasonableness” standard these regulations are an impermissibly exaggerated response to security concerns.

[D.] If a prison official deems part of a publication’s content—even just one page of a book—to present an intolerable security risk, the Bureau’s regulations authorize the official to return the entire issue to the publisher.... There is no evidence that delivery of only part of a publication would endanger prison security.\(^{17}\) Rather, the primary justification advanced for the all-or-nothing rule was administrative convenience. The Bureau has objected that a contrary rule “would mean defacing the material and laboriously going over each article in each publication....”

But general speculation that some administrative burden might ensue should not be sufficient to justify a meat-ax abridgment of the First Amendment rights of either a free citizen or a prison inmate.... [And] if, as the regulations’ text seems to require, prison officials actually read an article before rejecting it, the incremental burden associated with clipping out the offending matter could not be of constitutional significance.

The Bureau’s administrative convenience justification thus is insufficient ... under either the Martinez standard or a “reasonableness” standard. The District Court’s contradictory finding simply highlights the likelihood that an attitude of broad judicial deference, coupled with a “reasonableness” standard, will provide inadequate protection for the rights at stake. (Thus I must disagree with petitioners’ staunch insistence that the reasonableness standard is not “toothless.” ... “[I]f the standard can be satisfied by nothing more than a ‘logical connection’ between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless. Application of the standard would seem to permit

\(^{17}\) Justice Stevens argued that the only evidence supporting the District Court’s contrary conclusion merely “manifest[ed] the expert witness’ discontent with censoring parts of publications [and] offer[ed] no support for petitioners’ argument that inmate discontent with the practice would threaten prison security.”—ed.]
disregard for inmates’ constitutional rights whenever the imagination of
the warden produces a plausible security concern and a deferential trial
court is able to discern a logical connection between that concern and the
challenged regulation. Indeed, ... security is logically furthered by a total
ban on inmate communication ....”)

J. GOVERNMENT AS REGULATOR OF IMMIGRATION

b. Problem: Designing a Rule

Design what you think are the proper First Amendment rules for Con-
gressional decisions about (1) letting people the country, (2) expelling
people once they are allowed in for a temporary visit, (3) expelling people
once they are allowed to be permanent residents, and (4) letting people be-
come citizens. What are the most interesting test cases for these rules?

c. Harisiades v. Shaughnessy, 342 U.S. 580 (1952)

Justice Jackson delivered the opinion of the Court....

[A.] Harisiades, a Greek national, accompanied his father to the Uni-
ited States in 1916, when thirteen years of age, and has resided here since.
He has taken a wife and sired two children, all citizens. He joined the
Communist Party in 1925, when it was known as the Workers Party, and
served as an organizer, Branch Executive Committeeman, secretary of its
Greek Bureau, and editor of its paper “Empros.” The party discontinued
his membership, along with that of other aliens, in 1939, but he has con-
tinued association with members.

He was familiar with the principles and philosophy of the Communist
Party and says he still believes in them. He disclaims personal belief in
use of force and violence and asserts that the party favored their use only
in defense.... [H]e was ordered deported on the grounds that after entry he
had been a member of an organization which advocates overthrow of the
Government by force and violence and distributes printed matter so advoc-
cating....

[B.] For over thirty years [Harisiades] has enjoyed such advantages as
accrue from residence here without renouncing his foreign allegiance or
formally acknowledging adherence to the Constitution he now invokes.
[He] was admitted to the United States, upon passing formidable exclusion-
ary hurdles, in the hope that, after what may be called a probationary
period, he would desire and be found desirable for citizenship. [He] has
been offered naturalization, with all of the rights and privileges of citizen-
ship, conditioned only upon open and honest assumption of undivided alle-
giance to our Government. But acceptance was and is not compulsory. [He]
has been permitted to prolong his original nationality indefinitely....

The alien retains immunities from burdens which the citizen must
shoulder. By withholding his allegiance from the United States, he leaves
outstanding a foreign call on his loyalties which international law not only
permits our Government to recognize but commands it to respect.... Foreign nationals ... cannot ... be compelled “to take part in the operations of war directed against their own country.” In addition to such general immunities they may enjoy particular treaty privileges.

Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government’s power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.

War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it....

[C.] In historical context the Act before us stands out as an extreme application of the expulsion power. There is no denying that as world convulsions have driven us toward a closed society the expulsion power has been exercised with increasing severity, manifest in multiplication of grounds for deportation, in expanding the subject classes from illegal entrants to legal residents, and in greatly lengthening the period of residence after which one may be expelled....

But any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. These restraints upon the judiciary ... do not control today’s decision but they are pertinent. It is not necessary and probably not possible to delineate a fixed and precise line of separation in these matters be-

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9 ... [T]he Constitution assures him a large measure of equal economic opportunity, he may invoke the writ of habeas corpus to protect his personal liberty, in criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments, and, unless he is an enemy alien, his property cannot be taken without just compensation.

10 He cannot stand for election to many public offices.... The alien’s right to travel temporarily outside the United States is subject to restrictions not applicable to citizens....
between political and judicial power under the Constitution. Certainly, however, nothing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress.

Under the conditions which produced this Act, can we declare that congressional alarm about a coalition of Communist power without and Communist conspiracy within the United States is either a fantasy or a pretense? This Act was approved by President Roosevelt June 28, 1940, when a world war was threatening to involve us, as soon it did. Communists in the United States were exerting every effort to defeat and delay our preparations. Certainly no responsible American would say that there were then or are now no possible grounds on which Congress might believe that Communists in our midst are inimical to our security.

Congress received evidence that the Communist movement here has been heavily laden with aliens and that Soviet control of the American Communist Party has been largely through alien Communists. It would be easy for those of us who do not have security responsibility to say that those who do are taking Communism too seriously and overestimating its danger. But we have an Act of one Congress which, for a decade, subsequent Congresses have never repealed but have strengthened and extended. We, in our private opinions, need not concur in Congress’ policies to hold its enactments constitutional....

[D.] We are urged, because the policy inflicts severe and undoubted hardship on affected individuals, to find a restraint in the Due Process Clause. But the Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien. When citizens raised the Constitution as a shield against expulsion from their homes and places of business, the Court refused to find hardship a cause for judicial intervention [citing Korematsu v. United States, 323 U.S. 214 (1943)].

We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government’s power of deportation. However desirable world-wide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or

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* [The U.S. Communist Party's stance on World War II closely tracked that of the Soviet Union. The Party supported involvement of the war after the Nazi invasion of the Soviet Union on June 22, 1941; but from 1939 to 1941, when the Soviet Union and Nazi Germany were allied under the Molotov-Ribbentrop Pact, the Party opposed involvement in the war.—ed.]
immunities.... We hold that the Act is not invalid under the Due Process Clause. [Harisiades is] not entitled to judicial relief unless some other constitutional limitation has been transgressed, to which inquiry we turn.

[E.] The First Amendment is invoked as a barrier against this enactment. The claim is that in joining an organization advocating overthrow of government by force and violence the alien has merely exercised freedoms of speech, press and assembly which that Amendment guarantees to him.

The assumption is that the First Amendment allows Congress to make no distinction between advocating change in the existing order by lawful elective processes and advocating change by force and violence, that freedom for the one includes freedom for the other, and that when teaching of violence is denied so is freedom of speech.

Our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative—attack by ballot. To arm all men for orderly change, the Constitution put in their hands a right to influence the electorate by press, speech and assembly. This means freedom to advocate or promote Communism by means of the ballot box, but it does not include the practice or incitement of violence.

True, it often is difficult to determine whether ambiguous speech is advocacy of political methods or subtly shades into a methodical but prudent incitement to violence. Communist governments avoid the inquiry by suppressing everything distasteful. Some would have us avoid the difficulty by going to the opposite extreme of permitting incitement to violent overthrow at least unless it seems certain to succeed immediately.

We apprehend that the Constitution enjoins upon us the duty, however difficult, of distinguishing between the two. Different formulae have been applied in different situations and the test applicable to the Communist Party has been stated too recently to make further discussion at this time profitable [citing Dennis v. United States]. We think the First Amendment does not prevent the deportation of [Harisiades]....

Justice Douglas, with whom Justice Black concurs, dissenting....

An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. He can live and work here and raise a family, secure in the personal guarantees every resident has and safe from discriminations that might be leveled against him because he was born abroad. Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands. If those rights, great as they are, have constitutional protection, I think the more important one—the right to remain here—has a like dignity.

The power of Congress to exclude, admit, or deport aliens flows from sovereignty itself and from the power “To establish an uniform Rule of Naturalization.” The power of deportation is therefore an implied one. The right to life and liberty is an express one. Why this implied power should
be given priority over the *express* guarantee of the Fifth Amendment has never been satisfactorily answered....

“It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this? ...”

The right to be immune from arbitrary decrees of banishment certainly may be more important to “liberty” than the civil rights which all aliens enjoy when they reside here. Unless they are free from arbitrary banishment, the “liberty” they enjoy while they live here is indeed illusory.

Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.

This drastic step may at times be necessary in order to protect the national interest. There may be occasions when the continued presence of an alien, no matter how long he may have been here, would be hostile to the safety or welfare of the Nation due to the nature of his conduct. But unless such condition is shown, I would stay the hand of the Government and let those to whom we have extended our hospitality and who have become members of our communities remain here and enjoy the life and liberty which the Constitution guarantees.

Congress has not proceeded by that standard. It has ordered ... aliens deported not for what they are but for what they once were. Perhaps a hearing would show that they continue to be people dangerous and hostile to us. But the principle of forgiveness and the doctrine of redemption are too deep in our philosophy to admit that there is no return for those who have once erred.


**Justice Blackmun delivered the opinion of the Court.**

[A.] “Does [the government’s] refusing to allow an alien scholar to enter the country to attend academic meetings violate the First Amendment rights of American scholars and students who had invited him?”

[Under Section 212(a)(28) of the Immigration and Nationality Act, aliens (1) “who advocate [or publish] the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship...”] (2) “shall be ineligible to receive visas and shall be excluded from admission into the United States”
(3) unless the Attorney General, in his discretion, upon recommendation by the Secretary of State or a consular officer, waives inadmissibility and approves temporary admission ....

Ernest E. Mandel ... is a Belgian citizen ... and is editor-in-chief of the Belgian Left Socialist weekly La Gauche. He is author of a two-volume work entitled Marxist Economic Theory published in 1969.... He does not dispute ... that he advocates the economic, governmental, and international doctrines of world communism....

On September 8, 1969, Mandel applied to the American Consul in Brussels for a nonimmigrant visa to enter the United States in October for a six-day period, during which he would participate in a conference on Technology and the Third World at Stanford University. He had been invited to Stanford by the Graduate Student Association there.... The University ... “heartily endorse[d]” the invitation.

When Mandel’s intended visit became known, additional invitations for lectures and conference participations came to him from members of the faculties at Princeton, Amherst, Columbia, and Vassar, from groups in Cambridge, Massachusetts, and New York City, and from others. One conference, to be in New York City, was sponsored jointly by the Bertrand Russell Peace Foundation and the Socialist Scholars Conference; Mandel’s assigned subject there was “Revolutionary Strategy in Imperialist Countries.” Mandel then filed a second visa application proposing a more extensive itinerary and a stay of greater duration.

On October 23 the Consul at Brussels informed Mandel orally that his application of September 8 had been refused.... Mandel’s address to the New York meeting was then delivered by transatlantic telephone....

All the appellees who joined Mandel in this action are United States citizens and are university professors ... who invited Mandel to speak ... in the United States or who expected to participate in colloquia with him so that ... “they may hear his views and engage him in a free and open academic exchange.” ... [T]hese plaintiffs claim that the statutes prevent them from hearing and meeting with Mandel in person for discussions, in contravention of [among other things] the First Amendment ....

[B.] Until 1875 alien migration to the United States was unrestricted. [An 1875 Act] barred convicts and prostitutes. Seven years later Congress passed the first general immigration statute....

[A 1903 Act] ... made ineligible for admission “anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law.” [An October 1918 Act] expanded the provisions for the exclusion of subversive aliens. [A 1940 Act] amended the 1918 Act to bar aliens who, at any time, had advocated or were members of or affiliated with organizations that advocated violent overthrow of the United States Government.... The pattern generally has been one of increasing control with particular attention, for almost 70 years now, first to anarchists and then to those with communist affiliation or views....
It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise. The appellees concede this. Indeed, the American appellees assert that “they sue to enforce their rights, individually and as members of the American public, and assert none on the part of the invited alien.” “Dr. Mandel is in a sense made a plaintiff because he is symbolic of the problem.”

The case, therefore, comes down to the narrow issue whether the First Amendment confers upon the appellee professors, because they wish to hear, speak, and debate with Mandel in person, the ability to determine that Mandel should be permitted to enter the country or, in other words, to compel the Attorney General to allow Mandel’s admission....

[C.] [T]his Court has referred to a First Amendment right to “receive information and ideas” .... [For instance,] in Lamont v. Postmaster General, 381 U.S. 301 (1965), the Court held that a statute permitting the Government to hold “communist political propaganda” arriving in the mails from abroad unless the addressee affirmatively requested in writing that it be delivered to him placed an unjustifiable burden on the addressee’s First Amendment right. This Court has recognized that this right is “nowhere more vital” than in our schools and universities....

