Constitutional Law: Power, Liberty, Equality

2020 Supplement

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Introduction to the 2020 Supplement

The 2020 Supplement incorporates the additions and changes to the main text made in the 2018 and 2019 supplements. The introduction to the 2018 and 2019 supplements are retained below to provide an overview of those changes. Although there were a number of important issues decided in the October 2019 Term, no significant doctrinal changes were made to basic constitutional law doctrine and policy. Some decisions continued to foreshadow significant changes sentiment on the Court for changes in deference to be given to administrative agencies, and the standards for Congressional delegation of power to the executive branch, Second Amendment rights, and abortion, the expected shifts have not yet occurred.

Major decisions mostly confirmed existing standards with respect to separation of powers. The Court confirmed that the President is subject to judicial process while in office, *Trump v. Vance* and *Trump v. Mazars* and decided a case concerning the President's power to remove administrative agency officials from high positions.

The rarely-examined treaty power was used to uphold a 19th century treaty with respect to Native American rights in Oklahoma. McGirt v. Oklahoma (2020).

A number of important decisions enforced the requirements of the Administrative Procedures Act against executive branch attempts to undo federal regulations. Those are very important decisions, but not constitutional law per se.

The Court decided a very important case concerning statutory rights against discrimination on the basis of sex holding that discrimination on the basis of sexual orientation was, for statutory purposes, sex discrimination. *Bostock v. Clayton County* (2020). Although that was a statutory interpretation case, not a constitutional interpretation case, it seems likely that the logic and reasoning of the decision written by Justice Gorsuch will be applied to reach the same result under the Equal Protection Clause.

Introduction to the 2019 Supplement

The 2019 Supplement includes the material added and replaced by the 2018 Supplement. The introduction to the 2018 supplement is retained below. Although there were a number of important issues decided in the October 2018 Term, no

significant doctrinal changes were made to basic constitutional law doctrine and policy. Some decisions hinted at changes that the Court will be willing to countenance including in particular developments in deference to be given to administrative agencies, *see Kisor v. Wilkie*, No. 18-15, 588 U.S. ___ (2019), and the standards for Congressional delegation of power to the executive branch, *Gundy v. United States*, 588 U.S. ___ (2019).

Some important cases did clarify or otherwise affect the law, though not in truly fundamental ways. These matters include:

- The Court continued to intimate that it might alter the current doctrine allowing broad delegation of Congressional legislative power to the executive, , and would reduce judicial deference to administrative agency interpretation of statutes and regulations, but did not yet make significant changes. *Gundy v. United States,* 588 U.S. ___ (2019) (delegation to Justice Department under Sex Offender Registration and Notification Act upheld); *Kisor v. Wilkie,* 588 U.S. ___ (2019) (deference granted to Veteran's Administration's interpretation of its own regulations).
- State power over alcohol commerce is limited by the Dormant Commerce Clause, *Tennessee Wine and Spirits Retailers Assn. v. Thomas,* 588 U.S. ___ (2019) (state requirement that alcohol vendors be state residents held unconstitutional);
- The rigid approach to applying the strict scrutiny standard of review in freedom of speech cases continues, *Iancu v. Brunetti,* 588 U.S. ___, (2019) (Lanham Act prohibiting registration of scandalous trademarks held unconstitutional);
- The Court ruled that gerrymandering for political party purposes is constitutional, *Rucho v. Common Cause,* 588 U.S. ___ (2019) (North Carolina and Maryland partisan political gerrymandering upheld);
- Permissible displays of religious symbols by governments in some circumstances upheld, *McDonough v. Smith,* 588 U.S. ___ (2019) (WWI monument in the shape of a giant cross held not to violate the Establishment Clause).

Introduction to the 2018 Supplement

The non-case textual material included in this supplement fills a few gaps in the first edition and clarifies some difficult passages. The new material on freedom of expression shifts the focus in the first edition from the long-standing approach of the Court of a more nuanced approach to novel freedom of expression issues to the current approach which broadens the definition of content-based regulation and which applies the free speech strict scrutiny test in a more rigid manner. With the appointment of Gorsuch and the pending appointment of another justice in the Alito-Gorsuch mold, it seems all but certain that the current rote, instrumental approach will remain ascendant for some time to come.

Broader trends visible in the recent, and most especially the June 2018, decisions of the Court are brought out in this supplement both through the added text and cases. These trends include:

- Continued reliance on federalism jurisprudence to trim the power of Congress over the states, *Murphy v. NCAA,* 584 U.S. ___ (2018) (federal gambling law restricting state power held unconstitutional);
- Favoring liberty interests, especially of speech and free exercise of religion over state actions furthering equality and inclusion, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 584 U.S. __ (2018);
- Willingness to overturn established precedent, *South Dakota v. Wayfair, Inc.*, 585 U.S. ___ (2018) (physical nexus requirement for state taxation of out-of-state businesses overturned); and
- The rigid approach to applying the strict scrutiny standard of review in freedom of speech cases, *National Institute of Family and Life Advocates v Becerra,* 585 U.S. __ (2018) (California law mandating birth control advocates to disclose abortion option held to be an unconstitutional infringement of freedom of speech); *Minnesota Voters Alliance v Mansky,* 585 U.S. __ (2018) (Minnesota restrictions on polling place speech in the form of political buttons, clothing, or insignia violates the constitution because it cannot be applied in a reasoned way).

Chapter 3: Judicial Power

At the end of §3.3.6.2, p. 194, add the following:

In 2019 the Supreme Court held in a 5-4 decision that politically partisan gerrymandering issues are non-justiciable no matter how egregious the disproportionate representation that results are. The Court said the remedy was to be found in political processes at the state level and perhaps through Congressional action. The Court mentioned those possible avenues, but took care not to hold any such actions would be constitutional since those issues were not before the Court, so we do not know the extent to which states and Congress can adopt effective remedies to partisan gerrymandering.

Rucho v. Common Cause, 588 U.S. ___ (2019)

Chief Justice Roberts delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State's districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State's plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, §2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an

unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

A

The first case involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. *Rucho v. Common Cause,* No. 18–422. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. 318 F. Supp. 3d 777, 807–808 (MDNC 2018). As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.*, at 809. He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." Id., at 808. One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates." Ibid. The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote. Id., at 809.

…

B

The second case before us is *Lamone v. Benisek,* No. 18–726. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a "serial gerrymanderer," to advise the committee. 348 F. Supp. 3d 493, 502 (Md. 2018). The Governor later testified that his aim was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. Ibid. "[A] decision was made to go for the Sixth," ibid., which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. Id., at 498. The 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. Id., at 499–501. The map was adopted by a

party-line vote. Id., at 506. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

…

II

A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process." *Flast v. Cohen,* 392 U.S. 83, 95 (1968). In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.' " *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 (2006) (quoting 2 Records of the Federal Convention of 1787, p. 430 (M. Farrand ed. 1966)).

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer,* 541 U.S. 267, 277 (2004) (plurality opinion). In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker v. Carr,* 369 U.S. 186, 217 (1962). Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Ibid.*

… The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere. …

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. *See Vieth,* 541 U.S., at 274 (plurality opinion). During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe. Hunter, *The First Gerrymander?* 9 Early Am. Studies 792–794, 811 (2011). …

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. … At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. …

In the leading case of *Baker v. Carr,* voters in Tennessee complained that the State's districting plan for state representatives "debase[d]" their votes, because the plan was predicated on a 60-year-old census that no longer reflected the distribution of population in the State. … This Court … identified various considerations relevant to determining whether a claim is a nonjusticiable political question, including whether there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S., at 217. The Court concluded that the claim of population inequality among districts did not fall into that category, because such a claim could be decided under basic equal protection principles. *Id.*, at 226. In *Wesberry v. Sanders,* the Court extended its ruling to malapportionment of congressional districts, holding that Article I, §2, required that "one man's vote in a congressional election is to be worth as much as another's." 376 U.S., at 8.

Another line of challenges to districting plans has focused on race. Laws that explicitly discriminate on the basis of race, as well as those that are race neutral on their face but are unexplainable on grounds other than race, are of course presumptively invalid. The Court applied those principles to electoral boundaries in *Gomillion v. Lightfoot,* concluding that a challenge to an "uncouth twenty-eight sided" municipal boundary line that excluded black voters from city elections stated a constitutional claim. 364 U.S. 339, 340 (1960). In *Wright v. Rockefeller,* 376 U.S. 52 (1964), the Court extended the reasoning of *Gomillion* to congressional districting. *See Shaw I,* 509 U. S., at 645.

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie,* 526 U.S. 541, 551 (1999)… .

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth*, 541 U. S., at 296 (plurality opinion). *See League of United Latin American Citizens v. Perry,* 548 U.S. 399, 420 (2006) (LULAC) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

…

III

A

… Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." 541 U.S., at 306–308 (opinion concurring in judgment). An important reason for those careful

constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." *Bandemer*, 478 U. S., at 145 (opinion of O'Connor, J.). …

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U.S., at 420 (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U. S., at 307 (opinion of Kennedy, J.). If federal courts are to "inject [themselves] into the most heated partisan issues" by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U. S., at 145 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from "constitutional political gerrymandering." Cromartie, 526 U.S., at 551.

B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer*, 478 U. S., at 159 (opinion of O'Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Ibid.* "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130 (plurality opinion). …

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*:

> " 'Fairness' does not seem to us a judicially manage- able standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." 541 U.S., at 291.

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer*, 478 U.S., at 130 (plurality opinion).

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. *See id.*, at 130–131 ("To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit."); *Gaffney*, 412 U.S., at 735–738. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. See Brief for Bipartisan Group of Current and Former Members of the House of Representatives as Amici Curiae; Brief for Professor Wesley Pegden et al. as Amici Curiae in No. 18–422. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." Vieth, 541 U. S., at 308–309 (opinion concurring in judgment). See id., at 298 (plurality opinion) ("[P]acking and cracking, whether intentional or no, are quite consistent with adherence to compactness and respect for political subdivision lines").

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts. *Zivotofsky v. Clinton,* 566 U.S. 189, 196 (2012).

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional

districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

…

IV

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

…

D

The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, §2. We are unconvinced by that novel approach.

Article I, §2, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Art. I, §4, cl. 1.

The District Court concluded that the 2016 Plan exceeded the North Carolina General Assembly's Elections Clause authority because, among other reasons, "the Elections Clause did not empower State legislatures to disfavor the interests of supporters of a particular candidate or party in drawing congressional districts." 318 F. Supp. 3d, at 937. The court further held that partisan gerrymandering infringes the right of "the People" to select their representatives. *Id.*, at 938–940. Before the District Court's decision, no court had reached a similar conclusion. In fact, the plurality in *Vieth* concluded—without objection from any other Justice—that neither §2 nor §4 of Article I "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U.S., at 305.

The District Court nevertheless asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Art. I, §2, "namely, that the voters should choose their representatives, not the other way around." 318 F. Supp. 3d, at 940 (quoting *Arizona State Legislature,* 576 U.S., at ___ (slip op., at 35); internal quotation marks omitted; alteration in original). That seems like an objection more properly grounded in the Guarantee Clause of Article IV, §4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This

Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim. *See, e.g., Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U.S. 118 (1912).

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature,* 576 U.S., at ___ (slip op., at 1), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by standard, by rule," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. *Vieth*, 541 U.S., at 278, 279 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: "this Court can address the problem of partisan gerrymandering because it must." 585 U. S., at ___ (slip op., at 12). That is not the test of our authority under the Constitution; that document instead "confines the federal courts to a properly judicial role." *Town of Chester v. Laroe Estates, Inc.,* 581 U.S. ___, ___ (2017) (slip op., at 4).

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role. …

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. *League of Women Voters of Florida v. Detzner,* 172 So. 3d 363 (2015). The dissent wonders why we can't do the same. See post, at 31. The answer is that there is no "Fair Districts Amendment" to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. (We do not understand how the dissent can maintain that a provision saying that no districting plan "shall be drawn with the intent to favor or disfavor a political party" provides little guidance on the question. See post, at 31, n. 6.) Indeed, numerous

other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. See Colo. Const., Art. V, §§44, 46; Mich. Const., Art. IV, §6. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines. Mo. Const., Art. III, §3.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. See Fla. Const., Art. III, §20(a) ("No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent."); Mo. Const., Art. III, §3 ("Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency."); Iowa Code §42.4(5) (2016) ("No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group."); Del. Code Ann., Tit. xxix, §804 (2017) (providing that in determining district boundaries for the state legislature, no district shall "be created so as to unduly favor any person or political party").

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering. H. R. 1, 116th Cong., 1st Sess., §§2401, 2411 (2019).

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. In 2010, H. R. 6250 would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting. It also would have prohibited the establishment of congressional districts "with the major purpose of diluting the voting strength of any person, or group, including any political party," except when necessary to comply with the Voting Rights Act of 1965. H. R. 6250, 111th Cong., 2d Sess., §2 (referred to committee).

Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative's residence. H. R. 2642, 109th Cong., 1st Sess., §4 (referred to subcommittee).

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 1 Cranch, at 177. In this rare circumstance, that means our duty is to say "this is not law."

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

Justice Kagan, with whom Justice Ginsburg, Justice Breyer, and Justice Sotomayor join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is not beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland.

In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong.

…

The majority, in the end, fails to understand both the plaintiffs' claims and the decisions below. Everything in today's opinion assumes that these cases grew out of a "desire for proportional representation" or, more generally phrased, a "fair share of political power." Ante, at 16, 21. And everything in it assumes that the courts below had to (and did) decide what that fair share would be. But that is not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice's removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals' supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people's power to vote.

III

…

The majority's most perplexing "solution" is to look to state courts. … "[O]ur conclusion," the majority states, does not "condemn complaints about districting to echo into a void": Just a few years back, "the Supreme Court of Florida struck down that State's congressional districting plan as a violation" of the State Constitution. … *see League of Women Voters of Florida v. Detzner,* 172 So. 3d 363 (2015). And indeed, the majority might have added, the Supreme Court of Pennsylvania last year did the same thing. *See League of Women Voters,* ___ Pa., at ___, 178 A. 3d, at 818. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?

We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 1 Cranch 137, 177 (1803). That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, *see ante,* at 34, this was law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the amicus briefs here is one from a bipartisan group of current

and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call "a cascade of negative results." Brief as Amicus Curiae 5. These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. *See id.*, at 5–6. Last year, we heard much the same from current and former state legislators. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal." Brief as Amicus Curiae in *Gill v. Whitford*, O. T. 2016, No. 16–1161, pp. 6, 25. Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. *See supra*, at 7–8. In our government, "all political power flows from the people." *Arizona State Legislature,* 576 U. S., at ___ (slip op., at 35). And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." 2 Debates on the Constitution 257 (J. Elliot ed. 1891). But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent

Chapter 9: Executive Power

Insert in §9.5.2.1, p. 413, before the next section §9.5.3

The courts have long deferred to administrative agencies interpretations and actions when the agencies interpret and apply the statutes they administer. In 1984 the Court established a deferential two-step test for reviewing agency interpretations of their guiding statutes:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. v. NRDC, 467 U.S. 837, 842-43 (1984).

However, a number of justices have stated their hostility to this rule. *See*, *Arlington v. FCC,* 569 U.S. 290 (2013) (dissent); *SAS Institute Inc. v. Iancu*, 584 U.S. ___ (2018) (Gorsuch's lead opinion not granting deference in interpretation and calling *Chevron* into question). With the appointment of Justice Gorsuch and the pending appointment of a replacement for Justice Kennedy after his retirement in June 2018, it seems likely that there will be the necessary five votes to overrule *Chevron*.

Just how far the Court may go in eliminating judicial deference to administrative agencies is uncertain. It seems highly likely that the courts will not defer to an agency's interpretation of the statutes it administers but rather interpret the statutes *de novo* in each instance. It is less likely that an administrative agency decision that is merely applies a statute will not be granted deference, but it is possible that all decisions by administrative law judges and administrative agencies could be subject to *de novo* review in court. Such a step would upend more than 70 years of established law, *see* 5 U.S.C. ch. 7, but some justices appear willing to do exactly that.

It seems very unlikely that there would be five votes to declare the entire administrative state unconstitutional, though no provision is made in the Constitution for administrative agencies in general, let alone independent agencies such as the Federal Reserve, the Federal Communications Commission, and the Securities and Exchange Commission.

These difficult issues are typically explored in courses on administrative law and cannot be delved into deeply in a general constitutional law survey course such as those for which this book was written.

Insert in §9.5.3, p. 413, before the paragraph starting with "Two questions… ."

Under current interpretation of the Appointments Clause, there are three types of federal government employees: senior officers, inferior officers, and ordinary employees. Senior officers include cabinet secretaries, federal judges, ambassadors, United States Attorneys, and various other lesser officers as established by law. Senior officers are subject to the advice and consent of the Senate as provided in the Article II Section 2 Clause 2. "Inferior officers" may be appointed by the president, heads of departments, or the courts as provided by law. They do not need Senate confirmation. Most people employed by the federal government are ordinary employees and may be hired by inferior officers or other employees.

