First Amendment Law:

Freedom of Expression and Freedom of Religion

FIFTH EDITION

2022 Supplement

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Preface

The Supreme Court decided several significant First Amendment cases during the 2021 Term, and after the authors had completed work on the Fifth Edition to this casebook. This supplement excerpts three of those cases and provides note treatment of two more.

Freedom of Expression

- In *City of Austin, Texas v. Reagan National Advertising of Austin, LLC*, 142 S.Ct. 1464 (2022) (Chapter 5), the Court upheld a city's restrictions on off-location advertising — that is, signs advertising things not located on the premises where the sign was located or events not taking place on those premises. Rejecting a billboard company's claim that the restrictions were content-based and thus triggered strict scrutiny under *Reed v. Gilbert* (2015) (Chapter 5), the Supreme Court held that they were content-neutral. A three-judge dissent accused the majority of "implicitly rewrit[ing] *Reed*'s bright-line rule for content-based restrictions." *City of Austin* provides guidance on the critical question of whether a speech restriction is content-based or content-neutral.

- In *Federal Election Commission v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022) (Note Chapter 11), the Court struck down a provision of federal campaign finance law that made it harder for a campaign to use post-election contributions to pay off a candidate's personal loan to his own campaign. The government argued that that provision discouraged contributors from giving to a campaign after they knew the candidate had won the election, with the intent of funneling money to the candidate and thus ingratiating themselves. The Court was unpersuaded by that rationale, concluding instead that the provision unconstitutionally burdened the candidate's right to self-finance his campaign by loaning his campaign money, since it complicated the prospects that his loan might be repaid. *Cruz* is significant because it reflects the Court's continued skepticism of prophylactic justifications for limits on campaign contributions.

- In *Shurtleff v. City of Boston*, 142 S.Ct. 1583 (2022) (Chapter 13, Note Chapter 17, and Note Chapter 19), the Court considered whether the City of Boston was engaging in its own speech when it allowed private groups to fly flags from one of flagpoles outside City Hall. The Court unanimously agreed that it was not — rather, it concluded that the city had created a forum for private speech, which thus triggered the First Amendment's content-neutrality rule. The Court split, however, on the methodology for reaching that conclusion. The majority stated that it was applying the factors derived from its earlier government speech cases, such as *Walker v. Sons of Confederate Veterans* (2015) (Chapter 13): "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." Justice Alito's concurrence in the judgment, joined by Justices

Thomas and Gorsuch, took issue with the majority's argument that those factors provided a generally applicable set of guidelines for deciding the government speech issue.

Chapter 17's and 19's extensive notes on *Shurtleff* examine Justice Gorsuch's concurrence. Justice Gorsuch argued that Boston had mistakenly believed that allowing the private party to fly its religious-themed flag from the City Hall flagpole would violate the Establishment Clause. According to Justice Gorsuch, Boston's mistake was due to its reliance on *Lemon v. Kurtzman*'s (1971) (Chapter 17), a precedent Justice Gorsuch critiqued as unworkable. His opinion was prophetic: later in the term, the Court — in an opinion by Justice Gorsuch himself — announced that *Lemon* had in fact been overruled.

Freedom of Religion

- In *Kennedy v. Bremerton School District*, 142 S.Ct. 2407 (2022) (Note Chapter 17 and Chapter 19), the Court held that a school district violated the Free Exercise Clause rights of a high school football coach when it disciplined him for praying after games on the 50-yard line. After concluding that the coach was disciplined for his sincere religious exercise, the Court further reasoned that the District's discipline was not justified by the need to avoid violating the Establishment Clause. In rejecting the District's Establishment Clause argument, which was based on *Lemon v. Kurtzman*, the Court, speaking through Justice Gorsuch, stated that "this Court long ago abandoned *Lemon*." The Court explained that "In place of *Lemon* . . . this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings." It remains to be seen what this new test imports for the Establishment Clause.

- In *Carson v. Makin,* 142 S.Ct. 1987 (2022) (Note Chapter 19), the Court struck down a statutory limitation on Maine's legal scheme under which the state pays the tuition of rural high school students whose own districts are too sparsely populated to support a public high school. That limitation prevented the state from paying tuition to sectarian schools. In striking it down, the Court concluded that the Maine law was closer to ones previously struck down in *Espinoza v. Montana Department of Revenue* (2020) (Chapter 19) and *Trinity Lutheran Church v. Comer* (2017) (Note Chapter 19) than to the law upheld in *Locke v. Davey* (2004) (Note Chapter 19). In doing so, the Court further narrowed the space that states have to insist on a greater separation between Church and State than that required by the Establishment Clause — the concept *Locke* described as the "play in the joints" between the Establishment Clause and the Free Exercise Clause—and largely limited *Locke* to its facts.

In addition to this material, this supplement includes a problem in Chapter 18, based on a controversy that arose when a religious organization refused to place foster children with LGBTQ+ couples, and another problem in Chapter 19, based on several recent challenges to mandatory vaccination regulations brought by religious state employees claiming a free exercise exemption.

The supplement also includes in the Appendix an updated Table of the Justices. The Court's composition remained unchanged throughout the past Term. That has changed since the end of that term, however, with Justice Stephen Breyer's resignation taking effect at the end of the Term and Judge (now Justice) Ketanji Brown Jackson having been sworn in to take his place.

* * *

The authors express their appreciation to Maria Raneri of Brooklyn Law School for her assistance in producing this Supplement under a pressing deadline. As with the Casebook, we welcome comments and suggestions from users and readers.

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City of Austin, Texas v. Reagan National Advertising of Austin, LLC

142 S. Ct. 1464 (2022)

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Like thousands of jurisdictions around the country, the City of Austin, Texas (City), regulates signs that advertise things that are not located on the same premises as the sign, as well as signs that direct people to offsite locations. These are known as off-premises signs, and they include, most notably, billboards. The question presented is whether, under this Court's precedents interpreting the Free Speech Clause of the First Amendment, the City's regulation is subject to strict scrutiny. We hold that it is not.

I

A

American jurisdictions have regulated outdoor advertisements for well over a century. By some accounts, the proliferation of conspicuous patent-medicine advertisements on rocks and barns prompted States to begin regulating outdoor advertising in the late 1860s. As part of this regulatory tradition, federal, state, and local governments have long distinguished between signs (such as billboards) that promote ideas, products, or services located elsewhere and those that promote or identify things located onsite. . .

On-/off-premises distinctions, like the one at issue here, proliferated following the enactment of the Highway Beautification Act of 1965 (Act). In the Act, Congress directed States receiving federal highway funding to regulate outdoor signs in proximity to federal highways, in part by limiting off-premises signs. [In particular, the Act allowed] exceptions for "signs, displays, and devices advertising the sale or lease of property upon which they are located" and "signs, displays, and devices . . . advertising activities conducted on the property on which they are located". Under the Act, approximately two-thirds of States have implemented similar on-/off-premises distinctions. The City represents, and respondents have not disputed, that "tens of thousands of municipalities nationwide" have adopted analogous on-/off-premises distinctions in their sign codes.

The City of Austin is one such municipality. The City distinguishes between on-premises and off-premises signs in its sign code, and specially regulates the latter, in order to "protect the aesthetic value of the city and to protect public safety."

During the time period relevant to this dispute, the City's sign code defined the term "off-premise sign" to mean "a sign advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that directs persons to any location not on that site." This definition was materially analogous to the one used in the federal Highway Beautification Act and many other state and local codes referenced above. The code prohibited the construction of any new off-premises signs, but allowed existing off-premises signs to remain as grandfathered "non-conforming signs." An owner of a grandfathered off-premises sign could "continue or maintain it at its existing location" and could change the "face of the sign," but could not "increase the degree of the existing nonconformity," "change the method or technology used to convey a message," or "increase the illumination of the sign." By contrast, the code permitted the digitization of on-premises signs.

B

Respondents, Reagan National Advertising of Austin, LLC (Reagan), and Lamar Advantage Outdoor Company, L. P. (Lamar), are outdoor-advertising companies that own billboards in Austin. In April and June of 2017, Reagan sought permits from the City to digitize some of its off-premises billboards. The City denied the applications. Reagan filed suit against the City in state court alleging that the code's prohibition against digitizing off-premises signs, but not on-premises signs, violated the Free Speech Clause of the First Amendment. The City removed the case to federal court, and Lamar intervened as a plaintiff. . .

II

A regulation of speech is facially content based under the First Amendment if it "targets speech based on its communicative content" — that is, if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert* (2015) [*supra* this chapter]. The Court of Appeals interpreted *Reed* to mean that if "a reader must ask: who is the speaker and what is the speaker saying" to apply a regulation, then the regulation is automatically content based. This rule, which holds that a regulation cannot be content neutral if it requires reading the sign at issue, is too extreme an interpretation of this Court's precedent. Unlike the regulations at issue in *Reed*, the City's off-premises distinction requires an examination of speech only in service of drawing neutral, location-based lines. It is agnostic as to content. Thus, absent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny.

A

The *Reed* Court confronted a very different regulatory scheme than the one at issue here: a comprehensive sign code that "singled out specific subject matter for differential treatment." *Reed*. The town of Gilbert, Arizona, had adopted a code that applied distinct size, placement, and time restrictions to 23 different categories of

signs. The Court focused its analysis on three categories defined by whether the signs displayed ideological, political, or certain temporary directional messages. The code gave the most favorable treatment to " 'Ideological Signs,' " defined as those " 'communicating a message or ideas for noncommercial purposes' " with certain exceptions. It offered less favorable treatment to " 'Political Signs,' " defined as those " 'designed to influence the outcome of an election.' " Most restricted of all were " 'Temporary Directional Signs Relating to a Qualifying Event,' " with qualifying events defined as gatherings " 'sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.' "

The *Reed* Court determined that these restrictions were facially content based. Rejecting the contention that the restrictions were content neutral because they did not discriminate on the basis of viewpoint, the Court explained: "It is well established that 'the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.' " Applying these principles, the Court reasoned that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. . . . For example, a law banning the use of sound trucks for political speech — and only political speech — would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." By treating ideological messages more favorably than political messages, and both more favorably than temporary directional messages, "the Town's Sign Code likewise singled out specific subject matter for differential treatment, even if it did not target viewpoints within that subject matter."

In this case, enforcing the City's challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location. Unlike the sign code at issue in *Reed*, however, the City's provisions at issue here do not single out any topic or subject matter for differential treatment. A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional messages concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location. The on-/off-premises distinction is therefore similar to ordinary time, place, or manner restrictions. *Reed* does not require the application of strict scrutiny to this kind of location-based regulation. Cf. *Frisby v. Schultz* (1988) [Chapter 6] (sustaining an ordinance that prohibited "only picketing focused on, and taking place in front of, a particular residence" as content neutral).

B

This Court's First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral.

Most relevant here, the First Amendment allows for regulations of solicitation — that is, speech "requesting or seeking to obtain something" or "an attempt or effort to gain business." Black's Law Dictionary 1677 (11th ed. 2019). To identify whether speech entails solicitation, one must read or hear it first. Even so, the Court has reasoned that restrictions on solicitation are not content based and do not inherently present "the potential for becoming a means of suppressing a particular point of view," so long as they do not discriminate based on topic, subject matter, or viewpoint. *Heffron v. International Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). . .

Consistent with these precedents, the Court has previously understood distinctions between on-premises and off-premises signs, like the one at issue in this case, to be content neutral. . . Underlying these cases and others is a rejection of the view that *any* examination of speech or expression inherently triggers heightened First Amendment concern. Rather, it is regulations that discriminate based on "the topic discussed or the idea or message expressed" that are content based. *Reed*. The sign code provisions challenged here do not discriminate on those bases.

C

Reagan does not claim *Reed* expressly or implicitly overturned the precedents discussed above. Its argument relies primarily on one sentence in *Reed* recognizing that "some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." Seizing on this reference, Reagan asserts that the City's sign code "defines off-premises signs based on their 'function or purpose.' "

The argument stretches *Reed*'s "function or purpose" language too far. The principle the *Reed* Court articulated is more straightforward. While overt subject-matter discrimination is facially content based (for example, " 'Ideological Signs,' " defined as those " 'communicating a message or ideas for noncommercial purposes' "), so, too, are subtler forms of discrimination that achieve identical results based on function or purpose (for example, " 'Political Signs,' " defined as those " 'designed to influence the outcome of an election' "). In other words, a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a "function or purpose" proxy that achieves the same result. That does not mean that any classification that considers function or purpose is *always* content based. . .

Nor did *Reed* cast doubt on the Nation's history of regulating off-premises signs. Off-premises billboards of the sort that predominate today were not present in the founding era, but as large outdoor advertisements proliferated in the 1800s, regulation followed. As early as 1932, the Court had already approved a location-based differential for advertising signs. Thereafter, for the last 50-plus years, federal, state, and local jurisdictions have repeatedly relied upon on-/off-premises distinctions to address the distinct safety and esthetic challenges posed by billboards

and other methods of outdoor advertising. The unbroken tradition of on-/off-premises distinctions counsels against the adoption of Reagan's novel rule. See *Williams-Yulee v. Florida Bar* (2015) [*infra* this chapter] (recognizing "history and tradition of regulation" as relevant when considering the scope of the First Amendment).

D

Tellingly, even today's dissent appears reluctant to embrace the read-the-sign rule adopted by the court below. . .

It is the dissent that would upend settled understandings of the law. Where we adhere to the teachings of history, experience, and precedent, the dissent would hold that tens of thousands of jurisdictions have presumptively violated the First Amendment, some for more than half a century, and that they have done so by use of an on-/off-premises distinction this Court has repeatedly reviewed and never previously questioned. For the reasons we have explained, the Constitution does not require that bizarre result.

III

This Court's determination that the City's ordinance is facially content neutral does not end the First Amendment inquiry. If there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based. See *Reed*. Moreover, to survive intermediate scrutiny, a restriction on speech or expression must be " 'narrowly tailored to serve a significant governmental interest.' " *Ward v. Rock Against Racism* (1989) [Chapter 6].

The parties dispute whether the City can satisfy these requirements. . . Because the Court of Appeals did not address these issues, the Court leaves them for remand and expresses no view on the matters.

* * *

For these reasons, the judgment of the Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE BREYER, concurring.

[Justice Breyer largely reiterated the arguments made in his concurring opinion in *Reed* against applying strict scrutiny to all content-based laws.]

JUSTICE ALITO, concurring in the judgment in part and dissenting in part.

I agree with the majority that we must reverse the decision of the Court of Appeals holding that the provisions of the Austin City Code regulating on- and off-premises signs are facially unconstitutional. The Court of Appeals reasoned that those provisions impose content-based restrictions and that they cannot satisfy strict scrutiny, but the Court of Appeals did not apply the tests that must be met before a law is held to be facially unconstitutional. "Normally, a plaintiff bringing a facial challenge must 'establish that no set of circumstances exists under which the law would be valid,' or show that the law lacks 'a plainly legitimate sweep.' " *Americans for Prosperity Foundation v. Bonta* (2021) [Chapter 10]. A somewhat less demanding test applies when a law affects freedom of speech. Under our First Amendment "overbreadth" doctrine, a law restricting speech is unconstitutional "if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens* (2010) [Chapter 3].

In this case, the Court of Appeals did not apply either of those tests, and it is doubtful that they can be met. Many (and possibly the great majority) of the situations in which the relevant provisions may apply involve commercial speech, and under our precedents, regulations of commercial speech are analyzed differently. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) [Chapter 3 Note].

It is also questionable whether those code provisions are unconstitutional as applied to most of respondents' billboards. It appears that most if not all of those billboards are located off-premises in both the usual sense of that term,[1] and in the sense in which the term is used in the Austin code. . . Thus, they are clearly off-premises signs, and because they were erected before the enactment of the code provisions at issue, the only relevant restriction they face is that they cannot be digitized. The distinction between a digitized and non-digitized sign is not based on content, topic, or subject matter. Even if the message on a billboard were written in a secret code, an observer would have no trouble determining whether it had been digitized.

Because the Court of Appeals erred in holding that the code provisions are facially unconstitutional, I agree that we should reverse that decision. On remand, the lower courts should determine whether those provisions are unconstitutional as applied to each of the billboards at issue.

Today's decision, however, goes further and holds flatly that "the sign code provisions challenged here do not discriminate" on the basis of " 'the topic discussed or the idea or message expressed,' " and that categorical statement is incorrect. The provisions defining on- and off-premises signs clearly discriminate on those grounds, and at least as applied in some situations, strict scrutiny should be required.

---

[1] In ordinary usage, a sign that is attached to or located in close proximity to a building is not described as located "off-premises." The distinction between on- and off-premises signs is based solely on location, and that is why such a classification is not content-based.

As the Court notes, under the provisions in effect when petitioner's applications were denied, a sign was considered to be off-premises if it "advertised," among other things, a "person, activity, . . . or service not located on the site where the sign is installed" or if it "directed persons to any location not on that site." Consider what this definition would mean as applied to signs posted in the front window of a commercial establishment, say, a little coffee shop. If the owner put up a sign advertising a new coffee drink, the sign would be classified as on-premises, but suppose the owner instead mounted a sign in the same location saying: "Contribute to X's legal defense fund" or "Free COVID tests available at Y pharmacy" or "Attend City Council meeting to speak up about Z." All those signs would appear to fall within the definition of an off-premises sign and would thus be disallowed. Providing disparate treatment for the sign about a new drink and the signs about social and political matters constitutes discrimination on the basis of topic or subject matter. . .

JUSTICE THOMAS, with whom JUSTICE GORSUCH and JUSTICE BARRETT join, dissenting.

In *Reed v. Town of Gilbert* we held that a speech regulation is content based — and thus presumptively invalid — if it "draws distinctions based on the message a speaker conveys." Here, the city of Austin imposes special restrictions on "off-premises signs," defined as signs that "advertise a business, person, activity, goods, products, or services not located on the site where the sign is installed, or that direct persons to any location not on that site." Under *Reed*, Austin's off-premises restriction is content based. It discriminates against certain signs based on the message they convey — *e.g.*, whether they promote an on- or off-site event, activity, or service.

The Court nevertheless holds that the off-premises restriction is content neutral because it proscribes a sufficiently broad category of communicative content and, therefore, does not target a specific "topic or subject matter." This misinterprets *Reed*'s clear rule for content-based restrictions and replaces it with an incoherent and malleable standard. In so doing, the majority's reasoning is reminiscent of this Court's erroneous decision in *Hill v. Colorado*, 530 U.S. 703 (2000) [Note Chapter 6], which upheld a blatantly content-based prohibition on "counseling" near abortion clinics on the ground that it discriminated against "an extremely broad category of communications." Because I would adhere to *Reed* rather than echo *Hill*'s long-discredited approach, I respectfully dissent.

I

A

The First Amendment, applicable to the States through the Fourteenth, prohibits laws "abridging the freedom of speech." "When enforcing this prohibition, our precedents distinguish between content-based and content-neutral regulations." A content-based law is "presumptively invalid,", and may generally be upheld only if the government proves that the regulation is narrowly tailored to serve compelling state interests.

In *Reed*, we held that courts should identify content-based restrictions by applying a "commonsense" test: A speech regulation is content based if it "targets speech based on its communicative content." Put another way, a law is content based " 'on its face' [if it] draws distinctions based on the message a speaker conveys." While we noted that "some facial distinctions based on a message are obvious," we emphasized that others could be "more subtle, defining regulated speech by its function or purpose." In all events, whether a law is characterized as targeting a "topic," "idea," "subject matter," or "communicative content," the law is content based if it draws distinctions based in any way "on the message a speaker conveys". . .

B

Under *Reed*'s approach for identifying content-based regulations, Austin's off-premises sign restriction is content based. As relevant to this suit, Austin's sign code imposes stringent restrictions on a category of "off-premises signs." The code defines "off-premises signs" as those "advertising a business, person, activity, goods, products, or services not located on the site where the sign is installed," or as signs "directing persons to any location not on that site." This broad definition sweeps in a wide swath of signs, from 14- by 48-foot billboards to 24- by 18-inch yard signs. The sign code prohibits new off-premises signs and makes it difficult (or impossible) to change existing off-premises signs, including by digitizing them.

Like the town of Gilbert in *Reed*, Austin has identified a "category of signs based on the type of information they convey, and then subjected that category to different restrictions." *Reed*. A sign that conveys a message about off-premises activities is restricted, while one that conveys a message about on-premises activities is not. And, per *Reed*, it does not matter that Austin's code "defines regulated speech by its function or purpose" — *i.e.*, advertising or directing passersby elsewhere. Again, all that matters is that the regulation "draws distinctions based on" a sign's "communicative content," which the off-premises restriction plainly does.

This conclusion is not undermined because the off-premises sign restriction depends in part on a content-neutral element: the location of the sign. Much like in *Reed*, that an Austin official applying the sign code must know *where* the sign is does not negate the fact that he also must know *what* the sign says. Take, for instance, a sign outside a Catholic bookstore. If the sign says, "Visit the Holy Land," it is likely an off-premises sign because it conveys a message directing people elsewhere (unless the name of the bookstore is "Holy Land Books"). But if the sign instead says, "Buy More Books," it is likely a permissible on-premises sign (unless the sign also contains the address of another bookstore across town). Finally, suppose the sign says, "Go to Confession." After examining the sign's message, an official would need to inquire whether a priest ever hears confessions at that location. If one does, the sign could convey a permissible "on-premises" message. If not, the sign conveys an impermissible off-premises message. Because enforcing the sign code in any of these instances "requires [Austin] officials to determine whether a sign" conveys a particular message, the sign code is content based under *Reed*.

In sum, the off-premises rule is content based and thus invalid unless Austin can satisfy strict scrutiny. Because Austin has offered nothing to make that showing, the Court of Appeals did not err in holding that the off-premises rule violates the First Amendment.

II

To reach the opposite result, the majority implicitly rewrites *Reed*'s bright-line rule for content-based restrictions. In the majority's view, the off-premises restriction is not content based because it does not target a specific "topic or subject matter." The upshot of the majority's reasoning appears to be that a regulation based on a sufficiently general or broad category of communicative content is not actually content based.

Such a rule not only conflicts with *Reed* and many pre-*Reed* precedents but is also incoherent and unworkable. . .

A

The majority concedes that "the message on the sign matters" when applying Austin's sign code. That concession should end the inquiry under *Reed*. But the majority nonetheless finds the sign code to be content neutral by recasting facially content-based restrictions as only those that target sufficiently specific categories of communicative content and not as those that depend on communicative content *simpliciter*.

For example, while *Reed* defined content-based restrictions as those that "draw distinctions based on the *message* a speaker conveys," *Reed* (emphasis added), the majority decides that Austin's sign code is not content based because it draws no distinctions based on "a sign's *substantive* message," (emphasis added). Elsewhere, the majority speaks not of "substantive messages" but of "topics or subject matters," which the majority thinks are sufficiently *specific* categories of communicative content. As a result, the majority contends that a law targeting directional messages concerning "events generally, regardless of topic," would not be content based, but one targeting "directional messages concerning *specific* events" (*e.g.*, "religious" or "political" events) would be. Regardless of the label, the majority today excises, without a word of explanation, a subset of supposedly non-substantive or unspecific messages from the First Amendment's protection against content-based restrictions.

This understanding of content-based restrictions contravenes *Reed*, which held that a law is content based if it "targets speech based on its communicative content" — not "specific" or "substantive" categories of communicative content. Only by jettisoning *Reed*'s "commonsense" definition of what it means to be content based can the majority assert that the off-premises rule is strictly "location-based" and "agnostic as to content," even though the law undeniably depends on *both* location *and* communicative content. . .

We have defined content-based restrictions to include *all* content-based distinctions because any other rule would be incoherent. After all, off-premises advertising could be considered a "subject" or a "topic" as those words are ordinarily used. And, in any event, there is no principled way to decide whether a category of communicative content is "substantive" or "specific" enough for the majority to deem it a "topic" or "subject" worthy of heightened protection. Although off-premises advertising is a more general category of speech than some (*e.g.*, off-premises advertising of religious events), it is a more specific category than others (*e.g.*, advertising generally). The majority offers only its own *ipse dixit* to explain why off-premises advertising is insufficiently specific to qualify as content based under *Reed*. Worse still, the majority does not explain how courts should draw the line between a sufficiently substantive or specific content-based classification and one that is insufficiently substantive or specific.

On this point, Austin suggests there is no need to worry because our cases provide "guideposts" from which one can divine what "level of generality" renders a speech regulation content based. To be sure, that is the sort of inquiry the majority's opaque test invites. But *Reed* directed us elsewhere — to the text of the law in question and whether that law " 'on its face' draws distinctions based on the message a speaker conveys." The majority's holding that some rules based on content are not, as it turns out, content based nullifies *Reed*'s clear test.

B

The majority offers several reasons why its approach is consistent with *Reed* and other cases. None of these arguments is persuasive. Instead, they only serve to underscore the Court's ill-advised departure from our doctrine.

1

The majority first suggests that deeming Austin's sign code content based would require us to adopt an "extreme" reinterpretation of *Reed*. Specifically, the majority faults the Court of Appeals for concluding that Austin's regulation was content based because, to enforce the off-premises rule, " 'a reader must ask: who is the speaker and what is the speaker saying' "? In the majority's view, *Reed* cannot stand for such a simplistic read-the-sign test.

The majority's skepticism is misplaced. We have often acknowledged that the need to examine the content of a message is a strong indicator that a speech regulation is content based. One year before *Reed*, for example, we stated that an abortion clinic buffer-zone law "would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen v. Coakley* (2014) [Chapter 6]. That statement was not an outlier. . .

Ultimately, the majority's objection to the Court of Appeals' reliance on a read-the-sign test is a red herring; its real objection is to *Reed*'s rule that any law that draws distinctions based on communicative content is content based.