[W]e [thus] cannot realistically say[, as the Government urges us to,) that the problem facing us disappears entirely or is nonexistent because the mode of regulation bears directly on physical movement.... In Lamont, [for instance], the face of the regulation dealt only with the Government’s undisputed power to control physical entry of mail into the country.

The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel’s ideas through his books and speeches, and because “technological developments,” such as tapes or telephone hook-ups, readily supplant his physical presence. This argument overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning. While alternative means of access to Mandel’s ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in light of the discussion that follows ...—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.

[D.] Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here.... [T]he power to exclude aliens is “inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers—a power to be exercised exclusively by the political branches of government ....” ... The Court without exception has sustained Congress’ “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.” “[O]ver no conceivable subject is the legislative power of Congress more
complete than it is over” the admission of aliens....

“[M]uch could be said for the view” that due process places some limitations on congressional power in this area “were we writing on a clean slate[.]” ... “But the slate is not clean... [T]here is not merely ‘a page of history’ ... but a whole volume.

“Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process.... But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.... We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens ....”

[Nor do we accept the argument that] the Executive’s implementation of [the] congressional mandate through decision whether to grant a waiver in each individual case must be limited by the First Amendment rights of persons like appellees.... In almost every instance of an alien excludable under § 212(a)(28), there are probably those who would wish to meet and speak with him. The ideas of most such aliens might not be so influential as those of Mandel, nor his American audience so numerous, nor the planned discussion forums so impressive. But the First Amendment does not protect only the articulate, the well known, and the popular.

Were we to endorse the proposition that governmental power to withhold a waiver must yield whenever a bona fide claim is made that American citizens wish to meet and talk with an alien excludable under § 212(a)(28), one of two unsatisfactory results would necessarily ensue. Either every claim would prevail, in which case the plenary discretionary authority Congress granted the Executive becomes a nullity, or courts in each case would be required to weigh the strength of the audience’s interest against that of the Government in refusing a waiver to the particular alien applicant, according to some as yet undetermined standard. The dangers and the undesirability of making that determination on the basis of factors such as the size of the audience or the probity of the speaker’s ideas are obvious. Indeed, it is for precisely this reason that the waiver decision has, properly, been placed in the hands of the Executive....

[When the Executive exercises [the § 212(a)(28)] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant. What First Amendment or other grounds may be available for attacking exercise of discretion for which no justification whatsoever is advanced is a question we neither address nor decide in this case....
Justice Marshall, with whom Justice Brennan joins, dissenting...

[Justice Douglas also expressed a similar view.—ed.]

[A]. If Americans want to hear about Marxist doctrine, even from advocates, government cannot intervene simply because it does not approve of the ideas. (The availability to appellees of Mandel’s books and taped lectures is no substitute for live, face-to-face discussion and debate, just as the availability to us of briefs and exhibits does not supplant the essential place of oral argument ....) [The government] certainly may not selectively pick and choose which ideas it will let into the country....

The heart of appellants’ position in this case ... is that the Government’s power is distinctively broad and unreviewable because “[t]he regulation in question is directed at the admission of aliens.” Thus, in the appellants’ view, this case is no different from a long line of cases holding that the power to exclude aliens is left exclusively to the “political” branches of Government, Congress, and the Executive.

These cases are not the strongest precedents in the United States Reports, and the majority’s baroque approach reveals its reluctance to rely on them completely. They include ... [cases] in which this Court upheld the Government’s power to exclude and expel Chinese aliens from our midst.

But none of these old cases must be “reconsidered” or overruled to strike down Dr. Mandel’s exclusion, for none of them was concerned with the rights of American citizens.... [A]ll governmental power—even the war power, the power to maintain national security, or the power to conduct foreign affairs—is limited by the Bill of Rights. When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative Branch or Executive Branch, but rather we consider those claims in light of the individual freedoms....

I do not mean to suggest that simply because some Americans wish to hear an alien speak, they can automatically compel even his temporary admission to our country. Government may prohibit aliens from even temporary admission if exclusion is necessary to protect a compelling governmental interest. Actual threats to the national security, public health needs, and genuine requirements of law enforcement are the most apparent interests that would surely be compelling.

But in Dr. Mandel’s case, the Government has, and claims, no such compelling interest. Mandel’s visit was to be temporary. His “ineligibility” for a visa was based solely on § 212(a)(28). The only governmental interest embodied in that section is the Government’s desire to keep certain ideas out of circulation in this country. This is hardly a compelling governmental interest.... Without any claim that Mandel “live” is an actual threat to this country, there is no difference between excluding Mandel because of his ideas and keeping his books out because of their ideas. Neither is permitted. Lamont v. Postmaster General.

[B.] Dr. Mandel has written about his exclusion, concluding that “[i]t demonstrates a lack of confidence” on the part of our Government “in the capacity of its supporters to combat Marxism on the battleground of
ideas.” He observes that he “would not be carrying any high explosives, if I had come, but only, as I did before, my revolutionary views which are well known to the public.” And he wryly notes that “[i]n the nineteenth century the British ruling class, which was sure of itself, permitted Karl Marx to live as an exile in England for almost forty years.”

It is undisputed that Dr. Mandel’s brief trip would involve nothing but a series of scholarly conferences and lectures. The progress of knowledge is an international venture. As Mandel’s invitation demonstrates, individuals of differing world views have learned the ways of cooperation where governments have thus far failed. Nothing is served—least of all our standing in the international community—by Mandel’s exclusion.

In blocking his admission, the Government has departed from the basic traditions of our country, its fearless acceptance of free discussion. By now deferring to the Executive, this Court departs from its own best role as the guardian of individual liberty in the face of governmental overreaching. Principles of judicial restraint designed to allow the political branches to protect national security have no place in this case....
VII½. **INDEPENDENT APPELLATE REVIEW**

a. **Summary**

**Rule:** When a judge or jury decides that speech is unprotected—for instance, concludes that speech is libelous or obscene—the appellate courts must *independently review* this decision to make sure it’s correct. *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

— Outside free speech law, such “questions of application of law to fact” or “mixed questions of law and fact”—for instance, judgments about the reasonableness of conduct in negligence cases—are often reviewed with deference to the factfinder. Not so in free speech cases.

— The appellate court may, however, defer to the factfinder as to the underlying historical facts (such as what the defendant actually said), at least so long as this turns on judgments of credibility of witnesses.

— This rule applies to all reviewing courts—state and federal, intermediate and supreme.

**Policy justifications:**

1. Independent appellate review is needed as an extra check against decisions that erroneously restrict constitutionally guaranteed free speech.

2. Independent appellate review helps set precedents that clarify the First Amendment tests, which on their face are often quite vague.
XI. COMPelled Disregard of Religion?

A. The Non-Discrimination Principle (Free Exercise and Establishment)

3. Establishment Clause/Free Exercise Clause: No Discrimination Against the Irreligious

d2. Zorach v. Clauson, 343 U.S. 306 (1952)

Justice Douglas delivered the opinion of the Court.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.\(^1\)

This “released time” program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike McCollum v. Board of Education, 333 U.S. 203 (1948), which involved a “released time” program from Illinois. In that case the classrooms were turned over to religious instructors. We accor-

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\(^1\) The New York City released time program is embodied in the following provisions:

(a) [The N.Y. Education Law], which provides that “Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.”

(b) Regulations of the Commissioner of Education of the State of New York, which provide for absence during school hours for religious observance and education outside the school grounds [par. 1], where conducted by or under the control of a duly constituted religious body [par. 2]. Students must obtain written requests from their parents or guardians to be excused for such training [par. 1], and must register for the training and have a copy of their registration filed with the public school authorities [par. 3]. Weekly reports of their attendance at such religious schools must be filed with their principal or teacher [par. 4]. Only one hour a week is to be allowed for such training, at the end of a class session [par. 5], and where more than one religious school is conducted, the hour of release shall be the same for all religious schools [par. 6].

(c) Regulations of the Board of Education of the City of New York, which provide similar rules supplementing the State Commissioner’s regulations, with the following significant amplifications: No announcement of any kind will be made in the public schools relative to the program [rule 1]. The religious organizations and parents will assume full responsibility for attendance at the religious schools and will explain any failures to attend on the weekly attendance reports [rule 3]. Students who are released will be dismissed from school in the usual way [rule 5]. There shall be no comment by any principal or teacher on attendance or nonattendance of any pupil upon religious instruction [rule 6].
dingly held that the program violated the [Establishment Clause]....

Appellants, who are taxpayers and residents of New York City and whose children attend its public schools, challenge the present law, contending it is in essence not different from the one involved in the McCollum Case. Their argument, stated elaborately in various ways, reduces itself to this: the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this “released time” program, like the one in the McCollum Case, would be futile and ineffective....

It takes obtuse reasoning to inject any issue of the “free exercise” of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student ... is left to his own desires as to the manner or time of his religious devotions, if any.

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. [Nor is there any indication that the public schools enforce attendance at religious schools by punishing absentees from the released time programs for truancy.] The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented. Hence we put aside that claim of coercion both as respects the “free exercise” of religion and “an establishment of religion” within the meaning of the First Amendment.

Moreover, apart from that claim of coercion, we do not see how New York by this type of “released time” program has made a law respecting an establishment of religion within the meaning of the First Amendment.... The First Amendment ... does not say that in every and all respects there shall be a separation of Church and State. Rather, [the Free Exercise Clause and the Establishment Clause] studiously define[] the manner, the specific ways, in which there shall be no concert or union or dependency one on the other.

That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriend-

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7 Appellants contend that they should have been allowed to prove that the system is in fact administered in a coercive manner. The New York Court of Appeals declined to grant a trial on this issue, noting, inter alia, that appellants had not properly raised their claim in the manner required by state practice....
ly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday, “so help me God” in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: “God save the United States and this Honorable Court.”

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing.

In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe....

We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or
to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction....

**Justice Black, dissenting....**

New York [is using] its compulsory education laws to help religious sects get attendants presumably too unenthusiastic to go unless moved to do so by the pressure of this state machinery.... The state thus makes religious sects beneficiaries of its power to compel children to attend secular schools. Any use of such coercive power by the state to help or hinder some religious sects or to prefer all religious sects over nonbelievers or vice versa is just what I think the First Amendment forbids....

The Court’s validation of the New York system rests in part on its statement that Americans are “a religious people whose institutions presuppose a Supreme Being.” .... It was precisely because Eighteenth Century Americans were a religious people divided into many fighting sects that we were given the constitutional mandate to keep Church and State completely separate.

Colonial history had already shown that, here as elsewhere, zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim and kill those they branded “heretics,” “atheists” or “agnostics.” The First Amendment was therefore to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters whom they could not convert to their faith. Now as then, it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all nonbelievers can be maintained. It is this neutrality the Court abandons today when it treats New York’s coercive system as a program which merely “encourages religious instruction or cooperates with religious authorities.” ...

Under our system of religious freedom, people have gone to their religious sanctuaries not because they feared the law but because they loved their God. The choice of all has been as free as the choice of those who answered the call to worship moved only by the music of the old Sunday morning church bells. The spiritual mind of man has thus been free to believe, disbelieve, or doubt, without repression, great or small, by the heavy hand of government.... The First Amendment has lost much if the religious follower and the atheist are no longer to be judicially regarded as entitled to equal justice under law.

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4 A state policy of aiding “all religions” necessarily requires a governmental decision as to what constitutes “a religion.” Thus is created a governmental power to hinder certain religious beliefs by denying their character as such. See, e.g., the Regulations of the New York Commissioner of Education providing that, “The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.” This provides precisely the kind of censorship which we have said the Constitution forbids.
State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of “co-operation,” to steal into the sacred area of religious choice.

**Justice Frankfurter, dissenting.**

The Court tells us that in the maintenance of its public schools, “[The State government] can close its doors or suspend its operations” so that its citizens may be free for religious devotions or instruction.... [But t]he essence of this case is that the school system did not “close its doors” and did not “suspend its operations.” There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes. If every one is free to make what use he will of time wholly unconnected from schooling required by law—those who wish sectarian instruction devoting it to that purpose, those who have ethical instruction at home, to that, those who study music, to that—then of course there is no conflict with the [First] Amendment.

The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released-time program are compelled to attend. The school system is very much in operation during this kind of released time. If its doors are closed, they are closed upon those students who do not attend the religious instruction, in order to keep them within the school....

The deeply divisive controversy aroused by the attempts to secure public school pupils for sectarian instruction would promptly end if the advocates of such instruction would content to have the school “close its doors or suspend its operations”—that is, dismiss classes in their entirety, without discrimination—instead of seeking to use the public schools as the instrument for securing attendance at denominational classes. The unwillingness of the promoters of this movement to dispense with such use of the public schools betrays a surprising want of confidence in the inherent power of the various faiths to draw children to outside sectarian classes—an attitude that hardly reflects the faith of the greatest religious spirits.

**Justice Jackson, dissenting.**

This released time program is founded upon a use of the State’s power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages, first, that the State compel each student to yield a large part of his time for public secular education and, second, that some of it be “released” to him on condition that he devote it to sectarian religious purposes.