In the first case below, *Lucia v. SEC*, 585 U.S. ___ (2018), the Court articulates the current, vague standard for distinguishing inferior officers from employees in the context of Administrative Law Judges. As the several opinions make clear, there is room for development of the test to provide more clarity and certainty to Congress and to the executive branch as to the constitutional requirements. Even the majority opinion mentions this even as it chooses not to provide additional clarity. The dissent by Justice Sotomayor emphasizes the problem even more emphatically. Justice Thomas presents a his view of original meaning, contending that that original meaning

should control the result. His view of the original meaning is a contested area among scholars both as to whether original meaning should control and as to just what that original meaning was. Justice Breyer's concurrence and partial dissent highlights the related problem of constitutional constraints on Congressional attempts to constrain the power of the president or others within the executive branch to remove officers. The power of removal is the subject of *Morrison v. Olson,* 487 U.S. 654 (1988), the case in the textbook to be considered after *Lucia*.

Lucia v. Securities and Exchange Commission, 585 U.S. __ (2018)

Justice Kagan delivered the opinion of the Court.

….

I

The SEC has statutory authority to enforce the nation's securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. … But the Commission also may, and typically does, delegate that task to an ALJ. …. The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all. ….

An ALJ assigned to hear an SEC enforcement action has extensive powers—the "authority to do all things necessary and appropriate to discharge his or her duties" and ensure a "fair and orderly" adversarial proceeding. … [A]n SEC ALJ exercises authority "comparable to" that of a federal district judge conducting a bench trial. …

After a hearing ends, the ALJ issues an "initial decision." … The Commission can then review the ALJ's decision, either upon request or *sua sponte*. … But if it opts against review, the Commission "issue[s] an order that the [ALJ's] decision has become final." … At that point, the initial decision is "deemed the action of the Commission." …

….

II

The sole question here is whether the Commission's ALJs are "Officers of the United States" or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing "Officers." Only the President, a court of law, or a head of department can do so. See Art. II, §2, cl. 2. And as all parties agree, none of those actors appointed Judge Elliot before he heard Lucia's case; instead, SEC staff members gave him an ALJ slot. … So if the Commission's ALJs are constitutional officers, Lucia raises a valid Appointments Clause claim. The only way to defeat his position is to show that those ALJs are not officers at all, but instead non-officer employees—part of the broad swath of "lesser functionaries" in the Government's workforce. … For if that is true, the Appointments Clause cares not a whit about who named them. *See United States* v. *Germaine*, 99 U.S. 508, 510 (1879).

Two decisions set out this Court's basic framework for distinguishing between officers and employees. *Germaine* held that "civil surgeons" (doctors hired to perform various physical exams) were mere employees because their duties were "occasional or temporary" rather than "continuing and permanent." *Id.,* at 511–512. Stressing "ideas of tenure [and] duration," the Court there made clear that an individual must occupy a "continuing" position established by law to qualify as an officer. *Id.,* at 511. *Buckley* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they "exercis[ed] significant authority pursuant to the laws of the United States." 424 U.S., at 126. The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the *amicus* and the Government urge us to elaborate on *Buckley*'s "significant authority" test, but another of our precedents makes that project unnecessary. The standard is no doubt framed in general terms, tempting advocates to add whatever glosses best suit their arguments … And maybe one day we will see a need to refine or enhance the test *Buckley* set out so concisely. But that day is not this one, because in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), we applied the unadorned "significant authority" test to adjudicative officials who are near-carbon copies of the Commission's ALJs. As we now explain, our analysis there (sans any more detailed legal criteria) necessarily decides this case.

….

This Court held that the Tax Court's STJs are officers, not mere employees.

Freytag says everything necessary to decide this case. To begin, the Commission's ALJs, like the Tax Court's STJs, hold a continuing office established by law. See *id.*, at 881. … And that appointment is to a position created by statute, down to its "duties, salary, and means of appointment." *Freytag*, 501 U.S., at 881…

Still more, the Commission's ALJs exercise the same "significant discretion" when carrying out the same "important functions" as STJs do. *Freytag*, 501 U.S., at 882. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. … [P]oint for point—straight from *Freytag*'s list—the Commission's ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. … That last-word capacity makes this an *a fortiori* case: If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too.

….

The only issue left is remedial. For all the reasons we have given, and all those *Freytag* gave before, the Commission's ALJs are "Officers of the United States," subject to the Appointments Clause. And as noted earlier, Judge Elliot heard and decided Lucia's case without the kind of appointment the Clause requires. See *supra,* at 5. This Court has held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case" is entitled to relief. *Ryder* v. *United States*, 515 U.S. 177, 182–183 (1995). Lucia made just such a timely challenge: He contested the validity of Judge Elliot's appointment before the

Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the "appropriate" remedy for an adjudication tainted with an appointments violation is a new "hearing before a properly appointed" official. *Id.*, at 183, 188. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Breyer, with whom Justice Ginsburg and Justice Sotomayor join as to Part III, concurring in the judgment in part and dissenting in part.

I agree with the Court that the Securities and Exchange Commission did not properly appoint the Administrative Law Judge who presided over petitioner Lucia's hearing. But I disagree with the majority in respect to two matters. First, I would rest our conclusion upon statutory, not constitutional, grounds. I believe it important to do so because I cannot answer the constitutional question that the majority answers without knowing the answer to a different, embedded constitutional question, which the Solicitor General urged us to answer in this case: the constitutionality of the statutory "for cause" removal protections that Congress provided for administrative law judges. .... Second, I disagree with the Court in respect to the proper remedy.

I

The relevant statute here is the Administrative Procedure Act. That Act governs the appointment of administrative law judges. It provides (as it has, in substance, since its enactment in 1946) that "[e]ach agency shall appoint as many administrative law judges as are necessary for" hearings governed by the Administrative Procedure Act. 5 U.S. C. §3105; see also Administrative Procedure Act, §11, 60 Stat. 244 (original version, which refers to "examiners" as administrative law judges were then called). In the case of the Securities and Exchange Commission, the relevant "agency" is the Commission itself. But the Commission did not appoint the Administrative Law Judge who presided over Lucia's hearing. Rather, the Commission's staff appointed that Administrative Law Judge, without the approval of the Commissioners themselves. …

I do not believe that the Administrative Procedure Act permits the Commission to delegate its power to appoint its administrative law judges to its staff. …

…

The upshot, in my view, is that for statutory, not constitutional, reasons, the Commission did not lawfully appoint the Administrative Law Judge here at issue. And this Court should decide no more than that.

II

A

The reason why it is important to go no further arises from the holding in a case this Court decided eight years ago, *Free Enterprise Fund*, *supra*. The case concerned statutory provisions protecting members of the Public Company Accounting Oversight Board from removal without cause. The Court held in that case that the Executive Vesting Clause of the Constitution, Art. II, §1 ("[t]he executive Power shall be vested in a President of the United States of America"), forbade Congress from providing members of the Board with "multilevel protection from removal" by the President. *Free Enterprise Fund,* 561 U.S., at 484; see *id.,* at 514 ("Congress cannot limit the President's authority" by providing "two levels of protection from removal for those who . . . exercise significant executive power"). But see *id.,* at 514–549 (Breyer, J., dissenting). Because, in the Court's view, the relevant statutes (1) granted the Securities and Exchange Commissioners protection from removal without cause, (2) gave the Commissioners sole authority to remove Board members, and (3) protected Board members from removal without cause, the statutes provided Board members with two levels of protection from removal and consequently violated the Constitution. *Id.,* at 495–498.

In addressing the constitutionality of the Board members' removal protections, the Court emphasized that the Board members were "executive officers"—more specifically, "inferior officers" for purposes of the Appointments Clause. *E.g., id.,* at 492–495, 504–505. The significance of that fact to the Court's analysis is not entirely clear. The Court said:

> "The parties here concede that Board members are executive 'Officers', as that term is used in the Constitution. We do not decide the status of other Government employees, nor do we decide whether 'lesser functionaries subordinate to officers of the United States' must be subject to the same sort of control as those who exercise 'significant authority pursuant to the laws.' "

Id., at 506 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126, and n. 162 (1976) (*per curiam*); citations omitted). Thus, the Court seemed not only to limit its holding to the Board members themselves, but also to suggest that Government employees who were not officers would be distinguishable from the Board members on that ground alone.

…

The Administrative Procedure Act thus allows administrative law judges to be removed only "for good cause" found by the Merit Systems Protection Board. §7521(a). And the President may, in turn, remove members of the Merit Systems Protection Board only for "inefficiency, neglect of duty, or malfeasance in office." §1202(d). Thus, Congress seems to have provided administrative law judges with two levels of protection from removal without cause—just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of the Board members.

The substantial independence that the Administrative Procedure Act's removal protections provide to administrative law judges is a central part of the Act's overall

scheme. … Before the Administrative Procedure Act, hearing examiners "were in a dependent status" to their employing agency, with their classification, compensation, and promotion all dependent on how the agency they worked for rated them. ... As a result of that dependence, "[m]any complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." ... The Administrative Procedure Act responded to those complaints by giving administrative law judges "independence and tenure within the existing Civil Service system." *Id.,* at 132; cf. *Wong Yang Sung*, *supra,* at 41–46 (referring to removal protections as among the Administrative Procedure Act's "safeguards . . . intended to ameliorate" the perceived "evils" of commingling of adjudicative and prosecutorial functions in agencies).

If the *Free Enterprise Fund* Court's holding applies equally to the administrative law judges—and I stress the "if"—then to hold that the administrative law judges are "Officers of the United States" is, *perhaps*, to hold that their removal protections are unconstitutional. This would risk transforming administrative law judges from independent adjudicators into *dependent* decisionmakers, serving at the pleasure of the Commission. Similarly, to apply *Free Enterprise Fund*'s holding to high-level civil servants threatens to change the nature of our merit-based civil service as it has existed from the time of President Chester Alan Arthur. See *Free Enterprise Fund*, 561 U.S., at 540–542 (Breyer, J., dissenting).

…

And now it should be clear why the application of *Free Enterprise Fund* to administrative law judges is important. If that decision does not limit or forbid Congress' statutory "for cause" protections, then a holding that the administrative law judges are "inferior Officers" does not conflict with Congress' intent as revealed in the statute. But, if the holding is to the contrary, and more particularly if a holding that administrative law judges are "inferior Officers" brings with it application of *Free Enterprise Fund*'s limitation on "for cause" protections from removal, then a determination that administrative law judges are, constitutionally speaking, "inferior Officers" would directly conflict with Congress' intent, as revealed in the statute. In that case, it would be clear to me that Congress did not intend that consequence, and that it therefore did not intend to make administrative law judges "inferior Officers" at all.

B

Congress' intent on the question matters, in my view, because the Appointments Clause is properly understood to grant Congress a degree of leeway as to whether particular Government workers are officers or instead mere employees not subject to the Appointments Clause. The words "by Law" appear twice in the Clause. It says that the President ("with the Advice and Consent of the Senate") shall appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, . . . which shall be *established by Law*." Art. II, §2, cl. 2 (emphasis added). It then adds that "Congress may *by Law* vest the

Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.* (emphasis added).

The use of the words "by Law" to describe the establishment and means of appointment of "Officers of the United States," together with the fact that Article I of the Constitution vests the legislative power in Congress, suggests that (other than the officers the Constitution specifically lists) Congress, not the Judicial Branch alone, must play a major role in determining who is an "Office[r] of the United States." And Congress' intent in this specific respect is often highly relevant. Congress' leeway is not, of course, absolute—it may not, for example, say that positions the Constitution itself describes as "Officers" are not "Officers." But given the constitutional language, the Court, when deciding whether other positions are "Officers of the United States" under the Appointments Clause, should give substantial weight to Congress' decision.

…

Thus, neither *Buckley* nor any other case forecloses an interpretation of the Appointments Clause that focuses principally on whether the relevant statutes show that Congress intended that a particular Government position be held by an "Office[r] of the United States." Adopting such an approach, I would not answer the question whether the Securities and Exchange Commission's administrative law judges are constitutional "Officers" without first deciding the pre-existing *Free Enterprise Fund* question—namely, what effect that holding would have on the statutory "for cause" removal protections that Congress provided for administrative law judges. If, for example, *Free Enterprise Fund* means that saying administrative law judges are "inferior Officers" will cause them to lose their "for cause" removal protections, then I would likely hold that the administrative law judges are not "Officers," for to say otherwise would be to contradict Congress' enactment of those protections in the Administrative Procedure Act. In contrast, if *Free Enterprise Fund* does not mean that an administrative law judge (if an "Office[r] of the United States") would lose "for cause" protections, then it is more likely that interpreting the Administrative Procedure Act as conferring such status would not run contrary to Congress' intent. In such a case, I would more likely hold that, given the other features of the Administrative Procedure Act, Congress did intend to make administrative law judges inferior "Officers of the United States."

III

…

* * *

The Court's decision to address the Appointments Clause question separately from the constitutional removal question is problematic. By considering each question in isolation, the Court risks (should the Court later extend *Free Enterprise Fund*) unraveling, step-by-step, the foundations of the Federal Government's administrative adjudication system as it has existed for decades, and perhaps of the merit-based civil-service system in general. And the Court risks doing so without

considering that potential consequence. For these reasons, I concur in the judgment in part and, with respect, I dissent in part.

Justice Thomas, with whom Justice Gorsuch joins, concurring.

I agree with the Court that this case is indistinguishable from *Freytag* v. *Commissioner*, 501 U.S. 868 (1991). If the special trial judges in *Freytag* were "Officers of the United States," Art. II, §2, cl. 2, then so are the administrative law judges of the Securities and Exchange Commission. Moving forward, however, this Court will not be able to decide every Appointments Clause case by comparing it to *Freytag*. And, as the Court acknowledges, our precedents in this area do not provide much guidance. … While precedents like *Freytag* discuss what is *sufficient* to make someone an officer of the United States, our precedents have never clearly defined what is *necessary*. I would resolve that question based on the original public meaning of "Officers of the United States." To the Founders, this term encompassed all federal civil officials " 'with responsibility for an ongoing statutory duty.' " …

The Appointments Clause provides the exclusive process for appointing "Officers of the United States." … While principal officers must be nominated by the President and confirmed by the Senate, Congress can authorize the appointment of "inferior Officers" by "the President alone," "the Courts of Law," or "the Heads of Departments." …

This alternative process for appointing inferior officers strikes a balance between efficiency and accountability. Given the sheer number of inferior officers, it would be too burdensome to require each of them to run the gauntlet of Senate confirmation. … But, by specifying only a limited number of actors who can appoint inferior officers without Senate confirmation, the Appointments Clause maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones. …

The Founders likely understood the term "Officers of the United States" to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty. … "Officers of the United States" was probably not a term of art that the Constitution used to signify some special type of official. Based on how the Founders used it and similar terms, the phrase "of the United States" was merely a synonym for "federal," and the word "Office[r]" carried its ordinary meaning. … The ordinary meaning of "officer" was anyone who performed a continuous public duty. …

Applying the original meaning here, the administrative law judges of the Securities and Exchange Commission easily qualify as "Officers of the United States." These judges exercise many of the agency's statutory duties, including issuing initial decisions in adversarial proceedings. … As explained, the importance or significance of these statutory duties is irrelevant. All that matters is that the judges are continuously responsible for performing them.

…

Justice Sotomayor, with whom Justice Ginsburg joins, dissenting.

The Court today and scholars acknowledge that this Court's Appointments Clause jurisprudence offers little guidance on who qualifies as an "Officer of the United States." … The lack of guidance is not without consequence. "[Q]uestions about the Clause continue to arise regularly both in the operation of the Executive Branch and in proposed legislation." … This confusion can undermine the reliability and finality of proceedings and result in wasted resources. …

As the majority notes, … this Court's decisions currently set forth at least two prerequisites to officer status: (1) an individual must hold a "continuing" office established by law, *United States v. Germaine*, 99 U.S. 508, 511–512 (1879), and (2) an individual must wield "significant authority," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (*per curiam*). The first requirement is relatively easy to grasp; the second, less so. To be sure, to exercise "significant authority," the person must wield considerable powers in comparison to the average person who works for the Federal Government. As this Court has noted, the vast majority of those who work for the Federal Government are not "Officers of the United States." *See Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 506, n. 9 (2010) (indicating that well over 90% of those who render services to the Federal Government and are paid by it are not constitutional officers). But this Court's decisions have yet to articulate the types of powers that will be deemed significant enough to constitute "significant authority."

To provide guidance to Congress and the Executive Branch, I would hold that one requisite component of "significant authority" is the ability to make final, binding decisions on behalf of the Government. Accordingly, a person who merely advises and provides recommendations to an officer would not herself qualify as an officer.

There is some historical support for such a requirement. …

Confirming that final decisionmaking authority is a prerequisite to officer status would go a long way to aiding Congress and the Executive Branch in sorting out who is an officer and who is a mere employee. At the threshold, Congress and the Executive Branch could rule out as an officer any person who investigates, advises, or recommends, but who has no power to issue binding policies, execute the laws, or finally resolve adjudicatory questions.