2

The majority next argues that Austin's sign code is content neutral under our precedents. But none of the cases the majority cites supports its crabbed view of what constitutes a content-based restriction. . .

3

The majority also claims that finding Austin's sign code to be content based "would render the majority opinion in *Reed* irreconcilable with" Justice Alito's *Reed* concurrence. In particular, Justice Alito identified nine different types of sign regulations that he believed "would not be content based," including "rules distinguishing between on-premises and off-premises signs" and "rules imposing time restrictions on signs advertising a one-time event." The majority evidently believes that these two types of sign regulations necessarily turn on a sign's communicative content, like the off-premises sign restriction at issue here.

That reading of the *Reed* concurrence makes little sense. First, there is no reason to interpret the concurrence as referring to off-premises or one-time-event rules that turn on a sign's communicative content. Doing so would make those two rules categorically different from the other seven, none of which would ever turn on message content. And although off-premises and one-time-event rules *could* be drafted in terms of a sign's communicative content, as is true here, they need not be. "There might be many formulations of an on/off-premises distinction that are content-neutral." [Justice Thomas cites here to footnote 1 of Justice Alito's opinion in this case.] For instance, a city could define " 'an on-premises sign as any sign within 500 feet of a building,' " or a sign that is installed by " 'a business . . . licensed to occupy . . . the premises where the sign is located' ". . . Thus, interpreting Justice ALITO's concurrence as referring to rules that turn on communicative content, as opposed to rules that are content neutral, is unwarranted.

Second, it would be strange to interpret the concurrence as proclaiming that *all* off-premises sign restrictions are content neutral considering the longstanding dispute over that question. . . . Ultimately, it seems quite unlikely that Justice ALITO's quick recital of some content-neutral rules purported to pre-emptively decide an issue that had long perplexed federal and state courts.

4

Near the end of its analysis, the majority invokes an allegedly "unbroken tradition of on-/off-premises distinctions" that it claims "counsels against" faithful application of *Reed*. To be sure, history and tradition are relevant to identifying and

defining those "few limited areas" where, "from 1791 to the present," "the First Amendment has permitted restrictions upon the content of speech." *Brown v. Entertainment Merchants Assn.* (2011) [Chapter 3]. But the majority openly admits that off-premises regulations "were not present at the founding." And while it asserts that "large outdoor advertisements proliferated in the 1800s," it offers no evidence of any content-based restrictions from that period, let alone off-premises restrictions on *noncommercial* speech. . .

Ultimately, the majority's only "historical" support is that regulations like Austin's "proliferated following the enactment of the Highway Beautification Act of 1965." The majority's suggestion that the First Amendment should yield to a speech restriction that "proliferated" — under pressure from the Federal Government — some two centuries after the founding is both "startling and dangerous." *United States v. Stevens* (2010) [Chapter 3].

This Court has never hinted that the government can, with a few decades of regulation, subject "new categories of speech" to less exacting First Amendment scrutiny. *Stevens*.

Regardless, even if this allegedly "unbroken tradition" did not fall short by a century or two, the majority offers no explanation why historical regulation is relevant to the question whether the off-premises restriction is content based under *Reed* and our modern content-neutrality jurisprudence. If Austin had met its burden of identifying a historical tradition of analogous regulation — as can be done, say, for obscenity or defamation — that would not make the off-premises rule content neutral. It might simply mean that the off-premises rule is a constitutional form of content-based discrimination. But content neutrality under *Reed* is an empirical question, not a historical one. Thus, the majority's historical argument is not only meritless but misguided.

C

Despite asserting that the Court of Appeals' analysis under *Reed* would "contravene numerous precedents," the majority identifies no decision of this Court supporting the idea that a speech restriction is not content based so long as it regulates a sufficiently broad or non-substantive category of communicative content. . .

[The] majority's approach should offer little comfort because arbitrary carveouts from *Reed* undermine the "clear and firm rule governing content neutrality" that we understood to be "an essential means of protecting the freedom of speech." The majority's deviation from that "clear and firm rule" poses two serious threats to the First Amendment's protections.

First, transforming *Reed*'s clear definition of "content based regulation" back into an opaque and malleable "term of art" turns the concept of content neutrality into a "vehicle for the implementation of individual judges' policy preferences." *Tennessee v. Hill*, 541 U.S. 509 (2004) (SCALIA, J., dissenting). . .

Second, sanctioning certain content-based classifications but not others ignores that even seemingly reasonable content-based restrictions are ready tools for those who would "suppress disfavored speech." This is because "the responsibility for distinguishing between" permissible and impermissible content "carries with it the potential for invidious discrimination of disfavored subjects." *Cincinnati v . Discovery Network, Inc.*, 507 U.S. 410 (1993) [Note Chapter 3]. That danger only grows when the content-based distinctions are "by no means clear," giving more leeway for government officials to punish disfavored speakers and ideas.

The content-based distinction drawn by Austin's off-premises speech restriction is "by no means clear," and plainly lends itself "to suppressing disfavored speech," *Reed*. As the Court of Appeals noted, Austin's "prepared counsel" "struggled to answer whether" signs conveying messages like " 'God Loves You,' " " 'Vote for Kathy,' " or " 'Sally makes quilts here and sells them at 3200 Main Street' " would be regulated as off-premises signs. Before us, Austin's counsel had similar difficulties, and *amici* have proposed dozens of religious and political messages that would be next to impossible to categorize under Austin's rule. These pervasive ambiguities offer enforcement officials ample opportunity to suppress disfavored views. And they underscore *Reed*'s warning that "innocent motives do not eliminate the danger of censorship presented by a facially content-based statute."

* * *

Because *Reed* provided a clear and neutral rule that protected the freedom of speech from governmental caprice and viewpoint discrimination, I would adhere to that precedent. . . I respectfully dissent.

Note: Reining in Reed*?*

1. Is the Court's decision in *City of Austin* consistent with its decision in *Reed v. Town of Gilbert*, as the *City of Austin* majority claims? If so, why does the author of the *Reed* majority, Justice Thomas, dissent? If not, why did Chief Justice Roberts join both the majority opinion in *Reed* and the majority opinion here? And if the decisions are inconsistent, how does *City of Austin* alter or limit the holding in *Reed*?

2. The *City of Austin* majority clearly rejects the lower court's reasoning that if a government official has to read a sign's message to apply a law, it is automatically content-based. What are Justice Alito's and Justice Thomas's attitudes towards the lower court's approach? Is the lower court's approach a plausible understanding of the holding in *Reed*?

3. Given the majority's rejection of the lower court's approach as "too extreme an interpretation of this Court's precedent," what approach does the majority adopt towards determining whether a rule is, or is not, content-based? What,

in short, is the revised definition of content discrimination that emerges from *City of Austin*?

4. In his separate opinion, Justice Alito argues that Austin's sign ordinance would permit a coffee shop owner to put up a sign in front of her shop advertising a coffee drink, but not a sign with a political message. And Justice Thomas in dissent argues that the ordinance would permit a Catholic bookstore to erect signs promoting books, but not religious pilgrimages. If both are correct, as seems the case, how can the ordinance be content-neutral? What is the majority's response to these examples?

5. Is the dissent correct to argue that the majority has redefined content discrimination to exclude regulations "based on a sufficiently general or broad category of communicative content"? What would be the logic of such a rule?

6. One possible reading of the *City of Austin* decision is that it treats as content-based only laws that "single out any topic or subject matter for differential treatment." (Presumably the majority would also treat a law which singled out a particular viewpoint as content-based.) Is this a sensible definition of content discrimination? Is it a reasonable interpretation of *Reed*? And why doesn't the Austin ordinance "single out" a particular subject matter — the nature of the business on whose premises any particular sign is located?

7. In dissent, Justice Thomas expresses a concern that "seemingly reasonable content-based restrictions are ready tools for those who would 'suppress disfavored speech.' " Is his concern generally a realistic problem? Do the facts of the *City of Austin* case specifically raise this problem?

8. Justice Sotomayor's majority opinion and Justice Thomas's dissent disagree vigorously about the role of history in deciding this case. Who has the better of the argument?

Chapter 6
Regulating the "Time, Place, and Manner" of Protected Speech

B. Applications of the Doctrine

Page 395*: insert after note 2:*

2a. In his dissenting opinion in *City of Austin v. Reagan National Advertising of Austin* (2022) [Chapter 5], Justice Thomas insists that the only precedent supporting the majority's reasoning in that case is *Hill*, despite the fact that the majority never cites *Hill*. He also insists that *Hill* was clearly incorrect and was implicitly rejected in later cases such as *McCullen*. Is he correct on the latter point? Considering his dissent, does the *City of Austin* case effectively "revive" *Hill* as a precedent? Should *Hill* be revived?

Chapter 7
Expressive Conduct and Secondary Effects

B. "Secondary Effects" as a Basis for Regulation

Page 432: ***insert after note 2:***

2a. If there is tension between the "secondary effects" doctrine and *Reed*, is that tension resolved by the Court's opinion in *City of Austin v. Reagan National Advertising of Austin* (2022) [Chapter 5]? Both *City of Renton* and *City of Austin* uphold laws which restrict speech based on its location. However, note that *City of Renton* and the other secondary effects cases single out a specific sort of speech — sexually explicit speech — for unfavorable treatment, unlike the sign ordinance in *City of Austin*.

Chapter 11
Campaign Finance

D. Circumvention of Contribution Limits and *Buckley's* Limits

Page 652: ***insert at the end of page 652:***

Note: Further Skepticism About Contribution Limits

1. The Court's skepticism about contribution limits justified as anti-corruption measures continued in 2022. In *Federal Election Commission v. Ted Cruz for Senate*, 142 S. Ct. 1638 (2022), a six-Justice majority struck down a provision of federal campaign finance law that limited a campaign's ability to use contributions made after election day to repay loans candidates made to their own campaigns.

Candidates often loan their campaigns money and seek repayment from the campaign after the election. Section 304 of the Bipartisan Campaign Reform Act (BCRA — another part of which was at issue in *Citizens United*) limited to $250,000 the repayment that could be funded by contributions made after election day. A regulation promulgated pursuant to that provision allowed repayments over $250,000 if the funds used for that repayment were collected before the election and if the repayment was performed within 20 days of the election. During the 2018 election cycle, Ted Cruz, a Republican candidate for one of Texas' Senate seats (who ultimately won re-election to that seat) loaned his campaign $260,000. However, his campaign did not complete its repayment of the loan within the 20-day regulatory window. Thus, pursuant to the law, the final $10,000 of that loan was converted into a contribution from Senator Cruz to his campaign, with repayment not allowed. Senator Cruz sued, arguing that the law violated his First Amendment rights by limiting his freedom to spend his own money to lend to his campaign.

2. The Court agreed with Senator Cruz. Writing for the six-Justice majority, Chief Justice Roberts first concluded that Section 304 burdened Senator Cruz's First Amendment-protected ability to spend his own money to promote his campaign, by making it more difficult for the campaign to repay any large loans he might make to the campaign. Turning to the government's justifications for those restrictions, the Court acknowledged the government's defense of the law on anti-corruption grounds, describing the government as arguing "that post-election contributions are particularly troubling because the contributor will know — not merely hope — that the recipient, having prevailed, will be in a position to do him some good."

Immediately after stating that justification, the Court wrote as follows: "We greet the assertion of an anticorruption interest here with a measure of skepticism, for the loan-repayment limitation is yet another in a long line of 'prophylaxis-upon-prophylaxis approaches' to regulating campaign finance. *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014) [*supra* this chapter]." It then stated that the government was unable to provide a single example of *quid pro quo* corruption arising out of the contributions-for-candidate-loan-repayments practices the statute

regulated. It also discounted, as too tentative and conditional, conclusions made by academics studying that phenomenon, and also discounted, as too imprecise, the results of polls that asked Americans about the likely corrupting effect of such practices. The Court also dismissed statements made by congresspersons about the corrupting potential for such arrangements.

Finally, the Court dismissed the government's "common sense" observation that contributions made after elections for the purpose of repaying a candidate's loan were akin to gifts to the candidate, thus increasing the corruption risk. Chief Justice Roberts observed that, because the campaign's repayments merely returned money the candidate loaned, they did not enrich the candidate in a way that heightened the risk of corruption. With no justification for the law's infringement on Senator Cruz's First Amendment interests, the Court struck down the law and thus the regulations that rested on it.

3. Justice Kagan, joined by Justices Breyer and Sotomayor, dissented. She began her dissent with the following explanation of the unsavory dynamic the law sought to prevent:

> A candidate for public office extends a $500,000 loan to his campaign organization, hoping to recoup the amount from benefactors' post-election contributions. Once elected, he devotes himself assiduously to recovering the money; his personal bank account, after all, now has a gaping half-million-dollar hole. The politician solicits donations from wealthy individuals and corporate lobbyists, making clear that the money they give will go straight from the campaign to him, as repayment for his loan. He is deeply grateful to those who help, as they know he will be — more grateful than for ordinary campaign contributions (which do not increase his personal wealth). And as they paid him, so he will pay them. In the coming months and years, they receive government benefits — maybe favorable legislation, maybe prized appointments, maybe lucrative contracts. The politician is happy; the donors are happy. The only loser is the public. It inevitably suffers from government corruption.

After sketching out her theory of Section 304's purpose, Justice Kagan argued that the law imposed only modest burdens on Senator Cruz and persons like him, because it did not limit his ability to self-fund his campaign in any amount he wished, but instead simply limited the use of other persons' contributions to repay that self-funding. Again in pursuit of downplaying the burdens Section 304 imposed, she also noted that the law allowed unlimited sourcing of campaign repayments of candidate loans up to $250,000, and even allowed repayment of larger loans as long as they were made with pre-election contributions. She argued that the pre/post-election differentiation the statute drew reflected legitimate anti-corruption concerns, since pre-election contributions would be made without the certainty that the candidate would be elected and thus would be in a position to perform favors for contributors who enabled the campaign's repayment of loans to the candidate. By contrast, the post-election contributions Section 304 regulated were made after contributors knew whether the recipient campaign's candidate would be in a position to reward

the contributors. According to Justice Kagan, "The common sense of Section 304 — the obviousness of the theory behind it — lessens the need for the Government to identify past cases of *quid pro quo* corruption involving candidate loan repayments." She argued that the record contained evidence, from states and cities not subject to a regulation such as Section 304, of the sort of *quid pro quo* corruption that could occur in the absence of the statute.

4. Much of the Justices' debate in *Cruz* turns on empirical disagreements and the Justices' willingness to rely on data that examines the corrupting effects of the practices Section 304 regulated. But underlying that debate was a more fundamental disagreement about the Court's receptivity to arguments that guarding against *quid pro quo* corruption justifies restrictions on conduct — such as the loan repayment practices at issue in *Cruz* — that are not themselves examples of such corruption. Recall the majority's "skepticism" about what it called the "prophylaxis-upon-prophylaxis" theory it described the statute as resting upon. By contrast, Justice Kagan criticized the Court for what she called its "second-guess[ing of] Congress's experience-based judgment about the specially corrupting effects of post-election donations to repay candidate loans." Ultimately, in the absence of documented examples of *quid pro quo* corruption directly arising from such loan repayment practices, the disagreement in *Cruz*, as in other cases where contribution limits have been challenged, largely turns on how much deference the Court will accord legislatures (including Congress) when they seek to regulate contributions in support of anti-corruption goals.

5. Recall that in *Citizens United* and again in *McCutcheon*, the Court limited the sort of corruption that campaign finance regulation could address to classic *quid pro quo* corruption. Assume the Court is right that only *quid pro quo* corruption "counts" as "corruption," and that, for example, increased access to politicians growing out of previous financial support simply constitutes desirable democratic responsiveness. Even if *quid pro quo* corruption is the only kind of "corruption," to what extent should courts be willing to entertain contribution limits that are justified as prophylactic guards against such corruption? How would you balance the indirect, prophylactic nature of those anti-corruption guardrails against the view, acknowledged by the Court since *Buckley*, that contribution limitations impose a relatively less severe First Amendment burden than expenditure limits, and thus can be justified on a (perhaps slightly) more lenient standard?

Chapter 12
Beyond Regulation: The Government as Employer and Educator

A. The First Amendment Rights of Government Employees

Page 678*: insert before the Problem:*

Note: A Praying Coach and Government Employee Speech

1. In *Kennedy v. Bremerton School District*, 142 S.Ct. 2407 (2022) (Chapter 19), the Court upheld the free speech and free exercise rights of a public high school football coach who was disciplined for publicly praying after games on the 50-yard line of the field. The Religion Clauses aspects of the case are discussed in Chapter 19. This note sets forth the Court's analysis of the school district's claim that the coach was speaking as a government employee rather than as a private citizen when he performed the prayer, thus giving it the authority to discipline him for his speech.

2. In a 6-3 decision, the Court, speaking through Justice Gorsuch, rejected the District's claim that the coach was acting as a government employee when he spoke, which would have brought the case under *Garcetti*'s rule that the speech was unprotected under the First Amendment. The Court emphasized two points on which both sides agreed: first, that the coach's speech touched on a matter of public concern and, second, that the speech did not implicate the academic freedom concerns *Garcetti* suggested might serve as an exception to the broad discretion government enjoys to discipline employees for their job-related speech. With those elements put aside, Justice Gorsuch framed the issue as follows: "Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?"

After describing the Court's analysis in *Garcetti v. Ceballos* (2006) (*supra* this chapter) and *Lane v. Franks*, 573 U.S. 228 (2014) (Note *supra* this chapter), Justice Gorsuch explained why, like *Lane* but unlike *Garcetti*, the speech at issue was the coach's speech as a private citizen. He wrote:

> When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. *Lane*. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not "owe their existence" to Mr. Kennedy's responsibilities as a public employee. *Garcetti*.
>
> The timing and circumstances of Mr. Kennedy's prayers confirm the point. During the postgame period when these prayers occurred, coaches were free to attend briefly to personal matters —everything

> from checking sports scores on their phones to greeting friends and family in the stands. We find it unlikely that Mr. Kennedy was fulfilling a responsibility imposed by his employment by praying during a period in which the District has acknowledged that its coaching staff was free to engage in all manner of private speech. That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen. Nor is it dispositive that Mr. Kennedy's prayers took place "within the office" environment — here, on the field of play. *Garcetti*. Instead, what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

Justice Gorsuch acknowledged the lower court's conclusion that the coach was a "role model." But he rejected that justification for finding the speech to have been made in the coach's capacity as a school employee, concluding that "this argument commits the error of positing an 'excessively broad job description' by treating everything teachers and coaches say in the workplace as government speech subject to government control." *Garcetti*.

The Court's conclusion that the coach was speaking as a private citizen, when combined with the District's concession that the speech concerned a matter of public interest, triggered the balancing *Pickering* called for. The Court rejected the District's argument that its interests in suppressing the speech outweighed the coach's First Amendment interest because allowing the coach to speak as he wished would implicate the District in a violation of the Establishment Clause. That aspect of the Court's analysis is discussed in Chapter 19.

3. Justice Sotomayor, dissenting for herself and Justices Breyer and Kagan, argued that the lower court had made a strong argument that the coach's speech "was speech in his official capacity as an employee." But she concluded that it was not necessary to resolve that question, because "even assuming that Kennedy's speech was in his capacity as a private citizen, the District's responsibilities under the Establishment Clause provided 'adequate justification' for restricting it."

4. What actually happened — the facts surrounding the coach's behavior in *Kennedy* — was heatedly debated by the Justices at great length in their opinions. Given *Garcetti* and *Lane*, what facts do you think would suffice to render post-game prayers by a football coach part of his official duties, and thus subject to regulation by the government employer-school?

5. Recall how Justice Gorsuch framed the question the Court had to decide in *Kennedy*: "Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?" This is a perfectly natural framing. Government, because it is not a natural person, can only speak via its

employees. For that reason, it makes sense for the Court to pose the question as whether the coach "offer[ed] his prayers in his capacity as a private citizen" or as a government employee speaking on behalf of his employer. However, in Chapter 13 you will encounter a distinct line of cases that inquires into whether government is in fact speaking for itself or, alternatively, whether government is simply making available a forum for private speech. This latter line of cases is distinct from the government employee speech cases you have read in this chapter; indeed, Justice Gorsuch's analysis in *Kennedy* mentions none of the cases from that latter line. When you encounter that latter line of cases, keep in mind the cases from this chapter, and consider what relationships might exist between these two related but still distinct concepts.

Chapter 13
Beyond Regulation: Whose Message Is It?

B. When Is the Government the Speaker?

Page 751*: insert before the Problem:*

Shurtleff v. City of Boston
142 S. Ct. 1583 (2022)

JUSTICE BREYER delivered the opinion of the Court.

When the government encourages diverse expression — say, by creating a forum for debate — the First Amendment prevents it from discriminating against speakers based on their viewpoint. But when the government speaks for itself, the First Amendment does not demand airtime for all views. After all, the government must be able to "promote a program" or "espouse a policy" in order to function, *Walker v. Texas Div., Sons of Confederate Veterans, Inc.* (2015) [*supra* this chapter]. The line between a forum for private expression and the government's own speech is important, but not always clear.

This case concerns a flagpole outside Boston City Hall. For years, Boston has allowed private groups to request use of the flagpole to raise flags of their choosing. As part of this program, Boston approved hundreds of requests to raise dozens of different flags. The city did not deny a single request to raise a flag until, in 2017, Harold Shurtleff, the director of a group called Camp Constitution, asked to fly a Christian flag. Boston refused. At that time, Boston admits, it had no written policy limiting use of the flagpole based on the content of a flag. The parties dispute whether, on these facts, Boston reserved the pole to fly flags that communicate governmental messages, or instead opened the flagpole for citizens to express their own views. If the former, Boston is free to choose the flags it flies without the constraints of the First Amendment's Free Speech Clause. If the latter, the Free Speech Clause prevents Boston from refusing a flag based on its viewpoint.

We conclude that, on balance, Boston did not make the raising and flying of private groups' flags a form of government speech. That means, in turn, that Boston's refusal to let Shurtleff and Camp Constitution raise their flag based on its religious viewpoint "abridged" their "freedom of speech."

I

A

The flagpole at issue stands at the entrance of Boston City Hall. … On the plaza, near City Hall's entrance, stand three 83-foot flagpoles. Boston flies the American flag from the first pole (along with a banner honoring prisoners of war and soldiers missing in action). From the second, it flies the flag of the Commonwealth of Massachusetts. And from the third, it usually (but not always) flies Boston's flag — a sketch of the "City on a Hill" encircled by a ring against a blue backdrop.

Boston makes City Hall Plaza available to the public for events. Boston acknowledges that this means the plaza is a "public forum." … For years, since at least 2005, the city has allowed groups to hold flag-raising ceremonies on the plaza. Participants may hoist a flag of their choosing on the third flagpole (in place of the city's flag) and fly it for the duration of the event, typically a couple of hours. … Boston has no record of refusing a request before the events that gave rise to this case. We turn now to those events.

B

In July 2017, Harold Shurtleff, the director of an organization called Camp Constitution, asked to hold a flagraising event that September on City Hall Plaza. The event would "commemorate the civic and social contributions of the Christian community" and feature remarks by local clergy. As part of the ceremony, the organization wished to raise what it described as the "Christian flag." To the event application, Shurtleff attached a photo of the proposed flag: a red cross on a blue field against a white background.

The commissioner of Boston's Property Management Department said no. … The commissioner worried that flying a religious flag at City Hall could violate the Constitution's Establishment Clause and found no record of Boston ever having raised such a flag. He told Shurtleff that Camp Constitution could proceed with the event if they would raise a different flag. Needless to say, they did not want to do so.

C

Shurtleff and Camp Constitution (petitioners) sued Boston and the commissioner of its Property Management Department (respondents). … [The] District Court held that flying private groups' flags from City Hall's third pole amounted to government speech. Hence, the city acted within its constitutional authority in declining to raise Camp Constitution's flag. The District Court therefore granted summary judgment for Boston. The First Circuit affirmed.

Shurtleff and Camp Constitution next petitioned this Court for certiorari. We agreed to decide whether the flags Boston allows groups to fly express government speech, and whether Boston could, consistent with the Free Speech Clause, deny petitioners' flag-raising request.

II

A

The first and basic question we must answer is whether Boston's flag-raising program constitutes government speech. If so, Boston may refuse flags based on

viewpoint.

The First Amendment's Free Speech Clause does not prevent the government from declining to express a view. See *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) [Note *supra* this chapter]. When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say. That must be true for government to work. Boston could not easily congratulate the Red Sox on a victory were the city powerless to decline to simultaneously transmit the views of disappointed Yankees fans. The Constitution therefore relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks.

The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program. In those situations, when does government-public engagement transmit the government's own message? And when does it instead create a forum for the expression of private speakers' views?

In answering these questions, we conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression. Our review is not mechanical; it is driven by a case's context rather than the rote application of rigid factors. Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression. *See Walker*.

Considering these indicia in *Summum*, we held that the messages of permanent monuments in a public park constituted government speech, even when the monuments were privately funded and donated. In *Walker*, we explained that license plate designs proposed by private groups also amounted to government speech because, among other reasons, the State that issued the plates "maintained direct control over the messages conveyed" by "actively" reviewing designs and rejecting over a dozen proposals. In *Matal* v. *Tam* (2017) [*supra* this chapter and Chapter 15], on the other hand, we concluded that trademarking words or symbols generated by private registrants did not amount to government speech. Though the Patent and Trademark Office had to approve each proposed mark, it did not exercise sufficient control over the nature and content of those marks to convey a governmental message in so doing. These precedents point our way today.

B

Applying the government-speech analysis to this record, we find that some evidence favors Boston, and other evidence favors Shurtleff.