No one suggests that the Constitution would permit the State directly to require this “released” time to be spent “under the control of a duly constituted religious body.” This program accomplishes that forbidden result by indirection. If public education were taking so much of the pupils’ time as to injure the public or the students’ welfare by encroaching upon their religious opportunity, simply shortening everyone’s school day would faci-
litigate voluntary and optional attendance at Church classes. But that suggestion is rejected upon the ground that if they are made free many students will not go to the Church. Hence, they must be deprived of freedom for this period, with Church attendance put to them as one of the two permissible ways of using it.

The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the Church school, dogs him back to the public schoolroom. Here schooling is more or less suspended during the “released time” so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. It is as unconstitutional, in my view, when exerted by indirectness as when exercised forthrightly....

The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power. The same epithetical jurisprudence used by the Court today to beat down those who oppose pressuring children into some religion can devise as good epithets tomorrow against those who object to pressuring them into a favored religion. And, after all, if we concede to the State power and wisdom to single out “duly constituted religious” bodies as exclusive alternatives for compulsory secular instruction, it would be logical to also uphold the power and wisdom to choose the true faith among those “duly constituted.” We start down a rough road when we begin to mix compulsory public education with compulsory godliness....


Justice Souter delivered the opinion of the Court....

[A.] The Satmar Hasidic sect takes its name from the town near the Hungarian and Romanian border where, in the early years of this century, Grand Rebbe Joel Teitelbaum molded the group into a distinct community. After World War II and the destruction of much of European Jewry, the Grand Rebbe and most of his surviving followers moved to the Williamsburg section of Brooklyn, New York.

Then, 20 years ago, the Satmars purchased an approved but undeveloped subdivision in the town of Monroe and began assembling the community that has since become the village of Kiryas Joel.a When a zoning dispute arose in the course of settlement, the Satmars presented the Town Board of Monroe with a petition to form a new village within the town, a right that New York’s Village Law gives almost any group of residents who satisfy certain procedural niceties. Neighbors who did not wish to secede with the Satmars objected strenuously, and, after arduous negotiations, the proposed boundaries of the village of Kiryas Joel were drawn to in-

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a [Pronounced pretty much as it is spelled, “keer-yas joel.”—ed.]
clude just the 320 acres owned and inhabited entirely by Satmars. The village, incorporated in 1977, has a population of about 8,500 today.

The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools, most boys at the United Talmudic Academy where they receive a thorough grounding in the Torah and limited exposure to secular subjects, and most girls at Bais Rochel, an affiliated school with a curriculum designed to prepare girls for their roles as wives and mothers.

These schools do not, however, offer any distinctive services to handicapped children, who are entitled under state and federal law to special education services even when enrolled in private schools. Starting in 1984 the Monroe-Woodbury Central School District provided such services for the children of Kiryas Joel at an annex to Bais Rochel, but a year later ended that arrangement in response to ... *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985) [which held that such provision of public school services at religious schools violated the Establishment Clause—ed.]. Children from Kiryas Joel who needed special education (including the deaf, the mentally retarded, and others suffering from a range of physical, mental, or emotional disorders) were then forced to attend public schools outside the village, which their families found highly unsatisfactory. Parents of most of these children withdrew them from the Monroe-Woodbury secular schools, citing “the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different,” and some sought administrative review of the public school placements.

By 1989, only one child from Kiryas Joel was attending Monroe-Woodbury’s public schools; the village’s other handicapped children received privately funded special services or went without. It was then that the New York Legislature passed the statute at issue in this litigation, which provided that the village of Kiryas Joel “is constituted a separate school district, ... and shall have and enjoy all the powers and duties of a union free school district....” 1989 NY Laws, ch. 748. The statute thus empowered a locally elected board of education to take such action as opening schools and closing them, hiring teachers, prescribing textbooks, establishing disciplinary rules, and raising property taxes to fund operations. In signing the bill into law, Governor Cuomo recognized that the residents of the new school district were “all members of the same religious sect,” but said that the bill was “a good faith effort to solve th[e] unique problem” associated with providing special education services to handicapped children in the village.

Although it enjoys plenary legal authority over the elementary and secondary education of all school-aged children in the village, the Kiryas
Joel Village School District currently runs only a special education program for handicapped children. The other village children have stayed in their parochial schools, relying on the new school district only for transportation, remedial education, and health and welfare services. If any child without handicap in Kiryas Joel were to seek a public school education, the district would pay tuition to send the child into Monroe-Woodbury or another school district nearby. Under like arrangements, several of the neighboring districts send their handicapped Hasidic children into Kiryas Joel, so that two thirds of the full-time students in the village’s public school come from outside. In all, the new district serves just over 40 full-time students, and two or three times that many parochial school students on a part-time basis.

Several months before the new district began operations, the New York State School Boards Association and respondents [Louis] Grumet and [Albert] Hawk brought this action against the State Education Department and various state officials, challenging Chapter 748 ... as an unconstitutional establishment of religion....

[B.] [Justice Souter reasoned that the law creating the Kiryas Joel school district “delegat[ed] the State’s discretionary authority over public schools to a group defined by its character as a religious community,” and thus involved “a purposeful and forbidden ‘fusion of governmental and religious functions,’” in violation of the principle announced in Larkin v. Grendel’s Den. This part of the opinion, though, only got four votes—those of Justices Souter, Blackmun, Stevens, and Ginsburg; I excerpt it, and Justice Scalia’s dissenting views on the matter, at p. 151 below.—ed.]...

[C.] The fact that this school district was created by a special and unusual Act of the legislature ... gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups.... The anomalously case-specific nature of the legislature’s exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.

Because the religious community of Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law,7 we have no assurance that the next similarly situated group seeking a school district of its own will receive one; unlike an administrative agency’s denial of an exemption from a generally applicable law, which “would be entitled to a judicial audience,” a legislature’s failure to enact a special law is itself unreviewable. Nor can the historical context in this case furnish us with any reason to suppose

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7 This contrasts with the process by which the village of Kiryas Joel itself was created, involving, as it did, the application of a neutral state law designed to give almost any group of residents the right to incorporate.
that the Satmars are merely one in a series of communities receiving the benefit of special school district laws.... [T]he special Act in [this case] stands alone....

{We do not disable a religiously homogeneous group from exercising political power conferred on it without regard to religion. Unlike the States of Utah and New Mexico (which were laid out according to traditional political methodologies taking account of lines of latitude and longitude and topographical features), the reference line chosen for the Kiryas Joel Village School District was one purposely drawn to separate Satmars from non-Satmars.... The dissent protests it is novel to insist “up front” that a statute not tailor its benefits to apply only to one religious group .... [But] under the dissent’s theory, if New York were to pass a law providing school buses only for children attending Christian day schools, we would be constrained to uphold the statute against Establishment Clause attack until faced by a request from a non-Christian family for equal treatment under the patently unequal law.}

The general principle [is] that civil power must be exercised in a manner neutral to religion .... Here the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole, see Larson v. Valente, and we are forced to conclude that the State of New York has violated the Establishment Clause....

[D.] [T]he Constitution allows the State to accommodate religious needs by alleviating special burdens.... But accommodation is not a principle without limits, and what petitioners seek is an adjustment to the Satmars’ religiously grounded preferences9 [that] ... singles out a particular religious sect for special treatment[,] and whatever the limits of permissible legislative accommodations may be, compare Texas Monthly, Inc. v. Bullock (striking down law exempting only religious publications from taxation), with Corporation of Presiding Bishop v. Amos (upholding law exempting religious employers from Title VII), it is clear that neutrality as among religions must be honored. See Larson v. Valente....

[T]here are several [constitutional] alternatives here for providing bilingual and bicultural special education to Satmar children. Such services can perfectly well be offered to village children through the Monroe-Woodbury Central School District. Since the Satmars do not claim that separatism is religiously mandated, their children may receive bilingual and bicultural instruction at a public school already run by the Monroe-Woodbury district. Or if the educationally appropriate offering by Monroe-Woodbury should turn out to be a separate program of bilingual and bicultural education at a neutral site near one of the village’s parochial schools,

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9 The Board of Education of the Kiryas Joel Village School District explains that the Satmars prefer to live together “to facilitate individual religious observance and maintain social, cultural and religious values,” but that it is not “against their religion” to interact with others.
... no Establishment Clause difficulty would inhere in such a scheme, administered in accordance with neutral principles that would not necessarily confine special treatment to Satmars.

To be sure, the parties disagree on whether the services Monroe-Woodbury actually provided in the late 1980’s were appropriately tailored to the needs of Satmar children, but this dispute is of only limited relevance to the question whether such services could have been provided, had adjustments been made. As we understand New York law, parents who are dissatisfied with their handicapped child’s program have recourse through administrative review proceedings (a process that appears not to have run its course prior to resort to Chapter 748), and if the New York Legislature should remain dissatisfied with the responsiveness of the local school district, it could certainly enact general legislation tightening the mandate to school districts on matters of special education or bilingual and bicultural offerings....

**Justice Stevens, with whom Justice Blackmun and Justice Ginsburg join, concurring.**

New York created a special school district for the members of the Satmar religious sect in response to parental concern that children suffered “panic, fear and trauma” when “leaving their own community and being with people whose ways were so different.” To meet those concerns, the State could have taken steps to alleviate the children’s fear by teaching their schoolmates to be tolerant and respectful of Satmar customs. Action of that kind would raise no constitutional concerns and would further the strong public interest in promoting diversity and understanding in the public schools.

Instead, the State responded with a solution that affirmatively supports a religious sect’s interest in segregating itself and preventing its children from associating with their neighbors. The isolation of these children, while it may protect them from “panic, fear and trauma,” also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents’ religious faith. By creating a school district that is specifically intended to shield children from contact with others who have “different ways,” the State provided official support to cement the attachment of young adherents to a particular faith. It is telling, in this regard, that two thirds of the school’s full-time students are Hasidic handicapped children from outside the village; the Kiryas Joel school thus serves a population far wider than the village—one defined less by geography than by religion.

Affirmative state action in aid of segregation of this character is unlike the evenhanded distribution of a public benefit or service, a “release time” program for public school students involving no public premises or funds, see Zorach v. Clauson, or a decision to grant an exemption from a burdensome general rule. It is, I believe, fairly characterized as establishing, rather than merely accommodating, religion....

**Justice O’Connor, concurring in [relevant] part ....**
Religious needs can be accommodated through laws that are neutral with regard to religion. The Satmars’ living arrangements were accommodated by their right—a right shared with all other communities, religious or not, throughout New York—to incorporate themselves as a village. From 1984 to 1985, the Satmar handicapped children’s educational needs were accommodated by special education programs [provided at an annex to the village’s religious school] like those available to all handicapped children, religious or not. [Justice O’Connor elsewhere argued that the Court’s decisions striking down such programs were unsound; they were later reversed in relevant part, in Agostini v. Felton, 521 U.S. 203 (1997).]

Other examples of such accommodations abound: The Constitution itself, for instance, accommodates the religious desires of those who were opposed to oaths by allowing any officeholder—of any religion, or none—to take either an oath of office or an affirmation. Art. II, 1, cl. 8; Art. VI, cl. 3; see also Amdt. 4. Likewise, the selective service laws provide exemptions for conscientious objectors whether or not the objection is based on religious beliefs. Welsh v. United States (Harlan, J., concurring in result).

We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or do not worship. “The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” Larson v. Valente. “Just as we subject to the most exacting scrutiny laws that make classifications based on race ... so too we strictly scrutinize governmental classifications based on religion.” Employment Div. v. Smith. “[T]he Establishment Clause prohibits government from abandoning secular purposes ... to favor the adherents of any sect or religious organization.” Gillette v. United States. “Neither [the State nor the Federal Governments] can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” Torcaso v. Watkins.

This emphasis on equal treatment is, I think, an eminently sound approach. In my view, the Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one’s religion ought not affect one’s legal rights or duties or benefits. As I have previously noted, “the Establishment Clause is infringed when the government makes adherence to religion relevant to a person’s standing in the political community.”

That the government is acting to accommodate religion should generally not change this analysis.... Accommodations may ... justify treating those who share this belief differently from those who do not, but they do not justify discriminations based on sect. A state law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews. A draft law may ex-
empt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic belief (such as Quakers) as opposed to nontheistic belief (such as Buddhists) or atheistic belief. The Constitution permits “nondiscriminatory religious practice exemption[s],” not sectarian ones....

I think this law, rather than being a general accommodation, singles out a particular religious group for favorable treatment.... I realize this is a close question, because the Satmars may be the only group who currently need this particular accommodation. The legislature may well be acting without any favoritism, so that if another group came to ask for a similar district, the group might get it on the same terms as the Satmars.

But the nature of the legislative process makes it impossible to be sure of this. A legislature, unlike the judiciary or many administrative decisionmakers, has no obligation to respond to any group’s requests. A group petitioning for a law may never get a definite response, or may get a “no” based not on the merits, but on the press of other business or the lack of an influential sponsor. Such a legislative refusal to act would not normally be reviewable by a court. Under these circumstances, it seems dangerous to validate what appears to me a clear religious preference....

Justice Kennedy, concurring in the judgment....

As the Court recognizes, a legislative accommodation that discriminates among religions may become an establishment of religion. But the Court’s opinion can be interpreted to say that an accommodation for a particular religious group is invalid because of the risk that the legislature will not grant the same accommodation to another religious group suffering some similar burden. This rationale seems to me without grounding in our precedents and a needless restriction upon the legislature’s ability to respond to the unique problems of a particular religious group. The real vice of the school district, in my estimation, is that New York created it by drawing political boundaries on the basis of religion.... [Remainder of Justice Kennedy’s dissent, which generally rests on this “religious gerrymandering” argument, is omitted.—ed.]