Turning to the question presented here, it is true that the administrative law judges (ALJs) of the Securities and Exchange Commission wield "extensive powers." … They preside over adversarial proceedings that can lead to the imposition of significant penalties on private parties. … In the hearings over which they preside, Commission ALJs also exercise discretion with respect to important matters. …

Nevertheless, I would hold that Commission ALJs are not officers because they lack final decisionmaking authority. As the Commission explained below, the Commission retains " 'plenary authority over the course of [its] administrative proceedings and the rulings of [its] law judges.' " … Commission ALJs can issue only "initial" decisions. … The Commission can review any initial decision upon petition or on its own initiative. … The Commission's review of an ALJ's initial decision is *de novo*. … It can "make any findings or conclusions that in its judgment are proper and

> on the basis of the record." … The Commission is also in no way confined by the record initially developed by an ALJ. The Commission can accept evidence itself or refer a matter to an ALJ to take additional evidence that the Commission deems relevant or necessary. In recent years, the Commission has accepted review in every case in which it was sought. … Even where the Commission does not review an ALJ's initial decision, as in cases in which no party petitions for review and the Commission does not act *sua sponte*, the initial decision still only becomes final when the Commission enters a finality order. … And by operation of law, every action taken by an ALJ "shall, for all purposes, . . . be deemed the action of the *Commission*." … In other words, Commission ALJs do not exercise significant authority because they do not, and cannot, enter final, binding decisions against the Government or third parties.
>
> ….
>
> Because I would conclude that Commission ALJs are not officers for purposes of the Appointments Clause, it is not necessary to reach the constitutionality of their removal protections. … In any event, for at least the reasons stated in Justice Breyer's opinion, *Free Enterprise Fund* is readily distinguishable from the circumstances at play here.
>
> ….
>
> For the foregoing reasons, I respectfully dissent.

Insert a new paragraph at the end of section §9.5.3.1, p. 419.

In 2020 the Court addressed the limits on Congressional power over the executive power to remove the head of an administrative agency in the circumstance where the agency is led by a single person rather than by a board. It held that the limitation on the president's power to remove the single individual in charge of the Consumer Financial Protection Bureau only for inefficiency, neglect, or malfeasance violates the separation of powers. *Seila Law LLC v. Consumer Financial Protection Bureau,* 591 U.S. ____ (2020). It did not overrule other cases, but distinguished them because they involved multi-person board heading the agencies.

Chapter 11

State Power and the Federal Constitution

11.3.2 Dormant Commerce Clause: Discrimination

Add a new subsection immediately before § 11.3.2.5 [numbered 11.3.2.4bis for now]

11.3.2.4bis Dormant Commerce Clause: Discrimination and the 21st Amendment

The 21st Amendment repealed prohibition and provided that states could still regulate sales of alcohol. In 2019 the Supreme Court held that discrimination against

out-of-state persons with respect to owning licenses to sell liquor in state was unconstitutional as discriminatory under the Dormant Commerce Clause. That was a relatively easy (and obvious) result except for the possibility that the 21st Amendment functions to limit the Dormant Commerce Clause non-discrimination rule in the area of alcohol regulation. In the following case the court clearly restates the Dormant Commerce Clause discrimination standard of review and addresses the 21st Amendment issue.

Tennesee Wine and Spirits Retailers Ass'n v. Thomas, 585 U.S. ___ (2019)

Justice Alito delivered the opinion of the Court.

The State of Tennessee imposes demanding durational-residency requirements on all individuals and businesses seeking to obtain or renew a license to operate a liquor store. One provision precludes the renewal of a license unless the applicant has resided in the State for 10 consecutive years. Another provides that a corporation cannot obtain a license unless all of its stockholders are residents. The Court of Appeals for the Sixth Circuit struck down these provisions as blatant violations of the Commerce Clause, and neither petitioner—an association of Tennessee liquor retailers—nor the State itself defends them in this Court.

The Sixth Circuit also invalidated a provision requiring applicants for an initial license to have resided in the State for the prior two years, and petitioner does challenge that decision. But while this requirement is less extreme than the others that the Sixth Circuit found to be unconstitutional, we now hold that it also violates the Commerce Clause and is not shielded by §2 of the Twenty-first Amendment. Section 2 was adopted as part of the scheme that ended prohibition on the national level. It gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable. But §2 is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages. Because Tennessee's 2-year residency requirement for retail license applicants blatantly favors the State's residents and has little relationship to public health and safety, it is unconstitutional.

I

A

Tennessee, like many other States, requires alcoholic beverages distributed in the State to pass through a specified three-tiered system. Acting through the Tennessee Alcoholic Beverage Commission (TABC), the State issues different types of licenses to producers, wholesalers, and retailers of alcoholic beverages. *See*

Tenn. Code Ann. §57–3–201 (2018). Producers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers or other wholesalers; and only licensed retailers may sell to consumers. §57–3–404. No person may lawfully participate in the sale of alcohol without the appropriate license. *See, e.g.,* §57–3–406.

Included in the Tennessee scheme are onerous durational-residency requirements for all persons and companies wishing to operate "retail package stores" that sell alcoholic beverages for off-premises consumption (hereinafter liquor stores). See §57–3–204(a). To obtain an initial retail license, an individual must demonstrate that he or she has "been a bona fide resident" of the State for the previous two years. §57–3–204(b)(2)(A). And to renew such a license—which Tennessee law requires after only one year of operation—an individual must show continuous residency in the State for a period of 10 consecutive years. *Ibid.*

The rule for corporations is also extraordinarily restrictive. A corporation cannot get a retail license unless all of its officers, directors, and owners of capital stock satisfy the durational-residency requirements applicable to individuals. §57–3–204(b)(3). In practice, this means that no corporation whose stock is publicly traded may operate a liquor store in the State.

In 2012, the Tennessee attorney general was asked whether the State's durational-residency requirements violate the Commerce Clause, and his answer was that the requirements constituted "trade restraints and barriers that impermissibly discriminate against interstate commerce." …

The Tennessee General Assembly responded by amending the relevant laws to include a statement of legislative intent. Citing the alcohol content of the beverages sold in liquor stores, the Assembly found that protection of "the health, safety and welfare" of Tennesseans called for "a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control" of such outlets. §57–3–204(b)(4).

After the amendments became law, the attorney general was again asked about the constitutionality of the durational-residency requirements, but his answer was the same as before. … Consequently, the TABC continued its practice of nonenforcement.

…

II

A

The Court of Appeals held that Tennessee's 2-year residency requirement violates the Commerce Clause, which provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. "Although the Clause is framed as a positive grant of power to Congress," *Comptroller of Treasury of Md. v. Wynne,* 575 U. S. ___, ___ (2015) (slip op., at 5), we have long held that this Clause also

prohibits state laws that unduly restrict interstate commerce. *See, e.g., ibid.; Philadelphia v. New Jersey,* 437 U.S. 617, 623–624 (1978); *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots,* 12 How. 299, 318–319 (1852); *Willson v. Black Bird Creek Marsh Co.,* 2 Pet. 245, 252 (1829). "This 'negative' aspect of the Commerce Clause" prevents the States from adopting protectionist measures and thus preserves a national market for goods and services. *New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 273 (1988).

This interpretation, generally known as "the dormant Commerce Clause," has a long and complicated history. Its roots go back as far as *Gibbons v. Ogden,* 9 Wheat. 1 (1824), where Chief Justice Marshall found that a version of the dormant Commerce Clause argument had "great force." *Id.*, at 209. His successor disagreed, *see License Cases,* 5 How. 504, 578–579 (1847) (Taney, C. J.), but by the latter half of the 19th century the dormant Commerce Clause was firmly established, *see, e.g., Case of the State Freight Tax,* 15 Wall. 232, 279–280 (1873), and it played an important role in the economic history of our Nation. *See* Cushman, *Formalism and Realism in Commerce Clause Jurisprudence,* 67 U. Chi. L. Rev. 1089, 1107 (2000).

In recent years, some Members of the Court have authored vigorous and thoughtful critiques of this interpretation. *See, e.g., Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 609–620 (1997) (Thomas, J., dissenting); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue,* 483 U.S. 232, 259–265 (1987) (Scalia, J., concurring in part and dissenting in part); cf. post, at 2–3 (Gorsuch, J., dissenting) (deeming doctrine "peculiar"). But the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law. And without the dormant Commerce Clause, we would be left with a constitutional scheme that those who framed and ratified the Constitution would surely find surprising.

That is so because removing state trade barriers was a principal reason for the adoption of the Constitution. Under the Articles of Confederation, States notoriously obstructed the interstate shipment of goods. "Interference with the arteries of commerce was cutting off the very life-blood of the nation." M. Farrand, *The Framing of the Constitution of the United States* 7 (1913). The Annapolis Convention of 1786 was convened to address this critical problem, and it culminated in a call for the Philadelphia Convention that framed the Constitution in the summer of 1787. At that Convention, discussion of the power to regulate interstate commerce was almost uniformly linked to the removal of state trade barriers, see Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 Minn. L. Rev. 432, 470–471 (1941), and when the Constitution was sent to the state conventions, fostering free trade among the States was prominently cited as a reason for ratification. In *The Federalist No. 7,* Hamilton argued that state protectionism could lead to conflict among the States, *see The Federalist No. 7,* pp. 62–63 (C. Rossiter ed. 1961), and in *No. 11*, he touted the benefits of a free national market, *id.,* at 88–89. In *The Federalist No. 42*, Madison sounded a similar theme. *Id.*, at 267–268.

In light of this background, it would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no

provision other than the Commerce Clause could easily do the job. The only other provisions that the Framers might have thought would fill that role, at least in part, are the Import-Export Clause, Art. I, §10, cl. 2, which generally prohibits a State from "lay[ing] any Imposts or Duties on Imports or Exports," and the Privileges and Immunities Clause, Art. IV, §2, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." But the Import-Export Clause was long ago held to refer only to international trade. *See Woodruff v. Parham,* 8 Wall. 123, 136–137 (1869). And the Privileges and Immunities Clause has been interpreted not to protect corporations, *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.,* 451 U.S. 648, 656 (1981) (citing *Hemphill v. Orloff,* 277 U.S. 537, 548–550 (1928)), and may not guard against certain discrimination scrutinized under the dormant Commerce Clause, see Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 Minn. L. Rev. 384, 393–397 (2003). So if we accept the Court's established interpretation of those provisions, that leaves the Commerce Clause as the primary safeguard against state protectionism.

It is not surprising, then, that our cases have long emphasized the connection between the trade barriers that prompted the call for a new Constitution and our dormant Commerce Clause jurisprudence. In Guy v. Baltimore, 100 U.S. 434, 440 (1880), for example, the Court wrote that state protectionist measures, "if maintained by this court, would ultimately bring our commerce to that 'oppressed and degraded state,' existing at the adoption of the present Constitution, when the helpless, inadequate Confederation was abandoned and the national government instituted." More recently, we observed that our dormant Commerce Clause cases reflect a " 'central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.' " Granholm, 544 U. S., at 472 (quoting Hughes v. Oklahoma, 441 U.S. 322, 325–326 (1979)).

In light of this history and our established case law, we reiterate that the Commerce Clause by its own force restricts state protectionism.

B

Under our dormant Commerce Clause cases, if a state law discriminates against out-of-state goods or nonresident economic actors, the law can be sustained only on a showing that it is narrowly tailored to " 'advanc[e] a legitimate local purpose.' " *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). *See also, e.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.,* 511 U.S. 93, 100–101 (1994); *Maine v. Taylor,* 477 U.S. 131, 138 (1986).

Tennessee's 2-year durational-residency requirement plainly favors Tennesseans over nonresidents, and neither the Association nor the dissent below defends that requirement under the standard that would be triggered if the requirement applied to a person wishing to operate a retail store that sells a

commodity other than alcohol. *See* 883 F. 3d, at 626. Instead, their arguments are based on §2 of the Twenty-first Amendment, to which we will now turn.

III

A

Section 2 of the Twenty-first Amendment provides as follows:

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

Although the interpretation of any provision of the Constitution must begin with a consideration of the literal meaning of that particular provision, reading §2 to prohibit the transportation or importation of alcoholic beverages in violation of any state law would lead to absurd results that the provision cannot have been meant to produce. Under the established rule that a later adopted provision takes precedence over an earlier, conflicting provision of equal stature, *see, e.g., United States v. Tynen,* 11 Wall. 88, 92 (1871); *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936); A. Scalia & B. Garner, *Reading Law* 327–328 (2012); 1A N. Singer & J. Singer, *Sutherland on Statutory Construction* §23:9 (7th ed. 2009), such a reading of §2 would mean that the provision would trump any irreconcilable provision of the original Constitution, the Bill of Rights, the Fourteenth Amendment, and every other constitutional provision predating ratification of the Twenty-first Amendment in 1933. This would mean, among other things, that a state law prohibiting the importation of alcohol for sale to persons of a particular race, religion, or sex would be immunized from challenge under the Equal Protection Clause. Similarly, if a state law prohibited the importation of alcohol for sale by proprietors who had expressed an unpopular point of view on an important public issue, the First Amendment would provide no protection. If a State imposed a duty on the importation of foreign wine or spirits, the Import-Export Clause would have to give way. If a state law retroactively made it a crime to have bought or sold imported alcohol under specified conditions, the Ex Post Facto Clause would provide no barrier to conviction. The list goes on.

Despite the ostensibly broad text of §2, no one now contends that the provision must be interpreted in this way. Instead, we have held that §2 must be viewed as one part of a unified constitutional scheme. *See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 109 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 331–332 (1964); *cf.* Scalia & Garner, *supra*, at 167–169, 180–182. In attempting to understand how §2 and other constitutional provisions work together, we have looked to history for guidance, and history has taught us that the thrust of §2 is to "constitutionaliz[e]" the basic structure of federal-state alcohol regulatory authority that prevailed prior to the adoption of the Eighteenth Amendment. *Craig v. Boren,* 429 U.S. 190, 206 (1976). We therefore examine that history.

B

…

During this period [between the Civil war and 1900], state laws regulating the alcohol trade were unsuccessfully challenged in this Court on a variety of constitutional grounds. *See, e.g., Mugler v. Kansas,* 123 U.S. 623 (1887) (Privileges or Immunities and Due Process Clauses of Fourteenth Amendment); *Beer Co. v. Massachusetts,* 97 U.S. 25 (1878) (Contracts Clause); *Bartemeyer v. Iowa,* 18 Wall. 129 (1874) (Privileges or Immunities and Due Process Clauses of Fourteenth Amendment). In those decisions, the Court staunchly affirmed the "right of the States," in exercising their "police power," to "protect the health, morals, and safety of their people," but the Court also cautioned that this objective could be pursued only "by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States." *Mugler*, 123 U.S., at 659. For that reason, the Court continued, "mere pretences" could not sustain a law regulating alcohol; rather, if "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.*, at 661.

Dormant Commerce Clause challenges also reached the Court. States that banned the production and sale of alcohol within their borders found that these laws did not stop residents from consuming alcohol shipped in from other States. To curb that traffic, States passed laws regulating or prohibiting the importation of alcohol, and these enactments were quickly challenged.

By the late 19th century, the Court was firmly of the view that the Commerce Clause by its own force restricts state regulation of interstate commerce. *See Bowman v. Chicago & Northwestern R. Co.,* 125 U.S. 465 (1888); *Leisy v. Hardin,* 135 U.S. 100 (1890). Dormant Commerce Clause cases from that era "advanced two distinct principles," an understanding of which is critical to gauging the States' pre-Prohibition power to regulate alcohol. *Granholm*, 544 U. S., at 476.

First, the Court held that the Commerce Clause prevented States from discriminating "against the citizens and products of other States," … /The Court did not question the States' use of the police power to regulate the alcohol trade but stressed that such regulation must have a "bona fide" relation to protecting " 'the public health, the public morals or the public safety,' " *id.*, at 91 (quoting *Mugler, supra*, at 661), and could not encroach upon Congress's "power to regulate commerce among the several States," *Walling, supra,* at 458.

Second, the Court "held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce." ….

…

Despite Congress's clear aim [to allow states to ban the sale of all alcohol within the state], … the Court read the [Act such] that residents of dry States could

continue to order and receive imported alcohol. … In 1913, Congress tried to patch this hole by passing the Webb-Kenyon Act, ch. 90, 37 Stat. 699, 27 U.S.C. §122.

The aim of the Webb-Kenyon Act was to give each State a measure of regulatory authority over the importation of alcohol, but this created a drafting problem. There were those who thought that a federal law giving the States this authority would amount to an unconstitutional delegation of Congress's legislative power over interstate commerce. So the Act was framed not as a measure conferring power on the States but as one prohibiting conduct that violated state law. The Act provided that the shipment of alcohol into a State for use in any manner, "either in the original package or otherwise," "in violation of any law of such State," was prohibited. This formulation is significant for present purposes because it would provide a model for §2 of the Twenty-first Amendment.