To begin, we look to the history of flag flying, particularly at the seat of government. Were we to consider only that general history, we would find that it supports Boston. Flags are almost as old as human civilization. Indeed, flags *symbolize* civilization. From the "primordial rag dipped in the blood of a conquered enemy and lifted high on a stick," to the feudal banner bearing a lord's coats of arms, to the standards of the Aztecs, nearly every society has taken a piece of cloth and "endowed

it, through the circumstances of its display, with a condensed power" to speak for the community. …

Keeping with this tradition, flags on Boston's City Hall Plaza usually convey the city's messages. … While this history favors Boston, it is only our starting point. The question remains whether, on the 20 or so times a year when Boston allowed private groups to raise their own flags, those flags, too, expressed the city's message. So we must examine the details of *this* flag-flying program.

Next, then, we consider whether the public would tend to view the speech at issue as the government's. In this case, the circumstantial evidence does not tip the scale. On an ordinary day, a passerby on Cambridge Street sees three government flags representing the Nation, State, and city. Those flags wave "in unison, side-by-side, from matching flagpoles," just outside " 'the entrance to Boston's seat of government.' " Like the monuments in the public park in *Summum*, the flags "play an important role in defining the identity that the city projects to its own residents and to the outside world." So, like the license plates in *Walker*, the public seems likely to see the flags as " 'conveying some message' " on the government's " 'behalf.' "

But as we have said, Boston allowed its flag to be lowered and other flags to be raised with some regularity. These other flags were raised in connection with ceremonies at the flagpoles' base and remained aloft during the events. Petitioners say that a pedestrian glimpsing a flag other than Boston's on the third flagpole might simply look down onto the plaza, see a group of private citizens conducting a ceremony without the city's presence, and associate the new flag with them, not Boston. Thus, even if the public would ordinarily associate a flag's message with Boston, that is not necessarily true for the flags at issue here. Again, this evidence of the public's perception does not resolve whether Boston conveyed a city message with these flags.

Finally, we look at the extent to which Boston actively controlled these flag raisings and shaped the messages the flags sent. The answer, it seems, is not at all. And that is the most salient feature of this case.

To be sure, Boston maintained control over an event's date and time to avoid conflicts. It maintained control over the plaza's physical premises, presumably to avoid chaos. And it provided a hand crank so that groups could rig and raise their chosen flags. But it is Boston's control over the flags' content and meaning that here is key; that type of control would indicate that Boston meant to convey the flags' messages.

On this issue, Boston's record is thin. Boston says that all (or at least most) of the 50 unique flags it approved reflect particular city-approved values or views. Flying flags associated with other countries celebrated Bostonians' many different national origins; flying other flags, Boston adds, was not "wholly unconnected" from a diversity message or "some other day or cause the City or Commonwealth had already endorsed." That may well be true of the Pride Flag raised annually to commemorate Boston Pride Week. But it is more difficult to discern a connection to the city as to, say, the Metro Credit Union flag raising, a ceremony by a local community bank.

In any event, we do not settle this dispute by counting noses — or, rather, counting flags. That is so for several reasons. For one thing, Boston told the public that it sought "to accommodate all applicants" who wished to hold events at Boston's "public forums," including on City Hall Plaza. … The city's practice was to approve flag raisings, without exception. It has no record of denying a request until Shurtleff's. Boston acknowledges it "hadn't spent a lot of time really thinking about" its flag-raising practices until this case. True to its word, the city had nothing — no written policies or clear internal guidance — about what flags groups could fly and what those flags would communicate.

Compare the extent of Boston's control over flag raisings with the degree of government involvement in our most relevant precedents. In *Summum*, we emphasized that Pleasant Grove City always selected which monuments it would place in its park (whether or not the government funded those monuments), and it typically took ownership over them. In *Walker*, a state board "maintained direct control" over license plate designs by "actively" reviewing every proposal and rejecting at least a dozen. Boston has no comparable record.

The facts of this case are much closer to *Matal* v. *Tam*. There, we held that trademarks were not government speech because the Patent and Trademark Office registered all manner of marks and normally did not consider their viewpoint, except occasionally to turn away marks it deemed "offensive." Boston's come-one-come-all attitude — except, that is, for Camp Constitution's religious flag — is similar.

Boston could easily have done more to make clear it wished to speak for itself by raising flags. Other cities' flag-flying policies support our conclusion. The City of San Jose, California, for example, provides in writing that its " 'flagpoles are not intended to serve as a forum for free expression by the public,' " and lists approved flags that may be flown " 'as an expression of the City's official sentiments.' "

All told, while the historical practice of flag flying at government buildings favors Boston, the city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech — though nothing prevents Boston from changing its policies going forward.

III

Last, we consider whether Boston's refusal to allow Shurtleff and Camp Constitution to raise their flag amounted to impermissible viewpoint discrimination. …

When a government does not speak for itself, it may not exclude speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination." … Here, Boston concedes that it denied Shurtleff 's request solely because the Christian flag he asked to raise "promoted a specific religion." Under our precedents, and in view of our government-speech holding here, that refusal discriminated based on religious viewpoint and violated the Free Speech Clause.

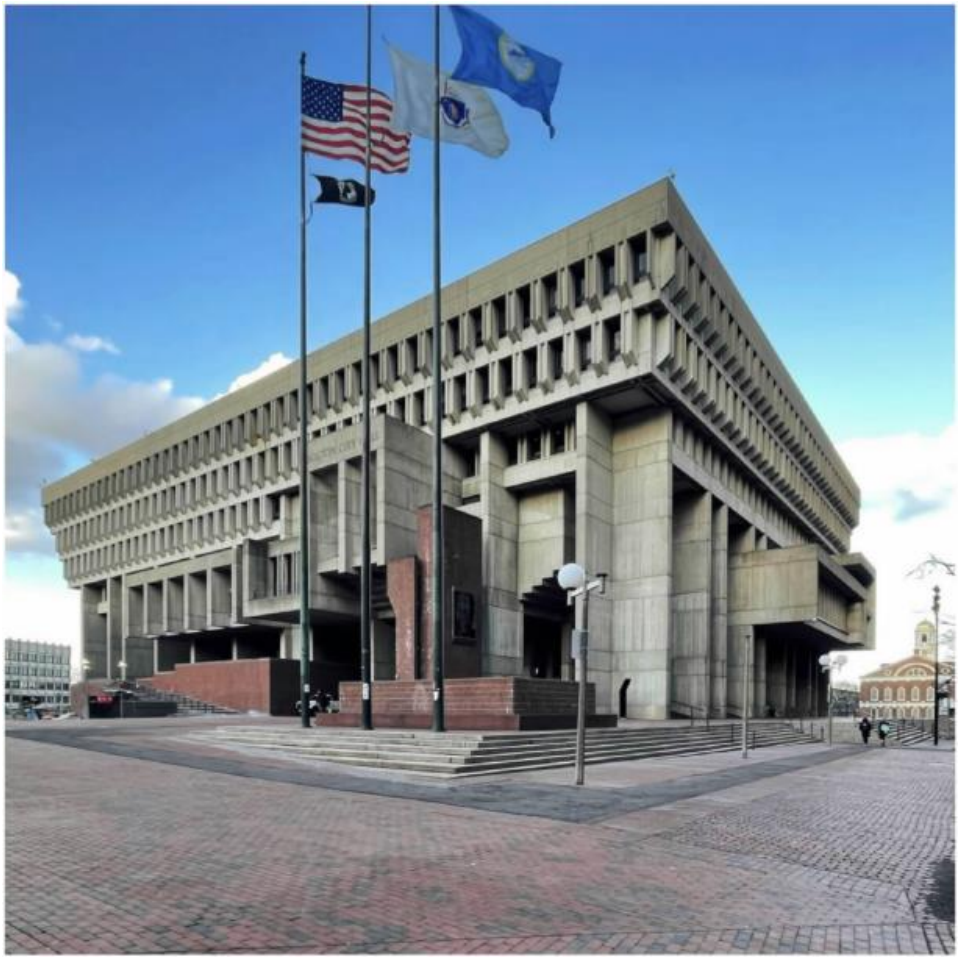
* * *

For the foregoing reasons, we conclude that Boston's flag-raising program does not express government speech. As a result, the city's refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment. We reverse the First Circuit's contrary judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

The flagpoles outside Boston City Hall fly the American flag, the Commonwealth of Massachusetts flag, and the city flag, side by side, on an ordinary day.



JUSTICE KAVANAUGH, concurring. [omitted]

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, concurring in the judgment.

I agree with the Court's conclusion that Boston (hereafter City) violated the First Amendment's guarantee of freedom of speech when it rejected Camp Constitution's application to fly what it characterized as a "Christian flag." But I cannot go along with the Court's decision to analyze this case in terms of the triad of factors — history, the public's perception of who is speaking, and the extent to which the government has exercised control over speech — that our decision in *Walker* derived from *Summum*. As the Court now recognizes, those cases did not set forth a test that always and everywhere applies when the government claims that its actions are immune to First Amendment challenge under the government-speech doctrine. And treating those factors as a test obscures the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression.

I

The government-speech doctrine recognizes that the Free Speech Clause of the First Amendment "restricts government regulation of private speech" but "does not regulate government speech." That doctrine presents no serious problems when the government speaks in its own voice — for example, when an official gives a speech in a representative capacity or a governmental body issues a report. But courts must be very careful when a government claims that speech by one or more private speakers is actually government speech. When that occurs, it can be difficult to tell whether the government is using the doctrine "as a subterfuge for favoring certain private speakers over others based on viewpoint," and the government-speech doctrine becomes "susceptible to dangerous misuse."

In *Tam*, for example, the United States defended a statutory provision that permitted the Patent and Trademark Office to deny federal registration to "disparaging" marks, on the theory that "the registration of a trademark converts the mark into government speech." We rejected that argument and held that because the Government's role in registration was limited to applying a standard of assessment to marks generated by private parties, registered marks are not government speech. But the Government's position had radical implications: If registration transforms trademarks into government speech, the same logic would presumably hold for other speech included on systems of government registration. Books on the copyright registry, for example, would count as the Government's own speech — presumably subject to editorial control. And the Government would be free to exclude authors from copyright protection based on their views.

To prevent the government-speech doctrine from being used as a cover for censorship, courts must focus on the identity of the speaker. The ultimate question is whether the government is actually expressing its own views or the real speaker is a private party and the government is surreptitiously engaged in the "regulation of private speech." But our precedent has never attempted to specify a general method for deciding that question, and the Court goes wrong in proceeding as though our

decisions in *Walker* and *Summum* settled on anything that might be considered a "government-speech analysis." In both cases, we employed a fact-bound totality-of-the-circumstances inquiry that relied on the factors that appeared helpful in evaluating whether the speech at issue was government or private speech. We did not set out a test to be used in all government-speech cases, and we did not purport to define an exhaustive list of relevant factors. And in light of the ultimate focus of the government-speech inquiry, each of the factors mentioned in those cases could be relevant only insofar as it sheds light on the identity of the speaker. When considered in isolation from that inquiry, the factors central to *Walker* and *Summum* can lead a court astray.

Consider first "the extent to which the government has actively shaped or controlled the expression." Government control over speech is relevant to speaker identity in that speech by a private individual or group cannot constitute government speech if the government does not attempt to control the message. But control is also an essential element of censorship. Consider this example. The British Licensing Act of 1737 prohibited the performance of any "interlude, tragedy, comedy, opera, play, farce, or other entertainment" without a patent issued by the King of England or a "License from the Lord Chamberlain of Her Majesty's Household." This regime attracted criticism precisely because it gave the Lord Chamberlain extensive "control over the nature and content" of covered performances. One of the leading critics of the Act—the playwright George Bernard Shaw — was denied permission to perform several plays, including Mrs. Warren's Profession, The Shewing-up of Blanco Posnet, and Press Cuttings. But had the Lord Chamberlain approved these plays, would anyone seriously maintain that those plays were thereby transmuted into the government's speech?

As this illustration shows, neither "control" nor "final approval authority" can in itself distinguish government speech from censorship of private speech, and analyzing that factor in isolation from speaker identity flattens the distinction between government speech and speech tolerated by the censor. And it is not as though "actively" exercising control over the "nature and content" of private expression makes a difference, as the Court suggests, *ibid.* Censorship is not made constitutional by aggressive and direct application.

Next, turn to the history of the means of expression. Historical practice can establish that a means of expression "*typically* represents government speech." *Summum* (emphasis added). But in determining whether speech is the government's, the real question is not whether a form of expression is *usually* linked with the government but whether the speech *at issue* expresses the government's own message. Governments can put public resources to novel uses. And when governments allow private parties to use a resource normally devoted to government speech to express their own messages, the government cannot rely on historical expectations to pass off private speech as its own.

This case exemplifies the point. Governments have long used flags to express government messages, so this factor provides prima facie support for Boston's position under the Court's mode of analysis. But on these facts, the history of flags clearly cannot have any bearing on whether the flag displays express the City's own message. The City put the flagpoles to an unorthodox use — allowing private parties

to use the poles to express messages that were not formulated by City officials. Treating this factor as significant in that circumstance loads the dice in favor of the government's position for no obvious reason.

Now consider the third factor: "the public's likely perception as to who (the government or a private person) is speaking." Our earlier government-speech precedents recognized that "the correct focus" of the government-speech inquiry "is not on whether the . . . reasonable viewer would identify the speech as the government's," *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550 (2005) [Note Chapter 9 and Note *supra* this chapter], and with good reason. Unless the public is assumed to be omniscient, public perception cannot be relevant to whether the government *is* speaking, as opposed merely *appearing* to speak. Focusing on public perception encourages courts to categorize private expression as government speech in circumstances in which the public is liable to misattribute that speech to the government. This case once again provides an apt illustration. As the Court rightly notes, "a passerby on Cambridge Street" confronted with a flag flanked by government flags standing just outside the entrance of Boston's seat of government would likely conclude that all of those flags "convey some message on the government's behalf." If that is the case, this factor supports the exclusion of private parties from using the flagpoles even though the government allows private parties to use the flagpoles to express private messages, presumably because those messages may be erroneously attributed to the government. But there is no obvious reason why a government should be entitled to suppress private views that might be attributed to it by engaging in viewpoint discrimination. The government can always disavow any messages that might be mistakenly attributed to it.

The factors relied upon by the Court are thus an uncertain guide to speaker identity. But beyond that, treating these factors as a freestanding test for the existence of government speech artificially separates the question whether the government is speaking from whether the government is facilitating or regulating private speech. Under the Court's factorized approach, government speech occurs when the government exercises a "sufficient" degree of control over speech that occurs in a setting connected with government speech in the eyes of history and the contemporary public, regardless of whether the government is actually merely facilitating private speech. This approach allows governments to exploit public expectations to mask censorship.

And like any factorized analysis, this approach cannot provide a principled way of deciding cases. The Court's analysis here proves the point. The Court concludes that two of the three factors — history and public perception — favor the City. But it nonetheless holds that the flag displays did not constitute government speech. Why these factors drop out of the analysis — or even do not justify a contrary conclusion — is left unsaid. This cannot be the right way to determine when governmental action is exempt from the First Amendment.

II

A

I would resolve this case using a different method for determining whether the government is speaking. In my view, the minimum conditions that must be met for expression to count as "government speech" can be identified by considering the definition of "government speech" and the rationale for the government-speech doctrine. Under the resulting view, government speech occurs if — but only if — a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech.

Defined in literal terms, "government speech" is "speech" spoken by the government. "Speech," as that term is used in our First Amendment jurisprudence, refers to expressive activity that is "intended to be communicative" and, "in context, would reasonably be understood . . . to be communicative." . . . For "speech" to be spoken by the government, the relevant act of communication must be government action. Governments are not natural persons and can only communicate through human agents who have been given the power to speak for the government. … And because "speech" requires the purposeful communication of the speaker's own message, the message expressed must have been formulated by a person with the power to determine what messages the government will communicate. In short, the government must "set the overall message to be communicated" through official action. *Johanns*.

Government speech is thus the purposeful communication of a governmentally determined message by a person exercising a power to speak for a government. But not all governmental activity that qualifies as "government speech" in this literal and factual sense is exempt from First Amendment scrutiny. For although we have said that the Free Speech Clause "has no application" when a government is "engaging in its own expressive conduct," *Summum*, we have also recognized that "the Free Speech Clause itself may constrain the government's speech" under certain conditions, as when a "government seeks to compel private persons to convey the government's speech." *Walker*; see also *Wooley v. Maynard* (1977); *West Virginia Bd. of Ed. v. Barnette* (1943) [both Chapter 9]. …

It follows that to establish that expression constitutes government speech exempt from First Amendment attack, the government must satisfy two conditions. First, it must show that the challenged activity constitutes government speech in the literal sense — purposeful communication of a governmentally determined message by a person acting within the scope of a power to speak for the government. Second, the government must establish it did not rely on a means that abridges the speech of persons acting in a private capacity. It is only then that "the Free Speech Clause has no application." *Summum*.

This framework explains the conditions under which government communication that relies on private parties can constitute government speech. Our precedents recognize two ways in which a government can speak using private assistance. First, the government can prospectively "enlist private entities to convey its own message" by deputizing private persons as its agents. …

Second, the government can "adopt" a medium of expression created by a private party and use it to express a government message. In that circumstance, private parties are not deputized by the government; instead a private person

generates a medium of expression and transfers it to the government. For the adopted expression to qualify as the government's, the private party must alienate control over the medium of expression to the government. And government actors must put the medium to use to intentionally express a government message. Compare *Summum* (holding that a government adopted donated monument because it "took ownership of that monument and put it on permanent display in a park that it owns and manages"), with *Tam* (no adoption occurred because governments neither produced nor took ownership of privately generated trademarks). Otherwise, the government is simply providing a forum for private parties to submit their own productions and usual First Amendment principles apply. And to avoid running afoul of the prohibition on compelled speech, that alienation must be voluntary. …

B

Analyzed under this framework, the flag displays were plainly private speech within a forum created by the City, not government speech. The record attests that the City's application materials — which were the only written form of guidance available on the program prior to the adoption of a written policy in 2018 — characterized the flagpoles as one of the City's "public forums." The application guidelines did not enumerate any criteria for access to the flagpoles that go beyond those typical of a resource that has been made generally available to the public. The first rejection of an application was the denial of Camp Constitution's application in 2017. Prior to then, the City never rejected any request to raise a flag submitted by any private party. And private speakers accounted for 78% of the flag-raising applicants.

A program with this design cannot possibly constitute government speech. The City did nothing to indicate an intent to communicate a message. Nor did it deputize private speakers or appropriate private-party expressive content. The flags flown reflected a dizzying and contradictory array of perspectives that cannot be understood to express the message of a single speaker. … Indeed, the City disclaimed virtually all messages expressed by characterizing the flagpoles as a "public forum" and adopting access criteria consistent with generalized public use. The City's policy and practice thus squarely indicate an intent to open a public forum for any private speakers who met the City's basic criteria. The requirement of viewpoint neutrality applies to any forum of this kind. …

On this record … the only viable inference is that the City had no policy restricting access to the forum apart from the modest access conditions articulated in the application materials. Having created a forum with those characteristics, the City could not reject Shurtleff 's application on account of the religious viewpoint he intended to express. For that reason, I agree with the Court's ultimate conclusion and concur in the judgment.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring in the judgment. [Justice Gorsuch addressed the question whether a city's display of a "Christian flag" would violate the Establishment Clause. His consideration of that issue is examined in

Chapter 17.]

Note: Flagpoles, Free Speech, and "Factorizing" the Government Speech Doctrine

1. Justice Breyer's majority opinion appears to consider *Shurtleff* simply to require a straightforward application of the factors he distills from the Court's previous government speech cases. Do you agree that *Shurtleff* is best analyzed via the factors he identifies? If so, are you persuaded that the Court reached the right result, given the fact that two of the three factors cut in favor of Boston's argument? Justice Breyer concluded that the third factor — whether the city "actively shaped or controlled" the relevant expression — was "the most salient feature of this case." Does he explain why that is?

2. Justice Alito challenges what he called the majority's "factorized" approach to the government speech question. Instead, he argues that "government speech occurs if — but only if — a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech." Do you find that approach more workable than the majority's reliance on the factors it distills from the earlier government speech cases? To what extent does at least the first part of his test repeat the third prong Justice Breyer identified (the one he characterized as *Shurtleff*'s "most salient feature"? Does it lead to more principled results? Does it better reflect the core values underlying the idea of government speech that is free from First Amendment scrutiny?

3. Justice Alito's discussion of his alternative view of government speech analysis included a footnote addressing how his approach jibed with *Walker*, where he wrote the dissenting opinion. He wrote as follows:

> The place of *Walker* within [Justice Alito's proposed] framework warrants comment. In that case, properly understood, the government claimed to have adopted specialty-license-plate designs submitted by private parties and actually did "own the designs on its license plates," But it was not obvious how designs such as "Rather Be Golfing" could possibly express a government message. Id. (ALITO, J., dissenting). In other words, although the private parties alienated control over the plate designs, the government did not have any purpose to communicate, and instead allowed private parties to use personal plates to communicate their own messages. This expansive understanding of government speech by adoption should be confined to government-issued IDs. As we have said, *Walker* "likely marks the outer bounds of the government-speech doctrine." *Matal*.

Is Justice Alito conceding that his test is inconsistent with *Walker*'s approach, or rather is he suggesting that *Walker* asked the right questions but came to the wrong answer?

4. Justice Alito's dissent takes issue with the majority's concern that a passer-by might misattribute the message on the city's flagpole as the city's own. In response to that concern, he states that "The government can always disavow any messages that might be mistakenly attributed to it." Consider the facts in both *Shurtleff* and *Walker*. How easy would such disavowals be? How effective might they be? On the other hand, how straightforward is Justice Breyer's analysis of the misattribution issue in *Shurtleff*?

5. Finally, consider Justice Alito's "factorizing" critique more broadly. As you have surely noticed, not just in First Amendment law but in constitutional law more generally, the Supreme Court is quite fond of multi-factor balancing tests. (Indeed, that latter term is likely very familiar to you.) Does Justice Alito's critique apply to all those other areas as well? Or is there something about government speech issues in particular that potentially renders that approach inappropriate?

Chapter 17
The Establishment Clause

A. Financial Aid to Religion

2. The *Lemon* Test as Modified

Page 878*: insert new note #3 after note #2:*

3. The rest of the cases in this chapter were decided within the rubric of the *Lemon* test. In *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022) (note *infra* this chapter; Chapter 19), the *Lemon* test was rejected. The majority announced that "the Establishment Clause must be interpreted by reference to historical practices and understandings." As you read the decisions between 1971 and 2022, contemplate whether the history-and-tradition test would result in different outcomes from the *Lemon* test.

E. Displays in Public Places

Page 980*: insert two new notes after Appendix and before the Problem:*

Note: Justice Gorsuch Digs a Grave for the Lemon Test

1. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the Supreme Court ruled that the public school district violated the Free Speech Clause by denying a church access to school premises after hours solely because the film series it wanted to show dealt with family values from a religious standpoint. The majority invoked the three-part *Lemon* test to conclude that the school district was mistaken to believe that doing so would have been an establishment of religion. In his concurring opinion, *id.* at 398-99 (citations omitted), Justice Scalia created a vivid metaphor for the *Lemon* test that — pun intended — has had a life of its own:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee v. Weisman* (1992) [*supra* this chapter], conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion [Justice White] repeatedly), and a sixth has joined an opinion doing so. [Here Justice Scalia named names with citations to their opinions: Justices Scalia, Thomas, Kennedy, O'Connor, Rehnquist, and White.]
>
> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

2. "This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie." Echoing Justice Scalia's metaphor, that was the bottom line of Justice Gorsuch's concurring opinion in *Shurtleff v. City of Boston* (2022) (Chapter 13) that seemed to dig an open grave for *Lemon v. Kurtzman* (1971) (*passim* this chapter). All nine Justices agreed that Boston's flag-raising program was not government speech, and therefore, the city violated the free speech rights of petitioners by refusing them permission to hoist the Christian Flag during their event

on the City Hall Plaza. *See* Note: Boston's Flagpole and a Christian Flag (Chapter 19). However, neither Justice Breyer's majority opinion nor Justice Alito's concurring opinion even referenced *Lemon*. Indeed, as Justice Scalia noted above and Justice Gorsuch repeated below, ignoring that decision has been a regular *stare decisis* move that has characterized the life of that precedent. Therefore, a majority did not formally vote to overrule it in *Shurtleff*. A month later, in *Kennedy v. Bremerton School District* (2022), discussed in the next Note, Justice Gorsuch did write for a majority to declare that *Lemon* was formally overruled.

> Justice GORSUCH, with whom Justice THOMAS joins, concurring in the judgment in *Shurtleff*.
>
> The real problem in this case doesn't stem from Boston's mistake about the scope of the government speech doctrine or its error in applying our public forum precedents. The trouble here runs deeper than that. Boston candidly admits that it refused to fly the petitioners' flag while allowing a secular group to fly a strikingly similar banner. And the city admits it did so for one reason and one reason only: It thought displaying the petitioners' flag would violate " 'the Constitution's Establishment Clause.' " App. to Pet. for Cert. That decision led directly to this lawsuit, all the years of litigation that followed, and the city's loss today. Not a single Member of the Court seeks to defend Boston's view that a municipal policy allowing all groups to fly their flags, secular and religious alike, would offend the Establishment Clause.
>
> How did the city get it so wrong? To be fair, at least some of the blame belongs here and traces back to *Lemon v. Kurtzman* (1971) [*supra* this chapter]. Issued during a " 'bygone era' " when this Court took a more freewheeling approach to interpreting legal texts, *Lemon* sought to devise a one-size-fits-all test for resolving Establishment Clause disputes. That project bypassed any inquiry into the Clause's original meaning. It ignored longstanding precedents. And instead of bringing clarity to the area, *Lemon* produced only chaos. In time, this Court came to recognize these problems, abandoned *Lemon*, and returned to a humbler jurisprudence centered on the Constitution's original meaning. Yet in this case, the city chose to follow *Lemon* anyway. It proved a costly decision, and Boston's travails supply a cautionary tale for other localities and lower courts. . . .
>
> The only sure thing *Lemon* yielded was new business for lawyers and judges. Before *Lemon*, this Court had never held a flag or other similar public display to constitute an unconstitutional "establishment" of religion. After *Lemon*, cases challenging public displays under the Establishment Clause came fast and furious. And just like the test itself, the results proved a garble. May a State or local government display a Christmas nativity scene? Some courts said yes, others no. How about a menorah? Again, the answers ran both ways. What about a city seal that features a cross? Good luck. [If] anything, the confusion grew with time. . . .