Justice Scalia, with whom ... Chief Justice [Rehnquist] and Justice Thomas join, dissenting.

[A.] The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hasidim. I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar.

The Grand Rebbe would be astounded to learn that after escaping brutal persecution and coming to America with the modest hope of religious toleration for their ascetic form of Judaism, the Satmar had become so powerful, so closely allied with Mammon, as to have become an “establishment” of the Empire State. And the Founding Fathers would be astonished to find that the Establishment Clause—which they designed “to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters”—has been employed to prohibit
characteristically and admirably American accommodation of the religious practices (or more precisely, cultural peculiarities) of a tiny minority sect. I, however, am not surprised. Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion....

[B.] [Justice Scalia argues that the Legislature singled out Kiryas Joel because of its handicapped children's cultural differences, not their religion. In particular, he reasoned:—ed.] Justice Souter's case [that the statute is religiously discriminatory] comes down to nothing more ... [than] the fact that all the residents of the Kiryas Joel Village School District are Satmars. But all its residents also wear unusual dress, have unusual civic customs, and have not much to do with people who are culturally different from them. (The Court recognizes that “the Satmars prefer to live together ‘to facilitate individual religious observance and maintain social, cultural and religious values,’ but that it is not ‘against their religion’ to interact with others.”) On what basis does Justice Souter conclude that it is the theological distinctiveness, rather than the cultural distinctiveness, that was the basis for New York State’s decision? The normal assumption would be that it was the latter, since it was not theology, but dress, language, and cultural alienation that posed the educational problem for the children....

I have little doubt that Justice Souter would laud this humanitarian legislation if all of the distinctiveness of the students of Kiryas Joel were attributable to the fact that their parents were nonreligious commune dwellers, or American Indians, or gypsies. The creation of a special, one-culture school district for the benefit of those children would pose no problem. The neutrality demanded by the Religion Clauses requires the same indulgence towards cultural characteristics that are accompanied by religious belief. “The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as ... subject to unique disabilities.” ...

Here, a facially neutral statute extends an educational benefit to the one area where it was not effectively distributed. Whether or not the reason for the ineffective distribution had anything to do with religion, it is a remarkable stretch to say that the Act was motivated by a desire to favor or disfavor a particular religious group. The proper analogy to Chapter 748 is not the Court’s hypothetical law providing school buses only to Christian students, but a law providing extra buses to rural school districts (which happen to be predominantly Southern Baptist)....

[C.] But even if Chapter 748 were intended to create a special arrangement for the Satmars because of their religion ..., it would be a permissible accommodation.... When a legislature acts to accommodate religion, particularly a minority sect, “it follows the best of our traditions.”

The Constitution itself contains an accommodation of sorts. Article VI, cl. 3, prescribes that executive, legislative and judicial officers of the Federal and State Governments shall bind themselves to support the Consti-
tution “by Oath or Affirmation.” Although members of the most populous religions found no difficulty in swearing an oath to God, Quakers, Moravians, and Mennonites refused to take oaths based on Matthew 5:34’s injunction “swear not at all.” The option of affirmation was added to accommodate these minority religions and enable their members to serve in government. Congress, from its earliest sessions, passed laws accommodating religion by refunding duties paid by specific churches upon the importation of plates for the printing of Bibles, vestments, and bells. Congress also exempted church property from the tax assessments it levied on residents of the District of Columbia; and all 50 States have had similar laws.

This Court has also long acknowledged the permissibility of legislative accommodation. In one of our early Establishment Clause cases, we upheld New York City’s early release program, which allowed students to be released from public school during school hours to attend religious instruction or devotional exercises. See Zorach. We determined that the early release program “accommodates the public service to ... spiritual needs,” and noted that finding it unconstitutional would “show a callous indifference to religious groups.” In Walz v. Tax Comm’n, 397 U.S. 664 (1970), we upheld a property tax exemption for religious organizations, observing that it was part of a salutary tradition of “permissible state accommodation to religion.” And in Presiding Bishop, we upheld a section of the Civil Rights Act of 1964 exempting religious groups from the antidiscrimination provisions of Title VII. We concluded that it was “a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”

In today’s opinion, however, the Court seems uncomfortable with this aspect of our constitutional tradition.... [T]he Court finds accommodation impermissible ..., astoundingly, [because of] the mere risk that the State will not offer accommodation to a similar group in the future, and that neutrality will therefore not be preserved....

At bottom, the Court’s “no guarantee of neutrality” argument is an assertion of this Court’s inability to control the New York Legislature’s future denial of comparable accommodation. We have “no assurance,” the Court says, “that the next similarly situated group seeking a school district of its own will receive one,” since “a legislature’s failure to enact a special law is ... unreviewable.” That is true only in the technical (and irrelevant) sense that the later group denied an accommodation may need to challenge the grant of the first accommodation in light of the later denial, rather than challenging the denial directly. But one way or another, “even if [an administrative agency is] not empowered or obliged to act, [a] litigant would be entitled to a judicial audience. Ultimately, the courts cannot escape the obligation to address [a] plea that the exemption [sought] is

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4 The Court hints that its fears would have been allayed if the New York Legislature had previously created similar school districts for other minority religions. But had it done so, each of them would have been attacked (and invalidated) for the same reason as this one: because it had no antecedents....
mandated by the first amendment’s religion clauses.”

The Court’s demand for “up front” assurances of a neutral system is at war with both traditional accommodation doctrine and the judicial role. As we have described, Congress’s earliest accommodations exempted duties paid by specific churches on particular items. See, e.g., 6 Stat. 346 (1816) (exempting vestments imported by “bishop of Bardstown”).

Moreover, most efforts at accommodation seek to solve a problem that applies to members of only one or a few religions. Not every religion uses wine in its sacraments, but that does not make an exemption from Prohibition for sacramental wine-use impermissible, nor does it require the State granting such an exemption to explain in advance how it will treat every other claim for dispensation from its controlled substances laws. Likewise, not every religion uses peyote in its services, but we have suggested that legislation which exempts the sacramental use of peyote from generally applicable drug laws is not only permissible, but desirable, without any suggestion that some “up front” legislative guarantee of equal treatment for sacramental substances used by other sects must be provided. The record is clear that the necessary guarantee can and will be provided, after the fact, by the courts. See, e.g., Olsen v. Drug Enforcement Admin., supra (rejecting claim that peyote exemption requires marijuana exemption for Ethiopian Zion Coptic Church); Olsen v. Iowa, 808 F.2d 652 (CA8 1986) (same); Kennedy v. Bureau of Narcotics and Dangerous Drugs, 459 F.2d 415 (CA9 1972) (accepting claim that peyote exemption for Native American Church requires peyote exemption for other religions that use that substance in their sacraments)....

Making law (and making exceptions) one case at a time, whether through adjudication or through highly particularized rulemaking or legislation, violates, ex ante, no principle of fairness, equal protection, or neutrality, simply because it does not announce in advance how all future cases (and all future exceptions) will be disposed of. If it did, the manner of proceeding of this Court itself would be unconstitutional. It is presumptuous for this Court to impose—out of nowhere—an unheard-of prohibition against proceeding in this manner upon the Legislature of New York State....

[D.] The separate Kiryas Joel school district is problematic in [Justice Stevens’] view because “[t]he isolation of these children, while it may protect them from ‘panic, fear and trauma,’ also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents’ religious faith.” So much for family values.

If the Constitution forbids any state action that incidentally helps parents to raise their children in their own religious faith, it would invalidate a release program permitting public school children to attend the religious instruction program of their parents’ choice, of the sort we approved in Zorach; indeed, it would invalidate state laws according parents physical

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Footnote continued on the next page.
control over their children at least insofar as that is used to take the little fellows to church or synagogue. Justice Stevens' statement is less a legal analysis than a manifesto of secularism. It surpasses mere rejection of accommodation, and announces a positive hostility to religion—which, unlike all other noncriminal values, the state must not assist parents in transmitting to their offspring....

* * *

The Court’s decision today is astounding. Chapter 748 involves no public aid to private schools, and does not mention religion. In order to invalidate it, the Court casts aside, on the flimsiest of evidence, the strong presumption of validity that attaches to facially neutral laws, and invalidates the present accommodation because it does not trust New York to be as accommodating toward other religions (presumably those less powerful than the Satmar Hasidim) in the future. This is unprecedented—except that it continues, and takes to new extremes, a recent tendency in the opinions of this Court to turn the Establishment Clause into a repealer of our Nation’s tradition of religious toleration. I dissent.

B. NON-DISCRIMINATION EXTENDED (ESTABLISHMENT)

1. THE NO ENDORSEMENT PRINCIPLE AS TO GOVERNMENT SPEECH


[This case involved two displays: in one place, a crèche, and in another a menorah, Christmas tree, and a sign celebrating liberty. The issue as to the crèche was simply whether religious governmental displays are constitutional; the menorah display discussion also raised the question whether the menorah, in context, was religious at all. Because the opinions are so long, I've separated them into two portions: this one, which discusses whether religious governmental displays are constitutional, and the next, which discusses how to decide whether a display is religious.—ed.]

Justice Blackmun ... delivered the opinion of the Court with respect to Parts [B-F], [and] an opinion with respect to Part [A] ... in which Justice Stevens and Justice O'Connor join ....

[A (joined only by Justice Stevens and Justice O'Connor).] ... The [Allegheny] county courthouse is owned by Allegheny County and is its seat of government.... The “main,” “most beautiful,” and “most public” part of the courthouse is its Grand Staircase, set into one arch and surrounded by others, with arched windows serving as a backdrop.

Since 1981, the county has permitted the Holy Name Society, a Roman...
Catholic group, to display a crèche in the county courthouse during the Christmas holiday season.... The crèche ... is a visual representation of the scene in the manger in Bethlehem shortly after the birth of Jesus, as described in the Gospels of Luke and Matthew. The crèche includes figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men, all placed in or before a wooden representation of a manger, which has at its crest an angel bearing a banner that proclaims “Gloria in Excelsis Deo!” [which means “Glory to God in the Highest”—ed.]

During the 1986-1987 holiday season, the crèche was on display on the Grand Staircase from November 26 to January 9. It had a wooden fence on three sides and bore a plaque stating: “This Display Donated by the Holy Name Society.” Sometime during the week of December 2, the county placed red and white poinsettia plants around the fence. The county also placed a small evergreen tree, decorated with a red bow, behind each of the two endposts of the fence. These trees stood alongside the manger backdrop and were slightly shorter than it was.

The angel thus was at the apex of the crèche display. Altogether, the crèche, the fence, the poinsettias, and the trees occupied a substantial amount of space on the Grand Staircase. No figures of Santa Claus or other decorations appeared on the Grand Staircase....

The county uses the crèche as the setting for its annual Christmas carol program. During the 1986 season, the county invited high school choirs and other musical groups to perform during weekday lunch hours from December 3 through December 23. The county dedicated this pro-
gram to world peace and to the families of prisoners-of-war and of persons missing in action in Southeast Asia.... [T]he Greater Pittsburgh Chapter of the American Civil Liberties Union and seven local residents[] filed suit against the county and the city, seeking permanently to enjoin the county from displaying the crèche in the county courthouse....

[B.] In recent [ Establishment Clause decisions]..., we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of “endorsing” religion, a concern that has long had a place in our Establishment Clause jurisprudence.... [T]he prohibition against governmental endorsement of religion “preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.” Moreover, the term “endorsement” is closely linked to the term “promotion,” and this Court long since has held that government “may not ... promote one religion or religious theory against another ....” ... The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from “making adherence to a religion relevant in any way to a person’s standing in the political community.” ...

[C.] [T]he crèche in this lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear. “Glory to God in the Highest!” says the angel in the crèche—Glory to God because of the birth of Jesus. This praise to God in Christian terms is indisputably religious—indeed sectarian ....

[T]he effect of a crèche display turns on its setting. Here, unlike in Lynch v. Donnelly, 465 U.S. 668 (1984) [(which upheld a crèche display)], nothing in the context of the display detracts from the crèche’s religious message. The Lynch display comprised a series of figures and objects, each group of which had its own focal point. Santa’s house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell. Similarly, whatever a “talking” wishing well [that accompanied the Lynch crèche] may be, it obviously was a center of attention separate from the crèche. Here, in contrast, the crèche stands alone ....

Furthermore, the crèche sits on the Grand Staircase, the “main” and “most beautiful part” of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the “display of the crèche in this particular physical setting,” the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche’s religious message.

The fact that the crèche bears a sign disclosing its ownership by a Ro-

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50 The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time .... In any event, the county’s own press releases made clear to the public that the county associated itself with the crèche.... In this respect, the crèche here does not raise the kind of “public forum” issue presented by the crèche in McCreary v. Stone, 539 F.2d 716 (CA2 1984) (private crèche in public park).
man Catholic organization does not alter this conclusion. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of that organization.... [B]y prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government’s lending its support to the communication of a religious organization’s religious message....

The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus. 51... [G]overnment may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine.

Here, Allegheny County ... has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ.... The display of the crèche in this context, therefore, must be permanently enjoined....