The Webb-Kenyon Act attempted to fix the hole in the Wilson Act and thus to "eliminate the regulatory advantage . . . afforded imported liquor," *Granholm, supra,* at 482 … . *Granholm* [in 2005] held, over a strenuous dissent, 544 U.S., at 505–514 (opinion of Thomas, J.), that the Webb-Kenyon Act did not purport to authorize States to enact protectionist measures.

There is good reason for this holding. As we have noted, the Court's pre-Webb-Kenyon Act decisions upholding state liquor laws against challenges based on constitutional provisions other than the Commerce Clause had cautioned that protectionist laws disguised as exercises of the police power would not escape scrutiny. *See supra,* at 14–15. … [T]he shelter given by the Webb-Kenyon Act applied only where "the States treated in-state and out-of-state liquor on the same terms." *Granholm, supra,* at 481.

Following passage of the Webb-Kenyon Act, temperance advocates began the final push for nationwide Prohibition, and with the ratification of the Eighteenth Amendment in 1919, their goal was achieved. The manufacture, sale, transportation, and importation of alcoholic beverages anywhere in the country were prohibited.

IV

A

By 1933, support for Prohibition had substantially diminished but not vanished completely. Thirty-eight state conventions eventually ratified the Twenty-first Amendment, but 10 States either rejected or took no action on the Amendment. Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment and thus ended nationwide Prohibition, but §2, the provision at issue here, gave each State the option of banning alcohol if its citizens so chose.

As we have previously noted, the text of §2 "closely follow[ed]" the operative language of the Webb-Kenyon Act, and this naturally suggests that §2 was meant to have a similar meaning. … The decision to follow that unusual formulation is especially revealing since the drafters of §2, unlike those who framed the Webb-Kenyon Act, had no need to worry that a more straightforward wording might trigger a constitutional challenge. Accordingly, we have inferred that §2 was meant to "constitutionaliz[e]" the basic understanding of the extent of the States' power to

regulate alcohol that prevailed before Prohibition…. And as recognized during that period, the Commerce Clause did not permit the States to impose protectionist measures clothed as police-power regulations. ...

This understanding is supported by the debates on the Amendment in Congress and the state ratifying conventions. The records of the state conventions provide no evidence that §2 was understood to give States the power to enact protectionist laws, "a privilege [the States] had not enjoyed at any earlier time." *Granholm, supra,* at 485.

…

C

Although some Justices have argued that §2 shields all state alcohol regulation—including discriminatory laws—from any application of dormant Commerce Clause doctrine, the Court's modern §2 precedents have repeatedly rejected that view. We have examined whether state alcohol laws that burden interstate commerce serve a State's legitimate §2 interests. And protectionism, we have stressed, is not such an interest. ...

Applying that principle, we have invalidated state alcohol laws aimed at giving a competitive advantage to in-state businesses. …

To summarize, the Court has acknowledged that §2 grants States latitude with respect to the regulation of alcohol, but the Court has repeatedly declined to read §2 as allowing the States to violate the "nondiscrimination principle" that was a central feature of the regulatory regime that the provision was meant to constitutionalize….

D

The Association resists this reading. Although it concedes (as it must under Granholm) that §2 does not give the States the power to discriminate against out-of-state alcohol products and producers, the Association presses the argument, echoed by the dissent, that a different rule applies to state laws that regulate in-state alcohol distribution. There is no sound basis for this distinction.

…

[W]e reject the Association's overly broad understanding of §2. That provision allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.

V

Having concluded that §2 does not confer limitless authority to regulate the alcohol trade, we now apply the §2 analysis dictated by the provision's history and our precedents.

If we viewed Tennessee's durational-residency requirements as a package, it would be hard to avoid the conclusion that their overall purpose and effect is protectionist. Indeed, two of those requirements—the 10-year residency requirement for license renewal and the provision that shuts out all publicly traded

corporations—are so plainly based on unalloyed protectionism that neither the Association nor the State is willing to come to their defense. The provision that the Association and the State seek to preserve—the 2-year residency requirement for initial license applicants—forms part of that scheme. But we assume that it can be severed from its companion provisions, see 883 F. 3d, at 626–628, and we therefore analyze that provision on its own.

Since the 2-year residency requirement discriminates on its face against nonresidents, it could not be sustained if it applied across the board to all those seeking to operate any retail business in the State. … But because of §2, we engage in a different inquiry. Recognizing that §2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy, but as we pointed out in *Granholm*, "mere speculation" or "unsupported assertions" are insufficient to sustain a law that would otherwise violate the Commerce Clause. 544 U.S., at 490, 492. Where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by §2.

The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety. … [T]he record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests. *Granholm, supra,* at 490; *see* 883 F.3d, at 625–626.

In this Court, the Association has attempted to defend the 2-year residency requirement on public health and safety grounds, but this argument is implausible on its face. The Association claims that the requirement ensures that retailers are "amenable to the direct process of state courts," … but the Association does not explain why this objective could not easily be achieved by ready alternatives, such as requiring a nonresident to designate an agent to receive process or to consent to suit in the Tennessee courts. …

Similarly unpersuasive is the Association's claim that the 2-year requirement gives the State a better opportunity to determine an applicant's fitness to sell alcohol and guards against "undesirable nonresidents" moving into the State for the purpose of operating a liquor store. … The State can thoroughly investigate applicants without requiring them to reside in the State for two years before obtaining a license. …

The 2-year residency requirement is not needed to enable the State to maintain oversight over liquor store operators. … In this case, … the stores at issue are physically located within the State. For that reason, the State can monitor the stores' operations through on-site inspections, audits, and the like. See §57–3–104. Should the State conclude that a retailer has "fail[ed] to comply with state law," it may revoke its operating license…. This "provides strong incentives not to sell alcohol" in a way that threatens public health or safety. Ibid.

> In addition to citing the State's interest in regulatory control, the Association argues that the 2-year residency requirement would promote responsible alcohol consumption. …
>
> Not only is the 2-year residency requirement ill suited to promote responsible sales and consumption practices (an interest that we recognize as legitimate, contrary to the dissent's suggestion…), but there are obvious alternatives that better serve that goal without discriminating against nonresidents. State law empowers the relevant authorities to limit both the number of retail licenses and the amount of alcohol that may be sold to an individual. … The State could also mandate more extensive training for managers and employees and could even demand that they demonstrate an adequate connection with and knowledge of the local community. … And the State of course remains free to monitor the practices of retailers and to take action against those who violate the law.
>
> Given all this, the Association has fallen far short of showing that the 2-year durational-residency requirement for license applicants is valid. Like the other discriminatory residency requirements that the Association is unwilling to defend, the predominant effect of the 2-year residency requirement is simply to protect the Association's members from out-of-state competition. We therefore hold that this provision violates the Commerce Clause and is not saved by the Twenty-first Amendment.[22]
>
> * * *
>
> The judgment of the Court of Appeals for the Sixth Circuit is affirmed.
>
> It is so ordered.

11.3.5.2 State Taxation

Replace the last full paragraph on p. 524 beginning with "Thus regulation has fallen to the court." with the following paragraph and the case following it:

Thus regulation has fallen to the courts. The Court had required "a substantial physical nexus" between the state imposing the tax and the object of the tax. *See National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996); *Goldberg v. Sweet,* 488 U.S. 522 (1989); and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In 2018 the Court addressed the problem presented by the rise of internet commerce and concluded that the older rules were not correct and overruled a line of cases requiring a physical nexus. *South Dakota v. Wayfair, Inc.*, 585 U.S. ___ (2018). A close connection between the state and the commerce being taxed is still required, but the Court returned to the more general rule enunciated in *Complete Auto Transit* (1977) to do the work. Note that Justice Gorsuch concurred but questions whether dormant commerce clause jurisprudence is itself constitutional because the constitution grants power over interstate commerce to Congress, not to the judiciary. Four justices dissented on the grounds the issue is best left to Congress both with respect to the physical presence rule (which Congress could undo at any time) and with respect to crafting rules that fit current circumstances better than the Court could do on a case

by case basis under the dormant commerce clause analysis, especially with respect to commerce over the internet.

South Dakota v. Wayfair, Inc., 585 U.S. ___ (2018)

Justice Kennedy delivered the opinion of the Court.

When a consumer purchases goods or services, the consumer's State often imposes a sales tax. This case requires the Court to determine when an out-of-state seller can be required to collect and remit that tax. All concede that taxing the sales in question here is lawful. The question is whether the out-of-state seller can be held responsible for its payment, and this turns on a proper interpretation of the Commerce Clause, U.S. Const., Art. I, §8, cl. 3.

In two earlier cases the Court held that an out-of-state seller's liability to collect and remit the tax to the consumer's State depended on whether the seller had a physical presence in that State, but that mere shipment of goods into the consumer's State, following an order from a catalog, did not satisfy the physical presence requirement. *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The Court granted certiorari here to reconsider the scope and validity of the physical presence rule mandated by those cases.

I

Like most States, South Dakota has a sales tax. It taxes the retail sales of goods and services in the State. … Sellers are generally required to collect and remit this tax to the Department of Revenue. … If for some reason the sales tax is not remitted by the seller, then in-state consumers are separately responsible for paying a use tax at the same rate. … Many States employ this kind of complementary sales and use tax regime.

Under this Court's decisions in *Bellas Hess* and *Quill*, South Dakota may not require a business to collect its sales tax if the business lacks a physical presence in the State. Without that physical presence, South Dakota instead must rely on its residents to pay the use tax owed on their purchases from out-of-state sellers. "[T]he impracticability of [this] collection from the multitude of individual purchasers is obvious." ... It is estimated that *Bellas Hess* and *Quill* cause the States to lose between $8 and $33 billion every year. … Particularly because South Dakota has no state income tax, it must put substantial reliance on its sales and use taxes for the revenue necessary to fund essential services. Those taxes account for over 60 percent of its general fund.

….

II

The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." Art. I, §8, cl. 3. The Commerce Clause "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to

avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325–326 (1979). Although the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action. Of course, when Congress exercises its power to regulate commerce by enacting legislation, the legislation controls. *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). But this Court has observed that "in general Congress has left it to the courts to formulate the rules" to preserve "the free flow of interstate commerce." *Id.,* at 770.

To understand the issue presented in this case, it is instructive first to survey the general development of this Court's Commerce Clause principles and then to review the application of those principles to state taxes.

A

….

… Modern [dormant commerce clause] precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." ... State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." ... Although subject to exceptions and variations, … these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.

B

These principles also animate the Court's Commerce Clause precedents addressing the validity of state taxes. The Court explained the now-accepted framework for state taxation in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). The Court held that a State "may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause." *Id.*, at 285. After all, "interstate commerce may be required to pay its fair share of state taxes." *D. H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 31 (1988). The Court will sustain a tax so long as it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides. See *Complete Auto*, *supra*, at 279.

….

III

The physical presence rule has "been the target of criticism over many years from many quarters." ... Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the

States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.

A

Quill is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto*, 430 U.S., at 279. Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow.

1

All agree that South Dakota has the authority to tax these transactions. S. B. 106 applies to sales of "tangible personal property, products transferred electronically, or services *for delivery into South Dakota*." ... "It has long been settled" that the sale of goods or services "has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." ...

The central dispute is whether South Dakota may require remote sellers to collect and remit the tax without some additional connection to the State. The Court has previously stated that "[t]he imposition on the seller of the duty to insure collection of the tax from the purchaser does not violate the [C]ommerce [C]lause." *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33, 50, n. 9 (1940). It is a " 'familiar and sanctioned device.' " *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 212 (1960). There just must be "a substantial nexus with the taxing State." *Complete Auto*, *supra*, at 279.

...

Quill puts both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers. Remote sellers can avoid the regulatory burdens of tax collection and can offer *de facto* lower prices caused by the widespread failure of consumers to pay the tax on their own. This "guarantees a competitive benefit to certain firms simply because of the organizational form they choose" while the rest of the Court's jurisprudence "is all about preventing discrimination between firms." *Direct Marketing*, 814 F.3d, at 1150–1151 (Gorsuch, J., concurring). In effect, *Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers—something that has become easier and more prevalent as technology has advanced.

Worse still, the rule produces an incentive to avoid physical presence in multiple States. Distortions caused by the desire of businesses to avoid tax collection mean that the market may currently lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable. The Commerce Clause must not prefer interstate commerce only to the point where a merchant physically crosses state borders. Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents. ...

3

The Court's Commerce Clause jurisprudence has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994). *Quill*, in contrast, treats economically identical actors differently, and for arbitrary reasons.

….

The "dramatic technological and social changes" of our "increasingly interconnected economy" mean that buyers are "closer to most major retailers" than ever before—"regardless of how close or far the nearest storefront." … Between targeted advertising and instant access to most consumers via any internet-enabled device, "a business may be present in a State in a meaningful way without" that presence "being physical in the traditional sense of the term." … A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State.

C

The physical presence rule as defined and enforced in *Bellas Hess* and *Quill* is not just a technical legal problem—it is an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions. Forty-one States, two Territories, and the District of Columbia now ask this Court to reject the test formulated in *Quill*. …

…

In the name of federalism and free markets, *Quill* does harm to both. The physical presence rule it defines has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.

IV

"Although we approach the reconsideration of our decisions with the utmost caution, *stare decisis* is not an inexorable command." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009) (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997); alterations and internal quotation marks omitted). Here, *stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power.

….

Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.

….

Respondents argue that "the physical presence rule has permitted start-ups and small businesses to use the Internet as a means to grow their companies and access a national market, without exposing them to the daunting complexity and business-development obstacles of nationwide sales tax collection." Brief for Respondents

29. These burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States. State taxes differ, not only in the rate imposed but also in the categories of goods that are taxed and, sometimes, the relevant date of purchase. Eventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems. Indeed, as the physical presence rule no longer controls, those systems may well become available in a short period of time, either from private providers or from state taxing agencies themselves. And in all events, Congress may legislate to address these problems if it deems it necessary and fit to do so.

In this case, however, South Dakota affords small merchants a reasonable degree of protection. The law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State; the law is not retroactive; and South Dakota is a party to the Streamlined Sales and Use Tax Agreement… .

Finally, other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. For example, the United States argues that tax-collection requirements should be analyzed under the balancing framework of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137. Others have argued that retroactive liability risks a double tax burden in violation of the Court's apportionment jurisprudence because it would make both the buyer and the seller legally liable for collecting and remitting the tax on a transaction intended to be taxed only once. … Complex state tax systems could have the effect of discriminating against interstate commerce. Concerns that complex state tax systems could be a burden on small business are answered in part by noting that, as discussed below, there are various plans already in place to simplify collection; and since in-state businesses pay the taxes as well, the risk of discrimination against out-of-state sellers is avoided. And, if some small businesses with only *de minimis* contacts seek relief from collection systems thought to be a burden, those entities may still do so under other theories. These issues are not before the Court in the instant case; but their potential to arise in some later case cannot justify retaining this artificial, anachronistic rule that deprives States of vast revenues from major businesses.

For these reasons, the Court concludes that the physical presence rule of *Quill* is unsound and incorrect. The Court's decisions in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U.S. 753 (1967), should be, and now are, overruled.

V

In the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State. 430 U.S., at 279. "[S]uch a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Polar Tankers, Inc.* v. *City of Valdez*, 557 U.S. 1, 11 (2009).

Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver

more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis. S. B. 106, §1. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.

…

The judgment of the Supreme Court of South Dakota is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Gorsuch, concurring.

Our dormant commerce cases usually prevent States from discriminating between in-state and out-of-state firms. *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), do just the opposite. For years they have enforced a judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals. … As Justice White recognized 26 years ago, judges have no authority to construct a discriminatory "tax shelter" like this. *Quill, supra,* at 329 (opinion concurring in part and dissenting in part). The Court is right to correct the mistake and I am pleased to join its opinion.

My agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine. The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by *stare decisis*, or defended as misbranded products of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day. … Today we put *Bellas Hess* and *Quill* to rest and rightly end the paradox of condemning interstate discrimination in the national economy while promoting it ourselves.

Chief Justice Roberts, with whom Justice Breyer, Justice Sotomayor, and Justice Kagan join, dissenting.

In *National Bellas Hess, Inc.* v. *Department of Revenue of Ill.*, 386 U.S. 753 (1967), this Court held that, under the dormant Commerce Clause, a State could not require retailers without a physical presence in that State to collect taxes on the sale of goods to its residents. A quarter century later, in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992), this Court was invited to overrule *Bellas Hess* but declined to do so. Another quarter century has passed, and another State now asks us to abandon the physical-presence rule. I would decline that invitation as well.

> I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court. The Court argues in favor of overturning that decision because the "Internet's prevalence and power have changed the dynamics of the national economy." *Ante,* at 18. But that is the very reason I oppose discarding the physical-presence rule. E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress. The Court should not act on this important question of current economic policy, solely to expiate a mistake it made over 50 years ago.
>
> ….

Chapter 12

Federalism and State Sovereignty

12.2.2 The Anti-Commandeering Doctrine: State Legislation and Regulation

Insert the following text and case after the New York v. United States (1992), on page 561, before section 12.2.3.