Ultimately, *Lemon* devolved into a kind of children's game. Start with a Christmas scene, a menorah, or a flag. Then pick your own "reasonable observer" avatar. In this game, the avatar's default settings are lazy, uninformed about history, and not particularly inclined to legal research. His default mood is irritable. To play, expose your avatar to the display and ask for his reaction. How does he *feel* about it? Mind you: Don't ask him whether the proposed display actually amounts to an establishment of religion. Just ask him if he *feels* it "endorses" religion. If so, game over.

Faced with such a malleable test, risk-averse local officials found themselves in an ironic bind. To avoid Establishment Clause liability, they sometimes felt they had to discriminate against religious speech and suppress religious exercises. But those actions, in turn, only invited liability under other provisions of the First Amendment. The hard truth is, *Lemon*'s abstract and ahistoric test put "policymakers . . . in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other."

Our case illustrates the problem. The flags of many nations bear religious symbols. So do the flags of various private groups. Historically, Boston has allowed them all. The city has even flown a flag with a cross nearly identical in size to the one on petitioners' flag. It was a banner presented by a secular group to commemorate the Battle of Bunker Hill. Yet when the petitioners offered their flag, the city flinched. Perhaps it worried: Would the assigned judge's imagined "reasonable observer" bother to learn about its generous policy for secular groups? Would this observer take the trouble to consult the long tradition in this country allowing comparable displays? Or would he turn out to be an uninformed passerby offended by the seeming incongruity of a new flag flying beside those of the city, State, and Nation? Who could tell? Better to err on the safe side and reject the petitioners' flag. As it turned out, though, that route only invited years of litigation and a unanimous adverse decision because no government may discriminate against religious speech in a public forum. To avoid a spurious First Amendment problem, Boston wound up inviting a real one. Call it a *Lemon* trade.

While it is easy to see how *Lemon* led to a strange world in which local governments have sometimes violated the First Amendment in the name of protecting it, less clear is why this state of affairs still persists. *Lemon* has long since been exposed as an anomaly and a mistake. . . .

Recognizing *Lemon*'s flaws, this Court has not applied its test for nearly two decades. In *Town of Greece v. Galloway* (2014) [*supra* this chapter] this Court declined an invitation to use the *Lemon* test. Instead, the Court explained that the primary question in Establishment Clause cases is whether the government's conduct "accords with history and faithfully reflects the understanding of the

Founding Fathers." The Court observed that this form of analysis represents the rule rather than "an exception" within the "Court's Establishment Clause jurisprudence." *Id.*

In *American Legion v. American Humanist Association* (2019) (plurality opinion) [*supra* this chapter] we underscored the message. Again, we expressly refused to apply *Lemon*, this time in a challenge to a public display — the very kind of dispute *Lemon*'s test ushered into existence and where it once held sway. Again, we explained that "if the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met." *Id*. And again we stressed that the right place to look for guidance lies in " ' historical practices and understandings. ' " *Id.* (quoting *Town of Greece*).

With all these messages directing and redirecting the inquiry to original meaning as illuminated by history, why did Boston still follow *Lemon* in this case? Why do other localities and lower courts sometimes do the same thing, allowing *Lemon* even now to "sit up in its grave and shuffle abroad"? *Lamb's Chapel v. Center Moriches Union Free School Dist.* 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgement) ? There may be other contributing factors but let me address two.

First, it's hard not to wonder whether some simply prefer the policy outcomes *Lemon* can be manipulated to produce. Just dial down your hypothetical observer's concern with facts and history, dial up his inclination to offense, and the test is guaranteed to spit out results more hostile to religion than anything a careful inquiry into the original understanding of the Constitution could sustain. *Lemon* may promote an unserious, results-oriented approach to constitutional interpretation. But for some, that may be more a virtue than a vice. [There] is more than a little in the record before us to suggest this line of thinking. . . . [To] the extent this is why some still invoke *Lemon* today, it reflects poorly on us all. . . . [Today's] case is just one more in a long line of reminders about the costs associated with governmental efforts to discriminate against disfavored religious speakers. *See Good News Club v. Milford Central School* (2001) [Chapter 19]; *Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) [Chapter 19].

Second, it seems that *Lemon* may occasionally shuffle from its grave for another and more prosaic reason. By demanding a careful examination of the Constitution's original meaning, a proper application of the Establishment Clause no doubt requires serious work and can pose its challenges. *Lemon*'s abstract three-part test may seem a simpler and tempting alternative to busy local officials and lower courts. But if this is part of the problem, it isn't without at least a partial remedy. For our constitutional history contains some helpful hallmarks that localities and lower courts can rely on.

Beyond a formal declaration that a religious denomination was in fact the established church, it seems that founding-era religious establishments often bore certain other telling traits. First, the government exerted control over the doctrine and personnel of the established church. Second, the government mandated attendance in the established church and punished people for failing to participate. Third, the government punished dissenting churches and individuals for their religious exercise. Fourth, the government restricted political participation by dissenters. Fifth, the government provided financial support for the established church, often in a way that preferred the established denomination over other churches. And sixth, the government used the established church to carry out certain civil functions, often by giving the established church a monopoly over a specific function. Most of these hallmarks reflect forms of "coercion" regarding "religion or its exercise." *Lee v. Weisman* (1992) (Scalia, J., dissenting) [*supra* this chapter].

These traditional hallmarks help explain many of this Court's Establishment Clause cases, too. This Court, for example, has held unlawful practices that restrict political participation by dissenters, including rules requiring public officials to proclaim a belief in God. *See Torcaso v. Watkins* (1961) [Chapter 19]. It has checked government efforts to give churches monopolistic control over civil functions. At the same time, it has upheld nondiscriminatory public financial support for religious institutions alongside other entities. *See Espinoza v. Montana Dept. of Revenue*, (2020) [Chapter 19]; *Zelman v. Simmons-Harris* (2002) [*supra* this chapter]. The thread running through these cases derives directly from the historical hallmarks of an establishment of religion — government control over religion offends the Constitution but treating a church on par with secular entities and other churches does not.

These historical hallmarks also help explain the result in today's case and provide helpful guidance for those faced with future disputes like it. As a close look at these hallmarks and our history reveals, "no one at the time of the founding is recorded as arguing that the use of religious symbols in public contexts was a form of religious establishment." For most of its existence, this country had an "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." [*See* Problem: Ceremonial Deism, Chapter 16]. In fact, and as we have seen, it appears that, until *Lemon*, this Court had never held the display of a religious symbol to constitute an establishment of religion. The simple truth is that no historically sensitive understanding of the Establishment Clause can be reconciled with a rule requiring governments to "roam the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine." *American Legion*. Our Constitution was not designed to erase religion from American life; it was designed to ensure "respect and tolerance." *Id.*

> To justify a policy that discriminated against religion, Boston sought to drag *Lemon* once more from its grave. It was a strategy as risky as it was unsound. *Lemon* ignored the original meaning of the Establishment Clause, it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game. This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie.

Note: Now it is Official: Lemon v. Kurtzman *is Overruled*

1. It is a foundational proposition of *stare decisis* in the Supreme Court that only a majority can speak for the Court or provide an authoritative explanation of its judgments. *See, e.g.*, *California v. Sierra Club*, 451 U.S. 287, 301 n.5 (1981). Thus, what Justice Gorsuch wrote above in *Shurtleff v. City of Boston* (2022) (Note *supra* this chapter) represented the views of only two of the nine Justices and not a majority. *See also Marks v. United States*, 430 U.S. 188 (1976) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds."). However, it surely was not a coincidence that he penned that concurring opinion while he was preparing the following majority opinion. In *Kennedy v. Bremerton School Dist.*, 142 S.Ct. 2407 (2022) (Chapter 19), Justice Gorsuch wrote the majority opinion, joined by Chief Justice Roberts and Justices Thomas, Alito, Barrett, and Kavanaugh. That six member majority decisively declared, "this Court long ago abandoned *Lemon*." The dissent, authored by Justice Sotomayor and joined by Justices Breyer and Kagan, disputed whether *Lemon* had previously been formally overruled in any majority opinion, but fully admitted that in the case *sub judice*, "The Court goes much further, overruling *Lemon* entirely and in all contexts."

2. Here is a sampling of the majority opinion's discussion of the Establishment Clause and the now overruled *Lemon* test:

> Petitioner Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied. Still, the Bremerton School District disciplined him anyway. It did so because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike. . . .

> [The] District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. On its account, Mr. Kennedy's prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in "direct tension" with the competing demands of the Establishment Clause. To resolve that clash, the District reasoned, Mr. Kennedy's rights had to "yield." The Ninth Circuit pursued this same line of thinking, insisting that the District's interest in avoiding an Establishment Clause violation " 'trumped' " Mr. Kennedy's rights to religious exercise and free speech.
>
> But how could that be? It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." Amdt. 1. A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others. See *Everson v. Board of Ed. of Ewing* (1947) [*supra* this chapter].
>
> The District arrived at a different understanding this way. It began with the premise that the Establishment Clause is offended whenever a "reasonable observer" could conclude that the government has "endorsed" religion. The District then took the view that a "reasonable observer" could think it "endorsed Kennedy's religious activity by not stopping the practice." On the District's account, it did not matter whether the Free Exercise Clause protected Mr. Kennedy's prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never actually endorsed Mr. Kennedy's prayer, no one complained that it had, and a strong public reaction only followed after the District sought to ban Mr. Kennedy's prayer. Because a reasonable observer could (mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own "vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other," placed itself in the middle, and then chose its preferred way out of its self-imposed trap. *See Shurtleff v. Boston* (2022) (Gorsuch, J., concurring in judgment) [note *supra* this chapter].
>
> To defend its approach, the District relied on *Lemon v. Kurtzman* (1971) (*passim* this chapter) and its progeny. In upholding the District's actions, the Ninth Circuit followed the same course. And, to be sure, in *Lemon* this Court attempted a "grand unified theory" for assessing Establishment Clause claims. *American Legion v. American Humanist Assn.* (2019) (plurality opinion) [*supra* this chapter]. That approach called for an examination of a law's purposes, effects, and

potential for entanglement with religion. *Lemon.* In time, the approach also came to involve estimations about whether a "reasonable observer" would consider the government's challenged action an "endorsement" of religion. *See Shurtleff* (Gorsuch, J., concurring).

What the District and the Ninth Circuit overlooked, however, is that the "shortcomings" associated with this "ambitious," abstract, and ahistorical approach to the Establishment Clause became so "apparent" that this Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion* (plurality opinion); *see also Town of Greece v. Galloway* (2014) [*supra* this Chapter]. The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "mine-field" for legislators. This Court has since made plain, too, that the Establishment Clause does not include anything like a "modified heckler's veto, in which . . . religious activity can be proscribed" based on " perceptions" or "discomfort." *Good News Club v. Milford Central School* (2001) [Chapter 19]. An Establishment Clause violation does not automatically follow whenever a public school or other government entity "fails to censor" private religious speech. Nor does the Clause "compel the government to purge from the public sphere" anything an objective observer could reasonably infer endorses or "partakes of the religious." *Van Orden v. Perry* (2005) (Breyer, J., concurring in judgment) [*supra* Chapter 16]. In fact, just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test. *See Shurtleff*; *id*. (Alito, J., concurring in judgment); *id*. (Gorsuch, J., concurring).[4]

In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by

[4] Nor was that decision an outlier. In the last two decades, this Court has often criticized or ignored *Lemon* and its endorsement test variation. *See, e.g., Espinoza v. Montana Dept. of Revenue* (2020) [Chapter 19]; *American Legion v. American Humanist Assn*. (2019) [*supra* this Chapter]; *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) [note Chapter 19]; *Town of Greece v. Galloway* (2014) [*supra* this chapter]; *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012) [Chapter 19]. A vast number of Justices have criticized those tests over an even longer period. *See Shurtleff v. Boston* (2022) (Gorsuch, J., concurring) (collecting opinions authored or joined by Roberts and Rehnquist, C. J., and Thomas, Breyer, Alito, Kavanaugh, Stevens, O'Connor, Scalia, and Kennedy, JJ.) [Chapter 13]. The point has not been lost on our lower court colleagues [as represented in the Ninth Circuit proceedings in this case where several dissenters argued that the majority misunderstood *Lemon* and was mistaken to apply it]. *See, e.g.*, 4 F. 4th 910, 939–941 (2021) (O'Scanlan, J., respecting denial of rehearing en banc); id., at 945 (R. Nelson, J., dissenting from denial of rehearing en banc); id., at 947, n. 3 (collecting lower court cases from "around the country" that "have recognized *Lemon*'s demise").

> "reference to historical practices and under- standings." *Town of Greece*; *see also American Legion* (plurality opinion). " The line " that courts and governments "must draw between the permissible and the impermissible" has to "accord with history and faithfully reflect the understanding of the Founding Fathers." *Town of Greece* (quoting *School Dist. of Abington Township v. Schempp* (1963) (Brennan, J., concurring) [*supra* this Chapter]). An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "exception" within the "Court's Establishment Clause jurisprudence." Id.; *see American Legion* (plurality opinion); *Torcaso v. Watkins* (1961) [Chapter 19] (analyzing certain historical elements of religious establishments). The [School] District and the Ninth Circuit erred by failing to heed this guidance.

3. As noted above, the dissent, authored by Justice Sotomayor and joined by Justices Breyer and Kagan, disputed whether *Lemon* had previously been formally overruled in any majority opinion, but recognized that in the case *sub judice*, "The Court goes much further, overruling *Lemon* entirely and in all contexts."

> For decades, the Court has recognized that, in determining whether a school has violated the Establishment Clause, "one of the relevant questions is whether an objective observer, acquainted with the text, legislative history, and implementation of the [practice], would perceive it as a state endorsement of prayer in public schools." The Court now says for the first time that endorsement simply does not matter, and completely repudiates the test established in *Lemon v. Kurtzman* (1971) [*passim* this chapter]. *Ante*. Both of these moves are erroneous and, despite the Court's assurances, novel.
>
> Start with endorsement. . . . The endorsement inquiry considers the perspective not of just any hypothetical or uninformed observer experiencing subjective discomfort, but of "the reasonable observer" who is "aware of the history and context of the community and forum in which the religious [speech takes place]." That is because "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort" but concern "with the political community writ large." Given this concern for the political community, it is unsurprising that the Court has long prioritized endorsement concerns in the context of public education. . . . No subsequent decisions in other contexts, including the cases about monuments and legislative meetings on which the Court relies, have so much as questioned the application of this core Establishment Clause concern in the context of public schools. . . . In short, the endorsement inquiry dictated by precedent is a measured, practical, and administrable one, designed to account for the competing interests present within any given community.
>
> Despite all of this authority, the Court claims that it "long ago abandoned" both the "endorsement test" and this Court's decision in

Lemon. *Ante*. The Court chiefly cites the plurality opinion in *American Legion v. American Humanist Assn.* (2019) [*supra* this chapter] to support this contention. That plurality opinion, to be sure, criticized *Lemon*'s effort at establishing a "grand unified theory of the Establishment Clause" as poorly suited to the broad "array" of diverse establishment claims. All the Court in *American Legion* ultimately held, however, was that application of the *Lemon* test to "longstanding monuments, symbols, and practices" was ill-advised for reasons specific to those contexts. The only categorical rejection of *Lemon* in *American Legion* appeared in separate writings. *Id*. (Kavanaugh, J., concurring); *id*. (Thomas, J., concurring in judgment); *id*. (Gorsuch, J., concurring in judgment). [Repositioned footnote 6: The Court also cites *Shurtleff v. Boston* (2022) [Note *supra* this chapter], as evidence that the *Lemon* test has been rejected. *See ante*. Again, while separate writings in *Shurtleff* criticized *Lemon*, the Court did not. The opinion of the Court simply applied the longstanding rule that, when the government does not speak for itself, it cannot exclude speech based on the speech's "religious viewpoint." *Shurtleff*. The Court further infers *Lemon*'s implicit overruling from recent decisions that do not apply its test. *See ante* n. 4. As explained above, however, not applying a test in a given case is a different matter from overruling it entirely and, moreover, the Court has never before questioned the relevance of endorsement in the school-prayer context.

The Court now goes much further, overruling *Lemon* entirely and in all contexts. It is wrong to do so. *Lemon* summarized "the cumulative criteria developed by the Court over many years" of experience "drawing lines" as to when government engagement with religion violated the Establishment Clause. *Lemon* properly concluded that precedent generally directed consideration of whether the government action had a "secular legislative purpose," whether its "principal or primary effect must be one that neither advances nor inhibits religion," and whether in practice it "foster[s] 'an excessive government entanglement with religion.' " *Id*. It is true "that rigid application of the *Lemon* test does not solve every Establishment Clause problem," but that does not mean that the test has no value. *American Legion* (Kagan, J., concurring in part). To put it plainly, the purposes and effects of a government action matter in evaluating whether that action violates the Establishment Clause, as numerous precedents beyond *Lemon* instruct in the particular context of public schools. Neither the critiques of *Lemon* as setting out a dispositive test for all seasons nor the fact that the Court has not referred to *Lemon* in all situations support this Court's decision to dismiss that precedent entirely, particularly in the school context.

Upon overruling one "grand unified theory," the Court introduces another: It holds that courts must interpret whether an Establishment Clause violation has occurred mainly "by reference to historical practices and understandings." *Ante*. Here again, the Court professes that nothing has changed. In fact, while the Court has long

> referred to historical practice as one element of the analysis in specific Establishment Clause cases, the Court has never announced this as a general test or exclusive focus. *American Legion* (Breyer, J., concurring) (noting that the Court was "appropriately 'looking to history for guidance' " but was not "adopting a 'history and tradition test' ").
>
> The Court reserves any meaningful explanation of its history-and-tradition test for another day, content for now to disguise it as established law and move on. It should not escape notice, however, that the effects of the majority's new rule could be profound. The problems with elevating history and tradition over purpose and precedent are well documented. For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules.

4. Six Justices joined the majority opinion, and three Justices joined the dissent. Therefore, all nine members of the High Court recognized that *Kennedy v. Bremerton School Dist.* marks the official overruling of *Lemon v. Kurtzman* and once and for all drives a stake through the heart of the *Lemon* test. This overruling is unmistakable.

5. Looking back on the recent decisions in this chapter, you should have expected the overruling. Do you think the new history-and-tradition test will be an improvement? Thought experiment: go back over the principal cases in this chapter and apply the new test. Which decisions would come out the same? Which decisions would come out differently?

Chapter 18
The Free Exercise Clause

B. Modern Cases

Page 1023*: insert new note #8A before note #9:*

8A. *Ramirez v. Collier*, 142 S.Ct. 1264 (2022), was a RLUIPA case brought by a death row inmate. Ramirez was convicted of murder and sentenced to death. After years of direct and collateral proceedings, Texas notified him of his execution date for a date certain. He promptly filed multiple administrative grievances requesting that his long-time pastor be allowed into the execution chamber and be permitted to "lay hands" on him and "pray over" him during the execution. When those administrative grievances were unsuccessful, Ramirez sued in U.S. District Court under RLUIPA. The District Court denied his request for injunctive relief and the U.S. Court of Appeals for the Fifth Circuit affirmed. The Supreme Court entered a stay of execution, then heard argument on an expedited basis, and reversed and remanded. The Court concluded that Ramirez was likely to succeed on his RLUIPA claim. Chief Justice Roberts delivered the opinion for the Court, joined by Justices Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, and Barrett. Justices Sotomayor and Kavanaugh filed concurring opinions. Only Justice Thomas dissented.

The majority tracked the language of the statute, which provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government demonstrates that the burden imposed on that person is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc–1(a). Ramirez was deemed likely to succeed in proving that his religious requests are "sincerely based on a religious belief." Both the laying on of hands and audible prayer are traditional forms of religious exercise, and Ramirez's pastor confirmed that prayer accompanied by touch is a significant part of their shared faith tradition. The prison officials argued two offsetting and compelling interests. First, they asserted that absolute silence is necessary to monitor the inmate's physical condition during the delicate process of lethal injection and audible prayer could potentially interfere and distract the executioners. The majority was not convinced. Other states and the federal government accommodate audible prayer and Texas itself has allowed its own prison chaplains to audibly pray with the condemned during executions. There is a long history of clerical prayer attending executions. The State does have a compelling interest in preventing disruptions of any sort and maintaining solemnity and decorum in the execution chamber. But the record here provided no indication that Ramirez's pastor would cause these sorts of disruptions, besides there are least restrictive means to avoid those concerns, such as providing extra security personnel. Ramirez is also likely to prevail on his claim that the State's categorical ban on religious touching in the execution chamber is inconsistent with his rights under RLUIPA. The State alleged three compelling governmental interests for the touching ban: security in the execution chamber, preventing unnecessary suffering of the prisoner, and avoiding emotional trauma to the victim's family members in attendance. The majority was not convinced that a categorical ban on religious touching was the least restrictive means of accomplishing any of these admittedly commendable, if not compelling, purposes. The majority went on to reject the State's

argument that Ramirez must be the one to identify other less restrictive means that would accomplish the government's interests, because that was contrary to RLUIPA's statutory burden shifting that favors religious exercise. In short, Texas failed to persuade the Court that the bans on audible prayer and religious touching were the least restrictive means to accomplish the State's otherwise valid purposes. Having concluded that Ramirez was likely to prevail on the merits of his RLUIPA claim, the majority easily concluded that he was likely to suffer irreparable harm absent injunctive relief because he would be unable to engage in protected religious exercises literally in the final moments of his life. That would be a grave spiritual harm that compensation paid to his estate could not remedy. The Texas execution protocol would have to be revised to accommodate his requests. The majority stopped with the RLUIPA claim and did not reach the claim under the Free Exercise Clause.

Justice Sotomayor joined the majority opinion and wrote a separate concurring opinion explaining why clear rules and regulations governing spiritual advisors at executions are necessary. She relied on the Prison Litigation Reform Act (PLRA), which requires prison officials and incarcerated individuals to act in good faith in resolving disputes: prisoners must timely raise their claims through the prison grievance system, and prison officials must ensure that the system is functioning and "available." 42 U.S.C. § 1997e(a).

Justice Kavanaugh joined the Court's opinion and wrote a separate concurring opinion to add three points: one point about the recent history of litigation involving religious advisors in execution rooms on the so-called shadow docket (*See* Note: Choosing Up Sides to Cast the Shadow of Strict Scrutiny on COVID-19 Regulations of Religious Gatherings (*supra* this chapter); a second point about the difficulty of applying RLUIPA's compelling interest and least restrictive means standards; and a third point about state execution procedures going forward. His discursive concurring opinion, which relied in part on a speech he delivered and later published as an article, was an exploration of how RLUIPA applies in the execution chamber:

> *First*, the recent history. The question of religious advisors in the execution room came to this Court three years ago as a question of religious *equality*. Some States had long permitted state-employed chaplains in the execution room. But those state-employed chaplains were mostly Christian. Those States did not allow inmates to have their own religious advisors in the room. Therefore, a Christian inmate could have the state-employed Christian chaplain in the room, but a Buddhist inmate, for example, could not have a Buddhist religious advisor in the room. The Court correctly determined that this practice constituted unlawful religious discrimination because it treated inmates of different religions differently. *See Murphy* v. *Collier*, 139 S.Ct. 1475 (2019). At the same time, the Court stressed that an inmate had to timely raise such a claim so that the execution would not be unreasonably delayed to the detriment of the victims' families, among others. For timeliness reasons, the Court denied relief in the first such claim to reach this Court. But the Court then granted relief in the second such claim, which was timely raised. *Id*.

The bedrock religious equality principle was easy for States to apply: States could either (i) always allow a religious advisor into the execution room or (ii) always exclude a religious advisor, including any state-employed chaplain. But States could not allow religious advisors of some religions while excluding religious advisors of other religions.

Then, however, a different kind of claim emerged. In States that equally barred all advisors from the execution room, some inmates brought a religious *liberty* claim — a claim seeking a religious exemption from an otherwise neutral and generally applicable rule excluding all advisors. The Religious Land Use and Institutionalized Persons Act of 2000 . . . proscribes the State from substantially burdening an inmate's religious exercise except when the State has a compelling interest and employs the least restrictive means to achieve that interest. Suing under RLUIPA, some inmates argued that the State did not have a sufficiently "compelling" interest to exclude religious advisors from the execution room — or at least that the State could satisfy its asserted safety, security, and solemnity interests by means less restrictive than excluding all religious advisors from the room.

And then, in this case, still another kind of claim emerged. Ramirez not only wants a religious advisor in the execution room. He also wants the advisor to be able to engage in audible prayer and even to be able to physically touch him during the execution process. Ramirez argues that the State does not have a sufficiently "compelling" interest to prevent such activities by religious advisors, or at least could satisfy its compelling interests by less restrictive means. For example, security officers in the room could prevent or promptly respond to any disruption or interference.

As to those RLUIPA claims, the Court previously indicated that a State may not completely exclude religious advisors from the execution room, even if the State equally excludes all advisors on a neutral and generally applicable basis. And the Court today further holds that the State may not prevent a religious advisor from engaging in at least some audible prayer and physical touching of the inmate while in the execution room. Although the Court concludes that the State has a compelling interest in ensuring the safety, security, and solemnity of the execution room, the Court decides that the State can satisfy those interests by means less restrictive than excluding religious advisors altogether or restricting religious advisors from audible prayer and touching.