[D.] However history may affect the constitutionality of nonsectarian references to religion by the government [such as in legislative prayer, the “In God We Trust” motto, or the Pledge of Allegiance], history cannot legitimate practices that demonstrate the government’s allegiance to a particular sect or creed. Indeed, in Marsh v. Chambers itself, the Court recognized that not even the “unique history” of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.... Although Justice Kennedy says that he “cannot comprehend” how the crèche display could be invalid after Marsh, surely he is able to distinguish between a specifically Christian symbol, like a crèche, and more general religious references, like the legislative prayers in Marsh.

Justice Kennedy’s reading of Marsh would gut the core of the Establishment Clause, as this Court understands it. The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically.53 Some of these examples date back to

51 Nor can the display of the crèche be justified as an “accommodation” of religion. See Corporation of Presiding Bishop v. Amos. Government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion. The display of a crèche in a courthouse does not remove any burden on the free exercise of Christianity.... To be sure, prohibiting the display of a crèche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.

53 ... [One example] is especially apt in light of Justice Kennedy’s citation of Thanksgiving Proclamations: “When James H. Hammond, governor of South Carolina, announced a day of ‘Thanksgiving, Humiliation, and Prayer’ in 1844, he ... exhorted ‘our citizens of all denominations to assemble at their respective places of worship, to offer up their devotions to God their Creator, and his Son Jesus Christ, the Redeemer of the world.’ The Jews of Charleston protested, charging Hammond with ‘such obvious discrimination and preference in the tenor of your proclamation, as amounted to an utter exclusion of a portion of the people of South Carolina.’

“Hammond responded that ‘I have always thought it a settled matter that I lived in a

(Footnote continued on the next page.)
the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause. Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). Larson v. Valente.

[E.] [Justice Kennedy] would repudiate the Court’s endorsement inquiry as a “jurisprudence of minutiae,” because it examines the particular contexts in which the government employs religious symbols. This label, of course, could be tagged on many areas of constitutional adjudication. The broad language of many clauses within the Bill of Rights must be translated into adjudicatory principles that realize their full meaning only after their application to a series of concrete cases.

Indeed, not even under Justice Kennedy’s preferred approach can the Establishment Clause be transformed into an exception to this rule. The Justice would substitute the term “proselytization” for “endorsement,” but his “proselytization” test suffers from the same “defect,” if one must call it that, of requiring close factual analysis. If one wished to be “uncharitable” to Justice Kennedy, one could say that his methodology requires counting the number of days during which the government displays Christian symbols and subtracting from this the number of days during which non-Christian symbols are displayed, divided by the number of different non-Christian religions represented in these displays, and then somehow factoring into this equation the prominence of the display’s location and the degree to which each symbol possesses an inherently proselytizing quality.

Christian land! And that I was the temporary chief magistrate of a Christian people. That in such a country and among such a people I should be, publicly, called to an account, reprimanded and required to make amends for acknowledging Jesus Christ as the Redeemer of the world, I would not have believed possible, if it had not come to pass.”

The Jews of Charleston succinctly captured the precise evil caused by such sectarian proclamations as Governor Hammond’s: they demonstrate an official preference for Christianity and a corresponding official discrimination against all non-Christians, amounting to an exclusion of a portion of the political community. It is against this very evil that the Establishment Clause, in part, is directed.

In 1776, for instance, Maryland adopted a “Declaration of Rights” that allowed its legislature to impose a tax “for the support of the Christian religion” and a requirement that all state officials declare “a belief in the Christian religion.” Efforts made in 1797 to remove these discriminations against non-Christians were unsuccessful.

Justice Kennedy evidently believes that contemporary references to exclusively Christian creeds (like the Trinity or the divinity of Jesus) in official acts or proclamations is justified by the religious sentiments of those responsible for the adoption of the First Amendment. See 2 J. Story, Commentaries on the Constitution of the United States § 1874 (1858) (at the time of the First Amendment’s adoption, “the general, if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state”). This Court, however, squarely has rejected the proposition that the Establishment Clause is to be interpreted in light of any favoritism for Christianity that may have existed among the Founders of the Republic.

In describing what would violate his “proselytization” test, Justice Kennedy uses the
Although Justice Kennedy repeatedly accuses the Court of harboring a “latent hostility” or “callous indifference” toward religion, nothing could be further from the truth.... Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause....

The government does not discriminate against any citizen on the basis of the citizen’s religious faith if the government is secular in its functions and operations. On the contrary, the Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.... A secular state establishes neither atheism nor religion as its official creed....

Justice O’Connor, with whom Justice Brennan and Justice Stevens join [in relevant part], concurring in part and concurring in the judgment....

The endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person’s religious beliefs relevant to his or her standing in the political community by conveying a message “that religion or a particular religious belief is favored or preferred.” ... If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community....

Justice Kennedy submits that the endorsement test is inconsistent with our precedents and traditions because, in his words, if it were “applied without artificial exceptions for historical practice,” it would invalidate many traditional practices recognizing the role of religion in our society. This criticism shortchanges both the endorsement test itself and my explanation of the reason why certain longstanding government acknowledgments of religion do not, under that test, convey a message of endorsement. Practices such as legislative prayers or opening Court sessions with “God save the United States and this honorable Court” serve the secular purposes of “solemnizing public occasions” and “expressing confidence in the future.” ...

Under the endorsement test, the “history and ubiquity” of a practice is relevant not because it creates an “artificial exception” from that test.
the contrary, the “history and ubiquity” of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion. It is the combination of the longstanding existence of practices such as [those noted in the previous paragraph—ed.] ..., as well as their nonsectarian nature, that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs.

Similarly, the celebration of Thanksgiving as a public holiday, despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs. The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time. Although the endorsement test requires careful and often difficult line-drawing and is highly context specific, no alternative test has been suggested that captures the essential mandate of the Establishment Clause as well as the endorsement test does, and it warrants continued application and refinement....

**Justice Kennedy, with whom the Chief Justice, Justice White, and Justice Scalia join, ... dissenting in [relevant] part...**

[A.] Taken to its logical extreme, some of [the Court’s statements about religious neutrality] would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage....

Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

A categorical approach would install federal courts as jealous guardians of an absolute “wall of separation,” sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality....

The ability of the organized community to recognize and accommodate religion in a society with a pervasive public sector requires diligent observance of the border between accommodation and establishment. Our cases disclose two limiting principles: government may not coerce anyone to
support or participate in any religion or its exercise; and it may not, in the
guise of avoiding hostility or callous indifference, give direct benefits to re-
ligion in such a degree that it in fact “establishes a [state] religion or reli-
gious faith, or tends to do so.” These two principles, while distinct, are not
unrelated, for it would be difficult indeed to establish a religion without
some measure of more or less subtle coercion, be it in the form of taxation
to supply the substantial benefits that would sustain a state-established
faith, direct compulsion to observance, or governmental exhortation to re-
ligiosity that amounts in fact to proselytizing....

[C]oercion need not be a direct tax in aid of religion or a test oath.
Symbolic recognition or accommodation of religious faith may violate the
Clause in an extreme case. I doubt not, for example, that the Clause for-
bids a city to permit the permanent erection of a large Latin cross on the
roof of city hall. This is not because government speech about religion is
per se suspect, as the majority would have it, but because such an obtrus-
ive year-round religious display would place the government’s weight be-
hind an obvious effort to proselytize on behalf of a particular religion.

Speech may coerce in some circumstances, but this does not justify a
ban on all government recognition of religion.... This is most evident where
the government’s act of recognition or accommodation is passive and sym-
bolic, for in that instance any intangible benefit to religion is unlikely to
present a realistic risk of establishment.... Our cases reflect this reality by
requiring a showing that the symbolic recognition or accommodation ad-
vances religion to such a degree that it actually “establishes a religion or
religious faith, or tends to do so.”

In determining whether there exists an establishment, or a tendency
toward one, we refer to the other types of church-state contacts that have
existed unchallenged throughout our history, or that have been found per-
missible in our case law.... [See Marsh v. Chambers.] ... Noncoercive gov-
ernment action within the realm of flexible accommodation or passive ac-
knowledgment of existing symbols does not violate the Establishment
Clause unless it benefits religion in a way more direct and more sub-
stantial than practices that are accepted in our national heritage....[2] ...  

[B.] If government is to participate in its citizens’ celebration of a holi-
day that contains both a secular and a religious component, enforced rec-
novation of only the secular aspect would signify the callous indifference
toward religious faith that our cases and traditions do not require; for by
commemorating the holiday only as it is celebrated by nonadherents, the
government would be refusing to acknowledge the plain fact, and the his-
torical reality, that many of its citizens celebrate its religious aspects as
well. Judicial invalidation of government’s attempts to recognize the reli-

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[2] The majority rejects the suggestion that the display of the crèche can “be justified as an
‘accommodation’ of religion,” because it “does not remove any burden on the free exercise of
Christianity.” Contrary to the assumption implicit in this analysis, however, ..., “[t]he limits of
permissible state accommodation to religion are by no means coextensive with the non-
interference mandated by the Free Exercise Clause.”
gious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious....

There is no suggestion here that the government’s power to coerce has been used to further the interests of Christianity ... in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith.... Passersby who disagree with the message conveyed by these displays are free to ignore them ... just as they are free to do when they disagree with any other form of government speech.

There is no realistic risk that the crèche ... represents an effort to proselytize or [is] otherwise the first step down the road to an establishment of religion.3 ... If Congress and the state legislatures do not run afoul of the Establishment Clause when they begin each day with a state-sponsored prayer for divine guidance offered by a chaplain whose salary is paid at government expense, I cannot comprehend how a menorah or a crèche, displayed in the limited context of the holiday season, can be invalid....

[C.] The notion that cases arising under the Establishment Clause should be decided by an inquiry into whether a “reasonable observer” may “fairly understand” government action to “send[d] a message to nonadherents that they are outsiders, not full members of the political community,” is a recent, and in my view most unwelcome, addition to our tangled Establishment Clause jurisprudence....

I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must at least suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence. It is true that, for reasons quite unrelated to the First Amendment, displays commemorating religious holidays were not commonplace in 1791. But the relevance of history is not confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding....

Marsh stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings.7 Whatever test we

3 One can imagine a case in which the use of passive symbols to acknowledge religious holidays could present this danger. For example, if a city chose to recognize, through religious displays, every significant Christian holiday while ignoring the holidays of all other faiths, the argument that the city was simply recognizing certain holidays celebrated by its citizens without establishing an official faith or applying pressure to obtain adherents would be much more difficult to maintain. On the facts of these cases, no such unmistakable and continual preference for one faith has been demonstrated or alleged.

7 Contrary to the majority’s discussion, the relevant historical practices are those conducted by governmental units which were subject to the constraints of the Establishment Clause. Acts of “official discrimination against non-Christians” perpetrated in the 18th and 19th centuries by States and municipalities are of course irrelevant to this inquiry, but the (Footnote continued on the next page.)
choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.... A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause....

Since the Founding of our Republic, American Presidents have issued Thanksgiving Proclamations establishing a national day of celebration and prayer. The first such proclamation was issued by President Washington at the request of the First Congress, and “recommend[ed] and assign[ed]” a day “to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be,” so that “we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to ... promote the knowledge and practice of true religion and virtue....”

Most of President Washington’s successors have followed suit.... President Franklin D. Roosevelt went so far as to “suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas” so that “we may bear more earnest witness to our gratitude to Almighty God.” ... It requires little imagination to conclude that these proclamations would cause nonadherents to feel excluded, yet they have been a part of our national heritage from the beginning....

The fact that this Court opens its sessions with the request that “God save the United States and this honorable Court” has been noted elsewhere. The Legislature has gone much further, not only employing legislative chaplains, but also setting aside a special prayer room in the Capitol for use by Members of the House and Senate.... Some endorsement is inherent in these reasonable accommodations, yet the Establishment Clause does not forbid them.... Congress has directed the President to “set aside and proclaim a suitable day each year ... as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.” This statute does not require anyone to pray, of course, but it is a straightforward endorsement of the concept of “turn[ing] to God in prayer.”

Also by statute, the Pledge of Allegiance to the Flag describes the United States as “one Nation under God.” To be sure, no one is obligated to recite this phrase, but it borders on sophistry to suggest that the “reasonable” atheist would not feel less than a “full membe[r] of the political community” every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Likewise, our national motto, “In God we trust,” which is prominently engraved in the wall above the Speaker’s [dais] in the Chamber of the House practices of past Congresses and Presidents are highly informative.

\footnote{In keeping with his strict views of the degree of separation mandated by the Establishment Clause, Thomas Jefferson declined to follow this tradition.}
of Representatives and is reproduced on every coin minted and every dollar printed by the Federal Government, must have the same effect.

If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation.... Either the endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.¹⁰ Neither result is acceptable.

[D.] In addition to disregarding precedent and historical fact, the majority’s approach to government use of religious symbolism threatens to trivialize constitutional adjudication.... Justice Blackmun embraces a jurisprudence of minutiae. A reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols as “a center of attention separate from the crèche.” After determining whether these centers of attention are sufficiently “separate” that each “had their specific visual story to tell,” the court must then measure their proximity to the crèche.