In the next case, *Murphy v. NCAA,* 584 U.S. ___ (2018) the Court interprets a 1992 act of Congress which purported to limit the power of states to regulate gambling on sports. Congress clearly has power under the Commerce Clause to regulate gambling directly and, through the Supremacy Clause, to preempt state laws regulating gambling. But what Congress cannot do is require or prohibit states from passing laws. Had *New York* (1992) been established law by the time Congress was considering PAPSA, it seems likely that Congress would have either stayed out of the issue or tried to enact a system under which state laws would be preempted. But, as viewed by the Court, Congress was telling states directly what they could or could not do with respect to regulating gambling and that violates the anti-commandeering rule.

The Court could have limited the reach of *New York* (1992) and *Printz* (1997) (included in the first edition and to be considered immediately after this case), as it did in *Reno* (2000) (p. 569), but it chose to continue to use its federalism theory in an expansive way.

The *Murhpy* (2018) case also includes extended discussions of preemption and separability which could prove important in later cases in those fields, but those portions have been mostly, albeit not completely, excised here.

Murphy v. NCAA

584 U.S. ___ (2018)

Justice Alito delivered the opinion of the Court.

The State of New Jersey wants to legalize sports gambling at casinos and horseracing tracks, but a federal law, the Professional and Amateur Sports Protection Act [of 1992], generally makes it unlawful for a State to "authorize" sports gambling schemes. 28 U.S.C. §3702(1). We must decide whether this provision is compatible with the system of "dual sovereignty" embodied in the Constitution.

I

A

Americans have never been of one mind about gambling, and attitudes have swung back and forth. By the end of the 19th century, gambling was largely banned throughout the country, but beginning in the 1920s and 1930s, laws prohibiting gambling were gradually loosened.

….

By the 1990s, there were signs that the trend that had brought about the legalization of many other forms of gambling might extend to sports gambling, and this sparked federal efforts to stem the tide. Opponents of sports gambling turned to the legislation now before us, the Professional and Amateur Sports Protection Act (PASPA). … PASPA's proponents argued that it would protect young people, and one of the bill's sponsors, Senator Bill Bradley of New Jersey, a former college and professional basketball star, stressed that the law was needed to safeguard the integrity of sports. The Department of Justice opposed the bill, but it was passed and signed into law.

PASPA's most important provision, part of which is directly at issue in these cases, makes it "unlawful" for a State or any of its subdivisions "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events. ... In parallel, §3702(2) makes it "unlawful" for "a person to sponsor, operate, advertise, or promote" those same gambling schemes—but only if this is done "pursuant to the law or compact of a governmental entity." PASPA does not make sports gambling a federal crime (and thus was not anticipated to impose a significant law enforcement burden on the Federal Government). Instead, PASPA allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations. ...

….

II

…

In our view, … [w]hen a State completely or partially repeals old laws banning sports gambling, it "authorize[s]" that activity. … The repeal of a state law banning

sports gambling not only "permits" sports gambling (petitioners' favored definition); it also gives those now free to conduct a sports betting operation the "right or authority to act"; it "empowers" them (respondents' and the United States's definition).

The concept of state "authorization" makes sense only against a backdrop of prohibition or regulation. A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State "authorizes" its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.

….

III

A

The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States. …

….

Although the anticommandeering principle is simple and basic, it did not emerge in our cases until relatively recently, when Congress attempted in a few isolated instances to extend its authority in unprecedented ways. The pioneering case was *New York v. United States,* 505 U.S. 144 (1992), which concerned a federal law that required a State, under certain circumstances, either to "take title" to low-level radioactive waste or to "regulat[e] according to the instructions of Congress." *Id.*, at 175. In enacting this provision, Congress issued orders to either the legislative or executive branch of state government (depending on the branch authorized by state law to take the actions demanded). Either way, the Court held, the provision was unconstitutional because "the Constitution does not empower Congress to subject state governments to this type of instruction." *Id.,* at 176.

Justice O'Connor's opinion for the Court traced this rule to the basic structure of government established under the Constitution. The Constitution, she noted, "confers upon Congress the power to regulate individuals, not States." *Id.*, at 166. …

As to what this structure means with regard to Congress's authority to control state legislatures, *New York* was clear and emphatic. … "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *Id.,* at 166. "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " *Id.*, at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 288 (1981)). "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." 505 U.S., at 178.

….

Our opinions in *New York* and *Printz* explained why adherence to the anticommandeering principle is important. Without attempting a complete survey, we mention several reasons that are significant here.

First, the rule serves as "one of the Constitution's structural protections of liberty." *Printz, supra,* at 921. "The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities." *New York, supra,* at 181. "To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." Ibid. " '[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.' " *Id.*, at 181–182 (quoting *Gregory*, 501 U.S., at 458).

Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred. *See New York, supra*, at 168–169; *Printz, supra,* at 929–930.

Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis. …

IV

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. … It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. … Noting that the laws challenged in *New York* and *Printz* "told states what they must do instead of what they must not do," respondents contend that commandeering occurs "only when Congress goes beyond precluding state action and affirmatively commands it." Brief for Respondents 19 (emphasis deleted).

This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded "affirmative" action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.

…

V

Respondents and the United States defend the anti-authorization prohibition on the ground that it constitutes a valid preemption provision, but it is no such thing. Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides "a rule of decision." *Armstrong v. Exceptional Child Center, Inc.,* 575 U.S. ___, ___ (2015) (slip op., at 3). … [I]n order for the PASPA provision to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution "confers upon Congress the power to regulate individuals, not States," *New York,* 505 U.S., at 166, the PASPA provision at issue must be best read as one that regulates private actors.

….

As we recently explained, "we do not require Congress to employ a particular linguistic formulation when preempting state law." *Coventry Health Care of Mo., Inc. v. Nevils,* 581 U.S. ___, ___–___ (2017) (slip op., at 10–11). And if we look beyond the phrasing employed in the Airline Deregulation Act's preemption provision, it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities (i.e., covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints.

….

In sum, regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States.

Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. ….

VI

….

[W]e hold that no provision of PASPA is severable from the provision directly at issue in these cases.

* * *

The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA "regulate[s] state governments' regulation" of their citizens…. The Constitution gives Congress no such power.

The judgment of the Third Circuit is reversed.

It is so ordered.

Chapter 13

Equal Protection

Add the following material at the end of section 13.7.1 on page 699. The Bostock *decision was* not *an Equal Protection Clause decision; it was decided under Title VI of the Civil Rights Act of 1964, a statute. Nonetheless, one might expect that the logic and rhetoric of the decision may well be ported into Equal Protection gender cases in the future.*

13.7.1 Equal Protection with Respect to Gender

A major decision for homosexual and transgender rights was authored by Justice Gorsuch, *Bostock v. Clayton County*, 590 U.S. ___ (2020), in which the Court held that under Title VII of the Civil Rights Act of 1964 the term "sex" protects people against discrimination on the basis of their sexual orientation or transgender status. Gorsuch wrote:

> Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.
>
> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.
>
> From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff 's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of

employees." Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (plurality opinion).

. . .

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Below is a new section on gerrymandering , added because it is a prominent, ongoing issue. The Court effectively ducked the issue this past term, but eventually political-party based gerrymandering will likely be decided directly by the Court. This topic does not fit all that well here, but as the book is currently organized, there is not a separate section on voting rights and voting issues or on representative democracy more generally. That may be changed when the second edition is published in a few years.

13.9.1.2 Voting Rights: Gerrymandering

A variety of voting rights issues have been confronting the Court in recent years including attempts to use various methods to regulate who can vote including purging voter registration rolls, *Hustad v. A. Phillip Randolph Institute,* 548 U.S. __ (2018); requiring state-issued IDs, *Crawford v. Marion County Election Board,* 553 U.S. 181 (2008); gerrymandering legislative districts to insure the party in power stays in power, *see Gill v. Whitford,* 585 U.S. ____ (2018) (Wisconsin), *Benisek v. Lamone,* 585 U.S. __ (2018) (Maryland); and more. The Court has also employed the right of free speech to limit state and federal attempts to safeguard the election process. *Minnesota Voters Alliance v. Mansky,* 585 U.S. ___ (2018) and *Citizens United v. Federal Election Commission,* 558 U.S. 310 (2010) respectively. It also held an important provision of the Voting

Rights Act of 1965 unconstitutional as unsupported by sufficiently current findings by Congress when the law was last renewed. *Shelby County v. Holder,* 570 U.S. 2 (2013).

In 2019 in *Rucho v. Common Cause,* 588 U.S. ___ (2019) (reproduced above at pp. 2-13), the Court in a 5-4 decision ruled that partisan political gerrymandering is presents a political question and is thus non-justiciable.

Federal law permits the use of race in drawing congressional districts, but only in certain limited ways. The Equal Protection Clause prohibits intentional racial discrimination to dilute the vote of a group on the basis of race or ethnicity. *Mobile v. Bolden,* 446 U.S. 55, 66–67 (1980) (plurality opinion). If sufficient justification is shown, race can be used in drawing congressional voting district lines. *Shaw v. Reno,* 509 U.S. 630, 641 (1993).

At the end of section 139.4.17.1 on page 7333, reread the material on Bostock included in the addition to section 13.7.1 above. The Bostock *decision was* not *an Equal Protection Clause decision; it was decided under Title VI of the Civil Rights Act of 1964, a statute. Nonetheless, one might expect that the logic and rhetoric of the decision may well be ported into Equal Protection gender cases in the future.*

Chapter 15

Economic Rights

15.2 Introduction to the Contract Clause

Insert the following text and case after the Allied Structural Steel v. Spannaus (1978), on page 759, before section 15.2.1.

The next case, *Sveen v. Melin* (2018), presents a simpler problem, reinforces the current approach to Contract Clause cases, and highlights the problem of retroactive application of statutes. Because he is new to the bench, Justice Gorsuch's dissent on this settled law may be of particular interest revealing as it does his view of using his version of originalism to constrain the meaning of the Constitution. The other eight justices were not persuaded. It is perhaps because of Justice Gorsuch's dissent that Justice Kagan takes an unusual amount of time to show that Gorsuch's history of the clause is at the very least contested in Court precedents (and in scholarship). Note that the retroactive application of statutes always implicates due process concerns, but in Contract Clause matters the due process concerns may be subsumed within the Contract Clause analysis.

Sveen v. Melin, 584 U.S. ___ (2018)

Justice Kagan delivered the opinion of the Court.

A Minnesota law provides that "the dissolution or annulment of a marriage revokes any revocable[ ] beneficiary designation[ ] made by an individual to the individual's former spouse." Minn. Stat. §524.2–804, subd. 1 (2016). That statute establishes a default rule for use when Minnesotans divorce. If one spouse has made the other the beneficiary of a life insurance policy or similar asset, their divorce automatically revokes that designation—on the theory that the policyholder would want that result. But if he does not, the policyholder may rename the ex-spouse as beneficiary.

We consider here whether applying Minnesota's automatic-revocation rule to a beneficiary designation made before the statute's enactment violates the Contracts Clause of the Constitution. We hold it does not.

I

…. In 1997, Sveen and Melin wed. The next year, Sveen purchased a life insurance policy. He named Melin as the primary beneficiary, while designating his two children from a prior marriage, Ashley and Antone Sveen, as the contingent beneficiaries. The Sveen-Melin marriage ended in 2007. The divorce decree made no mention of the insurance policy. And Sveen took no action, then or later, to revise his beneficiary designations. In 2011, he passed away.

In this action, petitioners the Sveen children and respondent Melin make competing claims to the insurance proceeds. The Sveens contend that under Minnesota's revocation-on-divorce law, their father's divorce canceled Melin's beneficiary designation and left the two of them as the rightful recipients. Melin notes in reply that the Minnesota law did not yet exist when her former husband bought his insurance policy and named her as the primary beneficiary. And she argues that applying the later-enacted law to the policy would violate the Constitution's Contracts Clause, which prohibits any state "Law impairing the Obligation of Contracts." Art. I, §10, cl. 1.

The District Court rejected Melin's argument and awarded the insurance money to the Sveens. … But the Court of Appeals for the Eighth Circuit reversed. It held that a "revocation-upon-divorce statute like [Minnesota's] violates the Contract Clause when applied retroactively." 853 F. 3d 410, 412 (2017).

We granted certiorari … to resolve a split of authority over whether the Contracts Clause prevents a revocation-on-divorce law from applying to a pre-existing agreement's beneficiary designation. We now reverse the decision below.

II

The Contracts Clause restricts the power of States to disrupt contractual arrangements. It provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const., Art. I, §10, cl. 1. The origins of the Clause lie in legislation enacted after the Revolutionary War to relieve debtors of their obligations to creditors. …. But the Clause applies to any kind of contract. … That includes, as here, an insurance policy.

At the same time, not all laws affecting pre-existing contracts violate the Clause. … To determine when such a law crosses the constitutional line, this Court has long applied a two-step test. The threshold issue is whether the state law has "operated as a substantial impairment of a contractual relationship." … In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights…. If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose." …

Here, we may stop after step one because Minnesota's revocation-on-divorce statute does not substantially impair pre-existing contractual arrangements. True enough that in revoking a beneficiary designation, the law makes a significant change. As Melin says, the "whole point" of buying life insurance is to provide the proceeds to the named beneficiary. … But three aspects of Minnesota's law, taken together, defeat Melin's argument that the change it effected "severely impaired" her ex-husband's contract. … First, the statute is designed to reflect a policyholder's intent—and so to support, rather than impair, the contractual scheme. Second, the law is unlikely to disturb any policyholder's expectations because it does no more than a divorce court could always have done. And third, the statute supplies a mere default rule, which the policyholder can undo in a moment. Indeed, Minnesota's revocation statute stacks up well against laws that this Court upheld against Contracts Clause challenges as far back as the early 1800s. …

….

….

For those reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice Gorsuch, dissenting.

The Court's argument proceeds this way. Because people are inattentive to their life insurance beneficiary designations when they divorce, the legislature needs to change those designations retroactively to ensure they aren't misdirected. But because those same people are simultaneously attentive to beneficiary designations (not to mention the legislature's activity), they will surely undo the change if they don't like it. And even if that weren't true, it would hardly matter. People know existing divorce laws sometimes allow courts to reform insurance contracts. So people should know a legislature might enact new laws upending insurance contracts at divorce. For these reasons, a statute rewriting the most important term of a life insurance policy—who gets paid—somehow doesn't "substantially impair" the contract. It just "makes a significant change." …

Respectfully, I cannot agree. Minnesota's statute automatically alters life insurance policies upon divorce to remove a former spouse as beneficiary. Everyone agrees that the law is valid when applied prospectively to policies

purchased after the statute's enactment. But Minnesota wants to apply its law retroactively to policies purchased before the statute's adoption. The Court of Appeals held that this violated the Contracts Clause, which guarantees people the "right to 'rely on the law . . . as it existed when the[ir] contracts were made.' " … That judgment seems to me exactly right.

I

Because legislation often disrupts existing social arrangements, it usually applies only prospectively. This longstanding and "sacred" principle ensures that people have fair warning of the law's demands. *Reynolds v. McArthur,* 2 Pet. 417, 434 (1829); 3 H. Bracton, De Legibus et Consuetudinibus Angliae 530–531 (1257) (T. Twiss ed. 1880). …

When it comes to legislation affecting contracts, the Constitution hardens the presumption of prospectivity into a mandate. The Contracts Clause categorically prohibits states from passing "any . . . Law impairing the Obligation of Contracts." Art. I, §10, cl. 1 (emphasis added). Of course, the framers knew how to impose more nuanced limits on state power. The very section of the Constitution where the Contracts Clause is found permits states to take otherwise unconstitutional action when "absolutely necessary," if "actually invaded," or "wit[h] the Consent of Congress." Cls. 2 and 3. But in the Contracts Clause the framers were absolute. They took the view that treating existing contracts as "inviolable" would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority. *Sturges v. Crowninshield,* 4 Wheat. 122, 206 (1819).

The categorical nature of the Contracts Clause was not lost on anyone, either. When some delegates at the Constitutional Convention sought softer language, James Madison acknowledged the " 'inconvenience' " a categorical rule could sometimes entail " 'but thought on the whole it would be overbalanced by the utility of it.' " Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding,* 14 Hastings Const. L.Q. 525, 529–530 (1987). During the ratification debates, these competing positions were again amply aired. Antifederalists argued that the proposed Clause would prevent states from passing valuable legislation. *Id.*, at 532–533. Federalists like Madison countered that the rule of law permitted "property rights and liberty interests [to] be dissolved only by prospective laws of general applicability." *Id.,* at 532. And, of course, the people chose to ratify the Constitution—categorical Clause and all.

For much of its history, this Court construed the Contracts Clause in this light. The Court explained that any legislative deviation from a contract's obligations, "however minute, or apparently immaterial," violates the Constitution. *Green v. Biddle,* 8 Wheat. 1, 84 (1823). "All the commentators, and all the adjudicated cases upon Constitutional Law agree[d] in th[is] fundamental propositio[n]." *Winter v. Jones,* 10 Ga. 190, 195 (1851). But while absolute in its field, the Clause also left significant room for legislatures to address changing social conditions. States could regulate contractual rights prospectively. *Ogden v. Saunders*, 12 Wheat. 213, 262 (1827). They could retroactively alter contractual remedies, so long as they did so

reasonably. Sturges, supra, at 200. And perhaps they could even alter contracts without "impairing" their obligations if they made the parties whole by paying just compensation. *See West River Bridge Co. v. Dix,* 6 How. 507, 532–533 (1848); El *Paso v. Simmons,* 379 U.S. 497, 525 (1965) (Black, J., dissenting). But what they could not do is destroy substantive contract rights—the "Obligation of Contracts" that the Clause protects.

More recently, though, the Court has charted a different course. Our modern cases permit a state to "substantial[ly] impai[r]" a contractual obligation in pursuit of "a significant and legitimate public purpose" so long as the impairment is " 'reasonable.' " *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400, 411–412 (1983). That test seems hard to square with the Constitution's original public meaning. After all, the Constitution does not speak of "substantial" impairments—it bars "any" impairment. …

….

The judicial power to declare a law unconstitutional should never be lightly invoked. But the law before us cannot survive an encounter with even the breeziest of Contracts Clause tests. It substantially impairs life insurance contracts by retroactively revising their key term. No one can offer any reasonable justification for this impairment in light of readily available alternatives. Acknowledging this much doesn't even require us to hold the statute invalid in all applications, only that it cannot be applied to contracts formed before its enactment. I respectfully dissent.

Chapter 16

Substantive Due Process

16.5.2 Further Development of the Constitutional Right to Obtain an Abortion

Insert the following paragraph at the bottom of page 8247 immediately after the last full paragraph.

In 2020 in *June Medical Services, LLC v. Russo*, 591 U.S. ___ (2020), the Court in a 4-1-4 decision affirmed the rule from *Whole Woman's Health* holding that the Louisiana anti-abortion law was unconstitutional. The plurality applied the *Casey/Whole Woman's Health* test and ruled that the Louisiana restrictions (which were substantively almost identical to the Texas restrictions ruled unconstitutional in *Whole Woman's Health*), while Chief Justice Roberts concurred on the prudential grounds of stare decisis, saying that though he dissented in *Whole Woman's Health* and still thought it wrongly decided, he was unwilling to overturn such a recent decision of the court on what were essentially identical facts.

We will continue to see challenges to the right to abortion, to the *Casey/Whole Woman's Health* test, and as to what restrictions states will be allowed to impose.

Chapter 17

Freedom of Expression

17.1 Introduction to Freedom of Expression

Insert the following paragraph at the bottom of page 897 immediately after the last full paragraph.

In its more recent cases, in new settings the Court has generally applied the free speech standards of review in a formulaic way rather than evaluating each new challenge by balancing important competing constitutional and other societal interests in light of underlying purposes and principles of freedom of expression law. When applying the standards rigidly the Court attempts to support its results with reference to those principles, but this rhetoric does not gainsay that the underlying approach evinces adherence to rigid formalism. *E.g., National Institute of Family and Life Advocates v Becerra,* 585 U.S. __ (2018) (California law mandating birth control advocates to disclose abortion option held to be an unconstitutional infringement of freedom of speech); *Minnesota Voters Alliance v Mansky,* 585 U.S. __ (2018) (Minnesota restrictions on polling place speech in the form of political buttons, clothing, or insignia violates the constitution because it cannot be applied in a reasoned way); *Matal v. Tam* (2017) (trademark statute denying federal registration of disparaging trademarks held unconstitutional under viewpoint regulation bar); *Reed v. Town of Gilbert* (2015) (city sign regulations held unconstitutional under content regulation strict scrutiny); *United States v. Alvarez* (2012) ("stolen valor" statute unconstitutional under content regulation strict scrutiny). *Compare, Holder v. Humanitarian Law Project* (2010) (anti-terrorism statute regulating speech held constitutional as regulating conduct, not speech per se); and *Sorrell v. IMS Health Inc.* (2011) (state regulation of commercial speech). This more rigid application of the standard of review formulas contrasts with the Court's historical willingness to examine particular circumstances and settings more carefully and substantively as exemplified not only in *Holder, supra,* but also in a host of decisions included in this chapter covering matters such as constitutional limits on the tort of defamation, the so-called secondary effects doctrine, expressive conduct, and commercial speech. This shift to rigidity is highlighted in the differing approaches of the majority and concurrences in *Reed v. Town of Gilbert* (2015) below.

In the 2019-2020 term of the Court it continued its rigid, formulaic approach, especially with respect to the application of content-based restrictions. *See, Barr v. American Ass'n of Political Consultants,* 591 U.S. ___ (2020) (holding the exception allowing the government to use robocalls to collect debts to the general ban on robocalls was content-based and therefore subject to strict scrutiny and must fall. But the general ban on robocalls to cell phones was upheld).

There were also developments in free speech with respect to the application of the rule against prior restraints in the context of violating non-disclosure agreements. Despite some missteps with respect to ill-advised issuance of temporary restraining orders and preliminary injunctions, in a relatively short period of time the prior restraint doctrine was applied to allow the books about Trump and the Trump administration to be published. *E.g.,* Mary Trump, *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man* (2020); John Bolton, *The Room Where It Happened: A White House Memoir* (2020).

Insert the following material on page 913, immediately before Section 17.3.1.1: Content Regulations Contrasted with Viewpoint Regulation and Government Speech

Reed (2015) exemplifies the Court's move toward a more rigid and absolutist application of freedom of expression to limit state power. This shift has continued through a number of recent cases as noted in the textual material added to §17.1 above. The following case shows the Court once again using freedom of expression to limit state power in the context of the state seeking to require crisis pregnancy centers to provide notice to clients of the availability of alternative counseling centers and in some instance, for licensed centers, of the availability of the option of abortion. *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. __ (2018). The Court considers this regulation as a form of content-based regulation because the speech compelled by the government alters the content of the message of the speaker who would prefer not to mention abortion as an option. Consequently, as in other situations involving content-based restrictions, strict scrutiny applies.

Government-compelled speech creates special problems. Informed consent for medical procedures, disclosure of contents of foods, disclosure of side effects of drugs, the dangers of smoking tobacco, and more are examples of compelled speech that have passed constitutional muster. In the crisis pregnancy centers, public health concerns and the individual right to medical care are implicated. Nonetheless, the Court held that the state had not met its burden to overcome the free speech rights of the reproductive counseling centers.

National Institute of Family and Life Advocates v Becerra,

585 U.S. __ (2018)

Justice Thomas delivered the opinion of the Court.

The California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) requires clinics that primarily serve pregnant women to provide certain notices. … Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call. Unlicensed clinics must notify women that California has not

licensed the clinics to provide medical services. The question in this case is whether these notice requirements violate the First Amendment.

I

A

…

1

The first notice requirement applies to "licensed covered facilit[ies]." …. ….

If a clinic is a licensed covered facility, the FACT Act requires it to disseminate a government-drafted notice on site. … The notice states that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Ibid.* This notice must be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in. .... The notice must be in English and any additional languages identified by state law. ...

The stated purpose of the FACT Act, including its licensed notice requirement, is to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." … The Legislature posited that "thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery." ... Citing the "time sensitive" nature of pregnancy-related decisions, ... the Legislature concluded that requiring licensed facilities to inform patients themselves would be "[t]he most effective" way to convey this information ... .

2

The second notice requirement in the FACT Act applies to "unlicensed covered facilit[ies]." ….

Unlicensed covered facilities must provide a government-drafted notice stating that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." … This notice must be provided on site and in all advertising materials. ... Its stated purpose is to ensure "that pregnant women in California know when they are getting medical care from licensed professionals." …

….

II

We first address the licensed notice.

A

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech. When enforcing this prohibition, our precedents distinguish between content-based and content-

neutral regulations of speech. Content-based regulations "target speech based on its communicative content." *Reed v. Town of Gilbert*, 576 U.S. ___, ___ (2015) (slip op., at 6). As a general matter, such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.* This stringent standard reflects the fundamental principle that governments have " 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.' " *Ibid.* (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such notices "alte[r] the content of [their] speech." *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) … . Here, for example, licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing. By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly "alters the content" of petitioners' speech. *Riley, supra*, at 795.

B

Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates "professional speech." …

But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." This Court has "been reluctant to mark off new categories of speech for diminished constitutional protection." *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part). And it has been especially reluctant to "exemp[t] a category of speech from the normal prohibition on content-based restrictions." *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion). This Court's precedents do not permit governments to impose content-based restrictions on speech without " 'persuasive evidence . . . of a long (if heretofore unrecognized) tradition' " to that effect. *Ibid.* (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792 (2011)).

This Court's precedents do not recognize such a tradition for a category called "professional speech." This Court has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." … Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. … But neither line of precedents is implicated here.

1

This Court's precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts. In *Zauderer*, for example, this Court upheld a rule requiring lawyers who advertised their services on a contingency-fee basis to disclose that clients might be required to pay some fees and costs. 471 U.S., at 650–653. Noting that the disclosure requirement governed only "commercial advertising" and required the disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available," the Court explained that such requirements should be upheld unless they are "unjustified or unduly burdensome." *Id.,* at 651.

The *Zauderer* standard does not apply here. Most obviously, the licensed notice is not limited to "purely factual and uncontroversial information about the terms under which . . . services will be available." 471 U.S., at 651 … . The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an "uncontroversial" topic. Accordingly, *Zauderer* has no application here.

2

In addition to disclosure requirements under *Zauderer*, this Court has upheld regulations of professional conduct that incidentally burden speech. "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011), and professionals are no exception to this rule ... . Longstanding torts for professional malpractice, for example, "fall within the traditional purview of state regulation of professional conduct." … While drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it, … and the line is " 'long familiar to the bar,' " … .

In *Planned Parenthood of Southeastern Pa. v. Casey*, for example, this Court upheld a law requiring physicians to obtain informed consent before they could perform an abortion. 505 U.S., at 884 (joint opinion of O'Connor, Kennedy, and Souter, JJ.). Pennsylvania law required physicians to inform their patients of "the nature of the procedure, the health risks of the abortion and childbirth, and the 'probable gestational age of the unborn child.' " *Id.,* at 881. The law also required physicians to inform patients of the availability of printed materials from the State, which provided information about the child and various forms of assistance. *Ibid.*

The joint opinion in *Casey* rejected a free-speech challenge to this informed-consent requirement. *Id.*, at 884. It described the Pennsylvania law as "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion," which "for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure." *Ibid.* The joint opinion explained that the law regulated speech only "as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State." *Ibid.* (emphasis added). Indeed, the requirement that a doctor obtain

informed consent to perform an operation is "firmly entrenched in American tort law." …

The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed. If a covered facility does provide medical procedures, the notice provides no information about the risks or benefits of those procedures. Tellingly, many facilities that provide the exact same services as covered facilities—such as general practice clinics, see §123471(a)—are not required to provide the licensed notice. The licensed notice regulates speech as speech.

3

Outside of the two contexts discussed above—disclosures under *Zauderer* and professional conduct—this Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, … professional fundraisers, … and organizations that provided specialized advice about international law… . And the Court emphasized that the lawyer's statements in *Zauderer* would have been "fully protected" if they were made in a context other than advertising. 471 U.S., at 637, n. 7. Moreover, this Court has stressed the danger of content-based regulations "in the fields of medicine and public health, where information can save lives." *Sorrell*, *supra*, at 566.

The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." … Take medicine, for example. "Doctors help patients make deeply personal decisions, and their candor is crucial." …. Throughout history, governments have "manipulat[ed] the content of doctor-patient discourse" to increase state power and suppress minorities:

"For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS." Berg, *Toward a First Amendment Theory of Doctor-Patient*

Discourse and the Right To Receive Unbiased Medical Advice, 74 B. U.L. Rev. 201, 201–202 (1994) (footnotes omitted).

Further, when the government polices the content of professional speech, it can fail to " 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.' "... Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

"Professional speech" is also a difficult category to define with precision. … As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others. …

C

In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny. California asserts a single interest to justify the licensed notice: providing low-income women with information about state-sponsored services. Assuming that this is a substantial state interest, the licensed notice is not sufficiently drawn to achieve it.

If California's goal is to educate low-income women about the services it provides, then the licensed notice is "wildly underinclusive." ... . The notice applies only to clinics that have a "primary purpose" of "providing family planning or pregnancy-related services" and that provide two of six categories of specific services. .... Other clinics that have another primary purpose, or that provide only one category of those services, also serve low-income women and could educate them about the State's services. ... But most of those clinics are excluded from the licensed notice requirement without explanation. Such "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." ...

The FACT Act also excludes, without explanation, federal clinics and Family PACT providers from the licensed-notice requirement. … If the goal is to maximize women's awareness of these programs, then it would seem that California would ensure that the places that can immediately enroll women also provide this information. The FACT Act's exemption for these clinics, which serve many women who are pregnant or could become pregnant in the future, demonstrates the disconnect between its stated purpose and its actual scope. Yet "[p]recision . . . must

be the touchstone" when it comes to regulations of speech, which "so closely touc[h] our most precious freedoms."...

Further, California could inform low-income women about its services "without burdening a speaker with unwanted speech." ... Most obviously, it could inform the women itself with a public-information campaign. … California cannot co-opt the licensed facilities to deliver its message for it. "[T]he First Amendment does not permit the State to sacrifice speech for efficiency." ...

In short, petitioners are likely to succeed on the merits of their challenge to the licensed notice. Contrary to the suggestion in the dissent, *post*, at 3–4 (opinion of Breyer, J.), we do not question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products.

III

We next address the unlicensed notice. The parties dispute whether the unlicensed notice is subject to deferential review under *Zauderer*. We need not decide whether the *Zauderer* standard applies to the unlicensed notice. Even under *Zauderer*, a disclosure requirement cannot be "unjustified or unduly burdensome." … Our precedents require disclosures to remedy a harm that is "potentially real not purely hypothetical," ... and to extend "no broader than reasonably necessary," ... . Otherwise, they risk "chilling" protected speech." ... Importantly, California has the burden to prove that the unlicensed notice is neither unjustified nor unduly burdensome. … It has not met its burden.

We need not decide what type of state interest is sufficient to sustain a disclosure requirement like the unlicensed notice. California has not demonstrated any justification for the unlicensed notice that is more than "purely hypothetical." ...

Even if California had presented a nonhypothetical justification for the unlicensed notice, the FACT Act unduly burdens protected speech. The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest. It requires covered facilities to post California's precise notice, no matter what the facilities say on site or in their advertisements. And it covers a curiously narrow subset of speakers. While the licensed notice applies to facilities that provide "family planning" services and "contraception or contraceptive methods," §123471(a), the California Legislature dropped these triggering conditions for the unlicensed notice. The unlicensed notice applies only to facilities that primarily provide "pregnancy-related" services. §123471(b). Thus, a facility that advertises and provides pregnancy tests is covered by the unlicensed notice, but a facility across the street that advertises and provides nonprescription contraceptives is excluded—even though the latter is no less likely to make women think it is licensed. This Court's precedents are deeply skeptical of laws that "distinguis[h] among different speakers, allowing speech by some but not others." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010). Speaker-based laws run the risk that "the State has left unburdened those speakers whose messages are in accord with its own views." *Sorrell*, 564 U.S., at 580.

The application of the unlicensed notice to advertisements demonstrates just how burdensome it is. The notice applies to all "print and digital advertising materials" by an unlicensed covered facility. §123472(b). These materials must include a government-drafted statement that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." §123472(b)(1). An unlicensed facility must call attention to the notice, instead of its own message, by some method such as larger text or contrasting type or color. See §§123472(b)(2)–(3). This scripted language must be posted in English and as many other languages as California chooses to require. As California conceded at oral argument, a billboard for an unlicensed facility that says "Choose Life" would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages. In this way, the unlicensed notice drowns out the facility's own message. More likely, the "detail required" by the unlicensed notice "effectively rules out" the possibility of having such a billboard in the first place. *Ibanez*, *supra*, at 146.

For all these reasons, the unlicensed notice does not satisfy *Zauderer*, assuming that standard applies. California has offered no justification that the notice plausibly furthers. It targets speakers, not speech, and imposes an unduly burdensome disclosure requirement that will chill their protected speech. Taking all these circumstances together, we conclude that the unlicensed notice is unjustified and unduly burdensome under *Zauderer*. We express no view on the legality of a similar disclosure requirement that is better supported or less burdensome.

IV

We hold that petitioners are likely to succeed on the merits of their claim that the FACT Act violates the First Amendment. We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Justice Breyer, with whom Justice Ginsburg, Justice Sotomayor, and Justice Kagan join, dissenting.

The petitioners ask us to consider whether two sections of a California statute violate the First Amendment. The first section requires licensed medical facilities (that provide women with assistance involving pregnancy or family planning) to tell those women where they might obtain help, including financial help, with comprehensive family planning services, prenatal care, and abortion. The second requires *un*licensed facilities offering somewhat similar services to make clear that they are unlicensed. In my view both statutory sections are likely constitutional, and I dissent from the Court's contrary conclusions.

I

….

A

Before turning to the specific law before us, I focus upon the general interpretation of the First Amendment that the majority says it applies. It applies heightened scrutiny to the Act because the Act, in its view, is "content based." *Ante,* at 6–7. "By compelling individuals to speak a particular message," it adds, "such notices 'alte[r] the content of [their] speech.' " *Ante,* at 7 (quoting *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 795 (1988)) (alteration in original). "As a general matter," the majority concludes, such laws are "presumptively unconstitutional" and are subject to "stringent" review. *Ante,* at 6–7.

The majority recognizes exceptions to this general rule: It excepts laws that "require professionals to disclose factual, noncontroversial information in their 'commercial speech,' " *provided that* the disclosure "relates to the services that [the regulated entities] provide." *Ante,* at 8–9. It also excepts laws that "regulate professional conduct" *and* only "incidentally burden speech." *Ante,* at 9–10.

This constitutional approach threatens to create serious problems. Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation. Virtually every disclosure law could be considered "content based," for virtually every disclosure law requires individuals "to speak a particular message." *See Reed* v. *Town of Gilbert*, 576 U.S. ___, ___ (2015) (Breyer, J., concurring in judgment) (slip op., at 3) (listing regulations that inevitably involve content discrimination, ranging from securities disclosures to signs at petting zoos). Thus, the majority's view, if taken literally, could radically change prior law, perhaps placing much securities law or consumer protection law at constitutional risk, depending on how broadly its exceptions are interpreted.

Many ordinary disclosure laws would fall outside the majority's exceptions for disclosures related to the professional's own services or conduct. These include numerous commonly found disclosure requirements relating to the medical profession. *See*, *e.g.*, Cal. Veh. Code Ann. §27363.5 (West 2014) (requiring hospitals to tell parents about child seat belts); Cal. Health & Safety Code Ann. §123222.2 (requiring hospitals to ask incoming patients if they would like the facility to give their family information about patients' rights and responsibilities); N.C. Gen. Stat. Ann. §131E–79.2 (2017) (requiring hospitals to tell parents of newborns about pertussis disease and the available vaccine). These also include numerous disclosure requirements found in other areas. *See*, *e.g.,* N.Y.C. Rules & Regs., tit. 1, §27–01 (2018) (requiring signs by elevators showing stair locations); San Francisco Dept. of Health, Director's Rules & Regs., Garbage and Refuse (July 8, 2010) (requiring property owners to inform tenants about garbage disposal procedures).

The majority, at the end of Part II of its opinion, perhaps recognizing this problem, adds a general disclaimer. It says that it does not "question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products." *Ante,* at 16–17. But this generally phrased disclaimer would seem more likely to invite litigation than to

provide needed limitation and clarification. The majority, for example, does not explain why the Act here, which is justified in part by health and safety considerations, does not fall within its "health" category. *Ante,* at 14; *see also Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 882–884 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (reasoning that disclosures related to fetal development and childbirth are related to the health of a woman seeking an abortion). Nor does the majority opinion offer any reasoned basis that might help apply its disclaimer for distinguishing lawful from unlawful disclosures. In the absence of a reasoned explanation of the disclaimer's meaning and rationale, the disclaimer is unlikely to withdraw the invitation to litigation that the majority's general broad "content-based" test issues. That test invites courts around the Nation to apply an unpredictable First Amendment to ordinary social and economic regulation, striking down disclosure laws that judges may disfavor, while upholding others, all without grounding their decisions in reasoned principle.

Notably, the majority says nothing about limiting its language to the kind of instance where the Court has traditionally found the First Amendment wary of content-based laws, namely, in cases of viewpoint discrimination. "Content-based laws merit this protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint." *Reed,* 576 U.S., at ___ (Alito, J., concurring) (slip op., at 1). Accordingly, "[l]imiting speech based on its 'topic' or 'subject' " can favor "those who do not want to disturb the status quo." *Ibid.* But the mine run of disclosure requirements do nothing of that sort. They simply alert the public about child seat belt laws, the location of stairways, and the process to have their garbage collected, among other things.

Precedent does not require a test such as the majority's. Rather, in saying the Act is not a longstanding health and safety law, the Court substitutes its own approach—without a defining standard—for an approach that was reasonably clear. Historically, the Court has been wary of claims that regulation of business activity, particularly health-related activity, violates the Constitution. Ever since this Court departed from the approach it set forth in *Lochner v. New York*, 198 U.S. 45 (1905), ordinary economic and social legislation has been thought to raise little constitutional concern. As Justice Brandeis wrote, typically this Court's function in such cases "is only to determine the reasonableness of the Legislature's belief in the existence of evils and in the effectiveness of the remedy provided." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 286–287 (1932) (dissenting opinion); *see Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486–488 (1955) (adopting the approach of Justice Brandeis).

The Court has taken this same respectful approach to economic and social legislation when a First Amendment claim like the claim present here is at issue. *See, e.g., Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (upholding reasonable disclosure requirements for attorneys); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 252–253 (2010) (same); cf. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 563–564 (1980) (applying intermediate scrutiny to other restrictions on commercial speech); *In re R. M.J.*, 455 U.S. 191, 203 (1982) (no First Amendment

protection for misleading or deceptive commercial speech). But see *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (striking down regulation of pharmaceutical drug-related information).

Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession. The Court took the view that a State may condition the practice of medicine on any number of requirements, and physicians, in exchange for following those reasonable requirements, could receive a license to practice medicine from the State. Medical professionals do not, generally speaking, have a right to use the Constitution as a weapon allowing them rigorously to control the content of those reasonable conditions. See, *e.g.*, *Dent v. West Virginia*, 129 U.S. 114 (1889) (upholding medical licensing requirements); *Hawker* v. *New York*, 170 U.S. 189 (1898) (same); *Collins* v. *Texas*, 223 U.S. 288, 297–298 (1912) (recognizing the "right of the State to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute"); *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the States"); *Graves v. Minnesota*, 272 U.S. 425, 429 (1926) (statutes "regulating the practice of medicine" involve "very different considerations" from those applicable to "trades [such as] locomotive engineers and barbers"); *Semler v. Oregon Bd. of Dental Examiners*, 294 U.S. 608, 612 (1935) (upholding state regulation of dentistry given the "vital interest of public health"). In the name of the First Amendment, the majority today treads into territory where the pre-New Deal, as well as the post-New Deal, Court refused to go.

The Court, in justification, refers to widely accepted First Amendment goals, such as the need to protect the Nation from laws that " 'suppress unpopular ideas or information' " or inhibit the " 'marketplace of ideas in which truth will ultimately prevail.' " *Ante*, at 12–13; see *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). The concurrence highlights similar First Amendment interests. *Ante,* at 2. I, too, value this role that the First Amendment plays—in an appropriate case. But here, the majority enunciates a general test that reaches far beyond the area where this Court has examined laws closely in the service of those goals. And, in suggesting that heightened scrutiny applies to much economic and social legislation, the majority pays those First Amendment goals a serious disservice through dilution. Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.

….

Replace §17.3.1.1 on page 913 with the following:

17.3.1.1 Content Regulations Contrasted with Viewpoint Regulation and Government Speech

Reed (2015) employs very broad tests for determining when a regulation is content based. *Reed's* three tests for whether a regulation is content-based are: (1) the regulation expressly distinguishes on the basis of subject matter, or (2) the regulation regulates speech based on the purpose or function of the speech, or (3) the purpose or effect of the otherwise facially neutral regulation is to regulate content.

Content regulation generally targets the topic or subject matter of the speech. In contrast, viewpoint regulation targets the position of the speaker on a particular subject. A regulation that bans all speech about abortion regardless of which side the speaker takes would be content-based. A viewpoint-based regulation would allow speech on one side of an issue, such as the anti-abortion stance, but would prohibit speech on the other side. In practice, viewpoint regulation is subject to an almost per se rule of invalidity, although the courts actually apply strict scrutiny to overturn such regulations. The Court has emphasized the importance of avoiding viewpoint regulation, holding a statute unconstitutional because it offended a "bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Matal v. Tam*, 582 U.S. ___, ___ (2017).

The four justices of the Court's opinion in *Matal* summarized viewpoint discrimination as follows:

> Our cases use the term "viewpoint" discrimination in a broad sense, … and in that sense, the disparagement clause discriminates on the bases of "viewpoint." To be sure, the clause evenhandedly prohibits disparagement of all groups. It applies equally to marks that damn Democrats and Republicans, capitalists and socialists, and those arrayed on both sides of every possible issue. It denies registration to any mark that is offensive to a substantial percentage of the members of any group. But in the sense relevant here, that is viewpoint discrimination: Giving offense is a viewpoint.
>
> We have said time and again that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York,* 394 U.S. 576, 592 (1969). *See also Texas v. Johnson,* 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); . . .
>
> For this reason, [i.e., because it is a viewpoint regulation,] the disparagement clause cannot be saved by analyzing it as a type of government program in which some content- and speaker-based restrictions are permitted.
>
> *Matal v. Tam,* 582 U.S. ___, ___ (2017).

In his concurrence in *Matal v. Tam* (2017), Justice Kennedy addresses viewpoint discrimination as follows:

> The First Amendment guards against laws "targeted at specific subject matter," a form of speech suppression known as content based discrimination. *Reed v. Town of Gilbert,* 576 U.S. ___, ___ (2015) (slip op., at 12). This category includes a subtype of laws that go further, aimed at the suppression of "particular views . . . on a subject." *Rosenberger,* 515 U.S., at 829. A law found to discriminate based on

> viewpoint is an "egregious form of content discrimination," which is "presumptively unconstitutional." *Id.*, at 829–830.
>
> At its most basic, the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed. . . . In the instant case, the disparagement clause the Government now seeks to implement and enforce identifies the relevant subject as "persons, living or dead, institutions, beliefs, or national symbols." 15 U.S.C. §1052(a). Within that category, an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive. This is the essence of viewpoint discrimination.
>
> *Matal v. Tam*, 582 U.S. ___, ___ (2017).

The First Amendment does not limit the power of the government itself to speak or to take positions on one side of an issue or another. The government typically does have a viewpoint on matters of health and safety and speaks forcefully on them. But the First Amendment does prohibit the government from stopping speech that takes a position contrary to that of the government. The government can promote vaccination, but it cannot stop people from speaking out against vaccinations.

In *Matal v. Tam* (2017) the Court explained the contours of the government speech doctrine this way:

> None of our government speech cases even remotely supports the idea that registered trademarks are government speech. In *Johanns*, we considered advertisements promoting the sale of beef products. A federal statute called for the creation of a program of paid advertising " 'to advance the image and desirability of beef and beef products.' " 544 U.S., at 561 (quoting 7 U.S.C. § 2902(13)). Congress and the Secretary of Agriculture provided guidelines for the content of the ads, Department of Agriculture officials attended the meetings at which the content of specific ads was discussed, and the Secretary could edit or reject any proposed ad. 544 U.S., at 561. Noting that "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government," we held that the ads were government speech. *Id.*, at 560. The Government's involvement in the creation of these beef ads bears no resemblance to anything that occurs when a trademark is registered.
>
> Our decision in *Summum* is similarly far afield. A small city park contained 15 monuments. 555 U.S., at 464. Eleven had been donated by private groups, and one of these displayed the Ten Commandments. *Id.*, at 464–465. A religious group claimed that the city, by accepting donated monuments, had created a limited public forum for private speech and was therefore obligated to place in the park a monument expressing the group's religious beliefs.
>
> Holding that the monuments in the park represented government speech, we cited many factors. Governments have used monuments to speak to the public since ancient times; parks have traditionally been selective in accepting and displaying donated monuments; parks would be overrun if they were obligated to accept all monuments offered by private groups; "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land"; and "[t]he monuments that are accepted . . . are meant to convey and have the effect of conveying a government message." *Id.*, at 472.

> Trademarks share none of these characteristics. Trademarks have not traditionally been used to convey a Government message. With the exception of the enforcement of 15 U.S.C. §1052(a), the viewpoint expressed by a mark has not played a role in the decision whether to place it on the principal register. And there is no evidence that the public associates the contents of trademarks with the Federal Government.
>
> This brings us to the case on which the Government relies most heavily, *Walker*, which likely marks the outer bounds of the government-speech doctrine. Holding that the messages on Texas specialty license plates are government speech, the *Walker* Court cited three factors distilled from *Summum*. 576 U.S., at ___–___ (slip op., at 7–8). First, license plates have long been used by the States to convey state messages. *Id.*, at ___–___ (slip op., at 9–10). Second, license plates "are often closely identified in the public mind" with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of "government ID." *Id.*, at ___ (slip op., at 10) (internal quotation marks omitted). Third, Texas "maintain[ed] direct control over the messages conveyed on its specialty plates." *Id.*, at ___ (slip op., at 11). As explained above, none of these factors are present in this case.
>
> In sum, the federal registration of trademarks is vastly different from the beef ads in *Johanns*, the monuments in *Summum*, and even the specialty license plates in *Walker*. Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine. For if the registration of trademarks constituted government speech, other systems of government registration could easily be characterized in the same way.
>
> . . .
>
> Trademarks are private, not government, speech.

Replace the introduction to the Sorrel *case, §17.4.4.1 on page 1022 with the following:*

17.4.4.1 Commercial Speech Today

In the next case, *Sorrell v. IMS Health Inc.* (2011), the Court continues smudging the line between commercial and other speech. The Court seems to reaffirm the *Central Hudson* test for commercial speech regulation, but it also brings in other principles of freedom of expression, such as viewpoint discrimination, content-based regulation, and speaker-based regulation that point in general not only to using a form of heightened scrutiny but to applying freedom of expression strict scrutiny in the commercial speech setting. The majority opinion illustrates the former tendency to treat freedom of expression cases very individually, to reason by analogy, and to analyze the issues more using the policies and principles of freedom of expression law than relatively rote application of the *Central Hudson* (1980) standard of review.

In the *Sorrell* dissent the *Central Hudson* (1980) standard of review is more conservatively (and simply) applied. The dissent goes even further and argues that the issue is nothing but ordinary economic regulation and as such should receive only rational basis review. Indeed the dissent brings up the ghost of the *Lochner* Era to haunt the majority's decision, as does the dissent in *Becerra*. In essence the dissent says

regulation of commercial information is just a regulation of a commodity and should be treated like any other marketplace regulation and given great deference by the Court. The dissent's point in *Sorrell* takes on more credence with the Court's recent willingness to use free speech to overturn and limit state and federal power. *E.g., National Institute of Family and Life Advocates v Becerra,* 585 U.S. __ (2018).

The majority's approach in *Sorrell* arguably indicates a Court that is more result-oriented than principle-driven. If it were consistently applying the rigid approach as exemplified in *Reed* (2015)*, Matal* (2017)*,* and *Becerra* (2018), then *Sorrell* would seem like it should have come out differently through a straightforward application of the *Central Hudson* (1980) standards, as argued for by the dissent in that case. Full exploration of these fine-grained analyses is beyond the scope of this general book in a survey course, but the potential inconsistency and difficulties it presents should be noticed and understood nonetheless.

As noted above at the start of the chapter, the Court in its most recent cases has not only tended to apply the standards of review in a relatively rigid, rote fashion, but has favored an almost absolutist approach of favoring speech over other rights and interests including equality *National Institute of Family and Life Advocates v Becerra,* 585 U.S. __ (2018) (California law mandating birth control advocates to disclose abortion option held to be an unconstitutional infringement of freedom of speech) and voting *Minnesota Voters Alliance v Mansky,* 585 U.S. __ (2018) (Minnesota restrictions on polling place speech in the form of poliitcal buttons, clothing, or insignia violates the constitution because it cannot be applied in a reasoned way). Both of these 2018 cases can be read narrowly and the Court left room to distinguish later cases, but the direction the Court is headed seems unmistakable.

Delete §17.4.4.2. Renumber §17.4.4.3 to §17.4.4.2 and add two new paragraphs at the start of the Commercial Speech: Concluding Thoughts section

17.4.4.2 Commercial Speech: Concluding Thoughts

In *Matal v. Tam* (2017) the Court, citing *Sorrell* (2011), confirmed that even though commercial speech is subject to greater regulation than is fully protected speech, the government cannot engage in viewpoint regulation when regulating commercial speech. The government can regulate false and misleading advertising, but that is different from regulating viewpoints about a person's views of a group or idea. The Court's approach in *National Institute of Family and Life Advocates v Becerra,* 585 U.S. __ (2018), in treating an ordinary health and social policy regulation as content-based regulation of speech similarly seems to be rigid and pushing free speech law into areas it has not been used before (see Breyer's dissent in that case).

Just what this portends is uncertain, but it does seem that the Court has moved commercial speech into the realm of strongly protected (but not yet fully protected) speech. Consider the implications of having done so on the role of the government with respect to regulating advertising and consider the extent to which commercial speech is within the core purposes of the protection of freedom of expression. Does

or should freedom of expression protection extend beyond political speech of a sort needed to protect democracy? What additional values are at stake? Given those ideals, should protection be extended as far as it has to commercial speech? Consider also the extent to which the line between commercial speech and other speech is a tenable one to draw.

17.5.1 Prior Restraint

Revise §17.5.1 by adding the following paragraph at the bottom of page 1029 just before the Near v. Minnesota *(1931) case.*

There were also developments in free speech with respect to the application of the rule against prior restraints in the context of violating non-disclosure agreements. Despite some missteps with respect to ill-advised issuance of temporary restraining orders and preliminary injunctions, in a relatively short period of time the prior restraint doctrine was applied to allow the books about Trump and the Trump administration to be published. *E.g.,* Mary Trump, *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man* (2020); John Bolton, *The Room Where It Happened: A White House Memoir* (2020).

17.5.5 Freedom of Expression and Intellectual Property

Revise §17.5.5 by changing "Copyright" to "Intellectual Property" in the title and by adding the following paragraph at the end of the section

In 2017 the Court again considered constitutional constraints on intellectual property, this time in the trademark context. *Matal v. Tam* (2017). The Court ruled that even though the officially recognized purpose of trademarks, the reason they are protected, is to identify the source of goods and services, trademarks also have an expressive component and that expressive aspect is protected by the First Amendment. It then applied the bar against viewpoint regulation and held the prohibition of registration of disparaging trademarks unconstitutional. Disparagement means that a viewpoint was expressed and that therefore the regulation impermissibly regulates viewpoint. The lead opinion (4 justices) written by Justice Alito also ruled that the regulation would not pass the lesser standard used for commercial speech, even if the viewpoint bar were not conclusive. Justice Kennedy, on the other hand, opined that commercial speech is subject to the viewpoint regulation bar and so that was sufficient to decide the case..

After *Matal v.Tam* (2017) decided disparagaing trademarks could not be prohibited from being registered, the Court was inevitably confronted with the issue of whether the statutory bar on registering "immoral or scandalous" marks was unconstitutional. The Court said it was in 2019, again due to viewpoint discrimination. Justice Breyer again argued for a more policy-based approach rather than the rigidly applied categorical approach, but again did not prevail.

Iancu v. Brunetti, 588 U.S. ___ (2019)

Justice Kagan delivered the opinion of the Court.

Two Terms ago, in *Matal v. Tam,* 582 U. S. ___ (2017), this Court invalidated the Lanham Act's bar on the registration of "disparag[ing]" trademarks. 15 U.S.C. §1052(a). Although split between two non-majority opinions, all Members of the Court agreed that the provision violated the First Amendment because it discriminated on the basis of viewpoint. Today we consider a First Amendment challenge to a neighboring provision of the Act, prohibiting the registration of "immoral[ ] or scandalous" trademarks. *Ibid.* We hold that this provision infringes the First Amendment for the same reason: It too disfavors certain ideas.

I

Respondent Erik Brunetti is an artist and entrepreneur who founded a clothing line that uses the trademark FUCT. According to Brunetti, the mark (which functions as the clothing's brand name) is pronounced as four letters, one after the other: F-U-C-T. See Brief for Respondent 1. But you might read it differently and, if so, you would hardly be alone. See Tr. of Oral Arg. 5 (describing the brand name as "the equivalent of [the] past participle form of a well-known word of profanity"). That common perception caused difficulties for Brunetti when he tried to register his mark with the U.S. Patent and Trademark Office (PTO).

Under the Lanham Act, the PTO administers a federal registration system for trademarks. See 15 U.S.C. §§1051, 1052. Registration of a mark is not mandatory. The owner of an unregistered mark may still use it in commerce and enforce it against infringers. *See Tam*, 582 U.S., at ___ (slip op., at 4). But registration gives trademark owners valuable benefits. For example, registration constitutes "prima facie evidence" of the mark's validity. §1115(a). And registration serves as "constructive notice of the registrant's claim of ownership," which forecloses some defenses in infringement actions. §1072. Generally, a trademark is eligible for registration, and receipt of such benefits, if it is "used in commerce." §1051(a)(1). But the Act directs the PTO to "refuse[ ] registration" of certain marks. §1052. For instance, the PTO cannot register a mark that "so resembles" another mark as to create a likelihood of confusion. §1052(d). It cannot register a mark that is "merely descriptive" of the goods on which it is used. §1052(e). It cannot register a mark containing the flag or insignia of any nation or State. See §1052(b). There are five or ten more (depending on how you count). And until we invalidated the criterion two years ago, the PTO could not register a mark that "disparage[d]" a "person[ ], living or dead." §1052(a); *see Tam,* 582 U. S. ___.

This case involves another of the Lanham Act's prohibitions on registration—one applying to marks that "[c]onsist[ ] of or comprise[ ] immoral[ ] or scandalous matter." §1052(a). The PTO applies that bar as a "unitary provision," rather than treating the two adjectives in it separately. *In re Brunetti,* 877 F.3d 1330, 1336 (C.A. Fed. 2017); Brief for Petitioner 6 (stating that the PTO "has long treated the two

terms as composing a single category"). To determine whether a mark fits in the category, the PTO asks whether a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety"; "giving offense to the conscience or moral feelings"; "calling out for condemnation"; "disgraceful"; "offensive"; "disreputable"; or "vulgar." 877 F. 3d, at 1336 (internal quotation marks omitted); see Brief for Petitioner 6 (agreeing that the PTO "generally defines" the category in that way).

Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board decided that Brunetti's mark flunked that test. … The Board concluded: "Whether one considers [the mark] as a sexual term, or finds that [Brunetti] has used [the mark] in the context of extreme misogyny, nihilism or violence, we have no question but that [the term is] extremely offensive." *Id.*, at 65a.

Brunetti then brought a facial challenge to the "immoral or scandalous" bar in the Court of Appeals for the Federal Circuit. That court found the prohibition to violate the First Amendment. As usual when a lower court has invalidated a federal statute, we granted certiorari.

II

This Court first considered a First Amendment challenge to a trademark registration restriction in *Tam*, just two Terms ago. There, the Court declared unconstitutional the Lanham Act's ban on registering marks that "disparage" any "person[ ], living or dead." §1052(a). The eight-Justice Court divided evenly between two opinions and could not agree on the overall framework for deciding the case. (In particular, no majority emerged to resolve whether a Lanham Act bar is a condition on a government benefit or a simple restriction on speech.) But all the Justices agreed on two propositions. First, if a trademark registration bar is viewpoint-based, it is unconstitutional. … And second, the disparagement bar was viewpoint-based. …

The Justices thus found common ground in a core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829–830 (1995) (explaining that viewpoint discrimination is an "egregious form of content discrimination" and is "presumptively unconstitutional"). In Justice Kennedy's explanation, the disparagement bar allowed a trademark owner to register a mark if it was "positive" about a person, but not if it was "derogatory." … That was the "essence of viewpoint discrimination," he continued, because "[t]he law thus reflects the Government's disapproval of a subset of messages it finds offensive." … The bar thus violated the "bedrock First Amendment principle" that the government cannot discriminate against "ideas that offend." … Slightly different explanations, then, but a shared conclusion: Viewpoint discrimination doomed the disparagement bar.

If the "immoral or scandalous" bar similarly discriminates on the basis of viewpoint, it must also collide with our First Amendment doctrine. … "[T]he criteria for federal trademark registration" must be "viewpoint-neutral to survive Free

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

It is viewpoint-based. … [T]he Lanham Act permits registration of marks that champion society's sense of rectitude and morality, but not marks that denigrate those concepts. … So the Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation. The statute favors the former, and disfavors the latter. "Love rules"? "Always be good"? Registration follows. "Hate rules"? "Always be cruel"? Not according to the Lanham Act's "immoral or scandalous" bar.

…

And once the "immoral or scandalous" bar is interpreted fairly, it must be invalidated. …

We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

Justice Sotomayor, with whom Justice Breyer joins, concurring in part and dissenting in part.

The Court's decision today will beget unfortunate results. With the Lanham Act's scandalous-marks provision, 15 U. S. C. §1052(a), struck down as unconstitutional viewpoint discrimination, the Government will have no statutory basis to refuse (and thus no choice but to begin) registering marks containing the most vulgar, profane, or obscene words and images imaginable.

The coming rush to register such trademarks—and the Government's immediate powerlessness to say no—is eminently avoidable. Rather than read the relevant text as the majority does, it is equally possible to read that provision's bar on the registration of "scandalous" marks to address only obscenity, vulgarity, and profanity. Such a narrowing construction would save that duly enacted legislative text by rendering it a reasonable, viewpoint-neutral restriction on speech that is permissible in the context of a beneficial governmental initiative like the trademark-registration system. I would apply that narrowing construction to the term "scandalous" and accordingly reject petitioner Erik Brunetti's facial challenge.

I…

Justice Breyer, concurring in part and dissenting in part.

Our precedents warn us against interpreting statutes in ways that would likely render them unconstitutional. … I agree with Justice Sotomayor that, for the reasons she gives, we should interpret the word "scandalous" in the present statute to refer only to certain highly "vulgar" or "obscene" modes of expression. …

The question, then, is whether the First Amendment permits the Government to rely on this statute, as narrowly construed, to deny the benefits of federal trademark registration to marks like the one at issue here, which involves the use of the term

"FUCT" in connection with a clothing line that includes apparel for children and infants. Like Justice Sotomayor, I believe the answer is "yes," though my reasons differ slightly from hers.

I

A

In my view, a category-based approach to the First Amendment cannot adequately resolve the problem before us. I would place less emphasis on trying to decide whether the statute at issue should be categorized as an example of "viewpoint discrimination," "content discrimination," "commercial speech," "government speech," or the like. Rather, as I have written before, I believe we would do better to treat this Court's speech-related categories not as outcome-determinative rules, but instead as rules of thumb. *See Reed v. Town of Gilbert,* 576 U. S. ___, ___ (2015) (opinion concurring in judgment) (slip op., at 1).

After all, these rules are not absolute. The First Amendment is not the Tax Code. Indeed, even when we consider a regulation that is ostensibly "viewpoint discriminatory" or that is subject to "strict scrutiny," we sometimes find the regulation to be constitutional after weighing the competing interests involved. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 397 (2007) ("[S]chools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use"); *Williams-Yulee v. Florida Bar,* 575 U.S. 433, ___ (2015) (slip op., at 8) (explaining that although " 'it is the rare case' " when a statute satisfies strict scrutiny, "those cases do arise" (quoting *Burson v. Freeman,* 504 U.S. 191, 211 (1992) (plurality opinion))).

Unfortunately, the Court has sometimes applied these rules—especially the category of "content discrimination"—too rigidly. In a number of cases, the Court has struck down what I believe are ordinary, valid regulations that pose little or no threat to the speech interests that the First Amendment protects. *See Janus v. State, County, and Municipal Employees,* 585 U. S. ___, ___–___ (2018) (Kagan, J., dissenting) (slip op., at 27–28); *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 589–592 (2011) (Breyer, J., dissenting); *see generally Reed,* 576 U. S., at ___–___ (opinion of Breyer, J.) (slip op., at 2–4).

Rather than deducing the answers to First Amendment questions strictly from categories, as the Court often does, I would appeal more often and more directly to the values the First Amendment seeks to protect. As I have previously written, I would ask whether the regulation at issue "works speech-related harm that is out of proportion to its justifications." *United States v. Alvarez,* 567 U.S. 709, 730 (2012) (opinion concurring in judgment); see Reed, 576 U. S., at ___ (opinion concurring in judgment) (slip op., at 4) (discussing the matter further, particularly in respect to the category of content discrimination).

…

The upshot of this analysis is that the narrowing construction articulated by Justice Sotomayor risks some harm to First Amendment interests, but not very much. And applying that interpretation seems a reasonable way—perhaps the only

way—to further legitimate government interests. Of course, there is a risk that the statute might be applied in a manner that stretches it beyond the few vulgar words that are encompassed by the narrow interpretation Justice Sotomayor sets forth. That risk, however, could be mitigated by internal agency review to ensure that agency officials do not stray beyond their mandate. In any event, I do not believe that this risk alone warrants the facial invalidation of this statute.

I would conclude that the prohibition on registering "scandalous" marks does not "wor[k] harm to First Amendment interests that is disproportionate in light of the relevant regulatory objectives." *Reed*, 576 U. S., at ___ (opinion of Breyer, J.) (slip op., at 4). I would therefore uphold this part of the statute. I agree with the Court, however, that the bar on registering "immoral" marks violates the First Amendment. Because Justice Sotomayor reaches the same conclusions, using roughly similar reasoning, I join her opinion insofar as it is consistent with the views set forth here.

Chief Justice Roberts, concurring in part and dissenting in part.

[omitted]

Justice Alito, concurring.

For the reasons explained in the opinion of the Court, the provision of the Lanham Act at issue in this case violates the Free Speech Clause of the First Amendment because it discriminates on the basis of viewpoint and cannot be fixed without rewriting the statute. Viewpoint discrimination is poison to a free society. But in many countries with constitutions or legal traditions that claim to protect freedom of speech, serious viewpoint discrimination is now tolerated, and such discrimination has become increasingly prevalent in this country. At a time when free speech is under attack, it is especially important for this Court to remain firm on the principle that the First Amendment does not tolerate viewpoint discrimination. We reaffirm that principle today.

Our decision is not based on moral relativism but on the recognition that a law banning speech deemed by government officials to be "immoral" or "scandalous" can easily be exploited for illegitimate ends. Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas. The particular mark in question in this case could be denied registration under such a statute. The term suggested by that mark is not needed to express any idea and, in fact, as commonly used today, generally signifies nothing except emotion and a severely limited vocabulary. The registration of such marks serves only to further coarsen our popular culture. But we are not legislators and cannot substitute a new statute for the one now in force.

Chapter 20

Freedom of Religion

20.2 Introduction to Freedom of Religion

Insert the following at the end of Section 20.2, immediately before §20.2.1

The Court continues to be active with respect to freedom of religion. However, so far most of the cases have concerned the application of statutes like the Religious Freedom Restoration Act (RFRA) (see §20.2.5 below), *e.g., Burwell v. Hobby Lobby* (2014) (private company allowed to not provide insurance for abortion despite Affordable Care Act requirement because of RFRA); and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (2020) (administrative regulations making religious and moral beliefs exceptions to Affordable Care Act coverage requirements).

20.2.4.1 Laws Targeting Religion for Adverse Treatment

Insert the following at the bottom of page 1133 immediately after the last full paragraph before §20.2.5.

In 2018 the Court was confronted with a direct challenge to a non-discrimination statute by someone asserting that his free exercise right allowed him to discriminate against LGBT persons contrary to the provisions of the applicable state statute prohibiting such discrimination. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* 584 U.S. __ (2018). The Court ruled for the cakeshop on the grounds that the Colorado Civil Rights Commission's ruling was tainted by animus against the religious beliefs of the cakeshop owner. That is, the violation was clear (the owner explicitly refused to serve a gay couple), but the Commission still should have heard the case without animus against the religion of the baker. In essence, the Court ducked the hard issue of when, if ever, free exercise will protect a person's free exercise rights when those conflict with a non-discrimination statute for employment or for places of public accommodation such as providing goods or services to the public in a commercial establishment. The Court also did not decide the closely related, and probably stronger theories, of freedom of speech or freedom of association under a sort of compelled speech or compelled association theory. On this matter the Court's decision on the California compelled speech case, *National Institute of Family and Life Advocates v Becerra,* 585 U.S. __ (2018) (California law mandating birth control advocates to disclose abortion option held to be an unconstitutional infringement of freedom of speech), may be a harbinger of things to come.

In 2020 the Court held that a Montana program that provided tax credits to people who donated to organizations that provide scholarships for private school tuition was unconstitutional because it prohibited granting the tax credit if the scholarships were used for religious schools. The Court held that the law violated the free exercise clause

because it targeted religious activity (donating money for religious school scholarships) and thus was subject to strict scrutiny under the Free Exercise Clause under *Lukumi Babalu Aye*. *Espinoza v. Montana Dept. of Revenue* (2020).

20.4.9 The Religious Freedom Clauses Working in Combination

Insert the following at the bottom of page 1188 immediately after the last full paragraph of §20.4.8. Renumber §§ 20.4.9 and 20.4.10 to 20.4.10 and 20.4.11 respectively

In 2012 the Court held that the religion clauses prohibit the application of federal non-discrimination statutes to religious organizations' selection of ministers. *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,* 565 U.S. 171 (2012). Chief Justice Roberts explained that "the Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."

In 2020 the Court extended the ministerial exception to apply to all employees who would qualify as holding positions with religious functions within the organization. *Our Lady of Guadalupe School v. Morrissey-Berru* (2020). The Court adopted a multi-function test but in effect left it to the religious organization itself to decide who is performing a religious function.

In the coming years, the Court will continue to be called upon to address challenges based on constitutional rights of freedom of expression, freedom of association, and freedom of religion as placing constraints on legislative power to limit discrimination and to equality interests in advancing inclusion in a diverse society.