Second, the Court's holding implicates significant issues about how the Court decides whether a State's asserted interest is sufficiently "compelling" and how the Court assesses whether less restrictive means could satisfy that compelling interest. This case illustrates both the difficulty of those inquiries and the important role that history and state practice often play in the analysis.

The compelling interest standard of RLUIPA — like the compelling interest standard that the Court employs when applying strict scrutiny to examine state limitations on certain constitutional rights — necessarily operates as a balancing test. *See generally* Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1914–1919 (2017). The Court starts with a heavy presumption against a state law that infringes the constitutional or statutory right in question. The Court allows state infringement on that right only when the State has a sufficiently "compelling" interest.

But what does "compelling" mean, and how does the Court determine when the State's interest rises to that level? And how does the Court then determine whether less restrictive means would still satisfy that interest? Good questions, for which there are no great answers. Sometimes, the Court looks to a State's policy-based or commonsense arguments. Often, the Court also examines history and contemporary state practice to inform the inquiries.

Here, the State asserts that it has a compelling interest in ensuring the safety, security, and solemnity of the execution room. To further those interests, the State has sought to restrict the number of people in the room, as well as their activities. As the United States pointed out at oral argument, any disruption or interference could be "catastrophic." And a religious advisor would not ordinarily be allowed in a public hospital's operating room during a major life-or-death surgical procedure, so why should one be allowed into the execution room?

The Court has no difficulty reaching the commonsense conclusion that the State has a compelling interest in ensuring safety, security, and solemnity in the execution room. The more difficult question is: How much risk of disruption or interference must the State tolerate in order to accommodate the inmate's religious liberty claim under RLUIPA?

The Court concludes that, even if audible prayer and physical touching are allowed, the State can still sufficiently ensure safety, security, and solemnity in the execution room. The Court suggests that the risk of disruption or interference is conjecture and can be addressed in other ways. For example, security officers in the room could immediately intervene if the religious advisor accidentally or intentionally disrupts or interferes with the execution.

Even so, it is undeniable that allowing an outside individual in an execution room and allowing touching would *increase the risk* of a problem occurring, such as accidental or intentional disruption of or interference with the execution. So why can't the State choose to avoid any additional risk of disruption or interference, especially

given the potentially catastrophic harm if the risked disruption or interference actually ensues?

That is a difficult question to answer, in my view. The core problem is that a State's understandable goal of avoiding a higher risk of great harm does not easily map onto the compelling interest/least restrictive means standards. In particular, it is difficult for a court applying those standards to know where to draw the line — that is, how much additional risk of great harm is too much for a court to order the State to bear.

Here, if the Court's own intuitive policy assessment that the State can reasonably tolerate the additional risk were all that the Court could muster in response to the State's argument, I might have concluded that the State could exclude religious advisors from the execution room, or at least could restrict their activities in the room and not allow physical touching, for example.

Importantly, however, the Court does not merely point to its own policy assessment of how much risk the State must tolerate in the execution room. The Court also relies in part on the history of religious advisors at executions. To be sure, the Court acknowledges that some of the history is not precisely on point because many executions historically were outdoor public hangings where the presence of religious advisors did not raise the same risks to safety, security, and solemnity that their presence in a small execution room does. And some of the other history involved state-employed chaplains, who arguably do not raise the same risks to safety, security, and solemnity as outsiders in the execution room. Still, the history generally demonstrates that religious advisors have often been present at executions. And perhaps even more relevant, the Federal Government and some States have recently allowed inmates' religious advisors into the execution room. Those religious advisors have been allowed to engage in audible prayer and limited touching of the inmate without apparent problems. As the Court explains, experience matters in assessing whether less restrictive alternatives could still satisfy the State's compelling interest.

In short, as this case demonstrates, the compelling interest and least restrictive means standards require this Court to make difficult judgments about the strength of the State's interests and whether those interests can be satisfied in other ways that are less restrictive of religious exercise. Although the compelling interest and least restrictive means standards are necessarily imprecise, history and state practice can at least help structure the inquiry and focus the Court's assessment of the State's arguments.

Third, turning from the doctrinal to the practical, States seek clarity going forward. States understandably want to know what they may and may not do to regulate the time and manner of audible

> prayer and touching in the execution room. In its opinion today, the Court supplies some guidance.
>
> Because the Court's guidance does not purport to answer every question, however, a dose of caution for the States is probably in order, especially given the Court's recent case law on this issue and the extraordinary micromanagement of the execution room that RLUIPA has ushered in. The States of course may ensure the safety, security, and solemnity of the execution room. But to avoid persistent future litigation and the accompanying delays, it may behoove States to try to accommodate an inmate's timely and reasonable requests about a religious advisor's presence and activities in the execution room if the States can do so without meaningfully sacrificing their compelling interests in safety, security, and solemnity. Doing so not only would help States avoid future litigation delays but also would serve the exceptionally powerful interests of victims' families in finally obtaining closure.

Justice Thomas's twenty-three-page dissent began with a "fuller retelling" of the brutal and horrific murder (29 stab wounds) and senseless robbery (of $1.25) of a sympathetic victim (a father of nine and grandfather of fourteen who was working in a convenience store). He then chronicled the ensuing years of "abusive" litigation and delay at the behest of Ramirez and his lawyers since the 2004 crime. Under RLUIPA and PLRA, Justice Thomas would have denied equitable relief for what he bottom-line characterized was "a demonstrably abusive and insincere claim filed by a prisoner with an established history of seeking unjustified delay, harming the State and Ramirez's victims in the process."

C. Discrimination Against Religion

Insert page 1042*: insert new Problem after the Problem*

Problem: Foster Parents and LGBTQ+ Children

Zack and Lane Van Gerbig hope to foster, and eventually adopt, their granddaughter, E.G.W. After E.G.W. was born, concerns about her welfare arose. The state Department of Health and Welfare ("DHW") ultimately removed E.G.W. from her birth parents' care and later reached out to the Van Gerbigs about possibly fostering or adopting her. The Van Gerbigs expressed an interest in caring for E.G.W., so DHW began the evaluation of the Van Gerbigs for a foster care license.

DHW completes home studies by foster care licensors for all caregivers who foster children in their custody. DHW encourages foster care licensors to ask questions available in the *Family Home Study Guide with Questions and Prompts*. The licensor assigned to the Van Gerbigs asked them many questions about their family history, past spouses, experience with children, communication styles, dietary habits, medical and mental health issues, employment history, and corporal punishment. Though only an infant, the licensor also asked hypothetical questions about E.G.W.'s possible future sexual orientation and gender identity. These questions included, for example:

- "How would you react if E.G.W. was a lesbian?"
- "Would you allow E.G.W. to have a girl spend the night at your home as E.G.W.'s romantic partner?"
- "If at 15 years old, E.G.W. wanted to undergo hormone therapy to change her sexual appearance, would you support that decision and facilitate those treatments?"
- "If as a teenager, E.G.W. wanted to dress like a boy and be called by a boy's name, would you accept her decision and allow her to act in that manner?"

The Van Gerbigs informed the licensor that their Christian faith obliges them to love and support all people. They conveyed that this tenet especially applies to children who may feel isolated or uncomfortable. As for the specific questions on possible hormone therapy, they responded that "although we could not support such treatments based on our sincerely held religious convictions, we absolutely would be loving and supportive of E.G.W." They also indicated that, "in the unlikely event E.G.W. may develop gender dysphoria (or any other medical condition) as a teenager, we would provide her with loving, medically and therapeutically appropriate care that is consistent with both accepted medical principles and our beliefs as Seventh-day Adventists and Christians."

In Seventh-day Adventism, what the Church calls "homosexual behaviour" is considered a violation of God's commands, and as such, same-sex relations are deemed sinful and subject to church discipline, as is any heterosexual relation outside of marriage such as adultery or pre-marital sex. However, the Church teaches:

> Gay and lesbian members who choose to be, and remain, sexually abstinent should be given the opportunity to participate in all church activities including leadership positions in the Church. Those who struggle with temptation to sin should be treated the same way

> as other members who struggle with sexual sin (*Matthew* 18:4; *Mark* 2:17; *Luke* 5:31; 19:10). We strongly affirm that homosexual persons have a place in the Seventh-day Adventist Church.

The Church's opposition to same-gender sexual practices and relationships is on the grounds that "sexual intimacy belongs only within the marital relationship of a man and a woman" — any other kind of sexual intimacy is deemed to be sinful. The Church believes the BIBLE consistently affirms the pattern of what the Church calls "heterosexual monogamy," and all sexual relations outside the scope of heterosexual marriage — whether opposite sex or same sex relations — are contrary to God's original plan. Although there are individual congregations that welcome openly LGBTQ+ people living in same-sex relationships, the Seventh-day Adventist General Conference — the governing body of the Church — remains opposed to this. The Van Gerbigs follow the teachings of the General Conference.

The Van Gerbigs' answers alarmed the licensor. He advised them that DHW would likely deny their application because their responses conflicted with DHW's policy to support LGBTQ+ children. Before making a final determination, however, the licensor decided to send the Van Gerbigs educational materials and statistics about LGBTQ+ children and invited them to review the materials, so that they could "make a more informed decision about supporting LGBTQ+ youth in foster care."

Meanwhile, DHW also mailed the Van Gerbigs' adult son a questionnaire to get more information about their parenting. One question probed, "If you needed someone to care for your child, either short or long-term, would you feel comfortable using the applicants?" Their son responded, "Short term, yes, but I would be hesitant for something long term as I have very different religious views from my parents, and I wouldn't necessarily want that environment for my own child for the long term. My parents have stringent fundamentalist religious views concerning same-sex marriage, sexual-orientation, and sexuality outside of marriage generally." The licensor would later note in the file that this response provided him with irrefutable and independent proof that the "Van Gerbigs lacked the ability to adequately support all foster children."

After reading the DHW materials, the Van Gerbigs reiterated their religious beliefs and repeated their pledge to offer a loving and supportive home for any foster child in their care, especially their infant granddaughter, E.G.W. The licensor then posed additional similar questions to the Van Gerbigs who responded in a similar fashion as the first interview. The licensor again explained DHW's policies to assure that children who identify as LGBTQ+ have "safe and affirming care." Because the Van Gerbigs again professed that they would remain faithful to their religious beliefs, the licensor advised them that they had reached an "impasse" and he would not approve them as foster parents.

The Van Gerbigs sued for declaratory and injunctive relief, alleging that DHW had violated their right of religious free exercise. How should the district court rule?

Chapter 19
Interrelationships Among the Clauses

B. Tensions between the Religious Clauses

Page 1100*: insert new Note after the case and before the Note:*

Note: Tightening the Play in the Joints

1. In *Carson v. Makin*, 142 S.Ct. 1987 (2022), the Supreme Court revisited the "play-in-the-joints" metaphor and adjusted the tension between the Religion Clauses in the direction of the Free Exercise Clause. Maine is one of the most rural states in the Union and has 260 local school districts called "School Administrative Units." Some of the most rural of those local school districts opt not to administer their own secondary schools and do not contract with another school district that has schools. Parents in those districts designate the secondary school they want their child to attend, and in turn those districts transmit payments to the designated school to defray the cost of tuition. Designated schools must be accredited and approved by the Maine Department of Education.

In 1981, based on an opinion by the state Attorney General, Maine imposed a new requirement that any school receiving state tuition assistance payments be "a nonsectarian school in accordance with the First Amendment of the United States Constitution." As the majority opinion noted, however, the Supreme Court subsequently ruled that a state voucher program in which private citizens "direct government aid to religious schools wholly as a result of their own genuine and independent private choice" does not violate the Establishment Clause. *Zelman v. Simmons-Harris* (2002) (Chapter 17). After *Zelman*, the state legislature considered but rejected a proposal to repeal the "nonsectarian" requirement. The Maine Department of Education "considers a sectarian school to be one that is associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith. The focus is on what the school teaches through its curriculum and related activities, and how the material is presented." Petitioners-plaintiffs are two families who sought but were refused tuition assistance to send their children to two "sectarian" schools aligned with their personal religious beliefs. The District Court rejected their constitutional claims. The Court of Appeals for the First Circuit affirmed after reconsidering the case in light of *Espinoza* v. *Montana Department of Revenue* (2020) (*supra* this chapter), which came down while the appeal was pending.

The Supreme Court reversed. The majority opinion by Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett held that the "nonsectarian" requirement violated the Free Exercise Clause. Justice Breyer filed a dissent, joined by Justices Kagan and Sotomayor. Justice Sotomayor also filed a dissent.

2. The majority opinion focused on the case law presented in this section and rejected out of hand the First Circuit's attempts to distinguish those precedents.

> [In] *Trinity Lutheran Church of Columbia, Inc.* v. *Comer* (2017) [Note *supra* this chapter], we considered a Missouri program that offered grants to qualifying nonprofit organizations that installed cushioning playground surfaces made from recycled rubber tires. The Missouri Department of Natural Resources maintained an express policy of denying such grants to any applicant owned or controlled by a church, sect, or other religious entity. The Trinity Lutheran Church Child Learning Center applied for a grant to resurface its gravel playground, but the Department denied funding on the ground that the Center was operated by the Church. We deemed it "unremarkable in light of our prior decisions" to conclude that the Free Exercise Clause did not permit Missouri to "expressly discriminate against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* . . . Such discrimination, we said, was "odious to our Constitution" and could not stand.
>
> Two Terms ago, in *Espinoza* v. *Montana Department of Revenue* (2020) [*supra* this chapter], we reached the same conclusion as to a Montana program that provided tax credits to donors who sponsored scholarships for private school tuition. The Montana Supreme Court held that the program, to the extent it included religious schools, violated a provision of the Montana Constitution that barred government aid to any school controlled in whole or in part by a church, sect, or denomination. As a result of that holding, the State terminated the scholarship program, preventing the petitioners from accessing scholarship funds they otherwise would have used to fund their children's educations at religious schools. We again held that the Free Exercise Clause forbade the State's action. The application of the Montana Constitution's no-aid provision, we explained, required strict scrutiny because it "barred religious schools from public benefits solely because of the religious character of the schools." "A State need not subsidize private education," we concluded, "but once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.*
>
> The "unremarkable" principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case. Maine offers its citizens a benefit: tuition assistance payments for any family whose school district does not provide a public secondary school. Just like the wide range of nonprofit organizations eligible to receive playground resurfacing grants in *Trinity Lutheran*, a wide range of private schools are eligible to receive Maine tuition assistance payments here. And like the daycare center in *Trinity Lutheran*, [the two religious schools in this case] are disqualified from this generally

available benefit "solely because of their religious character." By "conditioning the availability of benefits" in that manner, Maine's tuition assistance program — like the program in *Trinity Lutheran* — "effectively penalizes the free exercise" of religion.

Our recent decision in *Espinoza* applied these basic principles in the context of religious education that we consider today. There, as here, we considered a state benefit program under which public funds flowed to support tuition payments at private schools. And there, as here, that program specifically carved out private religious schools from those eligible to receive such funds. While the wording of the Montana and Maine provisions is different, their effect is the same: to "disqualify some private schools" from funding "solely because they are religious." A law that operates in that manner, we held in *Espinoza*, must be subjected to "the strictest scrutiny."

To satisfy strict scrutiny, government action "must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah* (1993) [*supra* Chapter 18]. "A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." *Id.*

This is not one of them. As noted, a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. *Zelman v. Simmons-Harris* (2002) [*supra* Chapter 17]. Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires. *See also post* (Breyer, J., dissenting) (States may choose "not to fund certain religious activity . . . even when the Establishment Clause does not itself prohibit the State from funding that activity"); *post* (Sotomayor, J., dissenting) (same point).

But as we explained in both *Trinity Lutheran* and *Espinoza*, such an "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise." Justice Breyer stresses the importance of "government neutrality" when it comes to religious matters, but there is nothing neutral about Maine's program. The State pays tuition for certain students at private schools — so long as the schools are not religious. That is discrimination against religion. A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise. . . .

Maine may provide a strictly secular education in its public schools. But the [two private sectarian schools chosen by Petitioner-

Plaintiffs] — like numerous other recipients of Maine tuition assistance payments — are not public schools. In order to provide an education to children who live in certain parts of its far-flung State, Maine has decided *not* to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of *their* choice. Maine's administration of that benefit is subject to the free exercise principles governing any such public benefit program — including the prohibition on denying the benefit based on a recipient's religious exercise.

The dissents are wrong to say that under our decision today Maine "*must*" fund religious education. *Post* (Breyer, J., dissenting). Maine chose to allow some parents to direct state tuition payments to private schools; that decision was not "forced upon" it. *Post* (Sotomayor, J., dissenting). The State retains a number of options: it could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own. As we held in *Espinoza*, a "State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."

The Court of Appeals . . . attempted to distinguish this case from *Trinity Lutheran* and *Espinoza* on the ground that the funding restrictions in those cases were "solely status-based religious discrimination," while the challenged provision here "imposes a use-based restriction." Justice Breyer makes the same argument. *Post* (dissenting opinion).

In *Trinity Lutheran*, the Missouri Constitution banned the use of public funds in aid of "any church, sect or denomination of religion." We noted that the case involved "express discrimination based on religious identity," which was sufficient unto the day in deciding it, and that our opinion did "not address religious uses of funding." *Id.* n. 3 (plurality opinion). So too in *Espinoza*, the discrimination at issue was described by the Montana Supreme Court as a prohibition on aiding "schools controlled by churches," and we analyzed the issue in terms of "religious status and not religious use." Foreshadowing Maine's argument here, Montana argued that its case was different from Trinity Lutheran's because it involved not playground resurfacing, but general funds that "could be used for religious ends by some recipients, particularly schools that believe faith should '*permeate*' everything they do." We explained, however, that the strict scrutiny triggered by status-based discrimination could not be avoided by arguing that "one of its goals or effects was preventing religious organizations from putting aid to religious *uses*." (emphasis added). And we noted that nothing in our analysis was "meant to suggest that we agreed with [Montana] that some

lesser degree of scrutiny applies to discrimination against religious uses of government aid."

Maine's argument, however — along with the [First Circuit's] decision below and Justice Breyer's dissent — is premised on precisely such a distinction. . . . That premise, however, misreads our precedents. In *Trinity Lutheran* and *Espinoza*, we held that the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why. "Educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school." *Our Lady of Guadalupe School* v. *Morrissey-Berru* (2020) [Note *supra* this chapter]; *see also Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC* (2012) [*supra* this chapter].

Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism. Indeed, Maine concedes that the Department barely engages in any such scrutiny when enforcing the "nonsectarian" requirement. *See* Brief for Respondent (asserting that there will be no need to probe private schools' uses of tuition assistance funds because "schools self-identify as nonsectarian" under the program and the need for any further questioning is "extremely rare"). That suggests that any status-use distinction lacks a meaningful application not only in theory, but in practice as well. In short, the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.

Maine and the dissents invoke *Locke* v. *Davey* (2004) [Note *supra* this chapter], in support of the argument that the State may preclude parents from designating a religious school to receive tuition assistance payments. In that case, Washington had established a scholarship fund to assist academically gifted students with postsecondary education expenses. But the program excluded one particular use of the scholarship funds: the "essentially religious endeavor" of pursuing a degree designed to "train a minister to lead a congregation." We upheld that restriction against a free exercise challenge, reasoning that the State had "merely chosen not to fund a distinct category of instruction." Our opinions in *Trinity Lutheran* and *Espinoza*, however, have already explained why *Locke* can be of no help to Maine here. Both precedents emphasized, as did *Locke* itself, that the funding in *Locke* was intended to be used "to prepare for the ministry." Funds could be and were used for theology courses; only pursuing a "vocational religious" *degree* was excluded. *Locke*'s reasoning expressly turned on what it identified as the "historic and substantial state interest" against using "taxpayer

> funds to support church leaders." But as we explained at length in *Espinoza*, "it is clear that there is no 'historic and substantial' tradition against aiding private religious schools comparable to the tradition against state-supported clergy invoked by *Locke*." *Locke* cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits.
>
> Maine's "nonsectarian" requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

3. Justice Breyer stridently dissented. He insisted that the Maine policy was within the metaphorical "play in the joints" in between the Religion Clauses that allowed the state to choose this policy. Sounding one of his leitmotifs, he lamented how the majority opinion would result in the grave mischief of religious strife. *See supra* Chapter 16 Note: Justice Breyer's Constitutional Distinctions.

> [The] First Amendment's two Religion Clauses together provide that the government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Each Clause, linguistically speaking, is "cast in absolute terms." *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664 (1970). . . . The apparently absolutist nature of these two prohibitions means that either Clause, "if expanded to a logical extreme, would tend to clash with the other." *Id*. Because of this, we have said, the two Clauses "are frequently in tension," and "often exert conflicting pressures" on government action.
>
> Although the Religion Clauses are, in practice, often in tension, they nonetheless "express complementary values." Together they attempt to chart a "course of constitutional neutrality" with respect to government and religion. They were written to help create an American Nation free of the religious conflict that had long plagued European nations with "governmentally established religions." *Engel v. Vitale* (1962) [*supra* Chapter 17]. Through the Clauses, the Framers sought to avoid the "anguish, hardship and bitter strife" that resulted from the "union of Church and State" in those countries. *Id.* The Religion Clauses thus created a compromise in the form of religious freedom. . . . This religious freedom in effect meant that people "were entitled to worship God in their own way and to teach their children" in that way. C. Radcliffe, *The Law & Its Compass*

71 (1960). We have historically interpreted the Religion Clauses with these basic principles in mind.

And in applying these Clauses, we have often said that "there is room for play in the joints" between them. *Walz*; *see*, *e.g.*, *Locke v. Davey* (2004) [Note *supra* this chapter]; *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) [Note *supra* this chapter]; *Espinoza v. Montana Dept. of Revenue* (2020) [*supra* this chapter]. This doctrine reflects the fact that it may be difficult to determine in any particular case whether the Free Exercise Clause *requires* a State to fund the activities of a religious institution, or whether the Establishment Clause *prohibits* the State from doing so. Rather than attempting to draw a highly reticulated and complex free-exercise/establishment line that varies based on the specific circumstances of each state-funded program, we have provided general interpretive principles that apply uniformly in all Religion Clause cases. At the same time, we have made clear that States enjoy a degree of freedom to navigate the Clauses' competing prohibitions. *Locke v. Davey.* And, States have freedom to make this choice even when the Establishment Clause does not itself prohibit the State from funding that activity. *Id*. ("There are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause"). The Court today nowhere mentions, and I fear effectively abandons, this longstanding doctrine.

I have previously discussed my views of the relationship between the Religion Clauses and how I believe these Clauses should be interpreted to advance their goal of avoiding religious strife. Here I simply note the increased risk of religiously based social conflict when government promotes religion in its public school system. . . . This potential for religious strife is still with us. We are today a Nation with well over 100 different religious groups, from Free Will Baptist to African Methodist, Buddhist to Humanist. *See* Pew Research Center, *America's Changing Religious Landscape* 21 (May 12, 2015). People in our country adhere to a vast array of beliefs, ideals, and philosophies. And with greater religious diversity comes greater risk of religiously based strife, conflict, and social division. The Religion Clauses were written in part to help avoid that disunion. . . .

I have also previously explained why I believe that a "rigid, bright-line" approach to the Religion Clauses — an approach without any leeway or "play in the joints" — will too often work against the Clauses' underlying purposes. . . . Not all state-funded programs that have religious restrictions carry the same risk of creating social division and conflict. In my view, that risk can best be understood by considering the particular benefit at issue, along with the reasons for the particular religious restriction at issue. *See Trinity Lutheran* (Breyer, J., concurring in judgment). Recognition that States enjoy a degree of constitutional leeway allows States to enact laws sensitive to local circumstances while also allowing this

Court to consider those circumstances in light of the basic values underlying the Religion Clauses. In a word, to interpret the two Clauses as if they were joined at the hip will work against their basic purpose: to allow for an American society with practitioners of over 100 different religions, and those who do not practice religion at all, to live together without serious risk of religion-based social divisions.

The majority believes that the principles set forth in this Court's earlier cases easily resolve this case. But they do not. We have previously found, as the majority points out, that "a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause." *Ante* (citing *Zelman*). We have thus concluded that a State *may*, consistent with the Establishment Clause, provide funding to religious schools through a general public funding program if the "government aid . . . reaches religious institutions only by way of the deliberate choices of . . . individual [aid] recipients." *Id.* But the key word is "*may.*" We have never previously held what the Court holds today, namely, that a State *must* (not *may*) use state funds to pay for religious education as part of a tuition program designed to ensure the provision of free statewide public school education.

What happens once "may" becomes "must"? Does that transformation mean that a school district that pays for public schools must pay equivalent funds to parents who wish to send their children to religious schools? Does it mean that school districts that give vouchers for use at charter schools must pay equivalent funds to parents who wish to give their children a religious education? What other social benefits are there the State's provision of which means — under the majority's interpretation of the Free Exercise Clause — that the State must pay parents for the religious equivalent of the secular benefit provided? The concept of "play in the joints" means that courts need not, and should not, answer with "must" these questions that can more appropriately be answered with "may."

The majority also asserts that "the 'unremarkable' principles applied in *Trinity Lutheran* and *Espinoza* suffice to resolve this case." *Ante*. Not so.