A community that wishes to construct a constitutional display must also take care to avoid floral frames or other devices that might insulate the crèche from the sanitizing effect of the secular portions of the display. The majority also notes the presence of evergreens near the crèche that are identical to two small evergreens placed near official county signs. After today’s decision, municipal greenery must be used with care....

The result the Court reaches ... is perhaps the clearest illustration of the unwisdom of the endorsement test. Although Justice O’Connor [p. 148—ed.] disavows Justice Blackmun’s suggestion that the minority or majority status of a religion is relevant to the question whether government recognition constitutes a forbidden endorsement [p. 146 n.64—ed.], the very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to this type of inquiry.

If there be such a person as the “reasonable observer,” I am quite certain that he or she will take away a salient message from our holding in these cases: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative

¹⁰ If the majority’s test were to be applied logically, it would lead to the elimination of all nonsecular Christmas caroling in public buildings or, presumably, anywhere on public property. It is difficult to argue that lyrics like “Good Christian men, rejoice,” “Joy to the world! the Savior reigns,” “This, this is Christ the King,” “Christ, by highest heav’n adored,” and “Come and behold Him, Born the King of angels” have acquired such a secular nature that nonadherents would not feel “left out” by a government-sponsored or approved program that included these carols.

We do not think for a moment that the Court will ban such carol programs, however. Like Thanksgiving Proclamations, the reference to God in the Pledge of Allegiance, and invocations to God in sessions of Congress and of this Court, they constitute practices that the Court will not proscribe, but that the Court’s reasoning today does not explain.
numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid any possible risk of offending members of minority religions....

[E.] Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the First Amendment.

A further contradiction arises from the majority’s approach, for the Court also assumes the difficult and inappropriate task of saying what every religious symbol means. Before studying these cases, I had not known the full history of the menorah, and I suspect the same was true of my colleagues. More important, this history was, and is, likely unknown to the vast majority of people of all faiths who saw the symbol displayed in Pittsburgh. Even if the majority is quite right about the history of the menorah, it hardly follows that this same history informed the observers’ view of the symbol and the reason for its presence. This Court is ill-equipped to sit as a national theology board, and I question both the wisdom and the constitutionality of its doing so....

[F.] The suit before us is admittedly a troubling one. It must be conceded that, however neutral the purpose of the city and county, the eager proselytizer may seek to use these symbols for his own ends. The urge to use them to teach or to taunt is always present. It is also true that some devout adherents of Judaism or Christianity may be as offended by the holiday display as are nonbelievers, if not more so. To place these religious symbols in a common hallway or sidewalk, where they may be ignored or even insulted, must be distasteful to many who cherish their meaning.

For these reasons, I might have voted against installation of these particular displays were I a local legislative official. But we have no jurisdiction over matters of taste within the realm of constitutionally permissible discretion.... [T]he principles of the Establishment Clause and our Nation’s historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects....


[The facts, which were broadly agreed on, provided in Justice Blackmun’s opinion.—ed.] ...

The City-County Building is separate and a block removed from the county courthouse and, as the name implies, is jointly owned by the city of Pittsburgh and Allegheny County. The city’s portion of the building houses the city’s principal offices, including the mayor’s. The city is responsible for
the building’s Grant Street entrance which has three rounded arches supported by columns.

For a number of years, the city has had a large Christmas tree under the middle arch outside the Grant Street entrance. Following this practice, city employees on November 17, 1986, erected a 45-foot tree under the middle arch and decorated it with lights and ornaments. A few days later, the city placed at the foot of the tree a sign bearing the mayor’s name and entitled “Salute to Liberty.” Beneath the title, the sign stated: “During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.”

At least since 1982, the city has expanded its Grant Street holiday display to include a symbolic representation of Chanukah, a 8-day Jewish holiday that begins on the 25th day of the Jewish lunar month of Kislev. The 25th of Kislev usually occurs in December, and thus Chanukah is the annual Jewish holiday that falls closest to Christmas Day each year. In 1986, Chanukah began at sundown on December 26.

According to Jewish tradition, on the 25th of Kislev in 164 B.C.E. (before the common era (165 B.C.)), the Maccabees rededicated the Temple of Jerusalem after recapturing it from ... the Greek-influenced Seleucid Empire, in the course of a political rebellion. Chanukah is the holiday which celebrates that event....

The Talmud explains the lamplighting ritual [that is the central ritual

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* [Pronounced “hah-noo-kah,” with an accent on the first syllable—ed.]
of Chanukah] as a commemoration of an event that occurred during the rededication of the Temple. The Temple housed a seven-branch menorah, which was to be kept burning continuously. When the Maccabees rededicated the Temple, they had only enough oil to last for one day. But, according to the Talmud, the oil miraculously lasted for eight days (the length of time it took to obtain additional oil). To celebrate and publicly proclaim this miracle, the Talmud prescribes that it is a mitzvah (i.e., a religious deed or commandment) for Jews to place a lamp with eight lights just outside the entrance to their homes or in a front window during the eight days of Chanukah....

[T]he Chanukah story always has had a political or national, as well as a religious, dimension: it tells of national heroism in addition to divine intervention.... Just as some Americans celebrate Christmas without regard to its religious significance, some nonreligious American Jews celebrate Chanukah as an expression of ethnic identity, and “as a cultural or national event, rather than as a specifically religious event.”...

On December 22[, 1986], the city placed at the Grant Street entrance to the City-County Building an 18-foot Chanukah menorah of an abstract tree-and-branch design. The menorah was placed next to the city’s 45-foot Christmas tree, against one of the columns that supports the arch into which the tree was set. The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city. The tree, the sign, and the menorah were all removed on January 13.... [The ACLU and several residents sued to enjoin] the city from displaying the menorah in front of the City-County Building....

Justice Blackmun[‘s solo opinion on this issue]....

The menorah ... is a religious symbol: it serves to commemorate the miracle of the oil as described in the Talmud. But the menorah’s message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. While no challenge has been made here to the display of the tree and the sign, their presence is obviously relevant in determining the effect of the menorah’s display. The necessary result of placing a menorah next to a Christmas tree is to create an “overall holiday setting” that represents both Christmas and Chanukah—two holidays, not one....

[T]he relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the [unconstitutional] effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society. Of the two interpretations of this particular display, the latter seems far more plausible....

64 It is distinctly implausible to view the combined display of the tree, the sign, and the (Footnote continued on the next page.)
The Christmas tree, unlike the menorah, is not itself a religious symbol. Although Christmas trees once carried religious connotations, today they typify the secular celebration of Christmas. Numerous Americans place Christmas trees in their homes without subscribing to Christian religious beliefs, and when the city’s tree stands alone in front of the City-County Building, it is not considered an endorsement of Christian faith.

The widely accepted view of the Christmas tree as the preeminent secular symbol of the Christmas holiday season serves to emphasize the secular component of the message communicated by other elements of an accompanying holiday display, including the Chanukah menorah.

The tree, moreover, is clearly the predominant element in the city’s display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa.

In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season. In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition. Although the city has used a symbol with religious meaning as its representation of Chanukah, this is not a case in which the city has reasonable alternatives that are less religious in nature. [Details omitted.—ed.]

The mayor’s sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that during the holiday season the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this Nation’s legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise.

While no sign can disclaim an overwhelming message of endorsement, an “explanatory plaque” may confirm that in particular contexts the government’s association with a religious symbol does not represent the government as endorsing the Jewish faith alone. During the time of this litigation, Pittsburgh had a population of 387,000, of which approximately 45,000 were Jews. When a city like Pittsburgh places a symbol of Chanukah next to a symbol of Christmas, the result may be a simultaneous endorsement of Christianity and Judaism (depending upon the circumstances of the display). But the city’s addition of a visual representation of Chanukah to its pre-existing Christmas display cannot reasonably be understood as an endorsement of Jewish—yet not Christian—belief.

The conclusion that Pittsburgh’s combined Christmas-Chanukah display cannot be interpreted as endorsing Judaism alone does not mean, however, that it is implausible, as a general matter, for a city like Pittsburgh to endorse a minority faith. The display of a menorah alone might well have that effect.
ernment’s sponsorship of religious beliefs. Here, the mayor’s sign serves to confirm what the context already reveals: that the display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity.

Given all these considerations, it is not “sufficiently likely” that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an “endorsement” or “disapproval ... of their individual religious choices.” While an adjudication of the display’s effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, the constitutionality of its effect must also be judged according to the standard of a “reasonable observer.” ... [F]or purposes of the Establishment Clause, the city’s overall display must be understood as conveying the city’s secular recognition of different traditions for celebrating the winter-holiday season....

**Justice O’Connor’s solo opinion on this issue** ...

The Easter holiday celebrated by Christians may be accompanied by certain “secular aspects” such as Easter bunnies and Easter egg hunts; but it is nevertheless a religious holiday. Similarly, Chanukah is a religious holiday with strong historical components particularly important to the Jewish people. Moreover, the menorah is the central religious symbol and ritual object of that religious holiday....

In characterizing the message conveyed by this display as either a “double endorsement” or a secular acknowledgment of the winter holiday season, [Justice Blackmun’s] opinion states [in footnote 64] that “[i]t is distinctly implausible to view the combined display of the tree, the sign, and the menorah as endorsing Jewish faith alone.” That statement, however, seems to suggest that it would be implausible for the city to endorse a faith adhered to by a minority of the citizenry.

Regardless of the plausibility of a putative governmental purpose, the more important inquiry here is whether the governmental display of a minority faith’s religious symbol could ever reasonably be understood to convey a message of endorsement of that faith. A menorah standing alone at city hall may well send such a message to nonadherents .... [Yet o]ne need not characterize Chanukah as a “secular” holiday or strain to argue that the menorah has a “secular” dimension in order to conclude that the city of Pittsburgh’s combined display does not convey a message of endorsement of Judaism or of religion in general....

By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season.... [T]his particular physical setting “changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a
religious painting, negates any message of endorsement of that content.”

The message of pluralism conveyed by the city’s combined holiday display is not a message that endorses religion over nonreligion. A reasonable observer would, in my view, appreciate that the combined display is an effort to acknowledge the cultural diversity of our country and to convey tolerance of different choices in matters of religious belief or nonbelief by recognizing that the winter holiday season is celebrated in diverse ways by our citizens. In short, in the holiday context, this combined display in its particular physical setting conveys neither an endorsement of Judaism or Christianity nor disapproval of alternative beliefs, and thus does not have the impermissible effect of “mak[ing] religion relevant, in reality or public perception, to status in the political community.” ...

Justice Kennedy, with whom the Chief Justice, Justice White, and Justice Scalia join, concurring in the judgment in part .... [These four Justices reasoned that government endorsement of religion is constitutionally permissible, so they didn’t have to decide whether the menorah and the tree constituted an endorsement.—ed.]

Justice Brennan, with whom Justice Marshall and Justice Stevens join, ... dissenting in part ....

I cannot agree ... that the city’s display of a 45-foot Christmas tree and an 18-foot Chanukah menorah at the entrance to the building housing the mayor’s office shows no favoritism towards Christianity, Judaism, or both.... [T]he decision as to the menorah rests on three premises: the Christmas tree is a secular symbol; Chanukah is a holiday with secular dimensions, symbolized by the menorah; and the government may promote pluralism by sponsoring or condoning displays having strong religious associations on its property. None of these is sound....

[A.] That the [Christmas] tree may, without controversy, be deemed a secular symbol if found alone, does not mean that it will be so seen when combined with other symbols or objects ... [including] such a forthrightly religious symbol [as the menorah]. Consider a poster featuring a star of David, a statue of Buddha, a Christmas tree, a mosque, and a drawing of Krishna. There can be no doubt that, when found in such company, the tree serves as an unabashedly religious symbol.

Justice Blackmun believes that it is the tree that changes the message of the menorah, rather than the menorah that alters our view of the tree.... As a factual matter, it seems to me that the sight of an 18-foot menorah would be far more eye catching than that of a rather conventionally sized Christmas tree. It also seems to me likely that the symbol with the more singular message will predominate over one lacking such a clear meaning.... And ... the menorah was lit during a religious ceremony complete with traditional religious blessings.... With such an openly religious introduction, it is most likely that the religious aspects of the menorah would be front and center in this display.

I would not, however, presume to say that my interpretation of the tree’s significance is the “correct” one, or the one shared by most visitors to
the City-County Building. I do not know how we can decide whether it was
the tree that stripped the religious connotations from the menorah, or the
menorah that laid bare the religious origins of the tree. Both are reason-
able interpretations of the scene the city presented, and thus both, I think,
should satisfy Justice Blackmun's requirement that the display "be judged
according to the standard of a 'reasonable observer.'" I shudder to think
that the only "reasonable observer" is one who shares the particular views
on perspective, spacing, and accent expressed in Justice Blackmun's opi-
nion, thus making analysis under the Establishment Clause look more like
an exam in Art 101 than an inquiry into constitutional law.

[B.] The second premise on which today's decision rests is the notion
that Chanukah is a partly secular holiday, for which the menorah can
serve as a secular symbol.... Most, if not all, major religious holidays have
beginnings and enjoy histories studded with figures, events, and practices
that are not strictly religious. It does not seem to me that the mere fact
that Chanukah shares this kind of background makes it a secular holiday
in any meaningful sense.

The menorah is indisputably a religious symbol, used ritually in a cel-
ebration that has deep religious significance. That, in my view, is all that
need be said. Whatever secular practices the holiday of Chanukah has
taken on in its contemporary observance are beside the point....