The state-funded program at issue in *Trinity Lutheran* provided payment for resurfacing school playgrounds to make them safer for children. Any Establishment Clause concerns arising from providing money to religious schools for the creation of safer play yards are readily distinguishable from those raised by providing money to religious schools through the program at issue here — a tuition program designed to ensure that all children receive their

> constitutionally guaranteed right to a free public education. . . . [P]aying the salary of a religious teacher as part of a public school tuition program is a different matter. [Schools] were excluded from the playground resurfacing program at issue in *Trinity Lutheran* because of the mere fact that they were "owned or controlled by a church, sect, or other religious entity." . . . Schools were thus disqualified from receiving playground funds "solely because of their religious character," not because of the "religious uses of the funding" they would receive. Here, by contrast . . . Maine chooses not to fund only those schools that "promote the faith or belief system with which [the schools are] associated and/or present the [academic] material taught through the lens of this faith" — *i.e.*, schools that will use public money for religious purposes. Maine thus excludes schools from its tuition program not because of the schools' religious character but because the schools will use the funds to teach and promote religious ideals.
>
> For similar reasons, *Espinoza* does not resolve the present case. In *Espinoza*, Montana created "a scholarship program for students attending private schools." But the State prohibited families from using the scholarship at any private school "owned or controlled in whole or in part by any church, religious sect, or denomination." *Id.* [Montana] denied funds to schools based "expressly on religious status and not religious use"; "to be eligible" for scholarship funds, a school had to "divorce itself from any religious control or affiliation." Here, again, Maine denies tuition money to schools not because of their religious affiliation, but because they will use state funds to promote religious views.
>
> These distinctions are important. The very point of the Establishment Clause is to prevent the government from sponsoring religious activity itself, thereby favoring one religion over another or favoring religion over nonreligion. . . . State funding of religious activity risks the very social conflict based upon religion that the Religion Clauses were designed to prevent. And, unlike the circumstances present in *Trinity Lutheran* and *Espinoza*, it is religious activity, not religious labels, that lies at the heart of this case. . . .
>
> Under Maine law, an "approved" private school must be "nonsectarian." A school fails to meet that requirement (and is deemed "sectarian") only if it is *both* (1) "associated with a particular faith or belief system" *and also* (2) "promotes the faith or belief system with which it is associated and/or presents the [academic] material taught through the lens of this faith." To determine whether a school is sectarian, [the Commissioner of Education explained] the "focus is on what the school teaches through its curriculum and related activities, and how the material is presented. [A]ffiliation or association with a church or religious institution . . . is not dispositive." The two private religious schools at issue here satisfy both of these criteria. They are affiliated with a church or religious

organization. And they also teach students to accept particular religious beliefs and to engage in particular religious practices. [Here Justice Breyer elaborated on the religious nature and practices of the two religious schools.] The differences between this kind of education and a purely civic, public education are important. . . . By contrast, public schools, including those in Maine, seek first and foremost to provide a primarily civic education. . . .

In the majority's view, the fact that private individuals, not Maine itself, choose to spend the State's money on religious education saves Maine's program from Establishment Clause condemnation. But that fact, as I have said, simply *permits* Maine to route funds to religious schools. *See, e.g.*, *Zelman*. It does not *require* Maine to spend its money in that way. That is because, as explained above, this Court has long followed a legal doctrine that gives States flexibility to navigate the tension between the two Religion Clauses. This doctrine "recognizes that there is 'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Trinity Lutheran* (quoting *Locke*). This wiggle-room means that "the course of constitutional neutrality in this area cannot be an absolutely straight line." And in walking this line of government neutrality, States must have "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause," in which they can navigate the tension created by the Clauses and consider their own interests in light of the Clauses' competing prohibitions. *See, e.g.* , *Walz*. Nothing in our Free Exercise Clause cases *compels* Maine to give tuition aid to private schools that will use the funds to provide a religious education. . . . The Free Exercise Clause thus does not require Maine to fund, through its tuition program, schools that will use public money to promote religion. And considering the Establishment Clause concerns underlying the program, Maine's decision not to fund such schools falls squarely within the play in the joints between those two Clauses. . . . The Religion Clauses give Maine the ability, and flexibility, to make this choice.

In my view, Maine's nonsectarian requirement is also constitutional because it supports, rather than undermines, the Religion Clauses' goal of avoiding religious strife. . . . Maine legislators who endorsed the State's nonsectarian requirement understood this potential for social conflict. . . . Maine's nonsectarian requirement also serves to avoid religious strife between the State and the religious schools. . . . I emphasize the problems that may arise out of today's decision because they reinforce my belief that the Religion Clauses do not require Maine to pay for a religious education simply because, in some rural areas, the State will help parents pay for a secular education. . . . Maine wishes to provide children within the State with a secular, public education. This wish embodies, in significant part, the constitutional need to avoid spending public money to support what is essentially the teaching

> and practice of religion. . . . [State] neutrality with respect to religion is particularly important. The Religion Clauses give Maine the right to honor that neutrality by choosing not to fund religious schools as part of its public school tuition program. I believe the majority is wrong to hold the contrary. And with respect, I dissent.

4. Justice Sotomayor also dissented, adhering to the spirit and letter of her previous dissents in this line of cases.

> This Court continues to dismantle the wall of separation between church and state that the Framers fought to build. Justice Breyer explains why the Court's analysis falters on its own terms . . . I write separately to add three points.
>
> First, this Court should not have started down this path five years ago. *See Trinity Lutheran Church of Columbia, Inc.* v. *Comer* (2017) [Note *supra* this chapter]. Before *Trinity Lutheran*, it was well established that "both the United States and state constitutions embody distinct views" on "the subject of religion" — "in favor of free exercise, but opposed to establishment" — "that find no counterpart" with respect to other constitutional rights. *Locke* v. *Davey* (2004) [Note *supra* this chapter]. Because of this tension, the Court recognized "room for play in the joints" between the Religion Clauses, with "some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." Using this flexibility, and consistent with a rich historical tradition, *see Trinity Lutheran* (Sotomayor, J., dissenting), States and the Federal Government could decline to fund religious institutions. Moreover, the Court for many decades understood the Establishment Clause to prohibit government from funding religious exercise.
>
> Over time, the Court eroded these principles in certain respects. *See*, *e.g., Zelman* v. *Simmons-Harris* (2002) [*supra* Chapter 17] (allowing government funds to flow to religious schools if private individuals selected the benefiting schools; the government program was "entirely neutral with respect to religion"; and families enjoyed a "genuine choice among options public and private, secular and religious"). Nevertheless, the space between the Clauses continued to afford governments "some room to recognize the unique status of religious entities and to single them out on that basis for exclusion from otherwise generally applicable laws." *Trinity Lutheran* (Sotomayor, J., dissenting).
>
> *Trinity Lutheran* veered sharply away from that understanding. After assuming away an Establishment Clause violation, the Court revolutionized Free Exercise doctrine by equating a State's decision not to fund a religious organization with presumptively unconstitutional discrimination on the basis of religious status. A plurality, however, limited the Court's decision to "express discrimination based on religious identity" (*i.e.,* status), not

"religious uses of funding." *Id.* n. 3. In other words, a State was barred from withholding funding from a religious entity "solely because of its religious character," *id.*, but retained authority to do so on the basis that the funding would be put to religious uses. Two Terms ago, the Court reprised and extended *Trinity Lutheran*'s error to hold that a State could not limit a private-school voucher program to secular schools. *Espinoza* v. *Montana Dept. of Revenue* (2020) [*supra* this chapter]. The Court, however, again refrained from extending *Trinity Lutheran* from funding restrictions based on religious *status* to those based on religious *uses*. *Id*.

As Justice Breyer explains, *see ante*, this status-use distinction readily distinguishes this case from *Trinity Lutheran* and *Espinoza*. I warned in *Trinity Lutheran*, however, that the Court's analysis could "be manipulated to call for a similar fate for lines drawn on the basis of religious use." *Trinity Lutheran* (Sotomayor, J., dissenting). That fear has come to fruition: The Court now holds for the first time that "any status-use distinction" is immaterial in both "theory" and "practice." *Ante*. It reaches that conclusion by embracing arguments from prior separate writings and ignoring decades of precedent affording governments flexibility in navigating the tension between the Religion Clauses. As a result, in just a few years, the Court has upended constitutional doctrine, shifting from a rule that permits States to decline to fund religious organizations to one that requires States in many circumstances to subsidize religious indoctrination with taxpayer dollars.

Second, the consequences of the Court's rapid transformation of the Religion Clauses must not be understated. From a doctrinal perspective, the Court's failure to apply the play-in-the-joints principle here, *see ante* (Breyer, J., dissenting), leaves one to wonder what, if anything, is left of it. The Court's increasingly expansive view of the Free Exercise Clause risks swallowing the space between the Religion Clauses that once "permitted religious exercise to exist without sponsorship and without interference." From a practical perspective, today's decision directs the State of Maine (and, by extension, its taxpaying citizens) to subsidize institutions that undisputedly engage in religious instruction. *See ante* (Breyer, J., dissenting). . . . The upshot is that Maine must choose between giving subsidies to its residents or refraining from financing religious teaching and practices. . . .

The Court's analysis does leave some options open to Maine. For example, under state law, school administrative units (SAUs) that cannot feasibly operate their own schools may contract directly with a public school in another SAU, or with an approved private school, to educate their students. I do not understand today's decision to mandate that SAUs contract directly with schools that teach religion, which would go beyond *Zelman*'s private-choice doctrine and blatantly violate the Establishment Clause. Nonetheless, it is

> irrational for this Court to hold that the Free Exercise Clause bars Maine from giving money to parents to fund the only type of education the State may provide consistent with the Establishment Clause: a religiously neutral one. Nothing in the Constitution requires today's result.
>
> What a difference five years makes. In 2017, I feared that the Court was "leading us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment." *Trinity Lutheran* (Sotomayor, J., dissenting). Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens. With growing concern for where this Court will lead us next, I respectfully dissent.

5. Use *Carson v. Makin* as a lens to reexamine the "play-in-the-joints" precedents. Is *Locke v. Davey* (2004) (Note *supra* this chapter) now limited to its facts, i.e., the Establishment Clause is an absolute prohibition of using state funds for the education and training of religious clergy? What is left of the distinction made in *Trinity Lutheran Church of Columbia v. Comer* (2017) (Note *supra* this chapter) between a "status-based state restriction" — which the Establishment Clause forbids as religious discrimination — and a "use-based state restriction" — which the Establishment Clause requires? Has Justice Gorsuch's concurring opinion in *Espinoza v. Montana Department of Revenue* (2020) (*supra* this chapter), rejecting that distinction as being too ephemeral, now been vindicated by the *Carson v. Makin* majority? For the present constitutional moment, what is left in the "play-in-the-joints" metaphor, i.e., what kinds of state actions are permitted by the Establishment Clause but not required by the Free Exercise Clause? Is the Free Exercise Clause ascendant over the Establishment Clause in the minds of a majority of the current Justices? When, if ever, can a state adopt a separation-of-church-and-state nonestablishment policy that is stricter than the Establishment Clause in the First Amendment?

6. The statute in *Carson v. Makin* had an interesting legislative dénouement. Before the case was decided by the Supreme Court, the Maine legislature amended the state's general anti-discrimination law — which the State Attorney General has interpreted to apply to private schools that choose to accept state funds — to forbid discrimination based on gender identity and sexual orientation. *See Statement of Main Attorney General* (June 21, 2022) (available at: https://www.maine.gov/ag/news/article.shtml?id=8075979). The two religious schools involved in the case reportedly have announced that they would decline state funds if the Maine Human Rights Act, as revised, would require them to change how they operate or alter their admissions standards to require them to admit LGBTQ+

students. *See* Aaron Tang, *There's a Way to Outmaneuver the Supreme Court, and Maine Has Found It*, N.Y. TIMES (June 22, 2022).

C. Religious Speech

Page 1121*: insert new Note and new case after the case and before the problem:*

Note: Boston's Flagpole and a Christian Flag

1. *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022) (Chapter 13) involved a challenge to the City of Boston's flag-raising policy. Outside the entrance to Boston City Hall, on a park-like area called City Hall Plaza, stand three flagpoles. (A photo of the flagpole is reprinted in the Chapter 13 excerpt.) The three flagpoles are the same height, approximately 80 feet tall. Boston flies the American flag from the first pole and the flag of the Commonwealth of Massachusetts from the second pole. Boston usually flies the city's own flag from the third pole. But Boston has, for many years, allowed groups to hold ceremonies on the plaza during which participants may hoist a flag of their choosing on the third pole in place of the city's flag. In 2017, Harold Shurtleff, the director of an organization called Camp Constitution, asked to hold an event on the plaza to celebrate the civic and social contributions of the Christian community. As part of that event, he asked for permission to raise what he described as the "Christian flag" — an ecumenical flag designed to represent all of Christianity that has a white field, emblazoned with a red Latin cross inside a blue canton. (Justice Gorsuch added a photograph of the flag to his concurring opinion.) The commissioner of Boston's Property Management Department was concerned that flying such an overtly religious flag at City Hall could violate the Establishment Clause, so he told Shurtleff that the group could hold their event on the plaza but could not raise their flag. Shurtleff and Camp Constitution (petitioners) sued, claiming that Boston's refusal to let them raise their flag violated, among other things, the First Amendment's Free Speech Clause. The District Court held that flying private groups' flags from City Hall's third flagpole amounted to government speech, so Boston could refuse petitioners' request without running afoul of the First Amendment. The First Circuit affirmed. The Supreme Court granted certiorari and held that the third-party flag-raisings were private speech, not government speech. Therefore, Boston's refusal to allow petitioners to fly their flag violated the Free Speech Clause of the First Amendment. Justice Breyer delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Kavanaugh, and Barrett.

2. Justice Breyer's majority opinion spent twelve pages determining that the third-party flag raisings were private speech, not government speech. *See Shurtleff v. City of Boston* (2022) (Chapter 13). The majority needed only one page to rule that Boston's refusal to allow the display of the Christian flag violated the Free Speech Clause:

> When a government does not speak for itself, it may not exclude speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination." *Good News Club v. Milford Central School* (2001) [*supra* this chapter]. Applying that rule, we have held, for example, that a public university may not bar student-activity funds from reimbursing only religious groups. *See*

> *Rosenberger v. Rector and Visitors of the University of Virginia* (1995) [*supra* this chapter]. Here, Boston concedes that it denied Shurtleff 's request solely because the Christian flag he asked to raise "promoted a specific religion." App. to Pet. for Cert. Under our precedents, and in view of our government-speech holding here, that refusal discriminated based on religious viewpoint and violated the Free Speech Clause.

3. Justice Kavanaugh wrote a brief concurring opinion to emphasize:

> [A] government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like. On the contrary, a government *violates* the Constitution when (as here) it *excludes* religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like. Under the Constitution, a government may not treat religious persons, religious organizations, or religious speech as second-class.

4. Justice Alito, joined by Justices Thomas and Gorsuch, concurred in the judgment but wrote a lengthy concurring opinion that took a deep dive into the government-speech doctrine. *See Shurtleff v. City of Boston* (2022) (Chapter 13). He further agreed that denying Shurtleff's application to use the forum of the city flagpole constituted impermissible viewpoint discrimination:

> The City's decision was grounded in a belief that "established First Amendment jurisprudence" prohibits a government from allowing a private party to "fly a religious flag on public property." App. to Pet. for Cert. But "more than once," this Court has "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger* [*supra* this chapter]; *see also Good News Club* [*supra* this chapter]. Indeed, excluding religious messages from public forums that are open to other viewpoints is a "denial of the right of free speech" indicating "hostility to religion" that would "undermine the very neutrality the Establishment Clause requires." *Rosenberger*.

5. Justice Gorsuch, joined by Justice Thomas, concurred in the judgment. He insisted that the "real problem in this case" was how the City mistakenly had relied on *Lemon v. Kurtzman* (1971) (Chapter 17) — a precedent he deemed to have been completely discredited and rightly interred. *See supra* Chapter 17 *Note: Justice Gorsuch Digs a Grave for the* Lemon *Test* and *Note: Now it is Official:* Lemon v. Kurtzman *is Overruled*. Here was his conclusion:

> To justify a policy that discriminated against religion, Boston sought to drag *Lemon* once more from its grave. It was a strategy as risky as it was unsound. *Lemon* ignored the original meaning of the Establishment Clause, it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game. This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie.

The next principal case is a paradigm decision for this chapter on the interrelations among the clauses and it fits neatly into this section on religious speech. It is a First Amendment trifecta: the Supreme Court considers the Free Speech Clause, the Free Exercise Clause, and the Establishment Clause. The Establishment Clause portions of the opinions are excerpted in Chapter 17. *See Note: Now it is Official:* Lemon v. Kurtzman *is Overruled*. The following excerpts emphasize the Free Speech Clause and the Free Exercise Clause. But this decision has far-reaching implications for other topics in this casebook. *See, e.g.,* Chapter 12. Section B. The First Amendment in the Public Schools; Chapter 13. Section B. When Is the Government the Speaker?; Chapter 17. Section B. School Prayer. There is a lot going on here.

Kennedy v. Bremerton School District

142 S. Ct. 2407 (2022)

JUSTICE GORSUCH delivered the opinion of the Court.

Joseph Kennedy lost his job as a high school football coach because he knelt at midfield after games to offer a quiet prayer of thanks. . . . [The] Bremerton School District disciplined him . . . because it thought anything less could lead a reasonable observer to conclude (mistakenly) that it endorsed Mr. Kennedy's religious beliefs. That reasoning was misguided. Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's. Nor does a proper understanding of the Amendment's Establishment Clause require the government to single out private religious speech for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.

I

A

Mr. Kennedy began working as a football coach at Bremerton High School in 2008 . . . . Like many other football players and coaches across the country, Mr. Kennedy made it a practice to give "thanks through prayer on the playing field" at the conclusion of each game. In his prayers, Mr. Kennedy sought to express gratitude for "what the players had accomplished and for the opportunity to be part of their lives through the game of football." Mr. Kennedy offered his prayers after the players and coaches had shaken hands, by taking a knee at the 50-yard line and praying "quietly" for "approximately 30 seconds."

Initially, Mr. Kennedy prayed on his own. But over time, some players asked whether they could pray alongside him. Mr. Kennedy responded by saying, "This is a free country. You can do what you want." The number of players who joined Mr.

Kennedy eventually grew to include most of the team, at least after some games. Sometimes team members invited opposing players to join. Other times Mr. Kennedy still prayed alone. Eventually, Mr. Kennedy began incorporating short motivational speeches with his prayer when others were present. Separately, the team at times engaged in pregame or postgame prayers in the locker room. It seems this practice was a "school tradition" that predated Mr. Kennedy's tenure. Mr. Kennedy explained that he "never told any student that it was important they participate in any religious activity." In particular, he "never pressured or encouraged any student to join" his postgame midfield prayers.

For over seven years, no one complained to the Bremerton School District (District) about these practices. It seems the District's superintendent first learned of them only in September 2015, after an employee from another school commented positively on the school's practices to Bremerton's principal. At that point, the District reacted quickly. On September 17, the superintendent sent Mr. Kennedy a letter. . . . It instructed Mr. Kennedy to avoid any motivational "talks with students" that "included religious expression, including prayer," and to avoid "suggesting, encouraging (or discouraging), or supervising" any prayers of students, which students remained free to "engage in." The District also explained that any religious activity on Mr. Kennedy's part must be "nondemonstrative (i.e., not outwardly discernible as religious activity)" if "students are also engaged in religious conduct" in order to "avoid the perception of endorsement." [The] District appealed to what it called a "direct tension between" the "Establishment Clause" and "a school employee's right to freely exercise" his religion. To resolve that "tension," the District explained, an employee's free exercise rights "must yield so far as necessary to avoid school endorsement of religious activities."

B

After receiving the District's September 17 letter, Mr. Kennedy ended the tradition, predating him, of offering locker-room prayers. He also ended his practice of incorporating religious references or prayer into his postgame motivational talks to his team on the field. Mr. Kennedy further felt pressured to abandon his practice of saying his own quiet, on-field post-game prayer. Driving home after a game, however, Mr. Kennedy felt upset that he had "broken [his] commitment to God" by not offering his own prayer, so he turned his car around and returned to the field. By that point, everyone had left the stadium, and he walked to the 50-yard line and knelt to say a brief prayer of thanks.

On October 14, through counsel, Mr. Kennedy sent a letter to school officials informing them that, because of his "sincerely-held religious beliefs," he felt "compelled" to offer a "post-game personal prayer" of thanks at midfield. He asked the District to allow him to continue that "private religious expression" alone. . . . On October 16, shortly before the game that day, the District responded with another letter. The District acknowledged that Mr. Kennedy "had complied" with the "directives" in its September 17 letter. Yet instead of accommodating Mr. Kennedy's request to offer a brief prayer on the field while students were busy with other activities — whether heading to the locker room, boarding the bus, or perhaps singing the school fight song — the District issued an ultimatum. It forbade Mr. Kennedy from

engaging in "any overt actions" that could "appear to a reasonable observer to endorse . . . prayer . . . while he is on duty as a District-paid coach." The District did so because it judged that anything less would lead it to violate the Establishment Clause.

After receiving this letter, Mr. Kennedy offered a brief prayer following the October 16 game. When he bowed his head at midfield after the game, "most Bremerton players were . . . engaged in the traditional singing of the school fight song to the audience." Though Mr. Kennedy was alone when he began to pray, players from the other team and members of the community joined him before he finished his prayer. This event spurred media coverage of Mr. Kennedy's dilemma and a public response from the District. The District placed robocalls to parents to inform them that public access to the field is forbidden; it posted signs and made announcements at games saying the same thing; and it had the Bremerton Police secure the field in future games. . . .

On October 23, shortly before that evening's game, the District wrote Mr. Kennedy again. It expressed "appreciation" for his "efforts to comply" with the District's directives, including avoiding "on-the-job prayer with players in the . . . football program, both in the locker room prior to games as well as on the field immediately following games." . . . Still, the District explained that a "reasonable observer" could think government endorsement of religion had occurred when a "District employee, on the field only by virtue of his employment with the District, still on duty" engaged in "overtly religious conduct." The District thus made clear that the only option it would offer Mr. Kennedy was to allow him to pray after a game in a "private location" behind closed doors and "not observable to students or the public."

After the October 23 game ended, Mr. Kennedy knelt at the 50-yard line, where "no one joined him," and bowed his head for a "brief, quiet prayer." . . . After the final relevant football game on October 26, Mr. Kennedy again knelt alone to offer a brief prayer as the players engaged in postgame traditions. While he was praying, other adults gathered around him on the field. . . .

C

Shortly after the October 26 game, the District placed Mr. Kennedy on paid administrative leave and prohibited him from "participating, in any capacity, in . . . football program activities." In a letter explaining the reasons for this disciplinary action, the superintendent criticized Mr. Kennedy for engaging in "public and demonstrative religious conduct while still on duty as an assistant coach" by offering a prayer following the games on October 16, 23, and 26. The letter did not allege that Mr. Kennedy performed these prayers with students, and it acknowledged that his prayers took place while students were engaged in unrelated postgame activities. Additionally, the letter faulted Mr. Kennedy for not being willing to pray behind closed doors. In an October 28 [document] provided to the public, the District admitted that it possessed "no evidence that students have been directly coerced to pray with Kennedy." But . . . the District could not allow Mr. Kennedy to "engage in a public religious display." Otherwise, the District would "violate the . . . Establishment Clause" because "reasonable . . . students and attendees" might perceive the "district [as] endorsing . . . religion."

While Mr. Kennedy received "uniformly positive evaluations" every other year of his coaching career, after the 2015 season ended in November, the District gave him a poor performance evaluation. The evaluation advised against rehiring Mr. Kennedy on the grounds that he "failed to follow district policy" regarding religious expression and "failed to supervise student-athletes after games." Mr. Kennedy did not return for the next season.

II

[Mr. Kennedy sued in federal court, alleging that the District's actions violated the First Amendment's Free Speech and Free Exercise Clauses. He also moved for a preliminary injunction requiring the District to reinstate him. The District Court denied that motion, and the Ninth Circuit affirmed. After the parties engaged in discovery, they filed cross-motions for summary judgment. The District Court found that the "sole reason" for the District's decision to suspend Mr. Kennedy was its perceived "risk of constitutional liability" under the Establishment Clause for his "religious conduct" after the three games in October 2015. The District Court granted summary judgment to the District and the Ninth Circuit affirmed. The Ninth Circuit denied a petition to rehear the case en banc over the dissents of 11 judges. And the Supreme Court granted certiorari.]

III

Now before us, Mr. Kennedy renews his argument that the District's conduct violated both the Free Exercise and Free Speech Clauses of the First Amendment. These Clauses work in tandem. Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. *See, e.g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.* (1995) [*supra* this chapter]. That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent. . . .

Under this Court's precedents, a plaintiff bears certain burdens to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses. If the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law. *See, e.g.*, *Fulton* v. *Philadelphia* (2021) [Note *supra* Chapter 18]; *Reed* v. *Town of Gilbert* (2015) [*supra* Chapter 5]; *Garcetti* v. *Ceballos* (2006) [*supra* Chapter 12]; *Church of Lukumi Babalu Aye*, *Inc.* v. *Hialeah* (1993) [*supra* Chapter 18]; *Sherbert* v. *Verner* (1963) [*supra* Chapter 18]. We begin by examining whether Mr. Kennedy has discharged his burdens, first under the Free Exercise Clause, then under the Free Speech Clause.

A

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. Amdt. 1. This Court has held the Clause applicable to the States under the terms of the Fourteenth Amendment. [*See supra* Chapter 16 *Note: The Incorporation Doctrine*.] The Clause protects not only the right

to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts." *Employment Div.*, *Dept. of Human Resources of Ore.* v. *Smith* (1990) [*supra* Chapter 18]. Under this Court's precedents, a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not "neutral" or "generally applicable." Should a plaintiff make a showing like that, this Court will find a First Amendment violation unless the government can satisfy "strict scrutiny" by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) [*supra* Chapter 18].[2]

That Mr. Kennedy has discharged his burdens is effectively undisputed. No one questions that he seeks to engage in a sincerely motivated religious exercise. The exercise in question involves, as Mr. Kennedy has put it, giving "thanks through prayer" briefly and by himself "on the playing field" at the conclusion of each game he coaches. Mr. Kennedy has indicated repeatedly that he is willing to "wait until the game is over and the players have left the field" to "walk to mid-field to say his short, private, personal prayer." The contested exercise before us does not involve leading prayers with the team or before any other captive audience. Mr. Kennedy's "religious beliefs do not require [him] to lead any prayer . . . involving students." At the District's request, he voluntarily discontinued the school tradition of locker-room prayers and his postgame religious talks to students. The District disciplined him *only* for his decision to persist in praying quietly without his players after three games in October 2015.

Nor does anyone question that, in forbidding Mr. Kennedy's brief prayer, the District failed to act pursuant to a neutral and generally applicable rule. A government policy will not qualify as neutral if it is "specifically directed at . . . religious practice." *Smith*. A policy can fail this test if it "discriminates on its face," or if a religious exercise is otherwise its "object." *Lukumi*; *see also Smith*. A government policy will fail the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or if it provides "a mechanism for individualized exemptions." *Fulton*. Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny. *See Lukumi*.

In this case, the District's challenged policies were neither neutral nor generally applicable. By its own admission, the District sought to restrict Mr. Kennedy's actions

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[2] A plaintiff may also prove a free exercise violation by showing that "official expressions of hostility" to religion accompany laws or policies burdening religious exercise; in cases like that we have "set aside" such policies without further inquiry. *Masterpiece Cakeshop*, *Ltd.* v. *Colorado Civil Rights Comm'n* (2018) [Note *supra* Chapter 18]. To resolve today's case, however, we have no need to consult that test. Likewise, while the test we do apply today has been the subject of some criticism, *see, e.g.*, *Fulton* v. *Philadelphia* (2021) [Note *supra* Chapter 18], we have no need to engage with that debate today because no party has asked us to do so.

at least in part because of their religious character. As it put it in its September 17 letter, the District prohibited "any overt actions on Mr. Kennedy's part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer." The District further explained that it could not allow "an employee, while still on duty, to engage in *religious* conduct." Prohibiting a religious practice was thus the District's unquestioned "object." The District candidly acknowledged as much [in the district court]. The District's challenged policies also fail the general applicability test. The District's performance evaluation after the 2015 football season advised against rehiring Mr. Kennedy on the ground that he "failed to supervise student-athletes after games." But, in fact, this was a bespoke requirement specifically addressed to Mr. Kennedy's religious exercise. . . . Again recognizing as much, the District conceded before the Ninth Circuit that its challenged directives were not "generally applicable."

B

When it comes to Mr. Kennedy's free speech claim, our precedents remind us that the First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent Community School Dist.* (1969) [*supra* Chapter 12]; *see also Lane* v. *Franks* (2014) [Note *supra* Chapter 12]. Of course, none of this means the speech rights of public school employees are so boundless that they may deliver any message to anyone anytime they wish. In addition to being private citizens, teachers and coaches are also government employees paid in part to speak on the government's behalf and convey its intended messages.

To account for the complexity associated with the interplay between free speech rights and government employment, this Court's decisions in *Pickering* v. *Board of Ed. of Township High School Dist. 205* (1968) [Note *supra* Chapter 12], *Garcetti v. Ceballos* (2006) [*supra* Chapter 12], and related cases suggest proceeding in two steps. The first step involves a threshold inquiry into the nature of the speech at issue. If a public employee speaks "pursuant to [his or her] official duties," this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline because that kind of speech is — for constitutional purposes at least—the government's own speech.

At the same time and at the other end of the spectrum, when an employee "speaks as a citizen addressing a matter of public concern," our cases indicate that the First Amendment may be implicated and courts should proceed to a second step. At this second step, our cases suggest that courts should attempt to engage in "a delicate balancing of the competing interests surrounding the speech and its consequences." Among other things, courts at this second step have sometimes considered whether an employee's speech interests are outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Both sides ask us to employ at least certain aspects of this *Pickering–Garcetti* framework to resolve Mr. Kennedy's free speech claim. They share additional common ground too. They agree that Mr. Kennedy's speech implicates a matter of public concern. They also appear to accept, at least for argument's sake, that Mr. Kennedy's speech does not raise questions of academic freedom that may or may not

involve "additional" First Amendment "interests" beyond those captured by this framework. At the first step of the *Pickering–Garcetti* inquiry, the parties' disagreement thus turns out to center on one question alone: Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the District?

Our cases offer some helpful guidance for resolving this question. . . . [Here the majority parsed those precedents and opinions.] Applying these lessons here, it seems clear to us that Mr. Kennedy has demonstrated that his speech was private speech, not government speech. When Mr. Kennedy uttered the three prayers that resulted in his suspension, he was not engaged in speech "ordinarily within the scope" of his duties as a coach. He did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not in structing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not "owe their existence" to Mr. Kennedy's responsibilities as a public employee. *Garcetti*. The timing and circumstances of Mr. Kennedy's prayers confirm the point. . . . [What] matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.

In reaching its contrary conclusion, the Ninth Circuit stressed that, as a coach, Mr. Kennedy served as a role model "clothed with the mantle of one who imparts knowledge and wisdom." . . . . Before us, the District presses the same arguments. And no doubt they have a point. Teachers and coaches often serve as vital role models. But this argument commits the error of positing an "excessively broad job description" by treating everything teachers and coaches say in the workplace as government speech subject to government control. *Garcetti*. On this understanding, a school could fire a Muslim teacher for wearing a headscarf in the classroom or prohibit a Christian aide from praying quietly over her lunch in the cafeteria. Likewise, this argument ignores the District Court's conclusion (and the District's concession) that Mr. Kennedy's actual job description left time for a private moment after the game to call home, check a text, socialize, or engage in any manner of secular activities. Others working for the District were free to engage briefly in personal speech and activity. That Mr. Kennedy chose to use the same time to pray does not transform his speech into government speech. To hold differently would be to treat religious expression as second-class speech and eviscerate this Court's repeated promise that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*.

Of course, acknowledging that Mr. Kennedy's prayers represented his own private speech does not end the matter. So far, we have recognized only that Mr. Kennedy has carried his threshold burden. Under the *Pickering–Garcetti* framework, a second step remains where the government may seek to prove that its interests as employer outweigh even an employee's private speech on a matter of public concern.[3]

[3] Because our analysis and the parties' concessions lead to the conclusion that Mr. Kennedy's prayer constituted private speech on a matter of public concern, we do not decide whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering–Garcetti* framework.

IV

Whether one views the case through the lens of the Free Exercise or Free Speech Clause, at this point the burden shifts to the District. Under the Free Exercise Clause, a government entity normally must satisfy at least "strict scrutiny," showing that its restrictions on the plaintiff 's protected rights serve a compelling interest and are narrowly tailored to that end. A similar standard generally obtains under the Free Speech Clause. The District, however, asks us to apply to Mr. Kennedy's claims the more lenient second-step *Pickering–Garcetti* test, or alternatively intermediate scrutiny. Ultimately, however, it does not matter which standard we apply. The District cannot sustain its burden under any of them.[4]

A

As we have seen, the District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. On its account, Mr. Kennedy's prayers might have been protected by the Free Exercise and Free Speech Clauses. But his rights were in "direct tension" with the competing demands of the Establishment Clause. To resolve that clash, the District reasoned, Mr. Kennedy's rights had to "yield." The Ninth Circuit pursued this same line of thinking, insisting that the District's interest in avoiding an Establishment Clause violation "trumped" Mr. Kennedy's rights to religious exercise and free speech.

But how could that be? It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. But the three Clauses appear in the same sentence of the same Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." Amdt. 1. A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail over the others. *See Everson* v. *Board of Ed. of Ewing* (1947) [*supra* Chapter 17].

The District arrived at a different understanding this way. It began with the premise that the Establishment Clause is offended whenever a "reasonable observer" could conclude that the government has "endorsed" religion. The District then took the view that a "reasonable observer" could think it "endorsed Kennedy's religious activity by not stopping the practice." On the District's account, it did not matter whether the Free Exercise Clause protected Mr. Kennedy's prayer. It did not matter if his expression was private speech protected by the Free Speech Clause. It did not matter that the District never actually endorsed Mr. Kennedy's prayer, no one complained that it had, and a strong public reaction only followed after the District sought to ban Mr. Kennedy's prayer. Because a reasonable observer could

[4] It seems, too, that it is only here where our disagreement with the dissent begins in earnest. We do not understand our colleagues to contest that Mr. Kennedy has met his burdens under either the Free Exercise or Free Speech Clause, but only to suggest the District has carried its own burden "to establish that its policy prohibiting Kennedy's public prayers was the least restrictive means of furthering a compelling state interest." *Post* (Sotomayor, J. dissenting).

(mistakenly) infer that by allowing the prayer the District endorsed Mr. Kennedy's message, the District felt it had to act, even if that meant suppressing otherwise protected First Amendment activities. In this way, the District effectively created its own "vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other," placed itself in the middle, and then chose its preferred way out of its self-imposed trap. *See Shurtleff* v. *Boston* (2022) (Gorsuch, J., concurring in judgment) [*See supra* Chapter 17 Note: Justice Gorsuch Digs a Grave for the *Lemon* Test].

[Here the majority canvassed the Establishment Clause case law and proclaimed: "this Court long ago abandoned *Lemon* and its endorsement test offshoot." The dissent countered that the majority deserved the blame or the credit for overruling *Lemon* in the case *sub judice*. *See supra* Chapter 17 Note: Now it is Official: *Lemon v. Kurtzman* is Overruled.]

B

Perhaps sensing that the primary theory it pursued below rests on a mistaken understanding of the Establishment Clause, the District offers a backup argument in this Court. It still contends that its Establishment Clause concerns trump Mr. Kennedy's free exercise and free speech rights. But the District now seeks to supply different reasoning for that result. Now, it says, it was justified in suppressing Mr. Kennedy's religious activity because otherwise it would have been guilty of coercing students to pray. *See* Brief for Respondent. And, the District says, coercing worship amounts to an Establishment Clause violation on anyone's account of the Clause's original meaning.

As it turns out, however, there is a pretty obvious reason why the Ninth Circuit did not adopt this theory in proceedings below: The evidence cannot sustain it. To be sure, this Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, "make a religious observance compulsory." Government "may not coerce anyone to attend church," nor may it force citizens to engage in "a formal religious exercise." *Lee* v. *Weisman* (1992) [*supra* Chapter 17]. No doubt, too, coercion along these lines was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment. Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause. But in this case Mr. Kennedy's private religious exercise did not come close to crossing any line one might imagine separating protected private expression from impermissible government coercion.

Begin with the District's own contemporaneous description of the facts. In its correspondence with Mr. Kennedy, the District never raised coercion concerns. . . . This is consistent with Mr. Kennedy's account too. He has repeatedly stated that he "never coerced, required, or asked any student to pray," and that he never "told any student that it was important that they participate in any religious activity."

Consider, too, the actual requests Mr. Kennedy made. . . . The only prayer Mr. Kennedy sought to continue was the kind he had "started out doing" at the beginning of his tenure — the prayer he gave alone. . . . In short, Mr. Kennedy did not seek to

direct any prayers to students or require anyone else to participate. . . . It was for three prayers of this sort alone in October 2015 that the District suspended him.

Naturally, Mr. Kennedy's proposal to pray quietly by himself on the field would have meant some people would have seen his religious exercise. . . . Of course, some will take offense to certain forms of speech or prayer they are sure to encounter in a society where those activities enjoy such robust constitutional protection. But "offense . . . does not equate to coercion." *Town of Greece* (plurality opinion).

The District responds that, as a coach, Mr. Kennedy "wielded enormous authority and influence over the students," and students might have felt compelled to pray alongside him. . . . This reply fails too. . . . There is no indication in the record that anyone expressed any coercion concerns to the District about the quiet, postgame prayers that Mr. Kennedy asked to continue and that led to his suspension. Nor is there any record evidence that students felt pressured to participate in these prayers. . . . The absence of evidence of coercion in this record leaves the District to its final redoubt. Here, the District suggests that *any* visible religious conduct by a teacher or coach should be deemed — without more and as a matter of law — impermissibly coercive on students. . . . *See also post* (Sotomayor, J., dissenting). . . . Such a rule would be a sure sign that our Establishment Clause jurisprudence had gone off the rails. In the name of protecting religious liberty, the District would have us suppress it. Rather than respect the First Amendment's double protection for religious expression, it would have us preference secular activity. Not only could schools fire teachers for praying quietly over their lunch, for wearing a yarmulke to school, or for offering a midday prayer during a break before practice. Under the District's rule, a school would be *required* to do so. It is a rule that would defy this Court's traditional understanding that permitting private speech is not the same thing as coercing others to participate in it. *See Town of Greece* (plurality opinion). It is a rule, too, that would undermine a long constitutional tradition under which learning how to tolerate diverse expressive activities has always been "part of learning how to live in a pluralistic society." *Lee v. Weisman*. We are aware of no historically sound understanding of the Establishment Clause that begins to "make it necessary for government to be hostile to religion" in this way.

Our judgments on all these scores find support in this Court's prior cases too. . . . Meanwhile, this case looks very different from those in which this Court has found prayer involving public school students to be problematically coercive. In *Lee v. Weisman*, this Court held that school officials violated the Establishment Clause by "including a clerical member" who publicly recited prayers "as part of an official school graduation ceremony" because the school had "in every practical sense compelled attendance and participation in a religious exercise." In *Santa Fe Independent School Dist.* v. *Doe*, 530 U.S. 290 (2000) the Court held that a school district violated the Establishment Clause by broadcasting a prayer "over the public address system" before each football game. . . . None of that is true here. The prayers for which Mr. Kennedy was disciplined were not publicly broadcast or recited to a captive audience. Students were not required or expected to participate. And, in fact, none of Mr.

Kennedy's students did participate in any of the three October 2015 prayers that resulted in Mr. Kennedy's discipline. [7]

C

In the end, the District's case hinges on the need to generate conflict between an individual's rights under the Free Exercise and Free Speech Clauses and its own Establishment Clause duties — and then develop some explanation why one of these Clauses in the First Amendment should "trump" the other two. But the project falters badly. Not only does the District fail to offer a sound reason to prefer one constitutional guarantee over another. It cannot even show that they are at odds. In truth, there is no conflict between the constitutional commands before us. . . . *See, e.g.*, *Rosenberger*; *Good News Club*.[8]

V

Respect for religious expressions is indispensable to life in a free and diverse Republic — whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination. Mr. Kennedy is entitled to summary judgment on his First Amendment claims. The judgment of the Court of Appeals is reversed.

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[7] Even if the personal prayers Mr. Kennedy sought to offer after games are not themselves coercive, the dissent suggests that they bear an indelible taint of coercion by association with the school's past prayer practices — some of which predated Mr. Kennedy, and all of which the District concedes he ended on request. But none of those abandoned practices formed the basis for Mr. Kennedy's suspension, and he has not sought to claim First Amendment protection for them. Nor, contrary to the dissent, does the possibility that students might choose, unprompted, to participate in Mr. Kennedy's prayers necessarily prove them coercive. For one thing, the District has conceded that no coach may "discourage" voluntary student prayer under its policies. For another, Mr. Kennedy has repeatedly explained that he is willing to conduct his prayer without students — as he did after each of the games that formed the basis of his suspension — and after students head to the locker room or bus.

[8] Failing under its coercion theory, the District offers still another backup argument. It contends that it had to suppress Mr. Kennedy's protected First Amendment activity to ensure order at Bremerton football games. *See also post* (Sotomayor, J., dissenting). But the District never raised concerns along these lines in its contemporaneous correspondence with Mr. Kennedy. And unsurprisingly, neither the District Court nor the Ninth Circuit invoked this rationale to justify the District's actions. Government "justifications" for interfering with First Amendment rights "must be genuine, not hypothesizedor invented *post hoc* in response to litigation." *United States* v. *Virginia*, 518 U. S. 515, 533 (1996). Nor under our Constitution does protected speech or religious exercise readily give way to a "heckler's veto." *Good News Club*.

JUSTICE THOMAS concurring [Omitted.]

JUSTICE ALITO concurring [Omitted.]

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

This case is about whether a public school must permit a school official to kneel, bow his head, and say a prayer at the center of a school event. The Constitution does not authorize, let alone require, public schools to embrace this conduct. Since *Engel* v. *Vitale* (1962) [*supra* Chapter 17], this Court consistently has recognized that school officials leading prayer is constitutionally impermissible. Official-led prayer strikes at the core of our constitutional protections for the religious liberty of students and their parents, as embodied in both the Establishment Clause and the Free Exercise Clause of the First Amendment.

The Court now charts a different path, yet again paying almost exclusive attention to the Free Exercise Clause's protection for individual religious exercise while giving short shrift to the Establishment Clause's prohibition on state establishment of religion. *See Carson* v. *Makin* (2022) (Breyer, J., dissenting) [Note *supra* this chapter]. To the degree the Court portrays petitioner Joseph Kennedy's prayers as private and quiet, it misconstrues the facts. The record reveals that Kennedy had a longstanding practice of conducting demonstrative prayers on the 50-yard line of the football field. Kennedy consistently invited others to join his prayers and for years led student athletes in prayer at the same time and location. The Court ignores this history. The Court also ignores the severe disruption to school events caused by Kennedy's conduct, viewing it as irrelevant because the Bremerton School District (District) stated that it was suspending Kennedy to avoid it being viewed as endorsing religion. Under the Court's analysis, presumably this would be a different case if the District had cited Kennedy's repeated disruptions of school programming and violations of school policy regarding public access to the field as grounds for suspending him. As the District did not articulate those grounds, the Court assesses only the District's Establishment Clause concerns. It errs by assessing them divorced from the context and history of Kennedy's prayer practice.

Today's decision goes beyond merely misreading the record. The Court overrules *Lemon* v. *Kurtzman* (1971) [*supra* Chapter 17], and calls into question decades of subsequent precedents that it deems "offshoots" of that decision. *Ante*. In the process, the Court rejects longstanding concerns surrounding government endorsement of religion and replaces the standard for reviewing such questions with a new "history and tradition" test. In addition, while the Court reaffirms that the Establishment Clause prohibits the government from coercing participation in religious exercise, it applies a nearly toothless version of the coercion analysis, failing to acknowledge the uniquepressures faced by students when participating in school-sponsored activities. This decision does a disservice to schools and the young citizens they serve, as well as to our Nation's longstanding commitment to the separation of church and state. I respectfully dissent.

I

As the majority tells it, Kennedy, a coach for the District's football program, "lost his job" for "praying quietly while his students were otherwise occupied." *Ante*. The record before us, however, tells a different story. [Justice Sotomayor's dissent endeavored to tell that story. Her dissent resembled a *de novo* review of the record with detailed factual findings. She carefully quoted and cited portions of the Appendix — for almost every statement — and she relied further on the opinions of the lower courts. *See infra* this chapter *Note: The Doctrine of Constitutional Facts Writ Large*.]

[Part I A. of the dissent summarized the religious diversity of the students and faculty of the District: "The county is home to Bahá'ís, Buddhists, Hindus, Jews, Muslims, Sikhs, Zoroastrians, and many denominations of Christians, as well as numerous residents who are religiously unaffiliated." The dissent went on to review Kennedy's hiring and job description, highlighted Kennedy's coaching responsibilities towards student-athletes, and quoted with emphasis the District's policy on "Religious-Related Activities and Practices" that provided: "school staff shall neither encourage or discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity" and that "religious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity."]

B

In September 2015, a coach from another school's football team informed [Kennedy's] principal that Kennedy had asked him and his team to join Kennedy in prayer. The other team's coach told the principal that he thought it was "cool" that the District "would allow its coaches to go ahead and invite other teams' coaches and players to pray after a game."

The District initiated an inquiry into whether its policy on Religious-Related Activities and Practices had been violated. It learned that, since his hiring in 2008, Kennedy had been kneeling on the 50-yard line to pray immediately after shaking hands with the opposing team. Kennedy recounted that he initially prayed alone and that he never asked any student to join him. Over time, however, a majority of the team came to join him, with the numbers varying from game to game. Kennedy's practice evolved into postgame talks in which Kennedy would hold aloft student helmets and deliver speeches with "overtly religious references," which Kennedy described as prayers, while the players kneeled around him. The District also learned that students had prayed in the past in the locker room prior to games, before Kennedy was hired, but that Kennedy subsequently began leading those prayers too. [The dissent included three photographs taken after separate games showing Kennedy at the fifty-yard line standing and holding up a player's helmet to deliver a prayer. He was surrounded by most of his team, some members of the opposing team, and even some members of the public who were kneeling around him joining him in prayer on the field.]

While the District's inquiry was pending, its athletic director attended [the] September 11, 2015, football game and told Kennedy that he should not be conducting prayers with players. After the game, while the athletic director watched, Kennedy led a prayer out loud, holding up a player's helmet as the players kneeled around him. While riding the bus home with the team, Kennedy posted on *Facebook* that he thought he might have just been fired for praying.

On September 17, the District's superintendent sent Kennedy a letter informing him that leading prayers with students on the field and in the locker room would likely be found to violate the Establishment Clause, exposing the District to legal liability. . . . The District instructed Kennedy that any motivational talks to students must remain secular, "so as to avoid alienation of any team member." The District reiterated that "all District staff are free to engage in religious activity, including prayer, so long as it does not interfere with job responsibilities." To avoid endorsing student religious exercise, the District instructed that such activity must be nondemonstrative or conducted separately from students, away from student activities. The District expressed concern that Kennedy had continued his midfield prayer practice at two games after the District's athletic director and the varsity team's head coach had instructed him to stop.

Kennedy stopped participating in locker room prayers and, after a game the following day, gave a secular speech. He returned to pray in the stadium alone after his duties were over and everyone had left the stadium, to which the District had no objection. Kennedy then hired an attorney, who, on October 14, sent a letter explaining that Kennedy was "motivated by his sincerely-held religious beliefs to pray following each football game." . . . . Kennedy requested that the District simply issue a "clarification that the prayer is [Kennedy's] private speech" and that the District not "interfere" with students joining Kennedy in prayer. The letter further announced that Kennedy would resume his 50-yard-line prayer practice the next day after the October 16 homecoming game.[1]

Before the homecoming game, Kennedy made multiple media appearances to publicize his plans to pray at the 50-yard line, leading to an article in the *Seattle News* and a local television broadcast about the upcoming homecoming game. In the wake of this media coverage, the District began receiving a large number of emails, letters, and calls, many of them threatening.

The District responded to Kennedy's letter before the game on October 16. It emphasized that Kennedy's letter evinced "material misunderstandings" of many of the facts at issue. . . . The District further noted that "during the time following completion of the game, until players are released to their parents or otherwise allowed to leave the event, Kennedy, like all coaches, is clearly on duty and paid to continue supervision of students." The District stated that it had no objection to Kennedy returning to the stadium when he was off duty to pray at the 50-yard line, nor with Kennedy praying while on duty if it did not interfere with his job duties or suggest the District's endorsement of religion. . . .

[1] The Court recounts that Kennedy was "willing to say his 'prayer while the players were walking to the locker room' or 'bus,' and then catch up with his team." *Ante*. Kennedy made the quoted remarks, however, only during his deposition in the underlying litigation, stating in response to a question that such timing would have been "physically possible" and "possibly" have been acceptable to him, but that he had never "discussed with the District whether that was a possibility for him to do" and had "no idea" whether his lawyers raised it with the District.

On October 16, after playing of the game had concluded, Kennedy shook hands with the opposing team, and as advertised, knelt to pray while most [of his] players were singing the school's fight song. He quickly was joined by coaches and players from the opposing team. Television news cameras surrounded the group. Members of the public rushed the field to join Kennedy, jumping fences to access the field and knocking over student band members. After the game, the District received calls from Satanists who "intended to conduct ceremonies on the field after football games if others were allowed to." To secure the field and enable subsequent games to continue safely, the District was forced to make security arrangements with the local police and to post signs near the field and place robocalls to parents reiterating that the field was not open to the public.

The District sent Kennedy another letter on October 23, explaining that his conduct at the October 16 game was inconsistent with the District's requirements for two reasons. First, it "drew him away from his work" . . . ; second, his conduct raised Establishment Clause concerns . . . . Again, the District emphasized that it was happy to accommodate Kennedy's desire to pray on the job in a way that did not interfere with his duties or risk perceptions of endorsement. [The letter] invited Kennedy to reach out to discuss accommodations that might be mutually satisfactory . . . . The District noted, however, that "further violations of its directives" would be grounds for discipline or termination.

Kennedy did not directly respond . . . . Instead, his attorneys told the media that he would accept only demonstrative prayer on the 50-yard line immediately after games. During the October 23 and October 26 games, Kennedy again prayed at the 50-yard line immediately following the game, while postgame activities were still ongoing. At the October 23 game, Kennedy kneeled on the field alone with players standing nearby. At the October 26 game, Kennedy prayed surrounded by members of the public, including state representatives who attended the game to support Kennedy. [His] players, after singing the fight song, joined Kennedy at midfield after he stood up from praying.

In an October 28 letter, the District notified Kennedy that it was placing him on paid administrative leave for violating its directives at the October 16, October 23, and October 26 games . . . . In Kennedy's annual review, the head coach of the varsity team recommended Kennedy not be rehired because he "failed to follow district policy," "demonstrated a lack of cooperation with administration," "contributed to negative relations between parents, students, community members, coaches, and the school district," and "failed to supervise student-athletes after games due to his interactions with media and community members." The head coach himself also resigned after 11 years in that position, expressing fears that he or his staff would be shot from the crowd or otherwise attacked because of the turmoil created by Kennedy's media appearances. Three of five other assistant coaches did not reapply.