[C.] Justice Blackmun, in his acceptance of the city's message of "di-
versity," and, even more so, Justice O'Connor, in her approval of the "mes-
sage of pluralism and freedom to choose one's own beliefs," appear to be-
lieve that, where seasonal displays are concerned, more is better. Whereas
a display might be constitutionally problematic if it showcased the holiday
of just one religion, those problems vaporize as soon as more than one reli-
gion is included.

I know of no principle under the Establishment Clause, however, that
permits us to conclude that governmental promotion of religion is accepta-
able so long as one religion is not favored. We have, on the contrary, inter-
preted that Clause to require neutrality, not just among religions, but be-
tween religion and nonreligion.

Nor do I discern the theory under which the government is permitted
to appropriate particular holidays and religious objects to its own use in
celebrating "pluralism." The message of the sign announcing a "Salute to
Liberty" is not religious, but patriotic; the government's use of religion to
promote its own cause is undoubtedly offensive to those whose religious
beliefs are not bound up with their attitude toward the Nation....
XII. COMPELLED EXCLUSION OF RELIGION?

B. THE NO DELEGATION TO RELIGIOUS INSTITUTIONS PRINCIPLE


Justice Souter delivered [an opinion joined in relevant part by Justices Blackmun, Stevens, and Ginsburg].

[For the facts, and for the rest of the discussion in this case, which focused on the religious discrimination argument, see p. 123.—ed.]

[A.] “A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion,” favoring neither one religion over others nor religious adherents collectively over nonadherents. Chapter 748, the statute creating the Kiryas Joel Village School District, departs from this constitutional command by delegating the State’s discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally.

Larkin v. Grendel’s Den provides an instructive comparison with the litigation before us. There, the Court was requested to strike down a Massachusetts statute granting religious bodies veto power over applications for liquor licenses. Under the statute, the governing body of any church, synagogue, or school located within 500 feet of an applicant’s premises could, simply by submitting written objection, prevent the Alcohol Beverage Control Commission from issuing a license.

In spite of the State’s valid interest in protecting churches, schools, and like institutions from “the hurly-burly” associated with liquor outlets,” the Court found that in two respects the statute violated “[t]he wholesome ‘neutrality’ of which this Court’s cases speak.” The Act brought about a “fusion of governmental and religious functions” by delegating “important, discretionary governmental powers” to religious bodies, thus impermissibly entangling government and religion. And it lacked “any ‘effective means of guaranteeing’ that the delegated power ‘[would] be used exclusively for secular, neutral, and nonideological purposes’”; this, along with the “significant symbolic benefit to religion” associated with “the mere appearance of a joint exercise of legislative authority by Church and State,” led the Court to conclude that the statute had a “‘primary’ and ‘principal’ effect of advancing religion.” Comparable constitutional problems inhere in the statute before us.

[B.] Larkin presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern
America, and a violation of “the core rationale underlying the Establishment Clause.” The Establishment Clause problem presented by Chapter 748 is more subtle, but it resembles the issue raised in Larkin to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion. Authority over public schools belongs to the State, and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group.

What makes this litigation different from Larkin is the delegation here of civic power to the “qualified voters of the village of Kiryas Joel,” as distinct from a religious leader such as the village rov, or an institution of religious government like the formally constituted parish council in Larkin. In light of the circumstances of this case, however, this distinction turns out to lack constitutional significance.

It is, first, not dispositive that the recipients of state power in this case are a group of religious individuals united by common doctrine, not the group’s leaders or officers. Although some school district franchise is common to all voters, the State’s manipulation of the franchise for this district limited it to Satmars, giving the sect exclusive control of the political subdivision. In the circumstances of [this case], the difference between thus vesting state power in the members of a religious group as such instead of the officers of its sectarian organization is one of form, not substance.

It is true that religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise, see McDaniel v. Paty, which the First Amendment guarantees as certainly as it bars any establishment. But McDaniel, which held that a religious individual could not, because of his religious activities, be denied the right to hold political office, is not in point here. That individuals who happen to be religious may hold public office does not mean that a state may deliberately delegate discretionary power to an individual, institution, or community on the ground of religious identity.

If New York were to delegate civic authority to “the Grand Rebbe,” Larkin would obviously require invalidation (even though under McDaniel the Grand Rebbe may run for, and serve on his local school board), and the same is true if New York delegates political authority by reference to religious belief. Where “fusion” is an issue, the difference lies in the distinction between a government’s purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority.

Of course, Chapter 748 delegates power not by express reference to the religious belief of the Satmar community, but to residents of the “territory of the village of Kiryas Joel.” Thus the second (and arguably more important) distinction between this case and Larkin is the identification here of the group to exercise civil authority in terms not expressly religious. But
our analysis does not end with the text of the statute at issue, see Church of Lukumi Babalu Aye, Inc. v. Hialeah, and the context here persuades us that Chapter 748 effectively identifies these recipients of governmental authority by reference to doctrinal adherence, even though it does not do so expressly. We find this to be the better view of the facts because of the way the boundary lines of the school district divide residents according to religious affiliation, under the terms of an unusual and special legislative act.... We ... find the legislature’s Act to be substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden “fusion of governmental and religious functions.” Larkin.

{Because it is the unusual circumstances of this district’s creation that persuade us the State has employed a religious criterion for delegating political power, this conclusion does not imply that any political subdivision that is coterminous with the boundaries of a religiously homogeneous community suffers the same constitutional infirmity. The district in this case is distinguishable from one whose boundaries are derived according to neutral historical and geographic criteria, but whose population happens to comprise coreligionists.}

[C (also joined by Justice O'Connor, which makes this part a majority opinion).] The fact that this school district was created by a special and unusual Act of the legislature also gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups. This is the second malady the Larkin Court identified in the law before it, the absence of an “effective means of guaranteeing” that governmental power will be and has been neutrally employed. But whereas in Larkin, it was religious groups the Court thought might exercise civic power to advance the interests of religion (or religious adherents), here the threat to neutrality occurs at an antecedent stage.

The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way. The anomalously case-specific nature of the legislature’s exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion....

Justice Kennedy, concurring in the judgment. [Omitted.—ed.]

Justice Scalia, with whom ... Chief Justice [Rehnquist] and Justice Thomas join, dissenting....

For his thesis that New York has unconstitutionally conferred governmental authority upon the Satmar sect, Justice Souter relies extensively, and virtually exclusively, upon Larkin. Justice Souter believes that the present litigation “resembles” Larkin because that case “teaches that a state may not delegate its civic authority to a group chosen according to a
religious criterion.”

That misdescribes both what that case taught (which is that a state may not delegate its civil authority to a church), and what this case involves (which is a group chosen according to cultural characteristics). The statute at issue there gave churches veto power over the State’s authority to grant a liquor license to establishments in the vicinity of the church. The Court had little difficulty finding the statute unconstitutional. “The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.”

Justice Souter concedes that Larkin “presented an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America.” The uniqueness of the case stemmed from the grant of governmental power directly to a religious institution, and the Court’s opinion focused on that fact, remarking that the transfer of authority was to “churches” (10 times), the “governing body of churches” (twice), “religious institutions” (twice) and “religious bodies” (once). Astonishingly, however, Justice Souter dismisses the difference between a transfer of government power to citizens who share a common religion as opposed to “the officers of its sectarian organization”—the critical factor that made Larkin unique and “rar[e]”—as being “one of form, not substance.”

Justice Souter’s steamrolling of the difference between civil authority held by a church, and civil authority held by members of a church, is breathtaking. To accept it, one must believe that large portions of the civil authority exercised during most of our history were unconstitutional, and that much more of it than merely the Kiryas Joel school district is unconstitutional today.

The history of the populating of North America is in no small measure the story of groups of people sharing a common religious and cultural heritage striking out to form their own communities. It is preposterous to suggest that the civil institutions of these communities, separate from their churches, were constitutionally suspect. And if they were, surely Justice Souter cannot mean that the inclusion of one or two nonbelievers in the community would have been enough to eliminate the constitutional vice. If the conferral of governmental power upon a religious institution as such (rather than upon American citizens who belong to the religious institution) is not the test of Larkin invalidity, there is no reason why giving power to a body that is overwhelmingly dominated by the members of one sect would not suffice to invoke the Establishment Clause. That might have made the entire States of Utah and New Mexico unconstitutional at the time of their admission to the Union, and would undoubtedly make

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1 A census taken in 1906, 10 years after statehood was granted to Utah, and 6 years before it was granted to New Mexico, showed that, in Utah, 87.7% of all church members were Mormon, and in New Mexico, 88.7% of all church members were Roman Catholic.
many units of local government unconstitutional today.  

Justice Souter’s position boils down to the quite novel proposition that any group of citizens (say, the residents of Kiryas Joel) can be invested with political power, but not if they all belong to the same religion. Of course such disfavoring of religion is positively antagonistic to the purposes of the Religion Clauses, and we have rejected it before. [See, e.g., McDaniel.] ... I see no reason why it is any less pernicious to deprive a group, rather than an individual, of its rights simply because of its religious beliefs.

Perhaps appreciating the startling implications for our constitutional jurisprudence of collapsing the distinction between religious institutions and their members, Justice Souter tries to limit his “unconstitutional conferral of civil authority” holding by pointing out several features supposedly unique to the present case[]: that the “boundary lines of the school district divide residents according to religious affiliation”; that the school district was created by “a special act of the legislature”; and that the formation of the school district ran counter to the legislature’s trend of consolidating districts in recent years. Assuming all these points to be true (and they are not), they would certainly bear upon whether the legislature had an impermissible religious motivation in creating the district (which is Justice Souter’s next point, in the discussion of which I shall reply to these arguments [see p. 130—ed.]).

But they have nothing to do with whether conferral of power upon a group of citizens can be the conferral of power upon a religious institution. It cannot. Or if it can, our Establishment Clause jurisprudence has been transformed....

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2 [The dissent cites several counties in which over 90% of churchgoers are of one denomination.—ed.]
**XIV. COMPELLED ACCOMMODATION OF RELIGION?**

**A. COMPELLED EXEMPTIONS FOR RELIGIOUS OBSERVERS**

3. **THE CURRENT DOCTRINE**

*d2. Reynolds v. United States, 98 U.S. 145 (1879)*

This is an indictment found in the District Court for the third judicial district of the Territory of Utah, charging George Reynolds with bigamy, in violation of sect. 5352 of the Revised Statutes[:] ... ‘Every person having a husband or wife living, who marries another, whether married or single, in a Territory ... is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for ... not more than five years.’ ...

**Chief Justice Waite delivered the opinion of the court....**

[A.] ... On the trial, ... the accused[,] proved that at the time of his alleged second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines; that it was an accepted doctrine of that Church ‘That it was the duty of male members of said Church, circumstances permitting, to practice polygamy; ... that this duty was enjoined by different books which the members of said Church believed to be of divine origin, and among others the Holy Bible, and also that the members of the Church believed that the practice of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said Church; that the failing or refusing to practise polygamy by such male members of Said church, when circumstances would admit, would be punished, and that the penalty for such failure and refusal would be damnation in the life to come.’ ...

Upon this proof he asked the court to instruct the jury that if they found from the evidence that he ‘was married as charged (if he was married) in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be ‘not guilty.” This request was refused .... [Reynolds was convicted.—ed.]

[B.] Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion.... The question to be determined is, whether the law now under consideration comes within this prohibition.

The word ‘religion’ is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guarant[eed]?
Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions.

The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration ‘A bill establishing provision for teachers of the Christian religion,’ postponed it until the next session, and directed that the bill should be published and distributed, and that the People be requested ‘to signify their opinion respecting the adoption of such a bill at the next session of Assembly.’

This brought out a determined opposition. Amongst others, Mr. Madison prepared a ‘Memorial and Remonstrance,’ which was widely circulated and signed, and in which he demonstrated ‘that religion, or the duty we owe the Creator,’ was not within the cognizance of civil government. At the next session the proposed bill was not only defeated, but another, ‘for establishing religious freedom,’ drafted by Mr. Jefferson, was passed. In the preamble of this Act, religious freedom is defined; and after a recital ‘That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,’ it is declared ‘that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.’ In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. Five of the States, while adopting the Constitution, proposed amendments. Three, New Hampshire, New York, and Virginia, included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon.

Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the
Danbury Baptist Association, took occasion to say:

   Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the Nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

   Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

   [C.] Polygamy has always been odious among the Northern and Western Nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society....

   In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the Act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a Bill of Rights that ‘All men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,’ the Legislature of that State substantially enacted the Statute of James I., death penalty included, because, as recited in the preamble, ‘It hath been doubted whether bigamy or polygamy be punishable by the laws of this Commonwealth.’

   From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.

   Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.

   In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the Government of the People, to
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...a greater or less extent, rests.... Polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.... An exceptional colony of polygamists under an exceptional leadership may sometimes exist for a time without appearing to disturb the social condition of the people who surround it; but there cannot be a doubt that, unless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

[D.] In our opinion the statute ... is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free.

This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances....

6. THE BURDEN THRESHOLD


Justice O'Connor delivered the opinion of the [unanimous] Court....