C

Kennedy then filed suit. He contended, as relevant, that the District violated his rights under the Free Speech and Free Exercise Clauses of the First Amendment. Kennedy moved for a preliminary injunction, which the District Court denied based on the circumstances surrounding Kennedy's prayers. . . . The Court of Appeals

affirmed, again emphasizing the specific context of Kennedy's prayers. . . . This Court denied certiorari.

Following discovery, the District Court granted summary judgment to the District. The court concluded that Kennedy's 50-yard-line prayers were not entitled to protection under the Free Speech Clause because his speech was made in his capacity as a public employee, not as a private citizen. . . . The District Court further found that players had reported "feeling compelled to join Kennedy in prayer to stay connected with the team or ensure playing time," and that the "slow accumulation of players joining Kennedy suggests exactly the type of vulnerability to social pressure that makes the Establishment Clause vital in the high school context." The court rejected Kennedy's free exercise claim, finding the District's directive narrowly tailored to its Establishment Clause concerns and citing Kennedy's refusal to cooperate in finding an accommodation that would be acceptable to him. The Court of Appeals affirmed. . . . [and concluded] that Kennedy's speech constituted government speech . . . In the alternative, the court concluded that Kennedy's speech, even if in his capacity as a private citizen, was appropriately regulated by the District to avoid an Establishment Clause violation. . . The court rejected Kennedy's free exercise claim for the reasons stated by the District Court. The Court of Appeals denied rehearing en banc, and this Court granted certiorari.

II

Properly understood, this case is not about the limits on an individual's ability to engage in private prayer at work. This case is about whether a school district is required to allow one of its employees to incorporate a public, communicative display of the employee's personal religious beliefs into a school event, where that display is recognizable as part of a longstanding practice of the employee ministering religion to students as the public watched. A school district is not required to permit such conduct; in fact, the Establishment Clause prohibits it from doing so.

A

[The Religion Clauses] express the view, foundational to our constitutional system, "that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee* v. *Weisman* (1992) [*supra* Chapter 17]. Instead, "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere," which has the "freedom to pursue that mission." *Id.* The Establishment Clause protects this freedom by "commanding a separation of church and state.". . . In the context of public schools, it means that a State cannot use "its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals." *Illinois ex rel. McCollum* v. *Board of Ed. of School Dist. No. 71,* 333 U. S. 203, 211 (1948). Indeed, "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards* v. *Aguillard* (1987) [*supra* Chapter 17]. The reasons motivating this vigilance inhere in the nature of schools themselves and the young people they serve. Two are relevant here.

First, government neutrality toward religion is particularly important in the public school context given the role public schools play in our society. "The public

school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny," meaning that "in no activity of the State is it more vital to keep out divisive forces than in its schools." . . . Accordingly, the Establishment Clause "proscribes public schools from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred" or otherwise endorsing religious beliefs. *Lee v. Weisman* (Blackmun, J., concurring).

Second, schools face a higher risk of unconstitutionally "coercing . . . support or participation in religion or its exercise" than other government entities. *Id.* (opinion of the Court). The State "exerts great authority and coercive power" in schools as a general matter "through mandatory attendance requirements." *Edwards*. Moreover, the State exercises that great authority over children, who are uniquely susceptible to "subtle coercive pressure." *Lee.* Children are particularly vulnerable to coercion because of their "emulation of teachers as role models" and "susceptibility to peer pressure." *Edwards*. Accordingly, this Court has emphasized that "the State may not, consistent with the Establishment Clause, place primary and secondary school children" in the dilemma of choosing between "participating, with all that implies, or protesting" a religious exercise in a public school. *Lee*. Given the twin Establishment Clause concerns of endorsement and coercion, it is unsurprising that the Court has consistently held integrating prayer into public school activities to be unconstitutional, including when student participation is not a formal requirement or prayer is silent. *See Wallace*; *School Dist. of Abington Township* v. *Schempp* (1963) [*supra* Chapter 17]; *Engel*. The Court also has held that incorporating a nondenominational general benediction into a graduation ceremony is unconstitutional. Lee. Finally, this Court has held that including prayers in student football games is unconstitutional, even when delivered by students rather than staff and even when students themselves initiated the prayer. *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290 (2000).

B

Under these precedents, the Establishment Clause violation at hand is clear. . . . Kennedy was on the job as a school official "on government property" when he incorporated a public, demonstrative prayer into "government-sponsored school-related events" as a regularly scheduled feature of those events. *Santa Fe*. Kennedy's tradition of a 50-yard line prayer thus strikes at the heart of the Establishment Clause's concerns about endorsement. . . . Permitting a school coach to lead students and others he invited onto the field in prayer at a predictable time after each game could only be viewed as a postgame tradition occurring "with the approval of the school administration."

Kennedy's prayer practice also implicated the coercion concerns at the center of this Court's Establishment Clause jurisprudence. . . . Students look up to their teachers and coaches as role models and seek their approval. Students also depend on this approval for tangible benefits. Players recognize that gaining the coach's approval may pay dividends small and large, from extra playing time to a stronger letter of recommendation to additional support in college athletic recruiting. In addition to these pressures to please their coaches, this Court has recognized that players face "immense social pressure" from their peers in the "extracurricular event that is American high school football." *Santa Fe.* The record before the Court bears this out. The District Court found, in the evidentiary record, that some students reported

joining Kennedy's prayer because they felt social pressure to follow their coach and teammates. Kennedy told the District that he began his prayers alone and that players followed each other over time until a majority of the team joined him, an evolution showing coercive pressure at work.

[The majority] accepts, that [Kennedy's] highly visible and demonstrative prayer at the last three games before his suspension did not violate the Establishment Clause because these prayers were quiet and thus private. This Court's precedents, however, do not permit isolating government actions from their context in determining whether they violate the Establishment Clause. . . . This Court's precedents [do] not permit treating Kennedy's "new" prayer practice as occurring on a blank slate, any more than those in the District's school community would have experienced Kennedy's changed practice (to the degree there was one) as erasing years of prior actions by Kennedy. . . . Students at the three games following Kennedy's changed practice witnessed Kennedy kneeling at the same time and place where he had led them in prayer for years. . . . Finally, Kennedy stresses that he never formally required students to join him in his prayers. But existing precedents do not require coercion to be explicit, particularly when children are involved. . . . To uphold a coach's integration of prayer into the ceremony of a football game, in the context of an established history of the coach inviting student involvement in prayer, is to exact precisely this price from students.

C

As the Court explains, *see ante,* Kennedy did not "shed his constitutional rights . . . at the schoolhouse gate" while on duty as a coach. *Tinker* v. *Des Moines Independent Community School Dist.* (1969) [*supra* Chapter 12]. Constitutional rights, however, are not absolutes. Rights often conflict and balancing of interests is often required to protect the separate rights at issue. . . . The particular tensions at issue in this case, between the speech interests of the government and its employees and between public institutions' religious neutrality and private individuals' religious exercise, are far from novel. . . . [The] District's interest in avoiding an Establishment Clause violation justified both its time and place restrictions on Kennedy's speech and his exercise of religion.

First, as to Kennedy's free speech claim, Kennedy "accepted certain limitations" on his freedom of speech when he accepted government employment. *Garcetti* v. *Ceballos* (2006) [*supra* Chapter 12]. The Court has recognized that "government employers, like private employers, need a significant degree of control over their employees' words and actions" to ensure "the efficient provision of public services." *Id*. Case law instructs balancing "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees" to determine whose interests should prevail. *Pickering* v. *Board of Ed. of Township High School Dist. 205* (1968) [Note *supra* Chapter 12]. As the Court of Appeals below outlined, the District has a strong argument that Kennedy's speech, formally integrated into the center of a District event, was speech in his official capacity as an employee that is not entitled to First Amendment protections at all. It is unnecessary to resolve this question, however, because, even assuming that

Kennedy's speech was in his capacity as a private citizen, the District's responsibilities under the Establishment Clause provided "adequate justification" for restricting it.

Similarly, Kennedy's free exercise claim must be considered in light of the fact that he is a school official and, as such, his participation in religious exercise can create Establishment Clause conflicts. Accordingly, his right to pray at any time and in any manner he wishes while exercising his professional duties is not absolute. Here, the District's directive prohibiting Kennedy's demonstrative speech at the 50-yard line was narrowly tailored to avoid an Establishment Clause violation. The District's suspension of Kennedy followed a long history. . . . Because the District's valid Establishment Clause concerns satisfy strict scrutiny, Kennedy's free exercise claim fails as well.

III

Despite the overwhelming precedents establishing that school officials leading prayer violates the Establishment Clause, the Court today holds that Kennedy's midfield prayer practice did not violate the Establishment Clause. This decision rests on an erroneous understanding of the Religion Clauses. . . .

A

This case involves three Clauses of the First Amendment. As a threshold matter, the Court today proceeds from two mistaken understandings of the way the protections these Clauses embody interact.

First, the Court describes the Free Exercise and Free Speech Clauses as "working in tandem" to "provide over-lapping protection for expressive religious activities," leaving religious speech "doubly protected." *Ante*. This narrative noticeably (and improperly) sets the Establishment Clause to the side. The Court is correct that certain expressive religious activities may fall within the ambit of both the Free Speech Clause and the Free Exercise Clause, but "the First Amendment protects speech and religion by quite different mechanisms." *Lee*. . . . [As] this Court has explained, while the Free [Exercise] Clause has "close parallels in the speech provisions of the First Amendment," the First Amendment's protections for religion diverge from those for speech because of the Establishment Clause, which provides a "specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Id. . . .*

Second, the Court contends that the lower courts erred by introducing a false tension between the Free Exercise and Establishment Clauses. *See ante*. The Court, however, has long recognized that these two Clauses, while "expressing complementary values," "often exert conflicting pressures." *Locke* v. *Davey* (2004) [Note *supra* this chapter]. The "absolute terms" of the two Clauses mean that they "tend to clash" if "expanded to a logical extreme." *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (1970). The Court inaccurately implies that the courts below relied upon a rule that the Establishment Clause must always "prevail" over the Free Exercise Clause. *Ante*. In focusing almost exclusively on Kennedy's free exercise claim, however, and declining to recognize the conflicting rights at issue, the Court substitutes one supposed blanket rule for another. The proper response where tension arises between the two Clauses is not to ignore it, which effectively silently

elevates one party's right above others. The proper response is to identify the tension and balance the interests based on a careful analysis of "whether the particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz*. As discussed above, that inquiry leads to the conclusion that permitting Kennedy's desired religious practice at the time and place of his choosing, without regard to the legitimate needs of his employer, violates the Establishment Clause in the particular context at issue here.

[In Part III B. & Part III C. of the dissent, Justice Sotomayor challenged how the majority went about overruling the *Lemon* test and adopting the history-and-tradition test. That discussion is excerpted in Chapter 17. *See Note: Now it is Official:* Lemon v. Kurtzman *is Overruled*.]

D

Finally, the Court acknowledges that the Establishment Clause prohibits the government from coercing people to engage in religion practice, *ante*, but its analysis of coercion misconstrues both the record and this Court's precedents.

The Court claims that the District "never raised coercion concerns" simply because the District conceded that there was " 'no evidence that students were *directly* coerced to pray with Kennedy.' " *Ante* (emphasis added). The Court's suggestion that coercion must be "direct" to be cognizable under the Establishment Clause is contrary to long-established precedent. The Court repeatedly has recognized that indirect coercion may raise serious establishment concerns, and that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*. Tellingly, *none* of this Court's major cases involving school prayer concerned school practices that required students to do any more than listen silently to prayers, and some did not even formally require students to listen, instead providing that attendance was not mandatory. *See Santa Fe*; *Lee*; *Wallace*; *School Dist. of Abington Township*; *Engel*. Nevertheless, the Court concluded that the practices were coercive as a constitutional matter.

Today's Court quotes the *Lee* Court's remark that enduring others' speech is "part of learning how to live in a pluralistic society." *Ante* (quoting *Lee*). The *Lee* Court, however, expressly concluded, in the very same paragraph, that "this argument cannot prevail" in the school-prayer context because the notion that being subject to a "brief " prayer in school is acceptable "overlooks a fundamental dynamic of the Constitution": its "specific prohibition on . . . state intervention in religious affairs." *Id*. ("The government may no more use social pressure to enforce orthodoxy than it may use more direct means").

The Court also distinguishes *Santa Fe* because Kennedy's prayers "were not publicly broadcast or recited to a captive audience." *Ante*. This misses the point. In *Santa Fe*, a student council chaplain delivered a prayer over the public-address system before each varsity football game of the season. Students were not required as a general matter to attend the games, but "cheerleaders, members of the band, and, of course, the team members themselves" were, and the Court would have found an "improper effect of coercing those present" even if it "regarded every high school student's decision to attend . . . as purely voluntary." *Id.* Kennedy's prayers raise

precisely the same concerns. His prayers did not need to be broadcast. His actions spoke louder than his words. His prayers were intentionally, visually demonstrative to an audience aware of their history and no less captive than the audience in *Santa Fe*, with spectators watching and some players perhaps engaged in a song, but all waiting to rejoin their coach for a postgame talk. Moreover, Kennedy's prayers had a greater coercive potential because they were delivered not by a student, but by their coach, who was still on active duty for postgame events.

In addition, despite the direct record evidence that students felt coerced to participate in Kennedy's prayers, the Court nonetheless concludes that coercion was not present in any event because "Kennedy did not seek to direct any prayers to students or require anyone else to participate." *Ante*. But nowhere does the Court engage with the unique coercive power of a coach's actions on his adolescent players.[8]

In any event, the Court makes this assertion only by drawing a bright line between Kennedy's yearslong practice of leading student prayers, which the Court does not defend, and Kennedy's final three prayers, which District students did not join, but student peers from the other teams did. As discussed above, this mode of analysis contravenes precedent by "turning a blind eye to the context in which [Kennedy's practice] arose." *Santa Fe*. This Court's precedents require a more nuanced inquiry into the realities of coercion in the specific school context concerned than the majority recognizes today. The question before the Court is not whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in any and all circumstances. It is whether permitting Kennedy to continue a demonstrative prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner, which led students to feel compelled to join him, violates the Establishment Clause. It does.

Having disregarded this context, the Court finds Kennedy's three-game practice distinguishable from precedent because the prayers were "quiet" and the students were otherwise "occupied." *Ante*. The record contradicts this narrative. Even on the Court's myopic framing of the facts, at two of the three games on which the Court focuses, players witnessed student peers from the other team and other authority figures surrounding Kennedy and joining him in prayer. The coercive pressures inherent in such a situation are obvious. . . . To reiterate, the District did not argue, and neither court below held, that "*any* visible religious conduct by a teacher or coach should be deemed . . . impermissibly coercive on students." *Ante*. Nor has anyone contended that a coach may never visibly pray on the field. The courts below simply recognized that Kennedy continued to initiate prayers visible to students, while still on duty during school events, under the exact same circumstances as his past practice of leading student prayer. It is unprecedented for the Court to hold that this conduct, taken as a whole, did not raise cognizable coercion concerns.

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[8] Puzzlingly, the Court goes a step further and suggests that Kennedy may have been in violation of the District policy on Religious-Related Activities and Practices if he did not permit the players to join his prayers because the policy prohibited staff from "discouraging" student prayer. Ante. The policy, however, specifically referred to student prayer of the student's "own volition" and equally prohibited staff from "encouraging" student prayer.

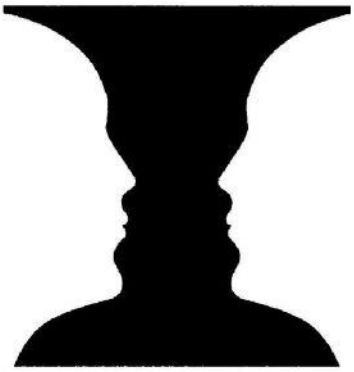
* * *

The Free Exercise Clause and Establishment Clause are equally integral in protecting religious freedom in our society. The first serves as "a promise from our government, "while the second erects a "backstop that disables our government from breaking it" and "starting us down the path to the past, when the right to free exercise was routinely abridged." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer* (2017) (Sotomayor, J., dissenting) [Note *supra* this Chapter].

Today, the Court once again weakens the backstop. It elevates one individual's interest in personal religious exercise, in the exact time and place of that individual's choosing, over society's interest in protecting the separation between church and state, eroding the protections for religious liberty for all. Today's decision is particularly misguided because it elevates the religious rights of a school official, who voluntarily accepted public employment and the limits that public employment entails, over those of his students, who are required to attend school and who this Court has long recognized are particularly vulnerable and deserving of protection. In doing so, the Court sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance. As much as the Court protests otherwise, today's decision is no victory for religious liberty. I respectfully dissent.

Note: The Doctrine of Constitutional Facts Writ Large

Beginning with the first chapter and continuing throughout this casebook on the First Amendment, we have observed the practice of the doctrine of constitutional fact. *See, e.g., Fiske v. Kansas*, 274 U.S. 380 (1927) (Note *supra* Chapter 1). That doctrine allows the Supreme Court to perform an independent review of the facts, as well as the law that was applied in an administrative agency, state court, or lower federal court. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-511 (1984). The traditional appellate standard of review to defer to the triers of fact is put aside for constitutional matters. The majority opinion and the dissent in *Kennedy v. Bremerton School District* (2022) are examples of how Supreme Court Justices perform this independent review. Both opinions are full of references to the record. *Supreme Court Rule 26* requires that the parties file "a joint appendix that shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (3) the judgment, order, or decision under review; and (4) any other parts of the record that the parties particularly wish to bring to the Court's attention." Each opinion draws different conclusions about what happened. Indeed, reading Justice Gorsuch's majority opinion along with Justice Sotomayor's dissenting opinion is the literary equivalent of staring at *Rubin's Vase*, the famous optical illusion in which some viewers see the outline of a vase and other viewers see two faces in profile. It is almost as if the majority and the dissent are reviewing two different cases. After reading these two opinions, do you see a vase or two faces? Are you persuaded that Coach Kennedy should prevail or are you persuaded that the Bremerton School District acted appropriately and constitutionally?



Page 1123*: insert new problem after the problem and before the note:*

Problem: A Religious Challenge to a State Vaccination Mandate

Faced with COVID-19's Omega variants — the most recent and the most virulent variants to date — and monitoring vaccination rates among healthcare workers that were too low to prevent community transmission, the State Center for Disease Control ("SCDC") promulgated an emergency regulation requiring all workers in state-licensed healthcare facilities to be vaccinated against the virus with the relevant booster inoculation as well. Previously, the SCDC regulations allowed for individual religious or philosophical exemptions to all of the state's various vaccination requirements. Those exemptions were repealed by the new Omega regulation. The new Omega regulation allows a healthcare worker to claim an exemption if — and only if — a medical practitioner certifies in writing that the vaccination would be "medically inadvisable," essentially only because of a severe allergy of the individual healthcare worker.

Twelve John/Jane Does sued based on their right to free exercise of religion. The plaintiffs are devout practicing Catholics who believe that their submitting to the new vaccination requirement would be an "immoral cooperation with evil in violation of their conscience." They assert that their personal religious beliefs prohibit them from using any product "derived or connected in any way with the grievous sin of abortion." The plaintiffs allege that Johnson & Johnson/Janssen pharmaceutical companies used embryonic stem cells ultimately derived from aborted fetuses to produce its vaccine and that Moderna and Pfizer/BioNTech also used the same type of cells in researching their vaccines.

Antecedent to the filing of the lawsuit, the plaintiffs sought to exhaust their administrative remedies by formally applying to the SCDC for a special religious exemption based on their sincere religious beliefs. The SCDC rejected their application by relying on an official pronouncement from the Catholic Church's *Congregation for the Doctrine of the Faith* posted at the Vatican's website which provides in part:

> [In] cases where cells from aborted fetuses are employed to create cell lines for use in scientific research, "there exist differing degrees of responsibility" of cooperation in evil. For example, "in organizations where cell lines of illicit origin are being utilized, the responsibility of those who make the decision to use them is not the same as that of those who have no voice in such a decision." In this sense, when ethically irreproachable Covid-19 vaccines are not available . . . *it is morally acceptable to receive Covid-19 vaccines that have used cell lines from aborted fetuses in their research and production process.* The fundamental reason for considering the use of these vaccines morally licit is that the kind of cooperation in evil (*passive material cooperation*) in the procured abortion from which these cell lines originate is, on the part of those making use of the resulting vaccines, *remote*. The moral duty to avoid such passive material cooperation is not obligatory if there is a grave danger, such as the otherwise uncontainable spread of a serious pathological

> agent — in this case, the pandemic spread of the SARS-CoV-2 virus that causes Covid-19. It must therefore be considered that, in such a case, all vaccinations recognized as clinically safe and effective can be used in good conscience with *the certain knowledge that the use of such vaccines does not constitute formal cooperation with the abortion* from which the cells used in production of the vaccines derive. It should be emphasized, however, that the morally licit use of these types of vaccines, in the particular conditions that make it so, does not in itself constitute a legitimation, even indirect, of the practice of abortion, and necessarily assumes the opposition to this practice by those who make use of these vaccines.

Note on the Morality of Using Some Anti-COVID-18 Vaccines (Dec. 21, 2020) (available at: https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20201221_nota-vaccini-anticovid_en.html) (emphasis in the original). The U.S. Conference of Catholic Bishops repeated and posted this teaching. *Moral Considerations Regarding the New COVID-19 Vaccines* (December 11, 2021) (available at: https://www.usccb.org/resources/moral-considerations-regarding-new-covid-19-vaccines). The SCDC specifically referenced these Catholic teachings to reject the plaintiffs' application.

Does the new emergency regulation violate the Free Exercise Clause? Are the plaintiffs entitled to a constitutional exemption? May the SCDC deny plaintiffs a religious exemption?

Appendix

The Justices of the United States Supreme Court, 1946-2021 Terms

U.S. Reports	Term*	The Court**
329-332[1]	1946	**Vinson**, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge, Burton
332[1]-335[2]	1947	"
335[2]-338[3]	1948	"
338[3]-339	1949	Vinson, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
340-341	1950	"
342-343	1951	"
344-346[4]	1952	"
346[4]-347	1953	**Warren**, Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton
348-349	1954	Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan[5]
350-351	1955	"
352-354	1956	Warren, Black, Reed,[6] Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker[7]
355-357	1957	Warren, Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker
358-360	1958	Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart
361-364[8]	1959	"
364[8]-367	1960	"

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* Rule 3 of the Supreme Court's Rules provides in part: "The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year."

** Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[1] The 1947 Term begins at 332 U.S. 371.

[2] The 1948 Term begins at 335 U.S. 281.

[3] The 1949 Term begins at 338 U.S. 217.

[4] The 1953 Term begins at 346 U.S. 325.

[5] Participation begins with 349 U.S.

[6] Participation ends with 352 U.S. 564.

[7] Participation begins with 353 U.S.

[8] The 1960 Term begins with 364 U.S. 285.

U.S. Reports	Term	The Court*
368-370	1961	Warren, Black, Frankfurter,[9] Douglas, Clark, Harlan, Brennan, Whittaker,[10] Stewart, White[11]
371-374	1962	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg
375-378	1963	"
379-381	1964	"
382-384	1965	Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas
385-388	1966	"
389-392	1967	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas, Marshall
393-395	1968	Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Fortas,[12] Marshall
396-399	1969	**Burger**, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, [vacancy]
400-403	1970	Burger, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall, Blackmun
404-408	1971	Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell,[13] Rehnquist[13]
409-413	1972	"
414-418	1973	"
419-422	1974	"
423-428	1975	Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens[14]
429-433	1976	"
434-438	1977	"
439-443	1978	"
444-448	1979	"
449-453	1980	"
454-458	1981	Burger, Brennan, White, Marshall, Blackmun, Powell, Rehnquist, Stevens, O'Connor
459-463	1982	"
464-468	1983	"
469-473	1984	"
474-478	1985	"
479-483	1986	**Rehnquist**, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia
484-487	1987	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[9] Participation ends with 369 U.S. 422.

[10] Participation ends with 369 U.S. 120.

[11] Participation begins with 370 U.S.

[12] Participation ends with 394 U.S.

[13] Participation begins with 405 U.S.

[14] Participation begins with 424 U.S.

U.S. Reports	Term	The Court*
488-492	1988	Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy
493-497	1989	"
498-501	1990	Rehnquist, White, Marshall, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter
502-505	1991	Rehnquist, White, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas
506-509	1992	"
510-512	1993	Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg
513-515	1994	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
516-518	1995	"
519-521	1996	"
522-524	1997	"
525-527	1998	"
528-530	1999	"
531-533	2000	"
534-536	2001	"
537-539	2002	"
540-542	2003	"
543-545	2004[15]	Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer
546-548	2005	**Roberts**, Stevens, O'Connor,[16] Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito[17]
549-551	2006	Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito
552-554	2007	"
555-557	2008	"
558-561	2009	Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor
562-564	2010	Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
565-567	2011	"
568-570	2012	"
571-573	2013	"
574-576	2014	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[15] Chief Justice Rehnquist died on Sept. 3, 2005, shortly before the 2004 Term officially concluded, but after all opinions from that Term had been delivered.

[16] Participation ends with 546 U.S. 417.

[17] Participation begins with 547 U.S.

U.S. Reports	Term	The Court*
577-579	2015	Roberts, Scalia,[18] Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan
580-582	2016	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch[19]
583-585	2017	Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch
586-588	2018	Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh
589-591	2019	"
592-594	2020	Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett
595-597	2021	"

* Justices are listed in order of seniority. Boldface indicates a new Chief Justice.

[18] Justice Scalia died on February 13, 2016, before most of the cases argued in the 2015 Term were decided. His participation ended with 136 S. Ct. 760.

[19] Justice Gorsuch joined the Court on April 10, 2017. He took no part in any of the cases from the 2016 Term discussed in this Supplement.