This case presents the question whether the Religion Clauses of the First Amendment prohibit a State from imposing a generally applicable sales ... tax on the distribution of religious materials [such as books, tapes, magazines, and other merchandise] by a religious organization.... “[T]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so,

Appellant relies almost exclusively on our decisions in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. McCormick*, 321 U.S. 573, 576 (1944), for the proposition that a State may not impose a sales or use tax on the evangelistic distribution of religious material by a religious organization.... We reject appellant's expansive reading of *Murdock* and *Follett* ...

In *Murdock*, we considered the constitutionality of a city ordinance requiring all persons canvassing or soliciting within the city to procure a license by paying a flat fee[, and reversed] the convictions of Jehovah’s Witnesses convicted under the ordinance of soliciting and distributing religious literature without a license .... We extended *Murdock* ... [in *Follett*] by invalidating, as applied to “one who earns his livelihood as an evangelist or preacher in his home town,” an ordinance (similar to that involved in *Murdock*) that required all booksellers to pay a flat fee to procure a license to sell books. Reaffirming our observation in *Murdock* that “the power to tax the exercise of a privilege is the power to control or suppress its enjoyment,” we reasoned that “… [h]e who makes a profession of evangelism is not in a less preferred position than the casual worker.”

Our decisions in these cases, however, resulted from the particular nature of the challenged taxes—flat license taxes that operated as a prior restraint on the exercise of religious liberty.... [W]e noted in both cases that a primary vice of the ordinances at issue was that they operated as prior restraints of constitutionally protected conduct:

In all of these cases [in which license taxes are being invalidated] the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, *it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise*. That is almost uniformly recognized as the inherent vice and evil of this flat license tax.

... Our concern in *Murdock* and *Follett*—that a flat license tax would act as a *precondition* to the free exercise of religious beliefs—is simply not present where a tax applies to all sales ... of tangible personal property in the State.... California’s generally applicable sales ... tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California. California imposes its sales ... tax even if the seller or the purchaser is charitable, religious, nonprofit, or state or local governmental in nature. Thus, the sales ... tax is not a tax on the right to disseminate religious information, ideas, or beliefs per se; rather, it is a tax on the privilege of making retail sales of tangible personal property ... in California.... There is no danger that ap-
pellant’s religious activity is being singled out for special and burdensome treatment.

Moreover, our concern in Murdock and Follett that flat license taxes operate as a precondition to the exercise of evangelistic activity is not present in this case, because the registration requirement and the tax itself do not act as prior restraints—no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message. Thus, unlike the license tax in Murdock, which was “in no way apportioned” to the “realized revenues” of the itinerant preachers forced to pay the tax, the tax at issue in this case is akin to a generally applicable income or property tax, which Murdock and Follett specifically state may constitutionally be imposed on religious activity.

The only burden on appellant is the claimed reduction in income resulting from the presumably lower demand for appellant’s wares (caused by the marginally higher price) and from the costs associated with administering the tax.... [But] to the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant....

Finally, because appellant’s religious beliefs do not forbid payment of the sales ... tax, appellant’s reliance on Sherbert v. Verner and its progeny is misplaced, because in no sense has the State “condition[ed] receipt of an important benefit upon conduct proscribed by a religious faith, or ... de[nie]d such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs.” ...

We therefore conclude that the collection and payment of the generally applicable tax in this case imposes no constitutionally significant burden on appellant’s religious practices or beliefs. The Free Exercise Clause accordingly does not require the State to grant appellant an exemption from its generally applicable sales ... tax. Although it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent’s religious practices, cf. Murdock (the burden of a flat tax could render itinerant evangelism “crushed and closed out by the sheer weight of the toll or tribute which is exacted town by town”), we face no such situation in this case. Accordingly, we intimate no views as to whether such a generally applicable tax might violate the Free Exercise Clause....


[In an accompanying case, McGowan v. Maryland, 366 U.S. 420 (1961), the Court rejected an Establishment Clause challenge to laws requiring most businesses to close on Sundays. Though such laws originally had a religious purpose—keeping the Sabbath holy—the Court concluded that “[t]he present purpose and effect of most [such laws] is to provide a uni-
form day of rest for all citizens,” “a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.”

[“T]he fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.” The question in *Braunfeld* was therefore whether, given that such statutes didn’t violate the Establishment Clause, the Free Exercise Clause nonetheless required that people who celebrate a different day as their Sabbath get an exemption from the Sunday closing law.—ed.] ...

Chief Justice Warren announced the judgment of the Court and an opinion in which Justice Black, Justice Clark, and Justice Whittaker concur.

[A.] This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities: clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs]....

Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute in issue. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstinence from all manner of work from nightfall each Friday until nightfall each Saturday. They instituted a suit in the court below seeking a permanent injunction against the enforcement of the 1959 statute....

Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of their religion because, due to the statute’s compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath.

Appellants also assert that the statute will operate so as to hinder the Orthodox Jewish faith in gaining new adherents. And the corollary to these arguments is that if the free exercise of appellants’ religion is impeded, that religion is being subjected to discriminatory treatment by the
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[B.] ... [L]egislative power over mere opinion is forbidden but it may reach people’s actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one’s religion.... Thus, in Reynolds v. United States, this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the duty to practice polygamy. And, in Prince v. Massachusetts, this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah’s Witnesses faith believed that it was her religious duty to perform this work.

It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

But, again, this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law’s effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday. And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alternatives open to appellants and others similarly situated—retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

[C.] To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless....

Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of al-
most every conceivable religious preference.... Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment....

If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State’s secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden....

[W]e cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquility—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself. This is particularly true in this day and age of increasing state concern with public welfare legislation...

[D.] However, appellants ... contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday. By such regulation, appellants contend, the economic disadvantages imposed by the present system would be removed and the State’s interest in having all people rest one day would be satisfied.

A number of States provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the exemption might well undermine the State’s goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.

Additional problems might also be presented by a regulation of this sort. To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must remain closed on that day; this might cause the Sunday-observers to complain that their religions are being discriminated against. “If [the Orthodox Jewish store-
keeper] opens on Saturday, he is subjected to very fierce competition indeed from Christian shopkeepers, whereas on Sunday, supposing he closes on Saturday, he has an absolutely free run and no competition from Christian shopkeepers at all.”) With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual’s religious beliefs, a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees.

Finally, in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring. For all of these reasons, we cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied....

Separate opinion of Justice Frankfurter, whom Justice Harlan joins[ , concurring in the judgment in relevant part]....

[Justices Frankfurter generally agreed with the plurality’s arguments (see Part D) about the problems that would be posed by an exemption for Sabbatarians, though he elaborated on them at more length. He then went on to say:—ed.]

It cannot, therefore, be said that Massachusetts and Pennsylvania have imposed gratuitous restrictions upon the Sunday activities of persons observing the Orthodox Jewish Sabbath in achieving the legitimate secular ends at which their Sunday statutes may aim. The remaining question is whether the importance to the public of those ends is sufficient to outweigh the restraint upon the religious exercise of Orthodox Jewish practitioners which the restriction entails. See Prince v. Massachusetts.

The nature of the legislative purpose is the preservation of a traditional institution which assures to the community a time during which the mind and body are released from the demands and distractions of an increasingly mechanized and competition-driven society. The right to this release has been claimed by workers and by small enterprisers, especially by retail merchandisers, over centuries, and finds contemporary expression in legislation in three-quarters of the States. The nature of the injury which must be balanced against it is the economic disadvantage to the enterpriser, and the inconvenience to the consumer, which Sunday regulations impose upon those who choose to adhere to the Sabbatarian tenets of their faith.

These statutes do not make criminal, do not place under the onus of civil or criminal disability, any act which is itself prescribed by the duties of the Jewish or other religions. They do create an undeniable financial burden upon the observers of one of the fundamental tenets of certain reli-
gious creeds, a burden which does not fall equally upon other forms of observance. This was true of the tax which this Court held an unconstitutional infringement of the free exercise of religion in *Follett*. But unlike the tax in *Follett*, the burden which the Sunday statutes impose is an incident of the only feasible means to achievement of their particular goal. And again unlike *Follett*, the measure of the burden is not determined by fixed legislative decree, beyond the power of the individual to alter.

Upon persons who earn their livelihood by activities not prohibited on Sunday, and upon those whose jobs require only a five-day week, the burden is not considerable... They are inconvenienced in their shopping. This is hardly to be assessed as an injury of preponderant constitutional weight.

The burden on retail sellers competing with Sunday-observing and non-observing retailers is considerably greater, but, without minimizing the fact of this disadvantage, the legislature may have concluded that its severity might be offset by the industry and commercial initiative of the individual merchant. More is demanded of him, admittedly, whether in the form of additional labor or of material sacrifices, than is demanded of those who do not choose to keep his Sabbath. More would be demanded of him, of course, in a State in which there were no Sunday laws and in which his competitors chose... to do business seven days a week.

In view of the importance of the community interests which must be weighed in the balance, is the disadvantage wrought by the non-exempting Sunday statutes an impermissible imposition upon the Sabbatarian’s religious freedom? Every court which has considered the question during a century and a half has concluded that it is not... On the basis of the criteria for determining constitutionality, as opposed to what one might desire as a matter of legislative policy, a contrary conclusion cannot be reached.

**Justice Douglas, dissenting**...

[Justice Douglas mostly argued that the Sunday closing laws violated the Establishment Clause, and should be struck down entirely. Under his approach, Saturday observers’ Free Exercise Clause demand for an exemption from the laws would thus be moot. He had this to say, though, about the Free Exercise Clause objection:—ed.] There is an “establishment” of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the “free exercise” of religion if what in conscience one can do or omit doing is required because of the religious scruples of the community. Hence I would declare each of those laws unconstitutional as applied to the complaining parties, whether or not they are members of a sect which observes as its Sabbath a day other than Sunday.

When these laws are applied to Orthodox Jews... or to Sabbatarians their vice is accentuated. If the Sunday laws are constitutional, kosher markets are on a five-day week. Thus those laws put an economic penalty on those who observe Saturday rather than Sunday as the Sabbath. For the economic pressures on these minorities, created by the fact that our
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Communities are predominantly Sunday-minded, there is no recourse. When, however, the State uses its coercive powers—here the criminal law—to compel minorities to observe a second Sabbath, not their own, the State undertakes to aid and “prefer one religion over another”—contrary to the command of the Constitution.

The reverse side of an “establishment” is a burden on the “free exercise” of religion. Receipt of funds from the State benefits the established church directly; laying an extra tax on nonmembers benefits the established church indirectly. Certainly the present Sunday laws place Orthodox Jews and Sabbatarians under extra burdens because of their religious opinions or beliefs. Requiring them to abstain from their trade or business on Sunday reduces their work-week to five days, unless they violate their religious scruples. This places them at a competitive disadvantage and penalizes them for adhering to their religious beliefs.

“The sanction imposed by the state for observing a day other than Sunday as holy time is certainly more serious economically than the imposition of a license tax for preaching,” which we struck down in Murdock and in Follett. The special protection which Sunday laws give the dominant religious groups and the penalty they place on minorities whose holy day is Saturday constitute, in my view, state interference with the “free exercise” of religion.

Justice Brennan, [dissenting in relevant part].

“... [The] freedoms of speech and of press, of assembly, and of worship ... are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect....” This exacting standard has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society.

Admittedly, [Sunday closing] laws do not compel overt affirmation of a repugnant belief, as in Barnette, nor do they prohibit outright any of appellants’ religious practices, as did the federal law upheld in Reynolds .... That is, the laws do not say that appellants must work on Saturday.

But their effect is that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage. Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen.

What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants’ freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in Reynolds, for the custom of resting one day a week is universally honored, as the Court has amply shown. Nor is it the State’s traditional protection of children, as in Prince, for appellants are reasoning and fully autonomous adults. It is not even the interest in see-
ing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

It is true, I suppose, that the granting of such an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind. We are not told that those States are significantly noisier, or that their police are significantly more burdened, than Pennsylvania's....

The Court conjures up several difficulties with such a system which seem to me more fanciful than real. Non-Sunday observers might get an unfair advantage, it is said. A similar contention against the draft exemption for conscientious objectors (another example of the exemption technique) was rejected with the observation that “its unsoundness is too apparent to require” discussion. Selective Draft Law Cases, 245 U.S. 366, 390 (1918). However widespread the complaint, it is legally baseless, and the State's reliance upon it cannot withstand a First Amendment claim.

We are told that an official inquiry into the good faith with which religious beliefs are held might be itself unconstitutional. But this Court indicated otherwise in United States v. Ballard. Such an inquiry is no more an infringement of religious freedom than the requirement imposed by the Court itself in McGowan, decided this day, that a plaintiff show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause of the First Amendment.

Finally, I find the Court's mention of a problem under state antidiscrimination statutes almost chimerical. Most such statutes provide that hiring may be made on a religious basis if religion is a bona fide occupational qualification. It happens, moreover, that Pennsylvania's statute has such a provision.

In fine, the Court, in my view, has exalted administrative convenience to a constitutional level high enough to justify making one religion economically disadvantageous. The Court would justify this result on the ground that the effect on religion, though substantial, is indirect. The Court forgets, I think, a warning uttered during the congressional discussion of the First Amendment itself: “... the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand ....”

Justice Stewart, dissenting.

I agree with substantially all that Justice Brennan has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness....