CASES AND MATERIALS ON FREEDOM OF SPEECH AND FREEDOM OF THE PRESS UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

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Criminal Prosecution of the Press for Publishing Subversive Material under the Law of the United States

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There is no question that prior restraints are a direct infringement on the liberty of the press and consequently United States law sets up many restrictions on when, if ever, a prior restraint may be used.[1] Prior restraints are bad because they have the effect of completely suppressing, at least for a period of time, a news story. In cases where a prior restraint might be allowable, the United States Supreme Court has required the government to follow strict procedural requirements.[2]

Nonetheless, a criminal prosecution or even the threat of a criminal prosecution can also seriously chill press freedom. While it may be true that most democratic governments are reluctant to prosecute the press or media for what they have published, few publishers or journalists are so brave that they will knowingly risk severe punishment if a news story exceeds the limits prescribed by law.

Criminal prosecutions against the press were central to the concerns of the drafters of the First Amendment.[3] Of particular concern was the English common law crime of seditious libel. Seditious libel was particularly pernicious because it had no consistent definition. A leading American historian of the First Amendment, Leonard Levy, described the crime of seditious libel as follows:

> The crime consisted of defaming or contemning or ridiculing the government: its form, constitution, officers, laws, conduct, or policies, to the jeopardy of the public peace. In effect, any malicious criticism about the government that could be construed to have the bad tendency of lowering it in the public's esteem, holding it up to contempt or hatred, or of disturbing the peace was seditious libel, exposing the speaker or writer to criminal prosecution.[4]

[1] Near v Minnesota, 283 U.S. 697 (1931); New York Times v United States, 403 U.S. 713 (1971); Nebraska Press Ass'n. v Stuart, 427 U.S. 539 (1976).

[2] Friedman v Maryland, 380 U.S. 51 (1965). Generally the law requires a prompt judicial hearing where the government has the burden of proving a compelling justification for the censorship.

[3] The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." As used herein, freedom of speech and freedom of press are equivalent.

[4] Levy, Emergence of a Free Press (1985) at 8.

Truth was not a defense to seditious libel. As described by Professor Levy, judges "proceeded on the theory that the truth of a libel made it even worse because it was more provocative, thereby increasing the tendency to breach of the peace or exacerbating the scandal against the government."[5]

One of the most highly publicized trials in Colonial America was that of John Peter Zenger in 1735. Zenger was a printer who published anonymous articles critical of the Colonial governor. Zenger was indicted for seditious libel. Although his publications clearly met the definition of seditious libel, Zenger was acquitted by a jury largely because of the compelling argument of his lawyer, Andrew Hamilton. The verdict was a serious, if not a fatal blow to the use of seditious libel in Colonial America.

The Zenger verdict demonstrated that a Colonial jury would not convict someone for criticizing an unpopular government. Of concern, however, after the American Revolution was what protection should be accorded to unpopular persons or minority groups that criticize a popular government -- especially a democratic government elected by the People.

An intense debate has taken place in the United States as to whether the drafters of the First Amendment really intended to do away with seditious libel or only prior restraints on the press. There can be little debate, however, that the drafters of the First Amendment intended to severely limit the ability of the government to censor or curtail the press. Nonetheless, only a few years after adopting the First Amendment, the United States Congress passed the Sedition Act of 1798. The theory behind the Sedition Act was that an attack on the government was an attack on the people themselves because the people freely elected the government.[6] Although only a handful of cases were prosecuted under the Sedition Act, the Act sparked a vigorous debate in the United States about the meaning of a free press. Madison and Jefferson spoke out eloquently against the Act.

The constitutionality of the Sedition Act was never appealed to the United States Supreme Court. However in the landmark case of New York Times v Sullivan[7] in 1964, Justice Brennan stated that there was "a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."

The first major cases involving freedom of speech and press to reach the United States Supreme Court involved the Espionage Act of 1917, which among other things made it a crime to willfully make false reports with the intent to interfere with the armed forces or to willfully cause insubordination or obstruct recruiting of the armed forces. In three very remarkable cases, Justice Holmes upheld convictions under the Espionage Act. In Schenck v United States,[8] Schenck was indicted and convicted of violating the Act because he conspired with others to print and distribute to men drafted into the armed forces, circulars

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[5] Id. at 12.

[6] Powe, The Fourth Estate and the Constitution (1991) at 59. The Act made it a crime, punishable by a $5,000 fine and five years in prison for any person to "write, print, utter or publish...any false, scandalous and malicious writing or writings against the government of the United States, or either house of Congress..., or the President..., with intent to defame...or excite against them, or either of them, the hatred of the good people of the United States." The Act did accept truth as a defense and provided for a right to trial by jury on both the law and the facts.

[7] New York Times v Sullivan, 376 U.S. 254 (1964).

[8] 249 U.S. 47 (1919).

calculated to cause insubordination and obstruction of the draft. The circulars stated that conscripting men into the military was the worst form of despotism and that the war was a crime against humanity and served only the interests of Wall Street. The circulars denied that the government could legally send men to foreign shores to fight and urged conscripted men to "Assert your rights."

Schenck argued that his speech was protected by the First Amendment, but the Supreme Court upheld the conviction. Justice Holmes wrote the Court's opinion and used what has become known as the "clean and present danger" test to determine whether speech is protected by the First Amendment:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done... The most stringent protection of free speech would not protect a man from shouting fire in a theatre and causing a panic.... The question in every case is whether the words used are used in such circumstances and are of such a nature as to present a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Similarly, the Supreme Court sustained the convictions of a publisher of a newspaper that printed articles critical of the war and of the draft,[9] and of Eugene Debs, an American labor leader and socialist, for praising draft resisters.[10]

As used by the Supreme Court, the "clear and present danger" test offered little protection to the press. By allowing circumstances to determine the validity of speech, the Court gave the press the least legal protection in times when it needs it the most -- in times of war and national hysteria.

Later in a series of dissenting opinions, Justice Holmes tried to tighten his "clear and present danger" test to protect more freedom of expression. In Abrams v United States,[11] a case decided in 1919, the Supreme Court upheld the conviction of persons who printed and distributed circulars critical of President Wilson for sending troops to Russia to support anti-Bolshevik forces. Justice Holmes dissented declaring that "the ultimate good desired is better reached by free trade of ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Holmes did not believe that freedom to publish was without limit, but he would not punish a publication unless "an immediate check is required to save the country."

Later in Gitlow v New York,[12] the Supreme Court sustained the conviction of a man convicted of a state law prohibiting criminal anarchy. The defendant had published and circulated a paper that urged the overthrow of organized government by force and violence. Justice Holmes again dissented on the ground that there was "no present danger of an attempt to overthrow the government." He rejected the argument that

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[9] Frohwerk v. United States, 249 U.S. 204 (1919).

[10] Debs v United States, 249 U.S. 211 (1919).

[11] 250 U.S. 616 (1919).

[12] 268 U.S. 652 (1919).

the publication was an incitement on the ground that "[e]very idea is an incitement" and that free speech means that every idea should be given a chance to be accepted in the community. Holmes did admit that if the publication had attempted to induce an uprising against the government at once and not at some indefinite time in the future, it would have presented a different question.

The Supreme Court again used a modified version of the "clear and present danger" test in 1951 in Dennis v United States,[13] to sustain the conviction of Communist Party members accused of violating the Smith Act. The Smith Act made it unlawful to conspire to teach and advocate the violent overthrow of the government. The defendants argued that the government failed to present any evidence that their advocacy presented any "clear and present danger" of the violent overthrow of the United States government. The Supreme Court held that such proof was unnecessary. Courts should instead determine "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." The Court based its reasoning on the ground that the "overthrow of the government by force or violence is certainly a substantial enough interest to limit speech" and that "if Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required." The Court refused to accept the argument that there is a "right" to rebellion where the existing structure of the government provides for peaceful and orderly change.

The Dennis case dealt with an alleged conspiracy to overthrow the government and not with a publication as such. Nonetheless, the Court articulated a lenient standard for the government to use to prosecute speech that advocates violence or the overthrow of the government. The Dennis case has never been specifically overruled by the Supreme Court, but subsequent cases have shown a greater strictness in protecting free speech rights, particularly when the speech involves advocating ideas rather than inciting violence.

A contemporary of Justice Holmes criticized the "clear and present danger" test and urged a different standard to determine if publication is protected by the First Amendment. Judge Learned Hand criticized the "clear and present danger" test on the ground that it depended too much on the circumstances of the publication. What a jury may find acceptable today it may find unacceptable tomorrow. Hand urged instead that the courts analyze the words themselves.[14] Expressions of opinion and criticism of the government are protected by the First Amendment, but one may not counsel or advise others to violate the law. He recognized that:

> Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.

[13] 341 U.S. 494 (1951).

[14] Masses Publishing Co. v Patten, 244 Fed. 535 (S.D.N.Y. 1917), rev'd, 246 Fed. 24 (2d Cir. 1917).

Later in the 1930's, the Supreme Court began to carefully scrutinize statutes that restrict freedom of speech to see if they gave fair notice of what was illegal. In a leading case, Herndon v Lowry,[15] a black labor organizer was convicted in the state of Alabama of possessing pamphlets urging self-determination for black persons and advocating strikes and boycotts and revolutionary struggle for power. The Alabama Insurrection Statute prohibited "any attempt, by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the State." The United States Supreme Court reversed Herndon's conviction because the statute was vague and overbroad. The Court emphasized that a statute must narrowly define what speech is forbidden. The Court stated that:

> The statute as construed and applied, amounts merely to a dragnet which may enmesh any one who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonable ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment [Due Process Clause].

Herndon was an important precedent. Statutes must be narrowly drafted so as not to sweep within their prohibitions speech that is protected by the First Amendment.

The most recent opinion of the Supreme Court takes the best of all of these cases and articulates an approach to evaluating statutes that restrict freedom of speech. In 1969 in Brandenburg v Ohio, 395 U.S. 444 (1969). the Court held that a state law that made it a crime to advocate "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" was unconstitutional under the First Amendment.

The Court stated that:

> the Constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action....'[T]he mere abstract teaching...of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action'.... A statute that fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from government control.

The Brandenburg opinion continues to be the definitive interpretation of the First Amendment in the United States. It consolidates the three different approaches that the courts have used to test speech and press issues under the First Amendment:

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[15] 301 U.S. 242 (1937).

First, it tightened the "clear and present danger test" by insisting that the lawless action be imminent.

Second, it carefully distinguished between teaching and advocacy, and incitement to violence. It thus borrowed from Judge Learned Hand's recommendation that the words themselves be carefully scrutinized.

Third, it incorporated the requirement of Herndon v Lowry that the statute be carefully drafted to give fair notice of what is prohibited and not sweep within its condemnation speech that is constitutionally protected

Will these standards continue to be strictly applied in the future? Are these standards that should be adopted elsewhere? The Brandenburg formulation gives wide protection to civil liberties; at the same time it allows the government power to punish imminent unlawful action. Experience in the United States has shown that when this standard has been relaxed serious abuses of civil liberties have occurred. Ultimately Justice Holmes' admonition that ideas and opinions must be allowed to compete in the marketplace and that the people must be trusted to sift truth from falsehood is essential to any democracy. It is true that the Nazi coup in Weimar Germany and the Bolshevik coup in post-Tsarist Russia occurred because of the actions of an admitted minority that skillfully used democratic procedures to defeat democracy. Even today pressure from Neo-Nazi and Ultra-Leftist groups pose serious challenges to democratic ideals in many countries. But muzzling the press is no substitute for a vigilant and informed citizenry.

The United States has experienced many swings in its approach to press freedom. At times when democracy has felt threatened -- and generally the threat was not as serious as it was perceived to be and the reaction was far more hysterical than warranted -- civil liberties have been eroded. This occurred in the early Nineteenth Century when the United States was weak and the government perceived threats to its sovereignty from France and England, during and immediately after World War I, and during the Red Scare after World War II. Should the country experience similar perceived threats in the future, it is possible that the courts will again water-down the Brandenburg test.

There have actually been very few instances when the federal government has brought criminal prosecutions against the press. When the Supreme Court reversed the injunction against the New York Times in the Pentagon Papers Case,[16] several Justices discussed the possibility of a criminal prosecution against the newspapers for printing the "secret" materials that were stolen from government offices. Nonetheless, the newspapers were never prosecuted. The government employee who took the documents, Daniel Ellsberg, was charged with theft of government property, but the prosecution was later dismissed because of government misconduct.

However, a prosecution brought during the Reagan administration demonstrated that the threat of prosecution still exists.[17] Samuel Loring Morison, a defense department employee, was charged with violating sections of the Espionage Act that made it illegal for "whoever" having access to national defense information to willfully communicate, deliver or transmit it to "a person not entitled to receive it," and with

[16] New York Times v United States, 403 U.S. 713 (1971).

[17] United States v Morison, 604 F. Supp. 655 (D. Md. 1985), appeal dismissed, 774 F.2d 1156 (4th Cir. 1985); 844 F.2d1057 (4th Cir. 1988), cert denied, 488 U.S. 908 (1988).

theft of government property for sending intelligence information and photographs to Janes Defense Weekly, a British magazine. Morison unsuccessfully argued that the laws were impermissibly vague and overbroad, that he did not have the requisite criminal intent to injure the United States, and that this was not an espionage situation because the information was released to the press not to a hostile foreign agent or government. The lower federal courts also rejected his argument that his disclosure of the information was protected by the First Amendment on the ground that the government could make the disclosure of classified information a crime. The decision does not fully answer what kind of information should be classified and the degree of danger it must pose to national security. The Supreme Court declined to review Morison's conviction.

The Morison case illustrates the tendency of courts, even in times of peace, to defer to government decisions on national security and defense. The press and the public need to be vigilant in seeing that their civil liberties are not eroded by unwarranted claims by the government that it is protecting the national security against indefinite and imprecise dangers.

Ultimately the best counsel on how to achieve a balance between First Amendment liberties and the legitimate needs of the state was articulated by Justice Brandeis in his famous dissent in Whitney v California[18]:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.
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> They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

[18] 274 U.S. 357 (1927).

WHITNEY v. CALIFORNIA

274 U.S. 357 (1927)

Charlotte Anita Whitney was convicted of violating the California Criminal Syndicalism Act, which made it a crime to advocate the violent overthrow of the government. The Supreme Court affirmed Ms. Whitney's conviction. Justice Brandeis agreed with the majority to uphold the conviction but in a separate concurring opinion gave one of the most eloquent defenses for freedom of speech. Ultimately the United States Supreme Court repudiated its Whitney opinion in Brandenburg v. Ohio, 395 U.S. 444 (1969).

Mr. Justice BRANDEIS (concurring.)

Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime, because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Miss Whitney the liberty guaranteed by the Fourteenth Amendment.

The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for attempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

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Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law-the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

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

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, selfreliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a state might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross uninclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

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Mr. Justice HOLMES joins in this opinion.

New York Times Company v. United States
(The Pentagon Papers Case)

403 U.S. 713 (1971)

PER CURIAM.

We granted certiorari, 403 U.S. 942, 943, 91 S.Ct. 2270, 2271, 29 L.Ed.2d 853 (1971) in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled 'History of U.S. Decision-Making Process on Viet Nam Policy.'

'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); see also Near v. Minnesota es rel Olson, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' Organization for a Better Ausin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971). The District Court for the Southern District of New York in the New York Times case, 328 F. Supp. 324, and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit, 446 F.2d 1327, in the Washington Post case held that the Government had not met that burden. We agree.

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

So ordered.

Judgment of the Court of Appeals for the District of Columbia Circuit affirmed; order of the Court of Appeals for the Second Circuit reversed and case remanded with directions.

Mr. Justice BLACK, with whom Mr. Justice DOUGLAS joins, concurring.

I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe that every moment's continuance of the

injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

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

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

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

New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

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

The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial Governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes--great man and great Chief Justice that he was--when the Court held a man could not be punished for attending a meeting run by Communists.

'The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.'

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK joins, concurring.

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It should be noted at the outset that the First Amendment provides that 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' That leaves, in my view, no room for governmental restraint on the press.

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use. . . .

So any power that the Government possesses must come from its 'inherent power.'

The power to wage war is 'the power to wage war successfully.' See Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 93, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774. But the war power stems from a declaration of war. The Constitution by Art. I, s 8, gives Congress, not the President, power '(t)o declare War.' Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures may have a serious impact. But that is no basis for sanctioning a previous restraint on the press. . . .

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See T. Emerson, The System of Freedom of Expression, c. V (1970); Z. Chafee, Free Speech in the United States, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate. New York Times Co. v. Sullivan, 376 U.S. 254, 269-270, 84 S.Ct. 710, 720-721, 11 L.Ed.2d 686. . . .

Mr. Justice BRENNAN, concurring.

II

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined 'could,' or 'might,' or 'may' prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result. Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation 'is at war,' Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed.470 91919), during which times '(n)o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.' Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. '(T)he chief purpose of (the First Amendment's) guaranty (is) to prevent previous restraints upon publication.' Near v. Minnesota ex rel. Olson, supra at 713, 51 S.Ct. at 630. Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment--and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more

thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

Mr. Justice STEWART, with whom Mr. Justice WHITE joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better of for worse, the simple fact is that a President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry--in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive--as a matter of sovereign prerogative and not as a matter of law as the courts know law--through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

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

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

Mr. Justice WHITE, with whom Mr. Justice STEWART joins, concurring.

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

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

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the 'grave and irreparable danger' standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to

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

. . . . .

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797 makes it a crime to publish certain photographs or drawings of military installations. Section 798, also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic systems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations. If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. . . .

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585-586, 72 S.Ct. 863, 865-866, 96 L.Ed. 1153 (1952); see also id., at 593-628, 72 S.Ct. at 888-928 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

Mr. Justice MARSHALL, concurring.

The Government contends that the only issue in these cases is whether in a suit by the United States, 'the First Amendment bars a court from prohibiting a newspaper from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States." Brief for the United States 7. With all due respect, I believe the ultimate issue in this case is even more basic than the one

posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases there is no problem concerning the President's power to classify information as 'secret' or 'top secret.' Congress has specifically recognized Presidential authority, which has been formally exercised in Exec. Order 10501 (1953), to classify documents and information. See, e.g., 18 U.S.C. §798; 50 U.S.C. §783; 50 U.S.C. §783f. Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether in these particular cases the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. See In re Debs, 158 U.S. 564, 584, 15 S.Ct. 900, 906, 39 L.Ed. 1092 (1895). . . .

In these cases we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes is found in chapter 37 of U.S.C., Title 18, entitled Espionage and Censorship. In that chapter, Congress has provided penalties ranging from a $10,000 fine to death for violating the various statutes.

. . . . .

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court to redecide those issues--to overrule Congress. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952).

Mr. Chief Justice BURGER, dissenting.

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the status quo in the post case. I would direct that the District Court on remand give priority to the Times case to the exclusion of all other business of that court but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what Mr. Justice WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function.

Mr. Justice HARLAN, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, dissenting.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though in different circumstances I would have felt constrained to deal with the cases in the fuller sweep indicated above.

. . . . .

The power to evaluate the 'pernicious influence' of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid 'a complete abandonment of judicial control.' Cf. United States v. Reynolds, 345 U.S. 1, 8, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953). Moreover the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned--here the Secretary of State or the Secretary of Defense--after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. See id. at 8 and n. 20, 73 S.Ct. at 532; Duncan v. Cammell, Laird & Co., (1942) A.C. 624, 638 (House of Lords).

But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

'(T)he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.' Chicago & Southern Air Lines, Inc., v. Waterman Steamship Corp. 333 U.S. 103, 111, 68 S.Ct. 431, 436, 92 L.Ed. 568 (1948) (Jackson J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the Post litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative. . . .

Mr. Justice BLACKMUN, dissenting.

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

. . . . .

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. See, for example, Near v. Minnesota ex rel. Olson, 283 U.S. 697, 708, 51 S.Ct. 625, 628, 75 L.Ed. 1357 (1931), and Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470 (1919). What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. Mr. Justice Holmes gave us a suggestion when he said in Schenck,

'It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' 249 U.S. at 52, 39 S.Ct. at 249.

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

New York Times Co. v. Sullivan

376 U.S. 254 (1964)

[Civil Rights supporters took out an advertisement in the New York Times to protest injustices against Negroes in the City of Montgomery, Alabama. A city official brought a civil libel action in the Alabama state courts against the Times and the persons whose names appeared in the advertisement, claiming that the advertisement contained misstatements of fact. He was awarded $500,000.00 by the Alabama courts. The defendants appealed to the United States Supreme Court.]

Brennan, J., delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

* * * *

II.

Under Alabama law as applied in this case, a publication is "libelous per se" if the words "tend to injure a person . . . in his reputation" or to "bring [him] into public contempt"; the trial court stated that the standard was met if the words are such as to "injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust . . . ." The jury must find that the words were published "of and concerning" the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once "libel per se" has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. Alabama Ride Co. v. Vance, 235 Ala. 263, 178 So. 438 (1938); Johnson Publishing Co. v. Davis, 271 Ala. 474, 494-495, 124 So. 2d 441, 457-458 (1960). His privilege of "fair comment" for expressions of opinion depends on the truth of the facts upon which the comment is based. Parsons v. Age-Herald Publishing Co., 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. Johnson Publishing Co. v. Davis, supra, 271 Ala., at 495, 124 So. 2d, at 458.

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. Those statements do not foreclose our inquiry here. * * * In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. N. A. A. C. P. v. Button, 371 U.S. 415, 429. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." Stromberg v. California, 283 U.S. 359, 369. "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," Bridges v. California, 314 U.S. 252, 270, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." N. A. A. C. P. v. Button, 371 U.S. 415, 429. The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." United States v. Associated Press, 52 F.Supp. 362, 372 (D. C. S. D. N. Y. 1943). Mr. Justice Brandeis, in his concurring opinion in Whitney v. California, 274 U.S. 357, 375-376, gave the principle its classic formulation:

"Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See Terminiello v. Chicago, 337 U.S. 1, 4; De Jonge v. Oregon, 299 U.S. 353, 365. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth -- whether administered by judges, juries, or administrative officials -- and especially one that puts the burden of proving truth on the speaker. Cf. Speiser v. Randall, 357 U.S. 513, 525-526. The constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." N. A. A. C. P. v. Button, 371 U.S. 415, 445. As Madison said, "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 Elliot's Debates on the Federal Constitution (1876), p. 571. In Cantwell v. Connecticut, 310 U.S. 296, 310, the Court declared:

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

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive," N. A. A. C. P. v. Button, 371 U.S. 415, 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, 76 U. S. App. D. C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

"Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate."

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. Bridges v. California, 314 U.S. 252. This is true even though the utterance contains "half-truths" and "misinformation." Pennekamp v. Florida, 328 U.S. 331, 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also Craig v. Harney, 331 U.S. 367; Wood v. Georgia, 370 U.S. 375. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," Craig v. Harney, supra, 331 U.S., at 376, surely the same must be true of other government officials, such as elected city commissioners. Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, Legacy of Suppression (1960), at 258 et seq.; Smith, Freedom's Fetters (1956), at 426, 431, and passim. That statute made it a crime, punishable by a $ 5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States." The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it

> "doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress . . . . [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto -- a power which, more than any other, ought to produce universal alarm, because it is leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." 4 Elliot's Debates, supra, pp. 553-554.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which "The people, not the government, possess the absolute sovereignty." The structure of the government dispersed power in reflection of the people's distrust of concentrated power, and of power itself at all levels. This form of government was "altogether different" from the British form, under which the Crown was sovereign and the people were subjects. "Is it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" Id., pp. 569-570. Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . ." 4 Elliot's Debates, supra, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.

Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See, e. g., Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter "which no one now doubts." Report with Senate bill No. 122, 24th Cong., 1st

Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in Abrams v. United States, 250 U.S. 616, 630; Jackson, J., dissenting in Beauharnais v. Illinois, 343 U.S. 250, 288-289; Douglas, The Right of the People (1958), p. 47. See also Cooley, Constitutional Limitations (8th ed., Carrington, 1927), pp. 899-900; Chafee, Free Speech in the United States (1942), pp. 27-28. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and that Jefferson, for one, while denying the power of Congress "to controul the freedom of the press," recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in Dennis v. United States, 341 U.S. 494, 522, n. 4 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions. See, e. g., Gitlow v. New York, 268 U.S. 652, 666; Schneider v. State, 308 U.S. 147, 160; Bridges v. California, 314 U.S. 252, 268; Edwards v. South Carolina, 372 U.S. 229, 235.

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.

* * * *

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in Smith v. California, 361 U.S. 147, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale.

* * * *

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.[19] Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual

[19] Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." Mill, On Liberty (Oxford: Blackwell, 1947), at 15; see also Milton, Areopagitica, in Prose Works (Yale, 1959), Vol. II, at 561.

particulars. See, e. g., Post Publishing Co. v. Hallam, 59 F. 530, 540 (C. A. 6th Cir. 1893); see also Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." Speiser v. Randall, supra, 357 U.S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

* * * *

Miller v. California

414 U.S. 881 (1973)

Mr. Chief Justice BURGER delivered the opinion of the Court.

This is one of a group of 'obscenity-pornography' cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called 'the intractable obscenity problem.' Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704, 88 S.Ct. 1298, 1313, 20 L.Ed.2d 225 (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called 'adult' material. After a jury trial, he was convicted of violating California Penal Code s 311.2(a), a misdemeanor, by knowingly distributing obscene matter,[FN1] and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

> FN1. At the time of the commission of the alleged offense, which was prior to June 25, 1969, ss 311.2(a) and 311 of the California Penal Code read in relevant part:
>
> 's 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state
>
> '(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . .'
>
> 's 311. Definitions
>
> 'As used in this chapter:
>
> '(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

'(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial represention or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

'(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

'(d) 'Distribute' means to transfer possession of, whether with or without consideration.

'(e) 'Knowingly' means having knowledge that the matter is obscene.'

Section 311(e) of the California Penal Code, supra, was amended on June 25, 1969, to read as follows:

'(e) 'Knowingly' means being aware of the character of the matter.'

Cal.Amended Stats.1969, c. 249, s 1, p. 598. . . .

The brochures advertise four books entitled 'Intercourse,' 'Man-Woman,' 'Sex Orgies Illustrated,' and 'An Illustrated History of Pornography,' and a film entitled 'Marital Intercourse.' While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material[FN2] when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. Stanley v. Georgia, 394 U.S. 557, 567, 89 S.Ct. 1243, 1249, 22 L.Ed.2d 542 (1969); Ginsberg v. New York, 390 U.S. 629, 637-643, 88 S.Ct. 1274, 1279-1282, 20 L.Ed.2d 195 (1968); Interstate Circuit, Inc. v. Dallas, supra, 390 U.S., at 690, 88 S.Ct., at 1306; Redrup v. New York, 386 U.S. 767, 769, 87 S.Ct., 1414, 1415, 18 L.Ed.2d 515 (1967); Jacobellis v. Ohio, 378 U.S. 184, 195, 84 S.Ct. 1676, 1682, 12 L.Ed.2d 793 (1964). . . . It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

FN2. This Court has defined 'obscene material' as 'material which deals with sex in a manner appealing to prurient interest,' Roth v. United States, supra, 354 U.S., at 487, 77 S.Ct., at 1310, but the Roth definition does not reflect the precise meaning of 'obscene' as traditionally used in

the English language. Derived from the Latin obscaenus, ob, to, plus caenum, filth, 'obscene' is defined in the Webster's Third New International Dictionary (Unabridged 1969) as '1a: disgusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle. 'The Oxford English Dictionary (1933 ed.) gives a similar definition, '(o)ffensive to the senses, or to taste or refinement, disgusting, repulsive, filthy, foul, abominable, loathsome.'

The material we are discussing in this case is more accurately defined as 'pornography' or 'pornographic material.' 'Pornography' derives from the Greek (porne, harlot, and graphos, writing). The word now means '1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a a portrayal of erotic behavior designed to cause sexual excitement. 'Webster's Third New International Dictionary, supra. Pornographic material which is obscene forms a subgroup of all 'obscene' expression, but not the whole, at least as the word 'obscene' is now used in our language. We note, therefore, that the words 'obscene material,' as used in this case, have a specific judicial meaning which derives from the Roth case, i.e., obscene material 'which deals with sex.' Roth, supra, at 487, 77 S.Ct., at 1310. See also ALI Model Penal Code s 251.4(l) 'Obscene Defined.' (Official Draft, 1962.)

. . . .

II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. Kois v. Wisconsin, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972); United States v. Reidel, 402 U.S., at 354, 91 S.Ct., at 1411-1412; Roth v. United States, supra, 354 U.S., at 485, 77 S.Ct., at 1309. The First and Fourteenth Amendments have never been treated as absolutes (footnote omitted).' Breard v. Alexandria, 341 U.S., at 642, 71 S.Ct., at 932, and cases cited. See Times Film Corp. v. Chicago, 365 U.S. 43, 47-50, 81 S.Ct. 391, 393-395, 5 L.Ed.2d 403 (1961); Joseph Burstyn, Inc. v. Wilson, 343 U.S., at 502, 72 S.Ct., at 780. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc. v. Dallas, supra, 390 U.S., at 682-685, 88 S.Ct., at 1302-1305. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, quoting Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constituional standard the 'utterly without redeeming social value' test of Memoirs v. Massachusetts, 383 U.S., at 419, 86 S.Ct., at

977; that concept has never commanded the adherence of more than three Justices at one time. See supra, at 2613. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. . . .

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See Kois v. Wisconsin, supra, 408 U.S., at 230-232, 92 S.Ct., at 2246-2247; Roth v. United States, supra, 354 U.S., at 487, 77 S.Ct., at 1310; Thornhill v. Alabama, 310 U.S. 88, 101-102, 60 S.Ct. 736, 743-744, 84 L.Ed. 1093 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

. . . .

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See Roth v. United States, supra, 354 U.S., at 491-492, 77 S.Ct., at 1312-1313. Cf. Ginsberg v. New York, 390 U.S., at 643, 88 S.Ct., at 1282.[FN10] If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, Mr. Justice Douglas contends. As to Mr. Justice Douglas' position, see United States v. Thirty-seven Photographs, 402 U.S. 363, 379-380, 91 S.Ct. 1400, 1409-1410, 28 L.Ed.2d 822 (1971) (Black, J., joined by Douglas, J., dissenting); Ginzburg v. United States, supra, 383 U.S. at 476, 491-492, 86 S.Ct., at 950, 974 (Black, J., and Douglas, J., dissenting); Jacobellis v. Ohio, supra, 378 U.S., at 196, 84 S.Ct., at 1682 (Black, J., joined by Douglas, J.,

concurring); Roth, supra, 354 U.S., at 508-514, 77 S.Ct., at 1321-1324 (Douglas, J., dissenting). In this belief, however, Mr. Justice DOUGLAS now stands alone.

. . . .

III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether 'the average person, applying contemporary community standards' would consider certain materials 'prurient,' it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a national 'community standard' would be an exercise in futility.

. . . .

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. See Hoyt v. Minnesota, 399 U.S. 524-525, 90 S.Ct. 2241 (1970) (Blackmun, J., dissenting); Walker v. Ohio, 398 U.S. 434, 90 S.Ct. 1884, 26 L.Ed.2d 385 (1970) (Burger, C.J., dissenting); id., at 434-435, 90 S.Ct., at 1884 (Harlan, J., dissenting); Cain v. Kentucky, 397 U.S. 319, 90 S.Ct. 1110, 25 L.Ed.2d 334 (1970) (Burger, C.J., dissenting); id., at 319-320, 90 S.Ct., at 1110 (Harlan, J., dissenting); United States v. Groner, 479 F.2d 577, at 581-583.O'Meara & Shaffer, Obscenity in The Supreme Court: A Note on Jacobellis v. Ohio, 40 Notre Dame Law. 1, 6-7 (1964). See also Memoirs v. Massachusetts, 383 U.S., at 458, 86 S.Ct., at 997 (Harlan, J., dissenting); Jacobellis v. Ohio, supra, 378 U.S., at 203-204, 84 S.Ct., at 1686 (Harlan, J., dissenting); Roth v. United States, supra, 354 U.S., at 505-506, 77 S.Ct., at 1319-1320 (Harlan, J., concurring and dissenting). People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in Mishkin v. New York, 383 U.S., at 508-509, 86 S.Ct., at 963, the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person-or indeed a totally insensitive one. See Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311. Cf. the now discredited test in Regina v. Hicklin, (1868) L.R. 3 Q.B. 360. We hold that the requirement that the jury evaluate the materials with reference to 'contemporary standards of the State of California' serves this protective purpose and is constitutionally adequate.

. . . .

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press . . ..' Breard v. Alexandria, 341 U.S., at 645, 71 S.Ct., at 934. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.' The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,' Roth v. United States, supra, 354 U.S., at 484, 77 S.Ct., at 1308 (emphasis added). See Kois v. Wisconsin, 408 U.S., at 230-232, 92 S.Ct., at 2246-2247; Thornhill v. Alabama, 310 U.S., at 101-102, 60 S.Ct., at 743-744. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, see Roth v. United States, supra, 354 U.S., at 482-485, 77 S.Ct., at 1307-1309, in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an 'extraordinarily vigorous period,' not just in economics and politics, but in belles lettres and in 'the outlying fields of social and political philosophies. We do not see the harsh hand of censorship of ideas-good or bad, sound or unsound-and 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex.
. . . .

In sum, we (a) reaffirm the Roth holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is 'utterly without redeeming social value'; and (c) hold that obscenity is to be determined by applying 'contemporary community standards,' see Kois v. Wisconsin, supra, 408 U.S., at 230, 92 S.Ct., at 2246, and Roth v. United States, supra, 354 U.S., at 489, 77 S.Ct., at 1311, not 'national standards.' The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. See United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, at 130 n. 7, 93 S.Ct. 2665, at 2670 n. 7, 37 L.Ed.2d 500.

Vacated and remanded.

Mr. Justice DOUGLAS, dissenting.

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since 'obscenity' is not mentioned in the Constitution or Bill of Rights. And the First Amendment makes no such exception from 'the press' which it undertakes to protect

nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated 'obscene' publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not 'obscene.' The Court is at large because we deal with tastes and standards of literature. What shocks me may be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

III

While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive. That was the basis of my dissent in Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467, 72 S.Ct. 813, 823, 96 L.Ed. 1068, where I protested against making streetcar passengers a 'captive' audience. There is no 'captive audience' problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter newsstands or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises a ban.

The idea that the First Amendment permits government to ban publications that are 'offensive' to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. The First Amendment was designed 'to invite dispute,' to induce 'a condition of unrest,' to 'create dissatisfaction with conditions as they are,' and even to stir 'people' to anger.' Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131. The idea that the First Amendment permits punishment for ideas that are 'offensive' to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle for dispensing tranquilizers to the people. Its prime function was to keep debate open to 'offensive' as well as to 'staid' people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard 'offensive' gives authority to government that cuts the very vitals out of the First Amendment. As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment-and solely because of it-speakers and publishers have not been threatened or subdued because their thoughts and ideas may be 'offensive' to some.

. . . .

We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires that all ideas competing for acceptance

must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilection.

Ashcroft v. The Free Speech Coalition

535 U.S. 234 (2002)

Justice KENNEDY delivered the opinion of the Court.

We consider in this case whether the Child Pornography Prevention Act of 1996 (CPPA), 18 U.S.C. § 2251*et seq.,* abridges the freedom of speech. The CPPA extends the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children. The statute prohibits, in specific circumstances, possessing or distributing these images, which may be created by using adults who look like minors or by using computer imaging. The new technology, according to Congress, makes it possible to create realistic images of children who do not exist. See Congressional Findings, notes following 18 U.S.C. § 2251.

By prohibiting child pornography that does not depict an actual child, the statute goes beyond *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), which distinguished child pornography from other sexually explicit speech because of the State's interest in protecting the children exploited by the production process. See *id.,* at 758, 102 S.Ct. 3348. As a general rule, pornography can be banned only if obscene, but under *Ferber,* pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). *Ferber* recognized that "[t]he *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children." 458 U.S., at 761, 102 S.Ct. 3348.

While we have not had occasion to consider the question, we may assume that the apparent age of persons engaged in sexual conduct is relevant to whether a depiction offends community standards. Pictures of young children engaged in certain acts might be obscene where similar depictions of adults, or perhaps even older adolescents, would not. The CPPA, however, is not directed at speech that is obscene; Congress has proscribed those materials through a separate statute. 18 U.S.C. §§ 1460-1466. Like the law in *Ferber,* the CPPA seeks to reach beyond obscenity, and it makes no attempt to conform to the *Miller*standard. For instance, the statute would reach visual depictions, such as movies, even if they have redeeming social value.

The principal question to be resolved, then, is whether the CPPA is constitutional where it proscribes a significant universe of speech that is neither obscene under *Miller* nor child pornography under *Ferber.*

Before 1996, Congress defined child pornography as the type of depictions at issue in *Ferber,* images made using actual minors. 18 U.S.C. § 2252 (1994 ed.). The CPPA retains that prohibition at 18 U.S.C. § 2256(8)(A) and adds three other prohibited categories of speech, of which the first, § 2256(8)(B), and the third, § 2256(8)(D), are at issue in this case. Section 2256(8)(B) prohibits "any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture," that "is, or appears to be, of a minor engaging in sexually explicit conduct." The prohibition on "any visual

depiction" does not depend at all on how the image is produced. The section captures a range of depictions, sometimes called "virtual child pornography," which include computer-generated images, as well as images produced by more traditional means. For instance, the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology, a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." The statute also prohibits Hollywood movies, filmed without any child actors, if a jury believes an actor "appears to be" a minor engaging in "actual or simulated ... sexual intercourse." § 2256(2).

These images do not involve, let alone harm, any children in the production process; but Congress decided the materials threaten children in other, less direct, ways. Pedophiles might use the materials to encourage children to participate in sexual activity. "[A] child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." Congressional Finding (3), notes following § 2251. Furthermore, pedophiles might "whet their own sexual appetites" with the pornographic images, "thereby increasing the creation and distribution of child pornography and the sexual abuse and exploitation of actual children." *Id.,* Findings (4), (10)(B). Under these rationales, harm flows from the content of the images, not from the means of their production. In addition, Congress identified another problem created by computer-generated images: Their existence can make it harder to prosecute pornographers who do use real minors. See *id.,* Finding (6)(A). As imaging technology improves, Congress found, it becomes more difficult to prove that a particular picture was produced using actual children. To ensure that defendants possessing child pornography using real minors cannot evade prosecution, Congress extended the ban to virtual child pornography.

Section 2256(8)(C) prohibits a more common and lower tech means of creating virtual images, known as computer morphing. Rather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity. Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber.* Respondents do not challenge this provision, and we do not consider it.

Respondents do challenge § 2256(8)(D). Like the text of the "appears to be" provision, the sweep of this provision is quite broad. Section 2256(8)(D) defines child pornography to include any sexually explicit image that was "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression" it depicts "a minor engaging in sexually explicit conduct." One Committee Report identified the provision as directed at sexually explicit images pandered as child pornography. See S.Rep. No. 104-358, p. 22 (1996) ("This provision prevents child pornographers and pedophiles from exploiting prurient interests in child sexuality and sexual activity through the production or distribution of pornographic material which is intentionally pandered as child pornography"). The statute is not so limited in its reach, however, as it punishes even those possessors who took no part in pandering. Once a work has been described as child pornography, the taint remains on the speech in the hands of subsequent possessors, making possession unlawful even though the content otherwise would not be objectionable.

Fearing that the CPPA threatened the activities of its members, respondent Free Speech Coalition and others challenged the statute in the United States District Court for the Northern District of California. The Coalition, a California trade association for the adult-entertainment industry, alleged that its members did not use minors in their sexually explicit works, but they believed some of these materials might fall within the CPPA's expanded definition of child pornography. The other respondents are Bold Type, Inc., the publisher of a book advocating the nudist lifestyle; Jim Gingerich, a painter of nudes; and Ron Raffaelli, a photographer specializing in erotic images. Respondents alleged that the "appears to be" and "conveys the impression" provisions are overbroad and vague, chilling them from producing works protected by the First Amendment. The District Court disagreed and granted summary judgment to the Government. The court dismissed the overbreadth claim because it was "highly unlikely" that any "adaptations of sexual works like 'Romeo and Juliet,' ... will be treated as 'criminal contraband.' " App. to Pet. for Cert. 62a-63a.

The Court of Appeals for the Ninth Circuit reversed. See 198 F.3d 1083 (1999). The court reasoned that the Government could not prohibit speech because of its tendency to persuade viewers to commit illegal acts. The court held the CPPA to be substantially overbroad because it bans materials that are neither obscene nor produced by the exploitation of real children as in *New York v. Ferber,* 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Judge Ferguson dissented on the ground that virtual images, like obscenity and real child pornography, should be treated as a category of speech unprotected by the First Amendment. 198 F.3d, at 1097. The Court of Appeals voted to deny the petition for rehearing en banc, over the dissent of three judges. See 220 F.3d 1113 (2000).

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II

The First Amendment commands, "Congress shall make no law ... abridging the freedom of speech." The government may violate this mandate in many ways, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Keller v. State Bar of Cal.,* 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990), but a law imposing criminal penalties on protected speech is a stark example of speech suppression. The CPPA's penalties are indeed severe. A first offender may be imprisoned for 15 years. § 2252A(b)(1). A repeat offender faces a prison sentence of not less than 5 years and not more than 30 years in prison. *Ibid.* While even minor punishments can chill protected speech, see *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), this case provides a textbook example of why we permit facial challenges to statutes that burden expression. With these severe penalties in force, few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law. The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment's vast and privileged sphere. Under this principle, the CPPA is unconstitutional on its face if it prohibits a substantial amount of protected expression. See *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. In its legislative findings, Congress recognized that there are subcultures of persons who harbor

illicit desires for children and commit criminal acts to gratify the impulses. See Congressional Findings, notes following § 2251; see also U.S. Dept. of Health and Human Services, Administration on Children, Youth and Families, Child Maltreatment 1999 (estimating that 93,000 children were victims of sexual abuse in 1999). Congress also found that surrounding the serious offenders are those who flirt with these impulses and trade pictures and written accounts of sexual activity with young children.

Congress may pass valid laws to protect children from abuse, and it has. *E.g.,* 18 U.S.C. §§ 2241, 2251. The prospect of crime, however, by itself does not justify laws suppressing protected speech. See *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y.,* 360 U.S. 684, 689, 79 S.Ct. 1362, 3 L.Ed.2d 1512 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech" (internal quotation marks and citation omitted)). It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities. See *FCC v. Pacifica Foundation,* 438 U.S. 726, 745, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it"); see also *Reno v. American Civil Liberties Union,* 521 U.S. 844, 874, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) ("In evaluating the free speech rights of adults, we have made it perfectly clear that '[s]exual expression which is indecent but not obscene is protected by the First Amendment' ") (quoting *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 126, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989)); *Carey v. Population Services Int'l,* 431 U.S. 678, 701, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression").

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 127, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (KENNEDY, J., concurring). While these categories may be prohibited without violating the First Amendment, none of them includes the speech prohibited by the CPPA. In his dissent from the opinion of the Court of Appeals, Judge Ferguson recognized this to be the law and proposed that virtual child pornography should be regarded as an additional category of unprotected speech. See 198 F.3d, at 1101. It would be necessary for us to take this step to uphold the statute.

As we have noted, the CPPA is much more than a supplement to the existing federal prohibition on obscenity. Under *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Government must prove that the work, taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value. *Id.,* at 24, 93 S.Ct. 2607. The CPPA, however, extends to images that appear to depict a minor engaging in sexually explicit activity without regard to the *Miller* requirements. The materials need not appeal to the prurient interest. Any depiction of sexually explicit activity, no matter how it is presented, is proscribed. The CPPA applies to a picture in a psychology manual, as well as a movie depicting the horrors of sexual abuse. It is not necessary, moreover, that the image be patently offensive. Pictures of what appear to be 17-year-olds engaging in sexually explicit activity do not in every case contravene community standards.

The CPPA prohibits speech despite its serious literary, artistic, political, or scientific value. The statute proscribes the visual depiction of an idea-that of teenagers engaging in sexual activity-that is a fact of modern society and has been a theme in art and literature throughout the ages. Under the CPPA, images are prohibited so long as the persons appear to be under 18 years of age. 18 U.S.C. § 2256(1). This is higher than the legal age for marriage in many States, as well as the age at which persons may consent to sexual relations. See § 2243(a) (age of consent in the federal maritime and territorial jurisdiction is 16); U.S. National Survey of State Laws 384-388 (R. Leiter ed., 3d ed. 1999) (48 States permit 16-year-olds to marry with parental consent); W. Eskridge & N. Hunter, Sexuality, Gender, and the Law 1021-1022 (1997) (in 39 States and the District of Columbia, the age of consent is 16 or younger). It is, of course, undeniable that some youths engage in sexual activity before the legal age, either on their own inclination or because they are victims of sexual abuse.

Both themes-teenage sexual activity and the sexual abuse of children-have inspired countless literary works. William Shakespeare created the most famous pair of teenage lovers, one of whom is just 13 years of age. See Romeo and Juliet, act I, sc. 2, l. 9 ("She hath not seen the change of fourteen years"). In the drama, Shakespeare portrays the relationship as something splendid and innocent, but not juvenile. The work has inspired no less than 40 motion pictures, some of which suggest that the teenagers consummated their relationship. *E.g.,* Romeo and Juliet (B. Luhrmann director, 1996). Shakespeare may not have written sexually explicit scenes for the Elizabethan audience, but were modern directors to adopt a less conventional approach, that fact alone would not compel the conclusion that the work was obscene.

Contemporary movies pursue similar themes. Last year's Academy Awards featured the movie, Traffic, which was nominated for Best Picture. See Predictable and Less So, the Academy Award Contenders, N.Y. Times, Feb. 14, 2001, p. E11. The film portrays a teenager, identified as a 16-year-old, who becomes addicted to drugs. The viewer sees the degradation of her addiction, which in the end leads her to a filthy room to trade sex for drugs. The year before, American Beauty won the Academy Award for Best Picture. See "American Beauty" Tops the Oscars, N.Y. Times, Mar. 27, 2000, p. E1. In the course of the movie, a teenage girl engages in sexual relations with her teenage boyfriend, and another yields herself to the gratification of a middle-aged man. The film also contains a scene where, although the movie audience understands the act is not taking place, one character believes he is watching a teenage boy performing a sexual act on an older man.

Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach. Whether or not the films we mention violate the CPPA, they explore themes within the wide sweep of the statute's prohibitions. If these films, or hundreds of others of lesser note that explore those subjects, contain a single graphic depiction of sexual activity within the statutory definition, the possessor of the film would be subject to severe punishment without inquiry into the work's redeeming value. This is inconsistent with an essential First Amendment rule: The artistic merit of a work does not depend on the presence of a single explicit scene. See *Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.,* 383 U.S. 413, 419, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966) (plurality opinion) ("[T]he social value of the book can neither be weighed

against nor canceled by its prurient appeal or patent offensiveness"). Under *Miller,* the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive. See *Kois v. Wisconsin,* 408 U.S. 229, 231, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972)*(per curiam)*. For this reason, and the others we have noted, the CPPA cannot be read to prohibit obscenity, because it lacks the required link between its prohibitions and the affront to community standards prohibited by the definition of obscenity.

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Ferber upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were "intrinsically related" to the sexual abuse of children in two ways. *Id.,* at 759, 102 S.Ct. 3348. First, as a permanent record of a child's abuse, the continued circulation itself would harm the child who had participated. Like a defamatory statement, each new publication of the speech would cause new injury to the child's reputation and emotional well-being. See *id.,* at 759, and n. 10, 102 S.Ct. 3348. Second, because the traffic in child pornography was an economic motive for its production, the State had an interest in closing the distribution network. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.,* at 760, 102 S.Ct. 3348. Under either rationale, the speech had what the Court in effect held was a proximate link to the crime from which it came.

Later, in *Osborne v. Ohio,* 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990), the Court ruled that these same interests justified a ban on the possession of pornography produced by using children. "Given the importance of the State's interest in protecting the victims of child pornography," the State was justified in "attempting to stamp out this vice at all levels in the distribution chain." *Id.,* at 110. *Osborne* also noted the State's interest in preventing child pornography from being used as an aid in the solicitation of minors. *Id.,* at 111, 110 S.Ct. 1691. The Court, however, anchored its holding in the concern for the participants, those whom it called the "victims of child pornography." *Id.,* at 110, 110 S.Ct. 1691. It did not suggest that, absent this concern, other governmental interests would suffice. See *infra,* at 1402-1403.

In contrast to the speech in *Ferber,* speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not "intrinsically related" to the sexual abuse of children, as were the materials in *Ferber*. 458 U.S., at 759, 102 S.Ct. 3348. While the Government asserts that the images can lead to actual instances of child abuse, see *infra,* at 1402-1404, the causal link is contingent and indirect. The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.

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III

The CPPA, for reasons we have explored, is inconsistent with *Miller* and finds no support in *Ferber.* The Government seeks to justify its prohibitions in other ways. It argues that the CPPA is necessary because

pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable materials to children, see *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968), and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. See *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989). In *Butler v. Michigan,* 352 U.S. 380, 381, 77 S.Ct. 524, 1 L.Ed.2d 412 (1957), the Court invalidated a statute prohibiting distribution of an indecent publication because of its tendency to "'incite minors to violent or depraved or immoral acts.' " A unanimous Court agreed upon the important First Amendment principle that the State could not "reduce the adult population ... to reading only what is fit for children." *Id.,* at 383, 77 S.Ct. 524. We have reaffirmed this holding. See *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 814, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("[T]he objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative"); *Reno v. American Civil Liberties Union,* 521 U.S., at 875, 117 S.Ct. 2329 (The "governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults"); *Sable Communications v. FCC, supra,* at 130-131, 109 S.Ct. 2829 (striking down a ban on "dial-a-porn" messages that had "the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear").

Here, the Government wants to keep speech from children not to protect them from its content but to protect them from those who would commit other crimes. The principle, however, remains the same: The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.

The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Stanley v. Georgia,* 394 U.S. 557, 566, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

To preserve these freedoms, and to protect speech for its own sake, the Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct. See *Kingsley Int'l Pictures Corp.,* 360 U.S., at 689, 79 S.Ct. 1362; see also *Bartnicki v. Vopper,* 532 U.S. 514, 529, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it"). The government may not prohibit speech because it

increases the chance an unlawful act will be committed "at some indefinite future time." *Hess v. Indiana,* 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973)*(per curiam)*. The government may suppress speech for advocating the use of force or a violation of law only if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)*(per curiam)*. There is here no attempt, incitement, solicitation, or conspiracy. The Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.

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Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. "[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted ...." *Broadrick v. Oklahoma,* 413 U.S., at 612, 93 S.Ct. 2908. The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U.S.C. § 2252A(c).

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IV

Respondents challenge § 2256(8)(D) as well. This provision bans depictions of sexually explicit conduct that are "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." The parties treat the section as nearly identical to the provision prohibiting materials that appear to be child pornography. In the Government's view, the difference between the two is that "the 'conveys the impression' provision requires the jury to assess the material at issue in light of the manner in which it

is promoted." Brief for Petitioners 18, n. 3. The Government's assumption, however, is that the determination would still depend principally upon the content of the prohibited work.

We disagree with this view. The CPPA prohibits sexually explicit materials that "conve[y] the impression" they depict minors. While that phrase may sound like the "appears to be" prohibition in § 2256(8)(B), it requires little judgment about the content of the image. Under § 2256(8)(D), the work must be sexually explicit, but otherwise the content is irrelevant. Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted. While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way.

Section 2256(8)(D), however, prohibits a substantial amount of speech that falls outside *Ginzburg's* rationale. Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described. The statute, furthermore, does not require that the context be part of an effort at "commercial exploitation." *Ibid.* As a consequence, the CPPA does more than prohibit pandering. It prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain. The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. Possession is a crime even when the possessor knows the movie was mislabeled. The First Amendment requires a more precise restriction. For this reason, § 2256(8)(D) is substantially overbroad and in violation of the First Amendment.

V

For the reasons we have set forth, the prohibitions of §§ 2256(8)(B) and 2256(8)(D) are overbroad and unconstitutional. Having reached this conclusion, we need not address respondents' further contention that the provisions are unconstitutional because of vague statutory language.

The judgment of the Court of Appeals is affirmed.

Dissenting and concurring opinions omitted

Cohen v. California

403 U.S. 15 (1971)

Mr. Justice HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of violating that part of California Penal Code s 415 which prohibits 'maliciously and willfully disturb(ing) the peace or quiet of any neighborhood or person * * * by * * * offensive conduct * * *.'[FN1] He was given 30 days' imprisonment. The facts upon which his conviction rests are detailed in the opinion of the Court of Appeal of California, Second Appellate District, as follows:

> FN1. The statute provides in full:
>
> 'Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in such unincorporated town, run any horse race, either for a wager of for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court.'

'On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse in the corridor outside of division 20 of the municipal court wearing a jacket bearing the words 'Fuck the Draft' which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

'The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest.' 1 Cal.App.3d 94, 97-98, 81 Cal.Rptr. 503, 505 (1969).

In affirming the conviction the Court of Appeal held that 'offensive conduct' means 'behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace,' and that the State had proved this element because, on the facts of this case, '(i)t was certainly reasonably foreseeable that such conduct might cause others to rise up to commit a violent act against the person of the defendant or attempt to forceably remove his jacket.' 1 Cal.App.3d, at 99-100, 81 Cal.Rptr., at 506. The California Supreme Court declined review by a divided vote. We brought the case here, postponing the consideration of the question of our jurisdiction over this appeal to a hearing of the case on the merits. 399 U.S. 904, 90 S.Ct. 2211, 26 L.Ed.2d 558. We now reverse.

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I

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does not present.

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech,' cf. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), not upon any separately identifiable conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views but which, on its face, does not necessarily convey any message and hence arguably could be regulated without effectively repressing Cohen's ability to express himself. Cf. United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957).

Appellant's conviction, then, rests squarely upon his exercise of the 'freedom of speech' protected from arbitrary governmental interference by the Constitution and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See Edwards v. South Carolina, 372 U.S. 229, 236-237, 83 S.Ct. 680, 683-684, 9 L.Ed.2d 697, and n. 11 (1963). Cf. Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.[FN3]

> FN3. It is illuminating to note what transpired when Cohen entered a courtroom in the building. He removed his jacket and stood with it folder over his arm. Meanwhile, a policeman sent the presiding judge a note suggesting that Cohen be held in contempt of court. The judge declined to do so and Cohen was arrested by the officer only after he emerged from the courtroom. App. 18-19.

In the second place, as it comes to us, this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example, an obscenity case. Whatever else may be necessary to give rise to the

States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not 'directed to the person of the hearer.' Cantwell v. Connecticut, 310 U.S. 296, 309, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940). No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction. Cf. Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951); Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949). There is, as noted above, no showing that anyone who saw Cohen was in fact violently aroused or that appellant intended such a result.

Finally, in arguments before this Court much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. See, e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971). While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, e.g., Rowan v. United States Post Office Dept., 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), we have at the same time consistently stressed that 'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech.' Id., at 738, 90 S.Ct., at 1491. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Cf. Keefe, supra.Given the subtlety and complexity of the factors involved, if Cohen's 'speech' was otherwise entitled to constitutional protection, we do not think the fact that some unwilling 'listeners' in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all 'offensive conduct' that disturbs 'any neighborhood or person.' Cf. Edwards v. South Carolina, supra.[FN4]

FN4. In fact, other portions of the same statute do make some such distinctions. For example, the statute also prohibits disturbing 'the peace or quiet * * * by loud or unusual noise' and using 'vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner.'See n. 1, supra. This secondquoted provision in particular serves to put the actor on much fairer notice as to what is prohibited. It also buttresses our view that the 'offensive conduct' portion, as construed and applied in this case, cannot legitimately be justified in this Court as designed or intended to make fine distinctions between differently situated recipients.

II

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most it reflects an 'undifferentiated fear or apprehension of disturbance (which) is not enough to overcome the right to freedom of expression.' Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508, 89 S.Ct. 733, 737, 21 L.Ed.2d 731 (1969). We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves. Cf. Ashton v. Kentucky, 384 U.S. 195, 200, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469 (1966); Cox v. Louisiana, 379 U.S. 536, 550-551, 85 S.Ct. 453, 462-463, 13 L.Ed.2d 471 (1965).

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

At the outset, we cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions, discussed above but not applicable here, to the usual rule that governmental bodies may not prescribe the form or content of individual expression. Equally important to our conclusion is the constitutional backdrop against which our decision must be made. The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. See Whitney v. California, 274 U.S. 357, 375-377, 47 S.Ct. 641, 648-649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring).

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord,

and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '(w)holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' Winters v. New York, 333 U.S. 507, 528, 68 S.Ct. 665, 676, 92 L.Ed. 840 (1948) (Frankfurter, J., dissenting), and why 'so long as the means are peaceful, the communication need not meet standards of acceptability,' Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971).

Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, '(o)ne of the prerogatives of American citizenship is the right to criticize public men and measures-and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.' Baumgartner v. United States, 322 U.S. 665, 673-674, 64 S.Ct. 1240, 1245, 88 L.Ed. 1525 (1944).

Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

It is, in sum, our judgment that, absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.

Reversed.

Dissenting opinions omitted

Virginia v. Black

538 U.S. 343 (2003)

Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which THE CHIEF JUSTICE, Justice STEVENS, and Justice BREYER join.

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. Va.Code Ann. § 18.2-423 (1996). We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form.

I

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating Virginia's cross-burning statute, § 18.2-423. That statute provides:

> "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> "Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a "few" of which stopped to ask the sheriff what was happening on the property. App. 71. Eight to ten houses were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, "sat and watched to see wha[t][was] going on" from the lawn of her in-laws' house. She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself. *Id.,* at 103.

During the rally, Sechrist heard Klan members speak about "what they were" and "what they believed in." *Id.,* at 106. The speakers "talked real bad about the blacks and the Mexicans." *Id.,* at 109. One speaker told the assembled gathering that "he would love to take a .30/.30 and just random[ly] shoot the blacks." *Ibid.* The speakers also talked about "President Clinton and Hillary Clinton," and about how their tax money "goes to ... the black people." *Ibid.* Sechrist testified that this language made her "very ... scared." *Id.,* at 110.

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross "then all of a sudden ... went up in a

flame." *Id.,* at 71. As the cross burned, the Klan played Amazing Grace over the loudspeakers. Sechrist stated that the cross burning made her feel "awful" and "terrible." *Id.,* at 110.

When the sheriff observed the cross burning, he informed his deputy that they needed to "find out who's responsible and explain to them that they cannot do this in the State of Virginia." *Id.,* at 72. The sheriff then went down the driveway, entered the rally, and asked "who was responsible for burning the cross." *Id.,* at 74. Black responded, "I guess I am because I'm the head of the rally." *Ibid.* The sheriff then told Black, "[T]here's a law in the State of Virginia that you cannot burn a cross and I'll have to place you under arrest for this." *Ibid.*

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of § 18.2-423. At his trial, the jury was instructed that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." *Id.,* at 146. The trial court also instructed the jury that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent." *Ibid.* When Black objected to this last instruction on First Amendment grounds, the prosecutor responded that the instruction was "taken straight out of the [Virginia] Model Instructions." *Id.,* at 134. The jury found Black guilty, and fined him $2,500. The Court of Appeals of Virginia affirmed Black's conviction. Rec. No. 1581-99-3 (Va.App., Dec. 19, 2000), App. 201.

On May 2, 1998, respondents Richard Elliott and Jonathan O'Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African-American, was Elliott's next-door neighbor in Virginia Beach, Virginia. Four months prior to the incident, Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to Elliott's mother to inquire about shots being fired from behind the Elliott home. Elliott's mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee's property, planted a cross, and set it on fire. Their apparent motive was to "get back" at Jubilee for complaining about the shooting in the backyard. *Id.,* at 241. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was "very nervous" because he "didn't know what would be the next phase," and because "a cross burned in your yard ... tells you that it's just the first round." *Id.,* at 231.

Elliott and O'Mara were charged with attempted cross burning and conspiracy to commit cross burning. O'Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O'Mara to 90 days in jail and fined him $2,500. The judge also suspended 45 days of the sentence and $1,000 of the fine.

At Elliott's trial, the judge originally ruled that the jury would be instructed "that the burning of a cross by itself is sufficient evidence from which you may infer the required intent." *Id.,* at 221-222. At trial, however, the court instructed the jury that the Commonwealth must prove that "the defendant intended to commit cross burning," that "the defendant did a direct act toward the commission of the cross burning," and that "the defendant had the intent of intimidating any person or group of persons." *Id.,* at 250. The court did not instruct the jury on the meaning of the word "intimidate," nor on the prima facie evidence provision of § 18.2-423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a $2,500 fine. The Court of Appeals of Virginia affirmed the convictions of both Elliott and O'Mara. *O'Mara v. Commonwealth,* 33 Va.App. 525, 535 S.E.2d 175 (2000).

Each respondent appealed to the Supreme Court of Virginia, arguing that § 18.2-423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases, and held that the statute is unconstitutional on its face. 262 Va. 764, 553 S.E.2d 738 (2001). It held that the Virginia cross-burning statute "is analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.*[*v.St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)]." *Id.,* at 772, 553 S.E.2d, at 742. The Virginia statute, the court held, discriminates on the basis of content since it "selectively chooses only cross burning because of its distinctive message." *Id.,* at 774, 553 S.E.2d, at 744. The court also held that the prima facie evidence provision renders the statute overbroad because "[t]he enhanced probability of prosecution under the statute chills the expression of protected speech." *Id.,* at 777, 553 S.E.2d, at 746.

Three justices dissented, concluding that the Virginia cross-burning statute passes constitutional muster because it proscribes only conduct that constitutes a true threat. The justices noted that unlike the ordinance found unconstitutional in *R.A.V. v. St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), the Virginia statute does not just target cross burning "on the basis of race, color, creed, religion or gender." 262 Va., at 791, 553 S.E.2d, at 753. Rather, "the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate." *Ibid.* The dissenters also disagreed with the majority's analysis of the prima facie provision because the inference alone "is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate." *Id.,* at 795, 553 S.E.2d, at 756. The dissent noted that the burden of proof still remains on the Commonwealth to prove intent to intimidate. We granted certiorari. 535 U.S. 1094, 122 S.Ct. 2288, 152 L.Ed.2d 1048 (2002).[FN1]

> FN1. After we granted certiorari, the Commonwealth enacted another statute designed to remedy the constitutional problems identified by the state court. See Va.Code Ann. § 18.2-423.01 (2002). Section 18.2-423.01 bans the burning of "an object" when done "with the intent of intimidating any person or group of persons." The statute does not contain any prima facie evidence provision. Section 18.2-423.01, however, did not repeal § 18.2-423, the cross-burning statute at issue in this case.

II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. See M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia 145 (1991). Sir Walter Scott used cross burnings for dramatic effect in The Lady of the Lake, where the burning cross signified both a summons and a call to arms. See W. Scott, The Lady of The Lake, canto third. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process. Soon the Klan imposed "a veritable reign of terror" throughout the South. S. Kennedy, Southern Exposure 31 (1991) (hereinafter Kennedy). The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. W. Wade, The Fiery Cross: The Ku Klux Klan in America 48-49 (1987) (hereinafter Wade). The Klan's victims included blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, "President Grant sent a message to Congress indicating that the Klan's reign of terror in the Southern States had

rendered life and property insecure." *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 722, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) (internal quotation marks and alterations omitted). In response, Congress passed what is now known as the Ku Klux Klan Act. See "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes," 17 Stat. 13 (now codified at 42 U.S.C. §§ 1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon's The Clansmen: An Historical Romance of the Ku Klux Klan. Dixon's book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes "saving" the South from blacks and the "horrors" of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon's book depicted the Klan burning crosses to celebrate the execution of former slaves. *Id.,* at 324-326; see also *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 770-771, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (THOMAS, J., concurring). Cross burning thereby became associated with the first Ku Klux Klan. When D.W. Griffith turned Dixon's book into the movie The Birth of a Nation in 1915, the association between cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. Wade 127. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. See Kennedy 163. This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a "gigantic cross" on Stone Mountain that was "visible throughout" Atlanta. Wade 144 (internal quotation marks omitted).

The new Klan's ideology did not differ much from that of the first Klan. As one Klan publication emphasized, "We avow the distinction between [the] races, ... and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things." *Id.,* at 147-148 (internal quotation marks omitted). Violence was also an elemental part of this new Klan. By September 1921, the New York World newspaper documented 152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings. Wade 160.

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. See Kennedy 175. After one cross burning at a synagogue, a Klan member noted that if the cross burning did not "shut the Jews up, we'll cut a few throats and see what happens." *Ibid.* (internal quotation marks omitted). In Miami in 1941, the Klan burned four crosses in front of a proposed housing project, declaring, "We are here to keep niggers out of your town .... When the law fails you, call on us." *Id.,* at 176 (internal quotation marks omitted). And in Alabama in 1942, in "a whirlwind climax to weeks of flogging and terror," the Klan burned crosses in front of a union hall and in front of a union leader's home on the eve of a labor election. *Id.,* at 180. These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an African-American "school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police ... after the burning of a cross in his front yard." Richmond News

Leader, Jan. 21, 1949, p. 19, App. 312. And after a cross burning in Suffolk, Virginia, during the late 1940's, the Virginia Governor stated that he would "not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization." D. Chalmers, Hooded Americanism: The History of the Ku Klux Klan 333 (1980) (hereinafter Chalmers). These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), along with the civil rights movement of the 1950's and 1960's, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. See, *e.g.,* Chalmers 349-350; Wade 302-303. Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the "fiery cross" was the "emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused." The Ku Klux Klan Hearings before the House Committee on Rules, 67th Cong., 1st Sess., 114, Exh. G (1921); see also Wade 419. And the Klan has often published its newsletters and magazines under the name The Fiery Cross. See *id.,* at 226, 489.

At Klan gatherings across the country, cross burning became the climax of the rally or the initiation. Posters advertising an upcoming Klan rally often featured a Klan member holding a cross. See N. MacLean, Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan 142-143 (1994). Typically, a cross burning would start with a prayer by the "Klavern" minister, followed by the singing of Onward Christian Soldiers. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang The Old Rugged Cross. Wade 185. Throughout the Klan's history, the Klan continued to use the burning cross in their ritual ceremonies.

For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who "were married in full Klan regalia beneath a blazing cross." *Id.,* at 271. In response to antimasking bills introduced in state legislatures after World War II, the Klan burned crosses in protest. See Chalmers 340. On March 26, 1960, the Klan engaged in rallies and cross burnings throughout the South in an attempt to recruit 10 million members. See Wade 305. Later in 1960, the Klan became an issue in the third debate between Richard Nixon and John Kennedy, with both candidates renouncing the Klan. After this debate, the Klan reiterated its support for Nixon by burning crosses. See *id.,* at 309. And cross burnings featured prominently in Klan rallies when the Klan attempted to move toward more nonviolent tactics to stop integration. See *id.,* at 323; cf. Chalmers 368-369, 371-372, 380, 384. In short, a burning cross has remained a symbol of Klan ideology and of Klan unity.

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a "symbol of hate." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S., at 771, 115 S.Ct. 2440 (THOMAS, J., concurring). And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making

a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

III

A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law ... abridging the freedom of speech." The hallmark of the protection of free speech is to allow "free trade in ideas"-even ideas that the overwhelming majority of people might find distasteful or discomforting. *Abrams v. United States,* 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting); see also *Texas v. Johnson,* 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (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"). Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney v. California,* 274 U.S. 357, 374, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. See, *e.g., R.A.V. v. City of St. Paul,* 505 U.S., at 382, 112 S.Ct. 2538; *Texas v. Johnson, supra,* at 405-406, 109 S.Ct. 2533; *United States v. O'Brien,* 391 U.S. 367, 376-377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *Tinker v. Des Moines Independent Community School Dist.,* 393 U.S. 503, 505, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969).

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, *e.g., Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem"). The First Amendment permits "restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " *R.A.V. v. City of St. Paul, supra,* at 382-383, 112 S.Ct. 2538 (quoting *Chaplinsky v. New Hampshire, supra,* at 572, 62 S.Ct. 766).

Thus, for example, a State may punish those words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire, supra,* at 572, 62 S.Ct. 766; see also *R.A.V. v. City of St. Paul, supra,* at 383, 112 S.Ct. 2538 (listing limited areas where the First Amendment permits restrictions on the content of speech). We have consequently held that fighting words-"those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"-are generally proscribable under the First Amendment. *Cohen v. California,* 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); see also *Chaplinsky v. New Hampshire, supra,* at 572, 62 S.Ct. 766. Furthermore, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S.Ct. 1827, 23

L.Ed.2d 430 (1969)*(per curiam)*. And the First Amendment also permits a State to ban a "true threat." *Watts v. United States,* 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969)*(per curiam)* (internal quotation marks omitted); accord, *R.A.V. v. City of St. Paul, supra,* at 388, 112 S.Ct. 2538 ("[T]hreats of violence are outside the First Amendment"); *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 774, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994); *Schenck v. Pro-Choice Network of Western N. Y.,* 519 U.S. 357, 373, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997).

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States, supra,* at 708, 89 S.Ct. 1399 ("political hyberbole" is not a true threat); *R.A.V. v. City of St. Paul,* 505 U.S., at 388, 112 S.Ct. 2538. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra,* the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

B

The Supreme Court of Virginia ruled that in light of *R.A.V. v. City of St. Paul, supra,* even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. 262 Va., at 771-776, 553 S.E.2d, at 742-745. It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else's lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.[FN2]

> FN2. Justice THOMAS argues in dissent that cross burning is "conduct, not expression." *Post,* at 1566. While it is of course true that burning a cross is conduct, it is equally true that the First Amendment protects symbolic conduct as well as pure speech. See *supra,* at 1547. As Justice THOMAS has previously recognized, a burning cross is a "symbol of hate," and a "a symbol of white supremacy." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 770-771, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (concurring opinion).

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R.A.V. v. City of St. Paul, supra,* to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

In *R.A.V.,* we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would " 'arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender' " was unconstitutional. *Id.,* at 380, 112 S.Ct. 2538 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who "provoke violence" on a basis specified in the law. 505 U.S., at 391, 112 S.Ct. 2538. The ordinance did not cover "[t]hose who wish to use 'fighting words' in connection with other ideas-to express hostility, for example, on the basis of political affiliation, union

membership, or homosexuality." *Ibid.* This content-based discrimination was unconstitutional because it allowed the city "to impose special prohibitions on those speakers who express views on disfavored subjects." *Ibid.*

We did not hold in *R.A.V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment:

> "When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class." *Id.,* at 388, 112 S.Ct. 2538.

Indeed, we noted that it would be constitutional to ban only a particular type of threat: "[T]he Federal Government can criminalize only those threats of violence that are directed against the President ... since the reasons why threats of violence are outside the First Amendment ... have special force when applied to the person of the President." *Ibid.* And a State may "choose to prohibit only that obscenity which is the most patently offensive *in its prurience-i.e.,* that which involves the most lascivious displays of sexual activity." *Ibid.* (emphasis in original). Consequently, while the holding of *R.A.V.* does not permit a State to ban only obscenity based on "offensive *political* messages," *ibid.,* or "only those threats against the President that mention his policy on aid to inner cities," *ibid.,* the First Amendment permits content discrimination "based on the very reasons why the particular class of speech at issue ... is proscribable," *id.,* at 393, 112 S.Ct. 2538.

Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.,* the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.,* at 391, 112 S.Ct. 2538. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. See, *e.g., supra,* at 1545 (noting the instances of cross burnings directed at union members); *State v. Miller,* 6 Kan.App.2d 432, 629 P.2d 748 (1981) (describing the case of a defendant who burned a cross in the yard of the lawyer who had previously represented him and who was currently prosecuting him). Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus. See 262 Va., at 791, 553 S.E.2d, at 753 (Hassell, J., dissenting) (noting that "these defendants burned a cross because they were angry that their neighbor had complained about the presence of a firearm shooting range in the Elliott's yard, not because of any racial animus").

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.

IV

The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Va.Code Ann. § 18.2-423 (1996). The Commonwealth added the prima facie provision to the statute in 1968. The court below did not reach whether this provision is severable from the rest of the cross-burning statute under Virginia law. See § 1-17.1 ("The provisions of all statutes are severable unless ... it is apparent that two or more statutes or provisions must operate in accord with one another"). In this Court, as in the Supreme Court of Virginia, respondents do not argue that the prima facie evidence provision is unconstitutional as applied to any one of them. Rather, they contend that the provision is unconstitutional on its face.

The Supreme Court of Virginia has not ruled on the meaning of the prima facie evidence provision. It has, however, stated that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va., at 778, 553 S.E.2d, at 746. The jury in the case of Richard Elliott did not receive any instruction on the prima facie evidence provision, and the provision was not an issue in the case of Jonathan O'Mara because he pleaded guilty. The court in Barry Black's case, however, instructed the jury that the provision means: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." App. 196. This jury instruction is the same as the Model Jury Instruction in the Commonwealth of Virginia. See Virginia Model Jury Instructions, Criminal, Instruction No. 10.250 (1998 and Supp.2001).

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. Because this jury instruction is the Model Jury Instruction, and because the Supreme Court of Virginia had the opportunity to expressly disavow the jury instruction, the jury instruction's construction of the prima facie provision "is a ruling on a question of state law that is as binding on us as though the precise words had been written into" the statute. *E.g., Terminiello v. Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (striking down an ambiguous statute on facial grounds based upon the instruction given to the jury); see also *New York v. Ferber,* 458 U.S. 747, 768, n. 21, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (noting that *Terminiello* involved a facial challenge to the statute); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 965, n. 13, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L.Rev. 844, 845-846, n. 8 (1970); Monaghan, Overbreadth, 1981 S.Ct. Rev. 1, 10-12; Blakey & Murray, Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law, 2002 B.Y.U.L.Rev. 829, 883, n. 133. As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted " 'would create an unacceptable risk of the suppression of ideas.' " *Secretary of State of Md. v. Joseph H. Munson Co., supra,* at 965, n. 13, 104 S.Ct. 2839 (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 797, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute-and potentially convict-somebody engaging only in lawful political speech at the core of what the First

Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, "[b]urning a cross at a political rally would almost certainly be protected expression." *R.A.V. v. St. Paul,* 505 U.S., at 402, n. 4, 112 S.Ct. 2538 (White, J., concurring in judgment) (citing *Brandenburg v. Ohio,* 395 U.S., at 445, 89 S.Ct. 1827). Cf. *National Socialist Party of America v. Skokie,* 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977)*(per curiam)*. Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as Mississippi Burning, and in plays such as the stage adaptation of Sir Walter Scott's The Lady of the Lake.

The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. To this extent I agree with Justice SOUTER that the prima facie evidence provision can "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Post,* at 1561 (opinion concurring in judgment and dissenting in part).

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." Casper, Gerry, 55 Stan. L.Rev. 647, 649 (2002) (internal quotation marks omitted). The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. Unlike Justice SCALIA, we refuse to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the First Amendment. Rather, all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under § 18.2-423.

V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott and O'Mara, we vacate the judgment of the Supreme Court of Virginia, and remand the case for further proceedings.

It is so ordered.

Justice THOMAS, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas v. Johnson,* 491 U.S. 397, 422-429, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (REHNQUIST, C. J., dissenting) (describing the unique position of the American flag in our Nation's 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

I

Although I agree with the majority's conclusion that it is constitutionally permissible to "ban ... cross burning carried out with the intent to intimidate," see *ante,* at 1550, I believe that the majority errs in imputing an expressive component to the activity in question, see *ante,* at 1549 (relying on one of the exceptions to the First Amendment's prohibition on content-based discrimination outlined in *R.A.V. v. St. Paul,* 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)). In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

A

. ., . .

To me, the majority's brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods.

Such methods typically include cross burning-"a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 770, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (THOMAS, J., concurring). For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder. J. Williams, Eyes on the Prize: America's Civil Rights Years, 1954-1965, p. 39 (1965). As the Government points out, the association between acts of intimidating cross burning and violence is well documented in recent American history. Brief for United States as *Amicus Curiae* 3-4, and n. 2. Indeed, the connection between cross burning and violence is well ingrained, and lower courts have so recognized:

"After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband's life. She testified what the burning cross symbolized to her as a black American: 'Nothing good. Murder, hanging, rape, lynching. Just anything bad that you can name. It is the worst thing that could happen to a person.'...Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. *...Seven months after the incident, the family still lived in fear.... This is a reaction reasonably to be anticipated from this criminal conduct.*" *United States v. Skillman,* 922 F.2d 1370, 1378 (C.A.9 1991) (emphasis added).

But the perception that a burning cross is a threat and a precursor of worse things to come is not limited to

blacks. Because the modern Klan expanded the list of its enemies beyond blacks and "radical[s]" to include Catholics, Jews, most immigrants, and labor unions, Newton & Newton, ix, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly agree with the observation made by the Commonwealth of Virginia:

"A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police." Brief for Petitioner 26.

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

B

Virginia's experience has been no exception. . . . .

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

II

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

B

The plurality, however, is troubled by the presumption because this is a First Amendment case. The plurality laments the fate of an innocent cross burner who burns a cross, but does so without an intent to intimidate. The plurality fears the chill on expression because, according to the plurality, the inference permits "the Commonwealth to arrest, prosecute and convict a person based solely on the fact of cross burning itself." *Ante,* at 1550-1551. First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second, as I explained above, the inference is rebuttable and, as the jury instructions given in this case demonstrate, Virginia law still requires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable ultimately results in dismissed charges. A regulation of pornography is one

such example. While possession of child pornography is illegal, *New York v. Ferber,* 458 U.S. 747, 764, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). As a result, those pornographers trafficking in images of adults who look like minors may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This "chilling" effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the Members of this Court.

That the First Amendment gives way to other interests is not a remarkable proposition. What is remarkable is that, under the plurality's analysis, the determination whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims. For instance, in *Hill v. Colorado,* 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments from "unwanted advice" and "unwanted communication," *id.,* at 708, 716, 717, 729, 120 S.Ct. 2480. In so concluding, the Court placed heavy reliance on the "vulnerable physical and emotional conditions" of patients. *Id.,* at 729, 120 S.Ct. 2480. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on "unwanted advice," which, notably, can be given only from a distance of at least eight feet from a prospective patient, justified by the countervailing interest in obtaining an abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross, but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience, see 262 Va., at 782, 553 S.E.2d, at 748-749 (Hassell, J., dissenting); see also App. 93-97, to extreme emotional distress, and is virtually never viewed merely as "unwanted communication," but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality's view, physical safety will be valued less than the right to be free from unwanted communications.

III

Because I would uphold the validity of this statute, I respectfully dissent.

Frisby v. Schultz

487 U.S. 474 (1988)

Justice O'CONNOR delivered the opinion of the Court.

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

I

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

The Town Board therefore resolved to enact an ordinance to restrict the picketing. On May 7, 1985, the town passed an ordinance that prohibited all picketing in residential neighborhoods except for labor picketing. But after reviewing this Court's decision in *Carey v. Brown,* 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980), which invalidated a similar ordinance as a violation of the Equal Protection Clause, the town attorney instructed the police not to enforce the new ordinance and advised the Town Board that the ordinance's labor picketing exception likely rendered it unconstitutional. This ordinance was repealed on May 15, 1985, and replaced with the following flat ban on all residential picketing:

"It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." App. to Juris. Statement A-28.

The ordinance itself recites the primary purpose of this ban: "the protection and preservation of the home" through assurance "that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy." *Id.,* at A-26. The Town Board believed that a ban was necessary because it determined that "the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants ... [and] has as its object the harassing of such occupants." *Id.,* at A-26-A-27. The ordinance also evinces a concern for public safety, noting that picketing obstructs and interferes with "the free use of public sidewalks and public ways of travel." *Id.,* at A-27.

On May 18, 1985, appellees were informed by the town attorney that enforcement of the new, revised ordinance would begin on May 21, 1985. Faced with this threat of arrest and prosecution, appellees ceased picketing in Brookfield and filed this lawsuit in the United States District Court for the Eastern District of Wisconsin. The complaint was brought under 42 U.S.C. § 1983 and sought declaratory as well as preliminary and permanent injunctive relief on the grounds that the ordinance violated the First Amendment. Appellees named appellants-the three members of the Town Board, the Chief of Police, the town attorney, and the town itself-as defendants.

The District Court granted appellees' motion for a preliminary injunction. The court concluded that the ordinance was not narrowly tailored enough to restrict protected speech in a public forum. 619 F.Supp. 792, 797 (1985). The District Court's order specified that unless the appellants requested a trial on the merits within 60 days or appealed, the preliminary injunction would become permanent. Appellants requested a trial and also appealed the District Court's entry of a preliminary injunction.

A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed. . . .

II

The antipicketing ordinance operates at the core of the First Amendment by prohibiting appellees from engaging in picketing on an issue of public concern. Because of the importance of "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 720-21, 11 L.Ed.2d 686 (1964), we have traditionally subjected restrictions on public issue picketing to careful scrutiny. See, *e.g., Boos v. Barry,* 485 U.S. 312, 318, 108 S.Ct. 1157, ----, 99 L.Ed.2d 333 (1988); *United States v. Grace,* 461 U.S. 171 (1983); *Carey v. Brown,* 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). Of course, "[e]ven protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 473 U.S. 788, 799, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567 (1985).

To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speaker seeks to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property at issue." *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). Specifically, we have identified three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius, supra,* 473 U.S. at 802, 105 S.Ct., at 3449.

The relevant forum here may be easily identified: appellees wish to picket on the public streets of Brookfield. Ordinarily, a determination of the nature of the forum would follow automatically from this identification; we have repeatedly referred to public streets as the archetype of a traditional public forum. See, *e.g., Boos v. Barry, supra,* 485 U.S., at 318, 108 S.Ct., at ----; *Cornelius, supra,* at 802, 105 S.Ct., at 3448-49; *Perry,* 460 U.S., at 45, 103 S.Ct., at 954-55. "[T]ime out of mind" public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum. See *ibid.; Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954, 963-64, 83 L.Ed. 1423 (1939) (Roberts, J.). Appellants, however, urge us to disregard these "clichés." Tr. of Oral Arg. 16. They argue that the streets of Brookfield should be considered a nonpublic forum. Pointing to the physical narrowness of Brookfield's streets as well as to their residential character, appellants contend that such streets have not by tradition or designation been held open for public communication. See Brief for Appellants 23 (citing *Perry, supra,* 460 U.S., at 46, 103 S.Ct., at 955-56).

We reject this suggestion. Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood. In *Carey v. Brown*-which considered a statute similar to the one at issue here, ultimately striking it down as a violation of the Equal Protection Clause because it included an exception for labor picketing-we expressly recognized that "public streets and sidewalks in residential neighborhoods," were "public for[a]." 447 U.S., at 460-461, 100 S.Ct., at 2289-2291. This rather ready identification virtually forecloses appellants' argument. See also *Perry, supra,* 460 U.S., at 54-55, 103 S.Ct., at 960 (noting that the "key" to *Carey*"was the presence

of a public forum").

In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a "cliché," but recognition that "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public." *Hague v. CIO, supra,* 307 U.S., at 515, 59 S.Ct., at 964 (Roberts, J.). No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora. Accordingly, the streets of Brookfield are traditional public fora. The residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test; the antipicketing ordinance must be judged against the stringent standards we have established for restrictions on speech in traditional public fora:

"In these quintessential public for[a], the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.... The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry, supra,* 460 U.S., at 45, 103 S.Ct., at 955 (citations omitted).

As *Perry* makes clear, the appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content. Appellees argue that despite its facial content-neutrality, the Brookfield ordinance must be read as containing an implied exception for labor picketing. See Brief for Appellees 20-26. The basis for appellees' argument is their belief that an express protection of peaceful labor picketing in state law, see Wis.Stat. § 103.53(1) (1985-1986), must take precedence over Brookfield's contrary efforts. The District Court, however, rejected this suggested interpretation of state law, 619 F.Supp., at 796, and the Court of Appeals affirmed, albeit ultimately by an equally divided court. 822 F.2d 642 (1987). See also 807 F.2d at 1347 (original panel opinion declining to reconsider District Court's construction of state law). Following our normal practice, "we defer to the construction of a state statute given it by the lower federal courts ... to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 499-500, 105 S.Ct. 2794, 2800, 86 L.Ed.2d 394 (1985). See *Virginia v. American Booksellers Assn.,* 484 U.S. 383, 395, 108 S.Ct. 636, 643, 98 L.Ed.2d 782 (1988) ("This Court rarely reviews a construction of state law agreed upon by the two lower federal courts"). Thus, we accept the lower courts' conclusion that the Brookfield ordinance is content neutral. Accordingly, we turn to consider whether the ordinance is "narrowly tailored to serve a significant government interest" and whether it "leave[s] open ample alternative channels of communication." *Perry,* 460 U.S., at 45, 103 S.Ct., at 955.

Because the last question is so easily answered, we address it first. Of course, before we are able to assess the available alternatives, we must consider more carefully the reach of the ordinance. The precise scope of the ban is not further described within the text of the ordinance, but in our view the ordinance is readily subject to a narrowing construction that avoids constitutional difficulties. Specifically, the use of the singular form of the words "residence" and "dwelling" suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence. As Justice WHITE's concurrence recounts, the lower courts described the ordinance as banning "all picketing in residential areas." *Post,* at 2505. But these general descriptions do not address the exact scope of the ordinance and are in no way inconsistent with our reading of its text. "Picketing," after all, is defined as posting at a particular place, see Webster's Third New International Dictionary 1710 (1981), a characterization in line with viewing the ordinance as limited to activity focused on a single residence. Moreover, while we ordinarily defer to lower court constructions of state statutes, see *supra,* at 2500, we do not invariably do

so, see *Virginia v. American Booksellers Assn., supra,* 484 U.S., at 395, 108 S.Ct., at ----. We are particularly reluctant to defer when the lower courts have fallen into plain error, see *Brockett v. Spokane Arcades, Inc., supra,* 472 U.S., at 500, n. 9, 105 S.Ct., at 2800, n. 9, which is precisely the situation presented here. To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties. See, *e.g., Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975); *Broadrick v. Oklahoma,* 413 U.S. 601, 613, 93 S.Ct. 2908, 2916-2917, 37 L.Ed.2d 830 (1973). Cf. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, ----, 99 L.Ed.2d 645 (1988). Thus, unlike the lower courts' judgment that the ordinance does not contain an implied exception for labor picketing, we are unable to accept their potentially broader view of the ordinance's scope. We instead construe the ordinance more narrowly. This narrow reading is supported by the representations of counsel for the town at oral argument, which indicate that the town takes, and will enforce, a limited view of the "picketing" proscribed by the ordinance. Thus, generally speaking, "picketing would be having the picket proceed on a definite course or route in front of a home." Tr. of Oral Arg. 8. The picket need not be carrying a sign, *id.,* at 14, but in order to fall within the scope of the ordinance the picketing must be directed at a single residence, *id.,* at 9. General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this ordinance. *Id.,* at 15. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

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

"Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching.... They may go door-to-door to proselytize their views. They may distribute literature in this manner ... or through the mails. They may contact residents by telephone, short of harassment." Brief for Appellants 41-42 (citations omitted).

We readily agree that the ordinance preserves ample alternative channels of communication and thus move on to inquire whether the ordinance serves a significant government interest. We find that such an interest is identified within the text of the ordinance itself: the protection of residential privacy. See App. to Juris. Statement A-26.

"The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown,* 447 U.S., at 471, 100 S.Ct., at 2296. Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," *Gregory v. Chicago,* 394 U.S. 111, 125 [89 S.Ct. 946, 954, 22 L.Ed.2d 134] (1969) (Black, J., concurring), and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value." *Carey, supra,* 447 U.S., at 471, 100 S.Ct., at 2295.

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, cf. *Erznoznik v. City of Jacksonville, supra,* 422 U.S., at 210-211, 95 S.Ct., at 2273-74; *Cohen v. California,* 403 U.S. 15, 21-22, 91 S.Ct. 1780, 1786-1787, 29 L.Ed.2d 284 (1971), the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech ... does not mean we must be captives everywhere." *Rowan v. Post Office Dept.,* 397 U.S. 728, 738, 90 S.Ct. 1484, 1491, 25 L.Ed.2d 736 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government

may protect this freedom. See, *e.g., FCC v. Pacifica Foundation,* 438 U.S. 726, 748-749, 98 S.Ct. 3026, 3039-3040, 57 L.Ed.2d 1073 (1978) (offensive radio broadcasts); *id.,* at 759-760, 98 S.Ct. at 3045-3047 (Powell, J., concurring in part and concurring in judgment) (same); *Rowan, supra* (offensive mailings); *Kovacs v. Cooper,* 336 U.S. 77, 86-87, 69 S.Ct. 448, 453-54, 93 L.Ed. 513 (1949) (sound trucks).

This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas. See, *e.g., Schneider v. State,* 308 U.S. 147, 162-163, 60 S.Ct. 146, 151-152, 84 L.Ed. 155 (1939) (handbilling); *Martin v. Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943) (door-to-door solicitation). In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. In *Schneider,* for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only "to one willing to receive it." Similarly, when we invalidated a ban on door-to-door solicitation in *Martin,* we did so on the basis that the "home owner could protect himself from such intrusion by an appropriate sign 'that he is unwilling to be disturbed.' " *Kovacs,* 336 U.S., at 86, 69 S.Ct., at 453. We have "never intimated that the visitor could insert a foot in the door and insist on a hearing." *Ibid.* There simply is no right to force speech into the home of an unwilling listener.

It remains to be considered, however, whether the Brookfield ordinance is narrowly tailored to protect only unwilling recipients of the communications. A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 808-810, 104 S.Ct. 2118, 2130-2132, 80 L.Ed.2d 772 (1984). A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because "the substantive evil-visual blight-[was] not merely a possible byproduct of the activity, but [was] created by the medium of expression itself." *Id.,* at 810, 104 S.Ct., at 2131.

The same is true here. The type of focused picketing prohibited by the Brookfield ordinance is fundamentally different from more generally directed means of communication that may not be completely banned in residential areas. See, *e.g., Schneider, supra,* 308 U.S., at 162-163, 60 S.Ct., at 151-152 (handbilling); *Martin, supra* (solicitation); *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (solicitation). See also *Gregory v. Chicago, supra* (marching). Cf. *Perry,* 460 U.S., at 45, 103 S.Ct., at 954-55 (in traditional public forum, "the government may not prohibit all communicative activity"). In such cases "the flow of information [is not] into ... household[s], but to the public." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 420, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971). Here, in contrast, the picketing is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt:

" 'To those inside ... the home becomes something less than a home when and while the picketing ... continue[s].... [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.' " *Carey, supra,* 447 U.S., at 478, 100 S.Ct., at 2299 (REHNQUIST, J., dissenting) (quoting *Wauwatosa v. King,* 49 Wis.2d 398, 411-412, 182 N.W.2d 530, 537 (1971)).

In this case, for example, appellees subjected the doctor and his family to the presence of a relatively

large group of protesters on their doorstep in an attempt to force the doctor to cease performing abortions. But the actual size of the group is irrelevant; even a solitary picket can invade residential privacy. See *Carey,* 447 U.S., at 478-479, 100 S.Ct., at 2299 (REHNQUIST, J., dissenting) ("Whether ... alone or accompanied by others ... there are few of us that would feel comfortable knowing that a stranger lurks outside our home"). The offensive and disturbing nature of the form of the communication banned by the Brookfield ordinance thus can scarcely be questioned. Cf. *Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 83-84, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (STEVENS, J., concurring in judgment) (as opposed to regulation of communications due to the ideas expressed, which "strikes at the core of First Amendment values,""regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment").

The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. See *Consolidated Edison Co. v. Public Service Comm'n of New York,* 447 U.S. 530, 542, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980). Cf. *Bolger v. Youngs Drug Products Corp., supra,* 463 U.S., at 72, 103 S.Ct., at 2883. The target of the focused picketing banned by the Brookfield ordinance is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Cf. *Cohen v. California,* 403 U.S., at 21-22, 91 S.Ct., at 1786-1787 (noting ease of avoiding unwanted speech in other circumstances). Thus, the "evil" of targeted residential picketing, "the very presence of an unwelcome visitor at the home," *Carey, supra,* 447 U.S., at 478, 100 S.Ct., at 2299 (REHNQUIST, J., dissenting), is "created by the medium of expression itself." See *Taxpayers for Vincent, supra,* 466 U.S., at 810, 104 S.Ct., at 2131. Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored.

Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance-to, for example, a particular resident's use of his or her home as a place of business or public meeting, or to picketers present at a particular home by invitation of the resident-may present somewhat different questions. Initially, the ordinance by its own terms may not apply in such circumstances, since the ordinance's goal is the protection of residential privacy, App. to Juris. Statement A-26, and since it speaks only of a "residence or dwelling," not a place of business, *id.,* at A-28. Cf. *Carey, supra,* 447 U.S., at 457, 100 S.Ct., at 2288 (quoting an antipicketing ordinance expressly rendered inapplicable by use of home as a place of business or to hold a public meeting). Moreover, since our First Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of applying the ordinance to such hypotheticals remains open to question. These are, however, questions we need not address today in order to dispose of appellees' facial challenge.

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

Reversed.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

The Court today sets out the appropriate legal tests and standards governing the question presented, and proceeds to apply most of them correctly. Regrettably, though, the Court errs in the final step of its

analysis, and approves an ordinance banning significantly more speech than is necessary to achieve the government's substantial and legitimate goal. Accordingly, I must dissent.

The ordinance before us absolutely prohibits picketing "before or about" any residence in the town of Brookfield, thereby restricting a manner of speech in a traditional public forum. Consequently, as the Court correctly states, the ordinance is subject to the well-settled time, place, and manner test: the restriction must be content and viewpoint neutral, leave open ample alternative channels of communication, and be narrowly tailored to further a substantial governmental interest. *Ante,* at 2501; *Perry Education Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983).

Assuming one construes the ordinance as the Court does, I agree that the regulation reserves ample alternative channels of communication. *Ante,* at 2501-2502. I also agree with the Court that the town has a substantial interest in protecting its residents right to be left alone in their homes. *Ante,* at 2501-2502; *Carey v. Brown,* 447 U.S. 455, 470-471, 100 S.Ct. 2286, 2295-2296, 65 L.Ed.2d 263 (1980). . . . But so long as the speech remains outside the home and does not unduly coerce the occupant, the government's heightened interest in protecting residential privacy is not implicated. See *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 420, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971).

The foregoing distinction is crucial here because it directly affects the last prong of the time, place, and manner test: whether the ordinance is narrowly tailored to achieve the governmental interest. I do not quarrel with the Court's reliance on *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), for the proposition that a blanket prohibition of a manner of speech in particular public fora may nonetheless be "narrowly tailored" if in each case the manner of speech forbidden necessarily produces the very "evil" the government seeks to eradicate. *Ante,* at 2502-2503; *Vincent,* 466 U.S., at 808, 104 S.Ct., at 2130-31; *id.,* at 830, 104 S.Ct., at 2142 (BRENNAN, J., dissenting). However, the application of this test requires that the government demonstrate that the offending aspects of the prohibited manner of speech cannot be separately, and less intrusively, controlled. Thus here, if the intrusive and unduly coercive elements of residential picketing can be eliminated without simultaneously eliminating residential picketing completely, the Brookfield ordinance fails the *Vincent* test.

Without question there are many aspects of residential picketing that, if unregulated, might easily become intrusive or unduly coercive. Indeed, some of these aspects are illustrated by this very case. As the District Court found, before the ordinance took effect up to 40 sign-carrying, slogan-shouting protesters regularly converged on Dr. Victoria's home and, in addition to protesting, warned young children not to go near the house because Dr. Victoria was a "baby killer." Further, the throng repeatedly trespassed onto the Victorias' property and at least once blocked the exits to their home. 619 F.Supp. 792, 795 (ED Wis.1985). Surely it is within the government's power to enact regulations as necessary to prevent such intrusive and coercive abuses. Thus, for example, the government could constitutionally regulate the number of residential picketers, the hours during which a residential picket may take place, or the noise level of such a picket. In short, substantial regulation is permitted to neutralize the intrusive or unduly coercive aspects of picketing around the home. But to say that picketing may be substantially regulated is not to say that it may be prohibited in its entirety. Once size, time, volume, and the like have been controlled to ensure that the picket is no longer intrusive or coercive, only the speech itself remains, conveyed perhaps by a lone, silent individual, walking back and**8** forth with a sign. Cf. *NLRB v. Retail Store Employees,* 447 U.S. 607, 618, 100 S.Ct. 2372, 2379, 65 L.Ed.2d 377 (1980) (STEVENS, J., concurring in part and concurring in result). Such speech, which no longer implicates the heightened governmental interest in residential privacy, is nevertheless banned by the Brookfield law. Therefore, the ordinance is not narrowly tailored.

The Court nonetheless attempts to justify the town's sweeping prohibition. Central to the Court's analysis is the determination that:

"[I]n contrast [to other forms of communication], the picketing [here] is narrowly directed at the household, not the public. The type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy." *Ante,* at 2503.

That reasoning is flawed. First, the ordinance applies to all picketers, not just those engaged in the protest giving rise to this challenge. Yet the Court cites no evidence to support its assertion that picketers generally, or even appellees specifically, desire to communicate only with the "targeted resident." . . .

A second flaw in the Court's reasoning is that it assumes that the intrusive elements of a residential picket are "inherent." However, in support of this crucial conclusion the Court only briefly examines the effect of a narrowly tailored ordinance: "[E]ven a solitary picket can invade residential privacy. See *Carey, supra,* [447 U.S.,] at 478-479 [100 S.Ct., at 2299] (REHNQUIST, J., dissenting) ('Whether ... alone or accompanied by others ... there are few of us that would feel comfortable knowing that a stranger lurks outside our home')." *Ante,* at 2503 (ellipses in Court's opinion). The Court's reference to the *Carey* dissent, its sole support for this assertion, conjures up images of a "lurking" stranger, secreting himself or herself outside a residence like a thief in the night, threatening physical harm. This hardly seems an apt depiction of a solitary picket, especially at midafternoon, whose presence is objectionable because it is notorious. . . .

A valid time, place, or manner law neutrally regulates speech only to the extent necessary to achieve a Brookfield ordinance in light of the precise governmental interest at issue, it condones a law that suppresses substantially more speech than is necessary.

Hill v. Colorado

530 U.S. 1476 (2000)

Justice STEVENS delivered the opinion of the Court.

At issue is the constitutionality of a 1993 Colorado statute that regulates speech-related conduct within 100 feet of the entrance to any health care facility. The specific section of the statute that is challenged, Colo.Rev.Stat. § 18-9-122(3) (1999), makes it unlawful within the regulated areas for any person to "knowingly approach" within eight feet of another person, without that person's consent, "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person ...." [FN1] Although the statute prohibits speakers from approaching unwilling listeners, it does not require a standing speaker to move away from anyone passing by. Nor does it place any restriction on the content of any message that anyone may wish to communicate to anyone else, either inside or outside the regulated areas. It does, however, make it more difficult to give unwanted advice, particularly in the form of a handbill or leaflet, to persons entering or leaving medical facilities.

FN1. The entire § 18-9-122 reads as follows:

"(1) The general assembly recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment is imperative for the citizens of this state; that the exercise of a person's right to protest or counsel against certain medical procedures must be balanced against another person's right to obtain medical counseling and treatment in an unobstructed manner; and that preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility is a matter of statewide concern. The general assembly therefore declares that it is appropriate to enact legislation that prohibits a person from knowingly obstructing another person's entry to or exit from a health care facility.

"(2) A person commits a class 3 misdemeanor if such person knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility.

"(3) No person shall knowingly approach another person within eight feet of such person, unless such other person consents, for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility. Any person who violates this subsection (3) commits a class 3 misdemeanor.

"(4) For the purposes of this section, 'health care facility' means any entity that is licensed, certified, or otherwise authorized or permitted by law to administer medical treatment in this state.

"(5) Nothing in this section shall be construed to prohibit a statutory or home rule city or county or city and county from adopting a law for the control of access to health care facilities that is no less restrictive than the provisions of this section.

"(6) In addition to, and not in lieu of, the penalties set forth in this section, a person who

violates the provisions of this section shall be subject to civil liability, as provided in section 13-21-106.7, C.R.S."

The question is whether the First Amendment rights of the speaker are abridged by the protection the statute provides for the unwilling listener.

I

Five months after the statute was enacted, petitioners filed a complaint in the District Court for Jefferson County, Colorado, praying for a declaration that § 18-9-122(3) was facially invalid and seeking an injunction against its enforcement. They stated that prior to the enactment of the statute, they had engaged in "sidewalk counseling" on the public ways and sidewalks within 100 feet of the entrances to facilities where human abortion is practiced or where medical personnel refer women to other facilities for abortions. "Sidewalk counseling" consists of efforts "to educate, counsel, persuade, or inform passersby about abortion and abortion alternatives by means of verbal or written speech, including conversation and/or display of signs and/or distribution of literature." They further alleged that such activities frequently entail being within eight feet of other persons and that their fear of prosecution under the new statute caused them "to be chilled in the exercise of fundamental constitutional rights."

Count 5 of the complaint claimed violations of the right to free speech protected by the First Amendment to the Federal Constitution, and Count 6 alleged that the impairment of the right to distribute written materials was a violation of the right to a free press. The complaint also argued that the statutory consent requirement was invalid as a prior restraint tantamount to a licensing requirement, that the statute was vague and overbroad, and that it was a content-based restriction that was not justified by a compelling state interest. Finally, petitioners contended that § 18-9-122(3) was content based for two reasons: The content of the speech must be examined to determine whether it "constitutes oral protest, counseling and education"; and that it is "viewpoint-based" because the statute "makes it likely that prosecution will occur based on displeasure with the position taken by the speaker."

In their answers to the complaint, respondents admitted virtually all of the factual allegations. They filed a motion for summary judgment supported by affidavits, which included a transcript of the hearings that preceded the enactment of the statute. It is apparent from the testimony of both supporters and opponents of the statute that demonstrations in front of abortion clinics impeded access to those clinics and were often confrontational. Indeed, it was a common practice to provide escorts for persons entering and leaving the clinics both to ensure their access and to provide protection from aggressive counselors who sometimes used strong and abusive language in face-to-face encounters. There was also evidence that emotional confrontations may adversely affect a patient's medical care. There was no evidence, however, that the "sidewalk counseling" conducted by petitioners in this case was ever abusive or confrontational.

The District Judge granted respondents' motion and dismissed the complaint. Because the statute had not actually been enforced against petitioners, he found that they only raised a facial challenge. He agreed with petitioners that their sidewalk counseling was conducted in a "quintessential" public forum, but held that the statute permissibly imposed content-neutral "time, place, and manner restrictions" that were narrowly tailored to serve a significant government interest, and left open ample alternative channels of communication. . . .

The Colorado Court of Appeals affirmed for reasons similar to those given by the District Judge. It noted that even though only seven percent of the patients receiving services at one of the clinics were there to obtain abortion services, all 60,000 of that clinic's patients "were subjected to the same treatment by the protesters." It also reviewed our then-recent decision in *Madsen v. Women's Health Center, Inc.*, 512 U.S.

753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994), and concluded that *Madsen's* reasoning supported the conclusion that the statute was content neutral.

In 1996, the Supreme Court of Colorado denied review, and petitioners sought a writ of certiorari from our Court. While their petition was pending, we decided *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). Because we held in that case that an injunctive provision creating a speech-free "floating buffer zone" with a 15-foot radius violates the First Amendment, we granted certiorari, vacated the judgment of the Colorado Court of Appeals, and remanded the case to that court for further consideration in light of *Schenck.* 519 U.S. 1145, 117 S.Ct. 1077, 137 L.Ed.2d 213 (1997).

On remand the Court of Appeals reinstated its judgment upholding the statute. . . .

The Colorado Supreme Court granted certiorari and affirmed the judgment of the Court of Appeals. . . . The court identified two important distinctions between this case and *Schenck.* First, *Schenck* involved a judicial decree and therefore, as explained in *Madsen,* posed "greater risks of censorship and discriminatory application than do general ordinances." Second, unlike the floating buffer zone in *Schenck,* which would require a protester either to stop talking or to get off the sidewalk whenever a patient came within 15 feet, the "knowingly approaches" requirement in the Colorado statute allows a protester to stand still while a person moving toward or away from a health care facility walks past her. Applying the test in *Ward,* the court concluded that the statute was narrowly drawn to further a significant government interest. It rejected petitioners' contention that it was not narrow enough because it applied to all health care facilities in the State. In the court's view, the comprehensive coverage of the statute was a factor that supported its content neutrality. Moreover, the fact that the statute was enacted, in part, because the General Assembly "was concerned with the safety of individuals seeking wide-ranging health care services, not merely abortion counseling and procedures," added to the substantiality of the government interest that it served. Finally, it concluded that ample alternative channels remain open because petitioners, and

> "indeed, everyone, are still able to protest, counsel, shout, implore, dissuade, persuade, educate, inform, and distribute literature regarding abortion. They just cannot knowingly approach within eight feet of an individual who is within 100 feet of a health care facility entrance without that individual's consent. As articulated so well ... in *Ward,* ['the fact that § 18-9-122(3)] may reduce to some degree the potential audience for [petitioners'] speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.'"

Because of the importance of the case, we granted certiorari. 527 U.S. 1068, 120 S.Ct. 10, 144 L.Ed.2d 841 (1999). We now affirm.

II

Before confronting the question whether the Colorado statute reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners, it is appropriate to examine the competing interests at stake. A brief review of both sides of the dispute reveals that each has legitimate and important concerns.

The First Amendment interests of petitioners are clear and undisputed. As a preface to their legal challenge, petitioners emphasize three propositions. First, they accurately explain that the areas protected by the statute encompass all the public ways within 100 feet of every entrance to every health care facility everywhere in the State of Colorado. There is no disagreement on this point, even though the legislative

history makes it clear that its enactment was primarily motivated by activities in the vicinity of abortion clinics. Second, they correctly state that their leafletting, sign displays, and oral communications are protected by the First Amendment. The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection. Third, the public sidewalks, streets, and ways affeced by the statute are "quintessential" public forums for free speech. Finally, although there is debate about the magnitude of the statutory impediment to their ability to communicate effectively with persons in the regulated zones, that ability, particularly the ability to distribute leaflets, is unquestionably lessened by this statute.

On the other hand, petitioners do not challenge the legitimacy of the state interests that the statute is intended to serve. It is a traditional exercise of the States' "police powers to protect the health and safety of their citizens." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). That interest may justify a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests. See *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994); *NLRB v. Baptist Hospital, Inc.,* 442 U.S. 773, 99 S.Ct. 2598, 61 L.Ed.2d 251 (1979). Moreover, as with every exercise of a State's police powers, rules that provide specific guidance to enforcement authorities serve the interest in evenhanded application of the law. Whether or not those interests justify the particular regulation at issue, they are unquestionably legitimate.

It is also important when conducting this interest analysis to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication. This statute deals only with the latter.

The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience. But the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. *Frisby v. Schultz,* 487 U.S. 474, 487, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Indeed, "[i]t may not be the content of the speech, as much as the deliberate 'verbal or visual assault,' that justifies proscription." *Erznoznik v. Jacksonville,* 422 U.S. 205, 210-211, n. 6, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (citation and brackets omitted). Even in a public forum, one of the reasons we tolerate a protester's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v. California,* 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

The recognizable privacy interest in avoiding unwanted communication varies widely in different settings. It is far less important when "strolling through Central Park" than when "in the confines of one's own home," or when persons are "powerless to avoid" it. *Id.,* at 21-22, 91 S.Ct. 1780. But even the interest in preserving tranquility in "the Sheep Meadow" portion of Central Park may at times justify official restraints on offensive musical expression. *Ward,* 491 U.S., at 784, 792, 109 S.Ct. 2746. More specific to the facts of this case, we have recognized that "[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." *Madsen,* 512 U.S., at 772-773, 114 S.Ct. 2516.

The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader "right to be let alone" that one of our wisest Justices characterized as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting). The right to avoid unwelcome speech has special force in the privacy of the home, *Rowan v. United States Post Office Dept.,*

397 U.S. 728, 738, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), and its immediate surroundings, *Frisby v. Schultz,* 487 U.S., at 485, 108 S.Ct. 2495, but can also be protected in confrontational settings. Thus, this comment on the right to free passage in going to and from work applies equally-or perhaps with greater force-to access to a medical facility:

> "How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free, and his employer has a right to have him free." *American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184, 204, 42 S.Ct. 72, 66 L.Ed. 189 (1921).
> We have since recognized that the "right to persuade" discussed in that case is protected by the First Amendment, *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), as well as by federal statutes. Yet we have continued to maintain that "no one has a right to press even 'good' ideas on an unwilling recipient." *Rowan,* 397 U.S., at 738, 90 S.Ct. 1484. None of our decisions has minimized the enduring importance of "a right to be free" from persistent "importunity, following and dogging" after an offer to communicate has been declined. While the freedom to communicate is substantial, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." *Id.,* at 736, 90 S.Ct. 1484. It is that right, as well as the right of "passage without obstruction," that the Colorado statute legitimately seeks to protect. The restrictions imposed by the Colorado statute only apply to communications that interfere with these rights rather than those that involve willing listeners.

The dissenters argue that we depart from precedent by recognizing a "right to avoid unpopular speech in a public forum,"*post,* at 2519 (opinion of KENNEDY, J.); see also *post,* at 2507-2509 (opinion of SCALIA, J.). We, of course, are not addressing whether there is such a "right." Rather, we are merely noting that our cases have repeatedly recognized the interests of unwilling listeners in situations where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. See *Lehman v.*[*Shaker Heights,* 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974)]." *Erznoznik,* 422 U.S., at 209, 95 S.Ct. 2268. We explained in *Erznoznik* that "[t]his Court has considered analogous issues-pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors-in a variety of contexts. Such cases demand delicate balancing." *Id.,* at 208, 95 S.Ct. 2268 (citations omitted). The dissenters, however, appear to consider recognizing any of the interests of unwilling listeners-let alone balancing those interests against the rights of speakers-to be unconstitutional. Our cases do not support this view.

III

All four of the state court opinions upholding the validity of this statute concluded that it is a content-neutral time, place, and manner regulation. Moreover, they all found support for their analysis in *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). It is therefore appropriate to comment on the "content neutrality" of the statute. As we explained in *Ward:*

> "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.,* at 791, 109 S.Ct. 2746.

The Colorado statute passes that test for three independent reasons. First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech. See *ibid.* and cases cited.

Petitioners nevertheless argue that the statute is not content neutral insofar as it applies to some oral communication. The statute applies to all persons who "knowingly approach" within eight feet of another for the purpose of leafletting or displaying signs; for such persons, the content of their oral statements is irrelevant. With respect to persons who are neither leafletters nor sign carriers, however, the statute does not apply unless their approach is "for the purpose of ... engaging in oral protest, education, or counseling." Petitioners contend that an individual near a health care facility who knowingly approaches a pedestrian to say "good morning" or to randomly recite lines from a novel would not be subject to the statute's restrictions. Because the content of the oral statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute, petitioners argue that the law is "content-based" under our reasoning in *Carey v. Brown,* 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

. . . .

It is common in the law to examine the content of a communication to determine the speaker's purpose. Whether a particular statement constitutes a threat, blackmail, an agreement to fix prices, a copyright violation, a public offering of securities, or an offer to sell goods often depends on the precise content of the statement. We have never held, or suggested, that it is improper to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct. With respect to the conduct that is the focus of the Colorado statute, it is unlikely that there would often be any need to know exactly what words were spoken in order to determine whether "sidewalk counselors" are engaging in "oral protest, education, or counseling" rather than pure social or random conversation.

Theoretically, of course, cases may arise in which it is necessary to review the content of the statements made by a person approaching within eight feet of an unwilling listener to determine whether the approach is covered by the statute. But that review need be no more extensive than a determination whether a general prohibition of "picketing" or "demonstrating" applies to innocuous speech. The regulation of such expressive activities, by definition, does not cover social, random, or other everyday communications. See Webster's Third New International Dictionary 600, 1710 (1993) (defining "demonstrate" as "to make a public display of sentiment for or against a person or cause" and "picket" as an effort "to persuade or otherwise influence"). Nevertheless, we have never suggested that the kind of cursory examination that might be required to exclude casual conversation from the coverage of a regulation of picketing would be problematic.

In *Carey v. Brown*, we examined a general prohibition of peaceful picketing that contained an exemption for picketing a place of employment involved in a labor dispute. We concluded that this statute violated the Equal Protection Clause of the Fourteenth Amendment, because it discriminated between lawful and unlawful conduct based on the content of the picketers' messages. That discrimination was impermissible because it accorded preferential treatment to expression concerning one particular subject matter-labor disputes-while prohibiting discussion of all other issues. Although our opinion stressed that "it is the

content of the speech that determines whether it is within or without the statute's blunt prohibition," 447 U.S., at 462, 100 S.Ct. 2286, we appended a footnote to that sentence explaining that it was the fact that the statute placed a prohibition on discussion of particular topics, while others were allowed, that was constitutionally repugnant. Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation. *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 530, 538, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

The Colorado statute's regulation of the location of protests, education, and counseling is easily distinguishable from *Carey.* It places no restrictions on-and clearly does not prohibit-either a particular viewpoint or any subject matter that may be discussed by a speaker. Rather, it simply establishes a minor place restriction on an extremely broad category of communications with unwilling listeners. Instead of drawing distinctions based on the subject that the approaching speaker may wish to address, the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries. Each can attempt to educate unwilling listeners on any subject, but without consent may not approach within eight feet to do so.

The dissenters, nonetheless, contend that the statute is not "content neutral." As Justice SCALIA points out, the vice of content-based legislation in this context is that "it lends itself" to being " 'used for invidious thought-control purposes.' " *Post,* at 2504. But a statute that restricts certain categories of speech only lends itself to invidious use if there is a significant number of communications, raising the same problem that the statute was enacted to solve, that fall outside the statute's scope, while others fall inside. *E.g., Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Here, the statute's restriction seeks to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her. The statutory phrases, "oral protest, education, or counseling," distinguish speech activities likely to have those consequences from speech activities (such as Justice SCALIA's "happy speech," *post,* at 2504) that are most unlikely to have those consequences. The statute does not distinguish among speech instances that are similarly likely to raise the legitimate concerns to which it responds. Hence, the statute cannot be struck down for failure to maintain "content neutrality," or for "underbreadth."

Also flawed is Justice KENNEDY's theory that a statute restricting speech becomes unconstitutionally content based because of its application "to the specific locations where [that] discourse occurs,"*post,* at 2517. A statute prohibiting solicitation in airports that was motivated by the aggressive approaches of Hare Krishnas does not become content based solely because its application is confined to airports-"the specific locations where [that] discourse occurs." A statute making it a misdemeanor to sit at a lunch counter for an hour without ordering any food would also not be "content based" even if it were enacted by a racist legislature that hated civil rights protesters (although it might raise separate questions about the State's legitimate interest at issue). See *ibid.*

Similarly, the contention that a statute is "viewpoint based" simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support. *Post,* at 2517-2518 (KENNEDY, J., dissenting). The antipicketing ordinance upheld in *Frisby v. Schultz,* 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), a decision in which both of today's dissenters joined, was obviously enacted in response to the activities of antiabortion protesters who wanted to protest at the home of a particular doctor to persuade him and others that they viewed his practice of performing abortions to be murder. We nonetheless summarily concluded that the statute was content neutral. *Id.,* at 482, 108 S.Ct. 2495.

Justice KENNEDY further suggests that a speaker who approaches a patient and "chants in praise of the Supreme Court and its abortion decisions," or hands out a simple leaflet saying, " 'We are for abortion rights,' " would not be subject to the statute. *Post,* at 2518. But what reason is there to believe the statute would not apply to that individual? She would be engaged in "oral protest" and "education," just as the abortion opponent who expresses her view that the Supreme Court decisions were incorrect would be "protest [ing]" the decisions and "educat[ing]" the patient on the issue. The close approach of the latter, more hostile, demonstrator may be more likely to risk being perceived as a form of physical harassment; but the relevant First Amendment point is that the statute would prevent both speakers, unless welcome, from entering the 8-foot zone. The statute is not limited to those who oppose abortion. It applies to the demonstrator in Justice KENNEDY's example. It applies to all "protest," to all "counseling," and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands.

The Colorado courts correctly concluded that § 18-9-122(3) is content neutral.

IV

We also agree with the state courts' conclusion that § 18-9-122(3) is a valid time, place, and manner regulation under the test applied in *Ward* because it is "narrowly tailored." We already have noted that the statute serves governmental interests that are significant and legitimate and that the restrictions are content neutral. We are likewise persuaded that the statute is "narrowly tailored" to serve those interests and that it leaves open ample alternative channels for communication. As we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.

The three types of communication regulated by § 18-9-122(3) are the display of signs, leafletting, and oral speech. The 8-foot separation between the speaker and the audience should not have any adverse impact on the readers' ability to read signs displayed by demonstrators. In fact, the separation might actually aid the pedestrians' ability to see the signs by preventing others from surrounding them and impeding their view. Furthermore, the statute places no limitations on the number, size, text, or images of the placards. And, as with all of the restrictions, the 8-foot zone does not affect demonstrators with signs who remain in place.

With respect to oral statements, the distance certainly can make it more difficult for a speaker to be heard, particularly if the level of background noise is high and other speakers are competing for the pedestrian's attention. Notably, the statute places no limitation on the number of speakers or the noise level, including the use of amplification equipment, although we have upheld such restrictions in past cases. See, *e.g., Madsen,* 512 U.S., at 772-773, 114 S.Ct. 2516. More significantly, this statute does not suffer from the failings that compelled us to reject the "floating buffer zone" in *Schenck,* 519 U.S., at 377, 117 S.Ct. 855. Unlike the 15-foot zone in *Schenck,* this 8-foot zone allows the speaker to communicate at a "normal conversational distance." *Ibid.* Additionally, the statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute. Finally, here there is a "knowing" requirement that protects speakers "who thought they were keeping pace with the targeted individual" at the proscribed distance from inadvertently violating the statute. *Id.,* at 378, n. 9, 117 S.Ct. 855.

It is also not clear that the statute's restrictions will necessarily impede, rather than assist, the speakers'

efforts to communicate their messages. The statute might encourage the most aggressive and vociferous protesters to moderate their confrontational and harassing conduct, and thereby make it easier for thoughtful and law-abiding sidewalk counselors like petitioners to make themselves heard. But whether or not the 8-foot interval is the best possible accommodation of the competing interests at stake, we must accord a measure of deference to the judgment of the Colorado Legislature. See *Madsen,* 512 U.S., at 769-770, 114 S.Ct. 2516. Once again, it is worth reiterating that only attempts to address unwilling listeners are affected.

The burden on the ability to distribute handbills is more serious because it seems possible that an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients. The statute does not, however, prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept. And, as in all leafletting situations, pedestrians continue to be free to decline the tender. In *Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), we upheld a state fair regulation that required a religious organization desiring to distribute literature to conduct that activity only at an assigned location-in that case booths. As in this case, the regulation primarily burdened the distributors' ability to communicate with unwilling readers. We concluded our opinion by emphasizing that the First Amendment protects the right of every citizen to " 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.' *Kovacs v. Cooper,* 336 U.S. 77, 87, 69 S.Ct. 448, 93 L.Ed. 513 (1949)." *Id.,* at 655, 69 S.Ct. 448. The Colorado statute adequately protects those rights.

Finally, in determining whether a statute is narrowly tailored, we have noted that "[w]e must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary." *Madsen,* 512 U.S., at 772, 114 S.Ct. 2516. States and municipalities plainly have a substantial interest in controlling the activity around certain public and private places. For example, we have recognized the special governmental interests surrounding schools, courthouses, polling places, and private homes. Additionally, we previously have noted the unique concerns that surround health care facilities:

"'Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and [her] family ... need a restful, uncluttered, relaxing, and helpful atmosphere.' " *Ibid.* (quoting *NLRB v. Baptist Hospital, Inc.,* 442 U.S., at 783-784, n. 12, 99 S.Ct. 2598).

Persons who are attempting to enter health care facilities-for any purpose-are often in particularly vulnerable physical and emotional conditions. The State of Colorado has responded to its substantial and legitimate interest in protecting these persons from unwanted encounters, confrontations, and even assaults by enacting an exceedingly modest restriction on the speakers' ability to approach.

Justice KENNEDY, however, argues that the statute leaves petitioners without adequate means of communication. *Post,* at 2523-2524. This is a considerable overstatement. The statute seeks to protect those who wish to enter health care facilities, many of whom may be under special physical or emotional stress, from close physical approaches by demonstrators. In doing so, the statute takes a prophylactic approach; it forbids all unwelcome demonstrators to come closer than eight feet. We recognize that by doing so, it will sometimes inhibit a demonstrator whose approach in fact would have proved harmless. But the statute's prophylactic aspect is justified by the great difficulty of protecting, say, a pregnant woman from physical harassment with legal rules that focus exclusively on the individual impact of each instance of behavior, demanding in each case an accurate characterization (as harassing or not harassing)

of each individual movement within the 8-foot boundary. Such individualized characterization of each individual movement is often difficult to make accurately. A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself.

As we explained above, the 8-foot restriction on an unwanted physical approach leaves ample room to communicate a message through speech. Signs, pictures, and voice itself can cross an 8-foot gap with ease. If the clinics in Colorado resemble those in *Schenck,* demonstrators with leaflets might easily stand on the sidewalk at entrances (without blocking the entrance) and, without physically approaching those who are entering the clinic, peacefully hand them leaflets as they pass by.

Finally, the 8-foot restriction occurs only within 100 feet of a health care facility-the place where the restriction is most needed. The restriction interferes far less with a speaker's ability to communicate than did the total ban on picketing on the sidewalk outside a residence (upheld in *Frisby v. Schultz,* 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988)), the restriction of leafletting at a fairground to a booth (upheld in *Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)), or the "silence" often required outside a hospital. Special problems that may arise where clinics have particularly wide entrances or are situated within multipurpose office buildings may be worked out as the statute is applied.

This restriction is thus reasonable and narrowly tailored.

V

Petitioners argue that § 18-9-122(3) is invalid because it is "overbroad." There are two parts to petitioners' "overbreadth" argument. On the one hand, they argue that the statute is too broad because it protects too many people in too many places, rather than just the patients at the facilities where confrontational speech had occurred. Similarly, it burdens all speakers, rather than just persons with a history of bad conduct. On the other hand, petitioners also contend that the statute is overbroad because it "bans virtually the universe of protected expression, including displays of signs, distribution of literature, and mere verbal statements."

The first part of the argument does not identify a constitutional defect. The fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance. What is important is that all persons entering or leaving health care facilities share the interests served by the statute. It is precisely because the Colorado Legislature made a general policy choice that the statute is assessed under the constitutional standard set forth in *Ward,* 491 U.S., at 791, 109 S.Ct. 2746, rather than a more strict standard. See *Madsen,* 512 U.S., at 764. The cases cited by petitioners are distinguishable from this statute. In those cases, the government attempted to regulate nonprotected activity, yet because the statute was overbroad, protected speech was also implicated. See *Houston v. Hill,* 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987); *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). In this case, it is not disputed that the regulation affects protected speech activity; the question is thus whether it is a "reasonable restrictio[n] on the time, place, or manner of protected speech." *Ward,* 491 U.S., at 791, 109 S.Ct. 2746. Here, the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive. As Justice Jackson observed, "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York,* 336 U.S. 106, 112, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (concurring opinion).

The second part of the argument is based on a misreading of the statute and an incorrect understanding of the overbreadth doctrine. As we have already noted, § 18-9-122(3) simply does not "ban" any messages, and likewise it does not "ban" any signs, literature, or oral statements. It merely regulates the places where communications may occur. As we explained in *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), the overbreadth doctrine enables litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." Moreover, "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.,* at 615, 93 S.Ct. 2908. Petitioners have not persuaded us that the impact of the statute on the conduct of other speakers will differ from its impact on their own sidewalk counseling. Cf. *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Like petitioners' own activities, the conduct of other protesters and counselors at all health care facilities are encompassed within the statute's "legitimate sweep." Therefore, the statute is not overly broad.

VI

Petitioners also claim that § 18-9-122(3) is unconstitutionally vague. They find a lack of clarity in three parts of the section: the meaning of "protest, education, or counseling"; the "consent" requirement; and the determination whether one is "approaching" within eight feet of another.

A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Chicago v. Morales,* 527 U.S. 41, 56-57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999).

In this case, the first concern is ameliorated by the fact that § 18-9-122(3) contains a scienter requirement. The statute only applies to a person who "knowingly" approaches within eight feet of another, without that person's consent, for the purpose of engaging in oral protest, education, or counseling. The likelihood that anyone would not understand any of those common words seems quite remote.

Petitioners proffer hypertechnical theories as to what the statute covers, such as whether an outstretched arm constitutes "approaching." And while "[t]here is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question," *American Communications Assn. v. Douds,* 339 U.S. 382, 412, 70 S.Ct. 674, 94 L.Ed. 925 (1950), because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language," *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). For these reasons, we rejected similar vagueness challenges to the injunctions at issue in *Schenck,* 519 U.S., at 383, 117 S.Ct. 855, and *Madsen,* 512 U.S., at 775-776, 114 S.Ct. 2516. We thus conclude that "it is clear what the ordinance as a whole prohibits." *Grayned,* 408 U.S., at 110, 92 S.Ct. 2294. More importantly, speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid "in the vast majority of its intended applications," *United States v. Raines,* 362 U.S. 17, 23, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960).

For the same reason, we are similarly unpersuaded by the suggestion that § 18-9-122(3) fails to give adequate guidance to law enforcement authorities. Indeed, it seems to us that one of the section's virtues is the specificity of the definitions of the zones described in the statute. "As always, enforcement requires the exercise of some degree of police judgment," *Grayned,* 408 U.S., at 114, 92 S.Ct. 2294, and the degree of judgment involved here is acceptable.

VII

Finally, petitioners argue that § 18-9-122(3)'s consent requirement is invalid because it imposes an unconstitutional "prior restraint" on speech. We rejected this argument previously in *Schenck,* 519 U.S., at 374, n. 6, 117 S.Ct. 855, and *Madsen,* 512 U.S., at 764, n. 2, 114 S.Ct. 2516.Moreover, the restrictions in this case raise an even lesser prior restraint concern than those at issue in *Schenck* and *Madsen* where particular speakers were at times completely banned within certain zones. Under this statute, absolutely no channel of communication is foreclosed. No speaker is silenced. And no message is prohibited. Petitioners are simply wrong when they assert that "[t]he statute compels speakers to obtain consent to speak and it authorizes private citizens to deny petitioners' requests to engage in expressive activities." To the contrary, this statute does not provide for a "heckler's veto" but rather allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject only to the narrow place requirement imbedded within the "approach" restriction.

Furthermore, our concerns about "prior restraints" relate to restrictions imposed by official censorship. The regulations in this case, however, only apply if the pedestrian does not consent to the approach. Private citizens have always retained the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider. This statute simply empowers private citizens entering a health care facility with the ability to prevent a speaker, who is within eight feet and advancing, from communicating a message they do not wish to hear. Further, the statute does not authorize the pedestrian to affect any other activity at any other location or relating to any other person. These restrictions thus do not constitute an unlawful prior restraint.

The judgment of the Colorado Supreme Court is affirmed.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

I

Colorado's statute makes it a criminal act knowingly to approach within 8 feet of another person on the public way or sidewalk area within 100 feet of the entrance door of a health care facility for the purpose of passing a leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with such person. Whatever may be said about the restrictions on the other types of expressive activity, the regulation as it applies to oral communications is obviously and undeniably content based. A speaker wishing to approach another for the purpose of communicating *any* message except one of protest, education, or counseling may do so without first securing the other's consent. Whether a speaker must obtain permission before approaching within eight feet-and whether he will be sent to prison for failing to do so-depends entirely on *what he intends to say* when he gets there. I have no doubt that this regulation would be deemed content based *in an instant* if the case before us involved antiwar protesters, or union members seeking to "educate" the public about the reasons for their strike. "[I]t is," we would say, "the content of the speech that determines whether it is within or without the statute's blunt prohibition," *Carey v. Brown,* 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). But the jurisprudence of this Court has a way of changing when abortion is involved.

. . . .

"The vice of content-based legislation-what renders it deserving of the high standard of strict scrutiny-is

not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Madsen, supra,* at 794, 114 S.Ct. 2516 (opinion of SCALIA, J.) (emphasis deleted). A restriction that operates only on speech that communicates a message of protest, education, or counseling presents exactly this risk. When applied, as it is here, at the entrance to medical facilities, it is a means of impeding speech against abortion. The Court's confident assurance that the statute poses no special threat to First Amendment freedoms because it applies alike to "used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries," *ante,* at 2493, is a wonderful replication (except for its lack of sarcasm) of Anatole France's observation that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges ...." J. Bartlett, Familiar Quotations 550 (16th ed.1992). This Colorado law is no more targeted at used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries than French vagrancy law was targeted at the rich. We know what the Colorado legislators, by their careful selection of content ("protest, education, and counseling"), were taking aim at, for they set it forth in the statute itself: the "right to protest or counsel *against* certain medical procedures" on the sidewalks and streets surrounding health care facilities. Colo.Rev.Stat. § 18-9-122(1) (1999) (emphasis added).

. . . .

II

As the Court explains, under our precedents even a content-neutral, time, place, and manner restriction must be narrowly tailored to advance a significant state interest, and must leave open ample alternative means of communication. *Ward,* 491 U.S., at 802, 109 S.Ct. 2746. It cannot be sustained if it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.,* at 799, 109 S.Ct. 2746.

This requires us to determine, first, what *is* the significant interest the State seeks to advance? Here there appears to be a bit of a disagreement between the State of Colorado (which should know) and the Court (which is eager to speculate). Colorado has identified in the text of the statute itself the interest it sought to advance: to ensure that the State's citizens may "obtain medical counseling and treatment in an unobstructed manner" by "preventing the willful obstruction of a person's access to medical counseling and treatment at a health care facility." Colo.Rev.Stat. § 18-9-122(1) (1999). In its brief here, the State repeatedly confirms the interest squarely identified in the statute under review. See, *e.g.,* Brief for Respondents 15 ("Each provision of the statute was chosen to precisely address crowding and physical intimidation: conduct shown to impede access, endanger safety and health, and strangle effective law enforcement"); *id.,* at 14 ("[T]his provision narrowly addresses the conduct shown to interfere with access through crowding and physical threats"). The Court nevertheless concludes that the Colorado provision is narrowly tailored to serve *...the State's interest in protecting its citizens' rights to be let alone from unwanted speech.*

Indeed, the situation is even more bizarre than that. The interest that the Court makes the linchpin of its analysis was not only unasserted by the State; it is not only completely *different* from the interest that the statute specifically sets forth; it was explicitly *disclaimed* by the State in its brief before this Court, and characterized as a "straw interest" *petitioners* served up in the hope of discrediting the State's case. *Id.,* at 25, n. 19. We may thus add to the lengthening list of "firsts" generated by this Court's relentlessly proabortion jurisprudence, the first case in which, in order to sustain a statute, the Court has relied upon a governmental interest not only unasserted by the State, but positively repudiated.

I shall discuss below the obvious invalidity of this statute assuming, first (in Part A), the fictitious state interest that the Court has invented, and then (in Part B), the interest actually recited in the statute and

asserted by counsel for Colorado.

A

It is not without reason that Colorado claimed that, in attributing to this statute the false purpose of protecting citizens' right to be let alone, petitioners were seeking to discredit it. Just three Terms ago, in upholding an injunction against antiabortion activities, the Court refused to rely on any supposed " 'right of the people approaching and entering the facilities to be left alone.' " *Schenck v. Pro-Choice Network of Western N.Y.,* 519 U.S. 357, 383, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). It expressed "doubt" that this "'right' ... accurately reflects our First Amendment jurisprudence." *Ibid.* Finding itself in something of a jam (the State here has passed a regulation that is obviously not narrowly tailored to advance any *other* interest), the Court today neatly repackages the repudiated "right" as an "interest" the State may decide to protect, *ante,* at 2490, n. 24, and then places it onto the scales opposite the right to free speech in a traditional public forum.

B

I turn now to the real state interest at issue here-the one set forth in the statute and asserted in Colorado's brief: the preservation of unimpeded access to health care facilities. We need look no further than subsection (2) of the statute to see what a provision would look like that is narrowly tailored to serve *that* interest. Under the terms of that subsection, any person who "knowingly obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility" is subject to criminal and civil liability. It is possible, I suppose, that subsection (2) of the Colorado statute will leave unrestricted some expressive activity that, if engaged in from within eight feet, may be sufficiently harassing as to have the effect of impeding access to health care facilities. In subsection (3), however, the State of Colorado has prohibited a vast amount of speech that cannot possibly be thought to correspond to that evil.

Justice KENNEDY, dissenting.

IV

In *Planned Parenthood of Southeastern Pa. v. Casey,* the Court reaffirmed its prior holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages. The majority opinion in *Casey* considered the woman's liberty interest and principles of *stare decisis,* but took care to recognize the gravity of the personal decision: "[Abortion] is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family, and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, for the life or potential life that is aborted." 505 U.S., at 852, 112 S.Ct. 2791.

The Court now strikes at the heart of the reasoned, careful balance I had believed was the basis for the opinion in *Casey.* The vital principle of the opinion was that in defined instances the woman's decision whether to abort her child was in its essence a moral one, a choice the State could not dictate. Foreclosed from using the machinery of government to ban abortions in early term, those who oppose it are remitted to debate the issue in its moral dimensions. In a cruel way, the Court today turns its back on that balance. It in effect tells us the moral debate is not so important after all and can be conducted just as well through

a bullhorn from an 8-foot distance as it can through a peaceful, face-to-face exchange of a leaflet. The lack of care with which the Court sustains the Colorado statute reflects a most troubling abdication of our responsibility to enforce the First Amendment.

There runs through our First Amendment theory a concept of immediacy, the idea that thoughts and pleas and petitions must not be lost with the passage of time. In a fleeting existence we have but little time to find truth through discourse. No better illustration of the immediacy of speech, of the urgency of persuasion, of the preciousness of time, is presented than in this case. Here the citizens who claim First Amendment protection seek it for speech which, if it is to be effective, must take place at the very time and place a grievous moral wrong, in their view, is about to occur. The Court tears away from the protesters the guarantees of the First Amendment when they most need it. So committed is the Court to its course that it denies these protesters, in the face of what they consider to be one of life's gravest moral crises, even the opportunity to try to offer a fellow citizen a little pamphlet, a handheld paper seeking to reach a higher law.

Adderley v. Florida

385 U.S. 39 (1967)

Mr. Justice BLACK delivered the opinion of the Court.

Petitioners, Harriett Louise Adderley and 31 other persons, were convicted by a jury in a joint trial in the County Judge's Court of Leon County, Florida, on a charge of 'trespass with a malicious and mischievous intent' upon the premises of the county jail contrary to s 821.18 of the Florida statutes set out below.[FN1] Petitioners, apparently all students of the Florida A. & M. University in Tallahassee, had gone from the school to the jail about a mile away, along with many other students, to 'demonstrate' at the mail their protests of arrests of other protesting students the day before, and perhaps to protest more generally against state and local policies and practices of racial segregation, including segregation of the jail. The county sheriff, legal custodian of the jail and jail grounds, tried to persuade the students to leave the jail grounds. When this did not work, he notified them that they must leave, that if they did not leave he would arrest them for trespassing, and that if they resisted he would charge them with that as well. Some of the students left but others, including petitioners, remained and they were arrested. On appeal the convictions were affirmed by the Florida Circuit Court and then by the Florida District Court of Appeal, 175 So.2d 249. That being the highest state court to which they could appeal, petitioners applied to us for certiorari contending that, in view of petitioners' purpose to protest against jail and other segregation policies, their conviction denied them 'rights of free speech, assembly, petition, due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.'On this 'Question Presented' we granted certiorari. 382 U.S. 1023, 86 S.Ct. 643, 15 L.Ed.2d 538.Petitioners present their argument on this question in four separate points, and for convenience we deal with each of their points in the order in which they present them.

> FN1.'Every trespass upon the property of another, committed with a malicious and mischievous intent, the punishment of which is not specially provided for, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars.'Fla.Stat. s 821.18, F.S.A. (1965).

I.

Petitioners have insisted from the beginning of this case that it is controlled by and must be reversed because of our prior cases of Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697, and Cox v. State of Louisiana, 379 U.S. 536, 559, 85 S.Ct. 453, 476, 13 L.Ed.2d 471, 487. We cannot agree.

The Edwards case, like this one, did come up when a number of persons demonstrated on public property against their State's segregation policies. They also sang hymns and danced, as did the demonstrators in this case. But here the analogies to this case end. In Edwards, the demonstrators went to the South Carolina State Capital grounds to protest. In this case they went to the jail. Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not. The demonstrators at the South Carolina Capital went in through a public driveway and as they entered they were told by state officials there that they had a right as citizens to go through the State House grounds as long as they were peaceful. Here the demonstrators entered the jail grounds through a driveway used only for jail purposes and without warning to or permission from the sheriff. More importantly, South Carolina sought to prosecute its State Capital demonstrators by charging them with the common-law crime of breach of the peace. This Court in Edwards took pains to point out at length the indefinite, loose, and broad nature of this charge; indeed, this Court pointed out, 372 U.S. at p. 237, 83 S.Ct. at p. 684, that the South Carolina Supreme

Court had itself declared that the 'breach of the peace' charge is 'not susceptible of exact definition.' South Carolina's power to prosecute, it was emphasized, 372 U.S. at p. 236, 83 S.Ct. at p. 684 would have been different had the State proceeded under a 'precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed' such as, for example, 'limiting the periods during which the State House grounds were open to the public * * *.' The South Carolina breach-of-the-peace statute was thus struck down as being so broad and all-embracing as to jeopardize speech, press, assembly and petition, under the constitutional doctrine enunciated in Cantwell v. State of Connecticut, 310 U.S. 296, 307-308, 60 S.Ct. 900, 904-905, 84 L.Ed. 1213 and followed in many subsequent cases. And it was on this same ground of vagueness that in Cox v. State of Louisiana, supra, 379 U.S. at 551-552, 85 S.Ct. at 462-463, the Louisiana Breach-of-the-peace law used to prosecute Cox was invalidated.

The Florida trespass statute under which these petitioners were charged cannot be challenged on this ground. It is aimed at conduct of one limited kind, that is, for one person or persons to trespass upon the property of another with a malicious and mischievous intent. There is no lack of notice in this law, nothing to entrap or fool the unwary.

Petitioners seem to argue that the Florida trespass law is void for vagueness because it requires a trespass to be 'with a malicious and mischievous intent * * *.' But these words do not broaden the scope of trespass so as to make it cover a multitude of types of conduct as does the common-law breach- of- the-peace charge. On the contrary, these words narrow the scope of the offense. The trial court charged the jury as to their meaning and petitioners have not argued that this definition, set out below,[FN2] is not a reasonable and clear definition of the terms. The use of these terms in the statute, instead of contributing to uncertainty and misunderstanding, actually makes its meaning more understandable and clear.

> FN2."Malicious' means wrongful, you remember back in the original charge, the State has to prove beyond a reasonable doubt there was a malicious and mischievous intent. The word 'malicious' means that the wrongful act shall be done voluntarily, unlawfully and without excuse or justification. The word 'malicious' that is used in these affidavits does not necessarily allege nor require the State to prove that the defendant had actual malice in his mind at the time of the alleged trespass. Another way of stating the definition of 'malicious' is by 'malicious' is meant the act was done knowingly and willfully and without any legal justification.
>
> "Mischievous,' which is also required, means that the alleged trespass shall be inclined to cause petty and trivial trouble, annoyance and vexation to others in order for you to find that the alleged trespass was committed with mischievous intent.' R. 74.

. . . .

IV.

Petitioners here contend that 'Petitioners' convictions are based on a total lack of relevant evidence.'If true, this would be a denial of due process under Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207, and Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654. Both in the petition for certiorari and in the brief on the merits petitioners state that their summary of the evidence 'does not conflict with the facts contained in the Circuit Court's opinion' which was in effect affirmed by the District Court of Appeal. 175 So.2d 249. That statement is correct and petitioners' summary of facts, as well as that of the Circuit Court, shows an abundance of facts to support the jury's verdict of guilty in this case.

In summary both these statements show testimony ample to prove this: Disturbed and upset by the arrest of their schoolmates the day before, a large number of Florida A. & M. students assembled on the school grounds and decided to march down to the county jail. Some apparently wanted to be put in jail too, along with the students already there. A group of around 200 marched from the school and arrived at the jail singing and clapping. They went directly to the jail-door entrance where they were met by a deputy sheriff, evidently surprised by their arrival. He asked them to move back, claiming they were blocking the entrance to the jail and fearing that they might attempt to enter the jail. They moved back part of the way, where they stood or sat, singing, clapping and dancing on the jail driveway and on an adjacent grassy area upon the jail premises. This particular jail entrance and driveway were not normally used by the public, but by the sheriff's department for transporting prisoners to and from the courts several blocks away and by commercial concerns for servicing the jail. Even after their partial retreat, the demonstrators continued to block vehicular passage over this driveway up to the entrance of the jail. Someone called the sheriff who was at the moment apparently conferring with one of the state court judges about incidents connected with prior arrests for demonstrations. When the sheriff returned to the jail, he immediately inquired if all was safe inside the jail and was told it was. He then engaged in a conversation with two of the leaders. He told them that they were trespassing upon jail property and that he would give them 10 minutes to leave or he would arrest them. Neither of the leaders did anything to disperse the crowd, and one of them told the sheriff that they wanted to get arrested. A local minister talked with some of the demonstrators and told them not to enter the jail, because they could not arrest themselves, but just to remain where they were. After about 10 minutes, the sheriff, in a voice loud enough to be heard by all, told the demonstrators that he was the legal custodian of the jail and its premises, that they were trespassing on county property in violation of the law, that they should all leave forthwith or he would arrest them, and that if they attempted to resist arrest, he would charge them with that as a separate offense. Some of the group then left. Others, including all petitioners, did not leave. Some of them sat down. In a few minutes, realizing that the remaining demonstrators had no intention of leaving, the sheriff ordered his deputies to surround those remaining on jail premises and placed them, 107 demonstrators, under arrest. The sheriff unequivocally testified that he did not arrest any persons other than those who were on the jail premises. Of the three petitioners testifying, two insisted that they were arrested before they had a chance to leave, had they wanted to, and one testified that she did not intent to leave. The sheriff again explicitly testified that he did not arrest any person who was attempting to leave.

Under the foregoing testimony the jury was authorized to find that the State had proven every essential element of the crime, as it was defined by the state court. That interpretation is, of course, binding on us, leaving only the question of whether conviction of the state offense, thus defined, unconstitutionally deprives petitioners of their rights to freedom of speech, press, assembly or petition. We hold it does not. The sheriff, as jail custodian, had power, as the state courts have here held, to direct that this large crowd of people get off the grounds. There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses. There is no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose. Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff's order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this ‘area chosen for the peaceful civil rights demonstration was not only ‘reasonable’ but also particularly appropriate * * *.' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and

however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, Cox v. State of Louisiana, supra, at 554-555 and 563-564, 85 S.Ct. at 464 and 480. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.

These judgments are affirmed.

Affirmed.

Mr. Justice DOUGLAS, with whom THE CHIEF JUSTICE, Mr. Justice BRENNAN, and Mr. Justice FORTAS concur, dissenting.

The First Amendment, applicable to the States by reason of the Fourteenth (Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 683), provides that 'Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'These rights, along with religion, speech, and press, are preferred rights of the Constitution, made so by reason of that explicit guarantee and what Edmond Cahn in Confronting Injustice (1966) referred to as 'The Firstness of the First Amendment.'[FN1]With all respect, therefore, the Court errs in treating the case as if it were an ordinary trespass case or an ordinary picketing case.

The jailhouse, like an executive mansion, a legislative chamber, a courthouse, or the statehouse itself (Edwards v. South Carolina, supra) is one of the seats of governments whether it be the Tower of London, the Bastille, or a small county jail. And when it houses political prisoners or those who many think are unjustly held, it is an obvious center for protest. The right to petition for the redress of grievances has an ancient history and is not limited to writing a letter or sending a telegram to a congressman; it is not confined to appearing before the local city council, or writing letters to the President or Governor or Mayor. See NAACP v. Button, 371 U.S. 415, 429-431, 83 S.Ct. 328, 335-336, 9 L.Ed.2d 405. Conventional methods of petitioning may be, and often have been, shut off to large groups of our citizens. Legislators may turn deaf ears; formal complaints may be routed endlessly through a bureaucratic maze; courts may let the wheels of justice grind very slowly. Those who do not control television and radio, those who cannot afford to advertise in newspapers or circulate elaborate pamphlets may have only a more limited type of access to public officials. Their methods should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable, as these were.

There is no question that petitioners had as their purpose a protest against the arrest of Florida A. & M. students for trying to integrate public theatres. . . . The sheriff's testimony indicates that he well understood the purpose of the rally. The petitioners who testified unequivocally stated that the group was protesting the arrests, and state and local policies of segregation, including segregation of the jail. This testimony was not contradicted or even questioned. The fact that no one gave a formal speech, that no elaborate handbills were distributed, and that the group was not laden with signs would seem to be immaterial. Such methods are not the sine qua non of petitioning for the redress of grievances. The group did sing 'freedom' songs. And history shows that a song can be a powerful tool of protest. See Cox v. State of Louisiana, 379 U.S. 536, 546-548, 85 S.Ct. 453, 459-460. There was no violence; no threat of violence; no attempted jail break; no storming of a prison; no plan or plot to do anything but protest. The evidence is uncontradicted that the petitioners' conduct did not upset the jailhouse routine; things went on as they normally would. None of the group entered the jail. Indeed, they moved back from the entrance as they were instructed. There was no shoving, no pushing, no disorder or threat of riot. It is said that some of the group blocked part of the driveway leading to the jail entrance. The chief jailer, to be sure, testified

that vehicles would not have been able to use the driveway. Never did the students locate themselves so as to cause interference with persons or vehicles going to or coming from the jail. Indeed, it is undisputed that the sheriff and deputy sheriff, in separate cars, were able to drive up the driveway to the parking places near the entrance and that no one obstructed their path. Further, it is undisputed that the entrance to the jail was not blocked. And whenever the students were requested to move they did so. If there was congestion, the solution was a further request to move to lawns or parking areas, not complete ejection and arrest. The claim is made that a tradesman waited inside the jail because some of the protestants were sitting around and leaning on his truck. The only evidence supporting such a conclusion is the testimony of a deputy sheriff that the tradesman 'came to the door * * * and then did not leave. 'His remaining is just as consistent with a desire to satisfy his curiosity as it is with a restraint. Finally, the fact that some of the protestants may have felt their cause so just that they were willing to be arrested for making their protest outside the jail seems wholly irrelevant. A petition is nonetheless a petition, though its futility may make martyrdom attractive.

We do violence to the First Amendment when we permit this 'petition for redress of grievances' to be turned into a trespass action. It does not help to analogize this problem to the problem of picketing. Picketing is a form of protest usually directed against private interests. I do not see how rules governing picketing in general are relevant to this express constitutional right to assemble and to petition for redress of grievances. In the first place the jailhouse grounds were not marked with 'NO TRESPASSING!' signs, nor does respondent claim that the public was generally excluded from the grounds. Only the sheriff's fiat transformed lawful conduct into an unlawful trespass. To say that a private owner could have done the same if the rally had taken place on private property is to speak of a different case, as an assembly and a petition for redress of grievances run to government, not to private proprietors.

The Court forgets that prior to this day our decisions have drastically limited the application of state statutes inhibiting the right to go peacefully on public property to exercise First Amendment rights. As Mr. Justice Roberts wrote in Hague v. C.I.O., 307 U.S. 496, 515-516, 59 S.Ct. 954, 964, 83 L.Ed. 1423:

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

Such was the case of Edwards v. South Carolina, where aggrieved people 'peaceably assembled at the site of the State Government' to express their grievances to the citizens of the State as well as to the legislature. 372 U.S., at 235, 83 S.Ct., at 683.Edwards was in the tradition of Cox v. State of New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, where the public streets were said to be 'immemorially associated' with 'the right of assembly and the opportunities for the communication of thought and the discussion of public questions.' Id., at 574, 61 S.Ct., at 765. When we allow Florida to construe her 'malicious trespass' statute to bar a person from going on property knowing it is not his own and to apply that prohibition to public property, we discard Cox and Edwards. Would the case be any different if, as is common, the demonstration took place outside a building which housed both the jail and the legislative body? I think not.

There may be some public places which are so clearly committed to other purposes that their use for the

airing of grievances is anomalous. There may be some instances in which assemblies and petitions for redress of grievances are not consistent with other necessary purposes of public property. A noisy meeting may be out of keeping with the serenity of the statehouse or the quiet of the courthouse. No one, for example, would suggest that the Senate gallery is the proper place for a vociferous protest rally. And in other cases it may be necessary to adjust the right to petition for redress of grievances to the other interests inhering in the uses to which the public property is normally put. See Cox v. State of New Hampshire, supra; Poulos v. State of New Hampshire, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105. But this is quite different from saying that all public places are off limits to people with grievances. See Hague v. C.I.O., supra;Cox v. State of New Hampshire, supra; Jamison v. State of Texas, 318 U.S. 413, 415-416, 63 S.Ct. 669, 671, 87 L.Ed. 869;Edwards v. South Carolina, supra. And it is farther yet from saying that the 'custodian' of the public property in his discretion can decide when public places shall be used for the communication of ideas, especially the constitutional right to assemble and petition for redress of grievances. See Hague v. C.I.O. supra; Schneider v. State of New Jersey, 308 U.S. 147, 163-164, 60 S.Ct. 146, 151, 84 L.Ed. 155; Cantwell v. State of Connecticut, 310 U.S. 296, 60 S.Ct. 900; Largent v. State of Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873; Niemotko v. State of Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267; Shuttlesworth v. City of Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176. For to place such discretion in any public official, be he the 'custodian' of the public property or the local police commissioner (cf. Kunz v. People of State of New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280), is to place those who assert their First Amendment rights at his mercy. It gives him the awesome power to decide whose ideas may be expressed and who shall be denied a place to air their claims and petition their government. Such power is out of step with all our decisions prior to today where we have insisted that before a First Amendment right may be curtailed under the guise of a criminal law, any evil that may be collateral to the exercise of the right, must be isolated and defined in a 'narrowly drawn' statute (Cantwell v. State of Connecticut, supra, at 307, 60 S.Ct. at 904) lest the power to control excesses of conduct be used to suppress the constitutional right itself. See Stromberg v. People of State of California, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Herndon v. Lowry, 301 U.S. 242, 258-259, 57 S.Ct. 732, 739, 81 L.Ed. 1066; Edwards v. South Carolina, supra, 372 U.S. at 238, 83 S.Ct. at 684; N.A.A.C.P. v. Button, supra, 371 U.S. at 433, 83 S.Ct. at 338.

. . . .

United States v. O'Brien

391 U.S. 367 (1968)

Mr. Chief Justice WARREN delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event. Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the District of Massachusetts. He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, 'so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.'

The indictment upon which he was tried charged that he 'willfully and knowingly did multilate, destroy, and change by burning * * * (his) Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462(b).'Section 462(b) is part of the Universal Military Training and Service Act of 1948.Section 462(b)(3), one of six numbered subdivisions of s 462(b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person,

'who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate * * *.' (Italics supplied.)

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose. The District Court rejected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech.

We hold that the 1965 Amendment is constitutional both as enacted and as applied. We therefore vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court without reaching the issue raised by O'Brien in No. 233.

I.

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to

register with a local draft board. He is assigned a Selective Service number, and within five days he is issued a registration certificate (SSS Form No. 2). Subsequently, and based on a questionnaire completed by the registrant, he is assigned a classification denoting his eligibility for induction, and '(a)s soon as practicable' thereafter he is issued a Notice of Classification (SSS Form No. 110). This initial classification is not necessarily permanent, and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified. After such a reclassification, the local board 'as soon as practicable' issues to the registrant a new Notice of Classification.

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

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

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

. . . .

II.

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

We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to s 12(b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. Lichter v. Uniter States, 334 U.S. 742, 755-758, 68 S.Ct. 1294, 1301-1303, 92 L.Ed. 1694 (1948); Selective Draft Law Cases, 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349 (1918); see also Ex parte Quirin, 317 U.S. 1, 25-26, 63 S.Ct. 1, 9-10, 87 L.Ed. 3 (1942). The power of Congress to classify and conscript manpower for military service is 'beyond question.' Lichter v. United States, supra, 334 U.S. at 756, 68 S.Ct. at 1302;Selective Draft Law Cases, supra. Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, does not lead to the conclusion that the certificate serves no purpose, but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. . . .

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. . . .

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. . . .

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery, or similar deceptive misuse of certificates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the nonpossession regulations in any way negates this interest.
. . . .

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to

raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. Compare Sherbert v. Verner, 374 U.S. 398, 407-408, 83 S.Ct. 1790, 1795-1796, 10 L.Ed.2d 965 (1963), and the cases cited therein. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

. . . .

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended s 462(b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

III.

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the 'purpose' of Congress was 'to suppress freedom of speech.' We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

'The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.' McCray v. United States, 195 U.S. 27, 56, 24 S.Ct. 769, 776, 49 L.Ed. 78 (1904).

This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in State of Arizona v. State of California, 283 U.S. 423, 455, 51 S.Ct. 522, 526, 75 L.Ed. 1154 (1931).

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer

than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.

. . . .

We think it not amiss, in passing, to comment upon O'Brien's legislative-purpose argument. There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. 111 Cong.Rec. 19746, 20433. After his brief statement, and without any additional substantive comments, the bill, H.R. 10306, passed the Senate. 111 Cong.Rec. 20434. In the House debate only two Congressmen addressed themselves to the Amendment-Congressmen Rivers and Bray. 111 Cong.Rec. 19871, 19872. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional-'purpose' argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. The portions of those reports explaining the purpose of the Amendment are reproduced in the Appendix in their entirety. While both reports make clear a concern with the 'defiant' destruction of so-called 'draft cards' and with 'open' encouragement to others to destroy their cards, both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

IV.

Since the 1965 Amendment to s 12(b)(3) of the Universal Military Training and Service Act is constitutional as enacted and as applied, the Court of Appeals should have affirmed the judgment of conviction entered by the District Court. Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court. This disposition makes unnecessary consideration of O'Brien's claim that the Court of Appeals erred in affirming his conviction on the basis of the nonpossession regulation.

It is so ordered.

APPENDIX TO OPINION OF THE COURT.

PORTIONS OF THE REPORTS OF THE COMMITTEES ON ARMED SERVICES OF THE SENATE AND HOUSE EXPLAINING THE 1965 AMENDMENT.

The 'Explanation of the Bill' in the Senate Report is as follows:

'Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things, that a person who forges, alters, or changes a draft registration certificate is subject to a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section against the knowing destruction or mutilation of such cards.

'The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

‘For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be ‘knowingly’ done. This qualification is intended to protect persons who lose or mutilate draft cards accidentally.'S.Rep. No. 589, 89th Cong., 1st Sess. (1965). And the House Report explained:

‘Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of $10,000 or imprisonment of not more than 5 years. H.R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

‘The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

‘While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

‘To this end, H.R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than $10,000 or imprisonment of not more than 5 years.’ H.R.Rep. No. 747, 89th Cong., 1st Sess. (1965) U.S. Congressional and Administrative News, p. 2890.

Mr. Justice DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is ‘broad and sweeping’ and that Congress' power ‘to classify and conscript manpower for military service is ‘beyond question.“ This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war. That question has not been briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling. . . .

Texas v. Johnson

491 U.S. 397 (1989)

Brennan, J., delivered the opinion of the Court.

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

* * * *

II

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, e. g., Spence v. Washington, 418 U.S. 405, 409-411 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, e. g., United States v. O'Brien, 391 U.S. 367, 377 (1968); Spence, supra, at 414, n. 8. If the State's regulation is not related to expression, then the less stringent standard we announced in United States v. O'Brien for regulations of noncommunicative conduct controls. See O'Brien, supra, at 377. If it is, then we are outside of O'Brien's test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. See Spence, supra, at 411. A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture. See 418 U.S., at 414, n. 8.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," United States v. O'Brien, supra, at 376, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," Spence, supra, at 409.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." 418 U.S., at 410-411. Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505 (1969); of a sit-in by blacks in a "whites only" area to protest segregation, Brown v. Louisiana, 383 U.S. 131, 141-142 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, Schacht v. United States, 398 U.S. 58 (1970); and of picketing about a wide variety of causes, see, e. g., Food Employees v.

Logan Valley Plaza, Inc., 391 U.S. 308, 313-314 (1968); United States v. Grace, 461 U.S. 171, 176 (1983).

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, Spence, supra, at 409-410; refusing to salute the flag, Barnette, 319 U.S., at 632; and displaying a red flag, Stromberg v. California, 283 U.S. 359, 368-369 (1931), we have held, all may find shelter under the First Amendment. See also Smith v. Goguen, 415 U.S. 566, 588 (1974) (White, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." Id., at 603 (Rehnquist, J., dissenting). Thus, we have observed:

"[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." Barnette, supra, at 632.

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

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. * * * *

The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, Tr. of Oral Arg. 4, and this concession seems to us as prudent as was Washington's in Spence. Johnson burned an American flag as part -- indeed, as the culmination -- of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism." 5 Record 656. In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," Spence, 418 U.S., at 409, to implicate the First Amendment.

III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See O'Brien, 391 U.S. at 376-377; Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Dallas v. Stanglin, 490 U.S. 19, 25 (1989). It may not, however, proscribe particular conduct because it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription. A law directed at the communicative

nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." Community for Creative Non-Violence v. Watt, 227 U. S. App. D. C. 19, 55-56, 703 F. 2d 586, 622-623 (1983) (Scalia, J., dissenting) (emphasis in original), rev'd sub nom. Clark v. Community for Creative Non-Violence, supra. It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," O'Brien, supra, at 376, we have limited the applicability of O'Brien's relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." Id., at 377; see also Spence, supra, at 414, n. 8. In stating, moreover, that O'Brien's test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," Clark, supra, at 298, we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under O'Brien's less demanding rule.

In order to decide whether O'Brien's test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether O'Brien's test applies. See Spence, supra, at 414, n. 8. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

A

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34-36, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning." Id., at 34.

* * * *

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Terminiello v. Chicago, 337 U.S. 1, 4 (1949). See also Cox v. Louisiana, 379 U.S. 536, 551 (1965); Tinker v. Des Moines Independent Community School Dist. 393 U.S., at 508-509; Coates v. Cincinnati, 402 U.S. 611, 615 (1971); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 (1988). It would be odd indeed to conclude both that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," FCC v. Pacifica

Foundation, 438 U.S. 726, 745 (1978) (opinion of Stevens, J.), and that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," Brief for Petitioner 37, and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in Brandenburg. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs. See id., at 572-573; Cantwell v. Connecticut, 310 U.S. 296, 309 (1940); FCC v. Pacifica Foundation, supra, at 745 (opinion of Stevens, J.).

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." Brandenburg, supra, at 447. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Tex. Penal Code Ann. § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See Boos v. Barry, 485 U.S., at 327-329.

B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In Spence, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. 418 U.S., at 414, n. 8. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of O'Brien. We are thus outside of O'Brien's test altogether.

IV

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

As in Spence, "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution." 418 U.S., at 411. Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. See, e. g., Boos v. Barry, supra, at 318; Frisby v. Schultz, 487 U.S. 474, 479 (1988).

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense."

* * * *

According to the principles announced in Boos, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." Boos v. Barry, supra, at 321.

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. * * * * According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

* * * *

We have not recognized an exception to this principle even where our flag has been involved. In Street v. New York, 394 U.S. 576 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." Id., at 593, quoting Barnette, 319 U.S., at 642. Nor may the government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." Id., at 634.

In holding in Barnette that the Constitution did not leave this course open to the government, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Id., at 642. In Spence, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag. "Given the protected character of [Spence's] expression

and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts," we held, "the conviction must be invalidated." 418 U.S., at 415. See also Goguen, supra, at 588 (White, J., concurring in judgment) (to convict person who had sewn a flag onto the seat of his pants for "contemptuous" treatment of the flag would be "[t]o convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature").

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.

* * * *

There is, moreover, no indication -- either in the text of the Constitution or in our cases interpreting it -- that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole -- such as the principle that discrimination on the basis of race is odious and destructive -- will go unquestioned in the market-place of ideas. See Brandenburg v. Ohio, 395 U.S. 444 (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

* * * *

Rehnquist, J., dissenting:

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

NAACP v. Claiborne Hardware Co.

458 U.S. 886 (1982)

[Black residents of Port Gibson, Mississippi conducted a boycott of white merchants to protest racial segregation and injustices. Several white merchants filed suit in state court to stop the boycott and for damages. The state court enjoined the boycott and awarded the merchants a total of $1,250,699 in damages. The defendants appealed to the United States Supreme Court.}

Stevens, J., delivered the opinion of the Court:

* * * *

II

This Court's jurisdiction to review the judgment of the Mississippi Supreme Court is, of course, limited to the federal questions necessarily decided by that court. We consider first whether petitioners' activities are protected in any respect by the Federal Constitution and, if they are, what effect such protection has on a lawsuit of this nature.

A

The boycott of white merchants at issue in this case took many forms. The boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause.

Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments. The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect. As we so recently acknowledged in Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 294, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." Ibid. In emphasizing "the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues," id., at 295, we noted the words of Justice Harlan, writing for the Court in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460:

"Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."

THE CHIEF JUSTICE stated for the Court in Citizens Against Rent Control: "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." 454 U.S., at 296.

The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. In De Jonge v. Oregon, 299 U.S. 353, the Court unanimously held that an individual could not be penalized simply for assisting in the conduct of an otherwise lawful meeting held under the auspices of the Communist Party, an organization that advocated "criminal syndicalism." After reviewing the rights of citizens "to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances," id., at 364, Chief Justice Hughes, writing for the Court, stated:

"It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." Id., at 365.

Of course, the petitioners in this case did more than assemble peaceably and discuss among themselves their grievances against governmental and business policy. Other elements of the boycott, however, also involved activities ordinarily safeguarded by the First Amendment. In Thornhill v. Alabama, 310 U.S. 88, the Court held that peaceful picketing was entitled to constitutional protection, even though, in that case, the purpose of the picketing "was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." Id., at 99. Cf. Chauffeurs v. Newell, 356 U.S. 341. In Edwards v. South Carolina, 372 U.S. 229, we held that a peaceful march and demonstration was protected by the rights of free speech, free assembly, and freedom to petition for a redress of grievances.

Speech itself also was used to further the aims of the boycott. Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addition, names of boycott violators were read

aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action. As Justice Rutledge, in describing the protection afforded by the First Amendment, explained:

"It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." Thomas v. Collins, 323 U.S. 516, 537.

In Organization for a Better Austin v. Keefe, 402 U.S. 415, the Court considered the validity of a prior restraint on speech that invaded the "privacy" of the respondent. Petitioner, a racially integrated community organization, charged that respondent, a real estate broker, had engaged in tactics known as "blockbusting" or "panic peddling." Petitioner asked respondent to sign an agreement that he would not solicit property in their community. When he refused, petitioner distributed leaflets near respondent's home that were critical of his business practices. A state court enjoined petitioner from distributing the leaflets; an appellate court affirmed on the ground that the alleged activities were coercive and intimidating, rather than informative, and therefore not entitled to First Amendment protection. Id., at 418. This Court reversed. THE CHIEF JUSTICE explained:

"This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment. E. g., Martin v. City of Struthers, 319 U.S. 141 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938). In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See Schneider v. State, supra; Thornhill v. Alabama, 310 U.S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability." Id., at 419.

In dissolving the prior restraint, the Court recognized that "offensive" and "coercive" speech was nevertheless protected by the First Amendment.

In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, "though not identical, are inseparable." Thomas v. Collins, supra, at 530. Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition -- rather than through riot

or revolution -- petitioners sought to change a social order that had consistently treated them as second-class citizens.

The presence of protected activity, however, does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See United States v. O'Brien, 391 U.S. 367. A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490; NLRB v. Retail Store Employees, 447 U.S. 607. The right of business entities to "associate" to suppress competition may be curtailed. National Society of Professional Engineers v. United States, 435 U.S. 679. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." NLRB v. Retail Store Employees, supra, at 617-618 (BLACKMUN, J., concurring in part). See Longshoremen v. Allied International, Inc., 456 U.S. 212, 222-223, and n. 20.

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 467. "[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74-75. There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270.

* * * *

We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment.

B

* * * *

The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" Samuels v. Mackell, 401 U.S. 66, 75 (Douglas, J., concurring). Although

the extent and significance of the violence in this case are vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. NAACP v. Button, 371 U.S. 415, 438. Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

* * * *

Petitioners withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.

The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another. In Scales v. United States, 367 U.S. 203, 229, the Court noted that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired." The Court suggested that to punish association with such a group, there must be "clear proof that a defendant 'specifically [intends] to accomplish [the aims of the organization] by resort to violence.'" Ibid. (quoting Noto v. United States, 367 U.S. 290, 299). Moreover, in Noto v. United States the Court emphasized that this intent must be judged "according to the strictest law," for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." Id., at 299-300.

In Healy v. James, 408 U.S. 169, the Court applied these principles in a noncriminal context. In that case the Court held that a student group could not be denied recognition at a state-supported college merely because of its affiliation with a national organization associated with disruptive and violent campus activity. It noted that "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." Id., at 185-186. The Court stated that "it has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." Id., at 186 (quoting United States v. Robel, 389 U.S. 258, 265). "The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." 408 U.S., at 186 (footnote omitted).

The principles announced in Scales, Noto, and Healy are relevant to this case. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' Shelton v. Tucker, 364 U.S. 479, 488 (1960)." Carroll v. Princess Anne, 393 U.S. 175, 183-184.

* * * *

Respondents have sought separately to justify the judgment entered against Charles Evers and the national NAACP. As set forth by the chancellor, Evers was specially connected with the boycott in four respects. First, Evers signed the March 23 supplemental demand letter and unquestionably played the primary leadership role in the organization of the boycott. Second, Evers participated in negotiations with MAP and successfully convinced MAP to abandon its practice of purchasing food alternately from white-owned and black-owned stores. Third, he apparently presided at the April 1, 1966, meeting at which the vote to begin the boycott was taken; he delivered a speech to the large audience that was gathered on that occasion. See n. 28, supra. Fourth, Evers delivered the speeches on April 19 and 21, 1969, which we have discussed previously. See supra, at 902; Appendix to this opinion.

For the reasons set forth above, liability may not be imposed on Evers for his presence at NAACP meetings or his active participation in the boycott itself. To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his "threats" of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award. Respondents point to Evers' speeches, however, as justification for the chancellor's damages award. Since respondents would impose liability on the basis of a public address -- which predominantly contained highly charged political rhetoric lying at the core of the First Amendment -- we approach this suggested basis of liability with extreme care.

There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.

While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been

understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

It is clear that "fighting words" -- those that provoke immediate violence -- are not protected by the First Amendment. Chaplinsky v. New Hampshire, 315 U.S. 568, 572. Similarly, words that create an immediate panic are not entitled to constitutional protection. Schenck v. United States, 249 U.S. 47. This Court has made clear, however, that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment. In Brandenburg v. Ohio, 395 U.S. 444, we reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued; we relied on "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id., at 447. See Noto v. United States, 367 U.S., at 297-298 (" the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action"). See also Whitney v. California, 274 U.S. 357, 372 (Brandeis, J., concurring).

The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in Brandenburg. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however -- with the possible exception of the Cox incident -- the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966, speech; the chancellor made no finding of any violence after the challenged 1969 speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S., at 270.

For these reasons, we conclude that Evers' addresses did not exceed the bounds of protected speech. If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence -- apart from the speeches themselves -- that Evers authorized, ratified, or directly threatened acts of violence. The chancellor's findings are not sufficient to establish that Evers had a duty to "repudiate" the acts of violence that occurred. The findings are constitutionally inadequate to support the damages judgment against him.

The liability of the NAACP derived solely from the liability of Charles Evers. The chancellor found:

"The national NAACP was well-advised of Evers' actions, and it had the option of repudiating his acts or ratifying them. It never repudiated those acts, and therefore, it is deemed by this Court to have affirmed them." App. to Pet. for Cert. 42b-43b.

Of course, to the extent that Charles Evers' acts are insufficient to impose liability upon him, they may not be used to impose liability on his principal. On the present record, however, the judgment against the NAACP could not stand in any event.

The associational rights of the NAACP and its members have been recognized repeatedly by this Court. The NAACP -- like any other organization -- of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority. Cf. American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified.

The chancellor made no finding that Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct. The evidence in the record suggests the contrary. Aaron Henry, President of the Mississippi State Conference of the NAACP and a member of the Board of Directors of the national organization, testified that the statements attributed to Evers were directly contrary to NAACP policy. Record 4930. Similarly, there is no evidence that the NAACP ratified -- or even had specific knowledge of -- any of the acts of violence or threats of discipline associated with the boycott. Henry testified that the NAACP never authorized, and never considered taking, any official action with respect to the boycott. Id., at 4896. The NAACP supplied no financial aid to the boycott. Id., at 4940. The chancellor made no finding that the national organization was involved in any way in the boycott.

To impose liability without a finding that the NAACP authorized -- either actually or apparently -- or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment.

* * * *

IV

In litigation of this kind the stakes are high. Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.

At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, petitioners' ultimate objectives were unquestionably legitimate. The charge of illegality -- like the claim of constitutional protection -- derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social

ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees. The findings of the chancellor, framed largely in the light of two legal theories rejected by the Mississippi Supreme Court, are constitutionally insufficient to support the judgment that all petitioners are liable for all losses resulting from the boycott.

The judgment is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

Boy Scouts of America v.Dale

530 U.S. 640 (2000)

Chief Justice REHNQUIST delivered the opinion of the Court.

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

I

James Dale entered Scouting in 1978 at the age of eight by joining Monmouth Council's Cub Scout Pack 142. Dale became a Boy Scout in 1981 and remained a Scout until he turned 18. By all accounts, Dale was an exemplary Scout. In 1988, he achieved the rank of Eagle Scout, one of Scouting's highest honors.

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/Gay Alliance.

Later that month, Dale received a letter from Monmouth Council Executive James Kay revoking his adult membership. Dale wrote to Kay requesting the reason for Monmouth Council's decision. Kay responded by letter that the Boy Scouts "specifically forbid membership to homosexuals." App. 137.

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation. N.J. Stat. Ann. §§ 10:5-4 and 10:5-5 (West Supp.2000); see Appendix, *infra,* at 2458-2459.

The New Jersey Superior Court's Chancery Division granted summary judgment in favor of the Boy Scouts. The court held that New Jersey's public accommodations law was inapplicable because the Boy Scouts was not a place of public accommodation, and that, alternatively, the Boy Scouts is a distinctly private group exempted from coverage under New Jersey's law. The court rejected Dale's common-law claim, holding that New Jersey's policy is embodied in the public accommodations law. The court also concluded that the Boy Scouts' position in respect of active homosexuality was clear and held that the First Amendment freedom of expressive association prevented the government from forcing the Boy Scouts to accept Dale as an adult leader.

The New Jersey Superior Court's Appellate Division affirmed the dismissal of Dale's common-law claim, but otherwise reversed and remanded for further proceedings. 308 N.J.Super. 516, 706 A.2d 270 (1998). It held that New Jersey's public accommodations law applied to the Boy Scouts and that the Boy Scouts violated it. The Appellate Division rejected the Boy Scouts' federal constitutional claims.

The New Jersey Supreme Court affirmed the judgment of the Appellate Division. We granted the Boy Scouts' petition for certiorari to determine whether the application of New Jersey's public accommodations law violated the First Amendment. 528 U.S. 1109, 120 S.Ct. 865, 145 L.Ed.2d 725 (2000).

II

In *Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas. See *ibid.*(stating that protection of the right to expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority"). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." *Id.,* at 623, 104 S.Ct. 3244. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association ... plainly presupposes a freedom not to associate." *Ibid.*

The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 13, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). But the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts, supra,* at 623, 104 S.Ct. 3244.

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

engage in some form of expression, whether it be public or private.

Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. See *Hurley, supra,* at 567-568, 115 S.Ct. 2338. The record reveals the following. The Boy Scouts is a private, nonprofit organization. According to its mission statement:

> "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential.
>
> "The values we strive to instill are based on those found in the Scout Oath and Law:
>
> "Scout Oath
>
> "On my honor I will do my best
> "To do my duty to God and my country
> "and to obey the Scout Law;
> "To help other people at all times;
> "To keep myself physically strong,
> "mentally awake, and morally straight.
>
> "Scout Law
>
> "A Scout is:
> "Trustworthy Obedient
> "Loyal Cheerful
> "Helpful Thrifty
> "Friendly Brave
> "Courteous Clean
> "Kind Reverent." App. 184.

Thus, the general mission of the Boy Scouts is clear: "[T]o instill values in young people." *Ibid.* The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts' values-both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts, supra,* at 636, 104 S.Ct. 3244 (O'CONNOR, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement").

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or

private viewpoints. This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality.

The values the Boy Scouts seeks to instill are "based on" those listed in the Scout Oath and Law.App. 184. The Boy Scouts explains that the Scout Oath and Law provide "a positive moral code for living; they are a list of 'do's' rather than 'don'ts.' " Brief for Petitioners 3. The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly with the values represented by the terms "morally straight" and "clean."

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. See *supra,* at 2451 and this page. And the terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership ... [and] contradicts Boy Scouts' overarching objective to reach 'all eligible youth.' " 160 N.J., at 618, 734 A.2d, at 1226. The court concluded that the exclusion of members like Dale "appears antithetical to the organization's goals and philosophy." *Ibid.* But our cases reject this sort of inquiry; it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent. See *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 124, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) ("[A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational"); see also *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

The Boy Scouts asserts that it "teach[es] that homosexual conduct is not morally straight," Brief for Petitioners 39, and that it does "not want to promote homosexual conduct as a legitimate form of behavior," Reply Brief for Petitioners 5. We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality. But because the record before us contains written evidence of the Boy Scouts' viewpoint, we look to it as instructive, if only on the question of the sincerity of the professed beliefs.

. . . .

Thus, at least as of 1978-the year James Dale entered Scouting-the official position of the Boy Scouts was that avowed homosexuals were not to be Scout leaders.

A position statement promulgated by the Boy Scouts in 1991 (after Dale's membership was revoked but before this litigation was filed) also supports its current view:

"We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout

be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." *Id.,* at 457.

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

"The Boy Scouts of America has always reflected the expectations that Scouting families have had for the organization. We do not believe that homosexuals provide a role model consistent with these expectations. Accordingly, we do not allow for the registration of avowed homosexuals as members or as leaders of the BSA." *Id.,* at 461.

The Boy Scouts publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation. For example, throughout a California case with similar facts filed in the early 1980's, the Boy Scouts consistently asserted the same position with respect to homosexuality that it asserts today. See *Curran v. Mount Diablo Council of Boy Scouts of America,* No. C-365529 (Cal.Super.Ct., July 25, 1991); 29 Cal.Rptr.2d 580 (1994); 17 Cal.4th 670, 72 Cal.Rptr.2d 410, 952 P.2d 218 (1998). We cannot doubt that the Boy Scouts sincerely holds this view.

We must then determine whether Dale's presence as an assistant scoutmaster would significantly burden the Boy Scouts' desire to not "promote homosexual conduct as a legitimate form of behavior." Reply Brief for Petitioners 5. As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression. See, *e.g., La Follette, supra,* at 123-124, 101 S.Ct. 1010 (considering whether a Wisconsin law burdened the National Party's associational rights and stating that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party"). That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have "become leaders in their community and are open and honest about their sexual orientation." App. 11. Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

Hurley is illustrative on this point. There we considered whether the application of Massachusetts' public accommodations law to require the organizers of a private St. Patrick's Day parade to include among the marchers an Irish-American gay, lesbian, and bisexual group, GLIB, violated the parade organizers' First Amendment rights. We noted that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner. We observed:

"[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals .... The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice

> of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." 515 U.S., at 574-575, 115 S.Ct. 2338.

Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not "promote homosexual conduct as a legitimate form of behavior." Reply Brief for Petitioners 5. As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs.

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

> "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." 160 N.J., at 612, 734 A.2d, at 1223.

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

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

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

Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. In this same vein, Dale makes much of the claim that the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant. The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

Having determined that the Boy Scouts is an expressive association and that the forced inclusion of Dale

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

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation-like inns and trains. See, *e.g., Hurley, supra,* at 571-572, 115 S.Ct. 2338 (explaining the history of Massachusetts' public accommodations law); *Romer v. Evans,* 517 U.S. 620, 627-629, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (describing the evolution of public accommodations laws). Over time, the public accommodations laws have expanded to cover more places.[FN2] New Jersey's statutory definition of " '[a] place of public accommodation' " is extremely broad. The term is said to "include, but not be limited to," a list of over 50 types of places. N.J. Stat. Ann. § 10:5-5(*l*) (West Supp.2000); see Appendix, *infra,* at 2458-2459. Many on the list are what one would expect to be places where the public is invited. For example, the statute includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public, like summer camps and roof gardens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location. As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

> FN2. Public accommodations laws have also broadened in scope to cover more groups; they have expanded beyond those groups that have been given heightened equal protection scrutiny under our cases. See *Romer,* 517 U.S., at 629, 116 S.Ct. 1620. Some municipal ordinances have even expanded to cover criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. See 1 Boston, Mass., Ordinance No. § 12-9.7 (1999) (ex-offender, prior psychiatric treatment, and military status); D.C.Code Ann. § 1-2519 (1999) (personal appearance, source of income, place of residence); Seattle, Wash., Municipal Code § 14.08.090 (1999) (political ideology).

We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. In *Roberts,* we said "[i]ndeed, the Jaycees has failed to demonstrate ... any serious burdens on the male members' freedom of expressive association." 468 U.S., at 626, 104 S.Ct. 3244. In *Duarte,* we said:

> "[I]mpediments to the exercise of one's right to choose one's associates can violate the right of association protected by the First Amendment. In this case, however, the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." 481 U.S., at 548, 107 S.Ct. 1940 (internal quotation marks and citations omitted).

We thereupon concluded in each of these cases that the organizations' First Amendment rights were not violated by the application of the States' public accommodations laws.

In *Hurley,* we said that public accommodations laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." 515 U.S., at 572, 115 S.Ct. 2338. But we went on to note that in that case "the Massachusetts [public accommodations] law has been applied in a peculiar way" because "any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own." *Id.,* at 572-573, 115 S.Ct. 2338. And in the associational freedom cases such as *Roberts, Duarte,* and *New York State Club Assn.,* after finding a compelling state interest, the Court went on to examine whether or not the application of the state law would impose any "serious burden" on the organization's rights of expressive association. So in these cases, the associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other.

Dale contends that we should apply the intermediate standard of review enunciated in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), to evaluate the competing interests. There the Court enunciated a four-part test for review of a governmental regulation that has only an incidental effect on protected speech-in that case the symbolic burning of a draft card. A law prohibiting the destruction of draft cards only incidentally affects the free speech rights of those who happen to use a violation of that law as a symbol of protest. But New Jersey's public accommodations law directly and immediately affects associational rights, in this case associational rights that enjoy First Amendment protection. Thus, *O'Brien* is inapplicable.

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

We are not, as we must not be, guided by our views of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of a tenet of an organization's expression does not justify the State's effort to compel the organization to accept members where such acceptance would derogate from the organization's expressive message. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley,* 515 U.S., at 579, 115 S.Ct. 2338.

The judgment of the New Jersey Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

N.J. Stat. Ann. § 10:5-4 (West Supp. 2000). "Obtaining employment, accommodations and privileges without discrimination; civil right

"All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."
N.J. Stat. Ann. § 10:5-5 (West Supp.2000). "Definitions

"As used in this act, unless a different meaning clearly appears from the context:

. . . . .

"*l.* 'A place of public accommodation' shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students."

Justice STEVENS dissenting.

New Jersey "prides itself on judging each individual by his or her merits" and on being "in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society." *Peper v. Princeton Univ. Bd. of Trustees,* 77 N.J. 55, 80, 389 A.2d 465, 478 (1978). Since 1945, it has had a law against discrimination. The law broadly protects the opportunity of all persons to obtain the advantages and privileges "of any place of public accommodation." N.J. Stat. Ann. § 10:5-4 (West Supp.2000). The New Jersey Supreme Court's construction of the statutory definition of a "place of public accommodation" has given its statute a more expansive coverage than most similar state statutes. And as amended in 1991, the law prohibits discrimination on the basis of nine different traits including an individual's "sexual orientation." The question in this case is whether that expansive construction trenches on the federal constitutional rights of the Boy Scouts of America (BSA).

Because every state law prohibiting discrimination is designed to replace prejudice with principle, Justice Brandeis' comment on the States' right to experiment with "things social" is directly applicable to this case.

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311, 52 S.Ct. 371, 76 L.Ed. 747 (1932) (dissenting opinion).

In its "exercise of this high power" today, the Court does not accord this "courageous State" the respect that is its due.

The majority holds that New Jersey's law violates BSA's right to associate and its right to free speech. But that law does not "impos[e] any serious burdens" on BSA's "collective effort on behalf of [its] shared goals," *Roberts v. United States Jaycees,* 468 U.S. 609, 622, 626-627, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), nor does it force BSA to communicate any message that it does not wish to endorse. New Jersey's law, therefore, abridges no constitutional right of BSA.

. . . .

III

BSA's claim finds no support in our cases. We have recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts,* 468 U.S., at 618, 104 S.Ct. 3244. And we have acknowledged that "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association ... may be implicated." *Ibid.* But "[t]he right to associate for expressive purposes is not ... absolute"; rather, "the nature and degree of constitutional

protection afforded freedom of association may vary depending on the extent to which ... the constitutionally protected liberty is at stake in a given case." *Id.,* at 623, 618, 104 S.Ct. 3244. Indeed, the right to associate does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 13, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988). For example, we have routinely and easily rejected assertions of this right by expressive organizations with discriminatory membership policies, such as private schools, law firms, and labor organizations. In fact, until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law. To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy.

. . . .

V

Even if BSA's right to associate argument fails, it nonetheless might have a First Amendment right to refrain from including debate and dialogue about homosexuality as part of its mission to instill values in Scouts. It can, for example, advise Scouts who are entering adulthood and have questions about sex to talk "with your parents, religious leaders, teachers, or Scoutmaster," and, in turn, it can direct Scoutmasters who are asked such questions "not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life" because "it is not construed to be Scouting's proper area." See *supra,* at 2462. Dale's right to advocate certain beliefs in a public forum or in a private debate does not include a right to advocate these ideas when he is working as a Scoutmaster. And BSA cannot be compelled to include a message about homosexuality among the values it actually chooses to teach its Scouts, if it would prefer to remain silent on that subject.

. . . . .

VI

Unfavorable opinions about homosexuals "have ancient roots." *Bowers v. Hardwick,* 478 U.S. 186, 192, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. *Id.,* at 196-197, 106 S.Ct. 2841 (Burger, C. J., concurring); *Loving v. Virginia,* 388 U.S. 1, 3, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). See also *Mathews v. Lucas,* 427 U.S. 495, 520, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976) (STEVENS, J., dissenting) ("Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white"). Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association's and the American Psychological Association's removal of "homosexuality" from their lists of mental disorders; a move toward greater understanding within some religious communities; Justice Blackmun's classic opinion in *Bowers;* Georgia's invalidation of the statute upheld in *Bowers;* and New Jersey's enactment of the provision at issue in this case. Indeed, the past month alone has witnessed some remarkable changes in attitudes about homosexuals.

That such prejudices are still prevalent and that they have caused serious and tangible harm to countless members of the class New Jersey seeks to protect are established matters of fact that neither the Boy Scouts nor the Court disputes. That harm can only be aggravated by the creation of a constitutional shield for a policy that is itself the product of a habitual way of thinking about strangers. As Justice Brandeis so wisely advised, "we must be ever on our guard, lest we erect our prejudices into legal principles."

If we would guide by the light of reason, we must let our minds be bold. I respectfully dissent.

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York

447 U.S. 557 (1980)

Mr. Justice POWELL delivered the opinion of the Court.

This case presents the question whether a regulation of the Public Service Commission of the State of New York violates the First and Fourteenth Amendments because it completely bans promotional advertising by an electrical utility.

I

In December 1973, the Commission, appellee here, ordered electric utilities in New York State to cease all advertising that "promot[es] the use of electricity." App. to Juris. Statement 31a. The order was based on the Commission's finding that "the interconnected utility system in New York State does not have sufficient fuel stocks or sources of supply to continue furnishing all customer demands for the 1973-1974 winter." *Id*., at 26a.

Three years later, when the fuel shortage had eased, the Commission requested comments from the public on its proposal to continue the ban on promotional advertising. Central Hudson Gas & Electric Corp., the appellant in this case, opposed the ban on First Amendment grounds. App. A10. After reviewing the public comments, the Commission extended the prohibition in a Policy Statement issued on February 25, 1977.

The Policy Statement divided advertising expenses "into two broad categories: promotional-advertising intended to stimulate the purchase of utility services-and institutional and informational, a broad category inclusive of all advertising not clearly intended to promote sales." App. to Juris. Statement 35a. The Commission declared all promotional advertising contrary to the national policy of conserving energy. It acknowledged that the ban is not a perfect vehicle for conserving energy. For example, the Commission's order prohibits promotional advertising to develop consumption during periods when demand for electricity is low. By limiting growth in "off-peak" consumption, the ban limits the "beneficial side effects" of such growth in terms of more efficient use of existing power-plants. *Id.*, at 37a. And since oil dealers are not under the Commission's jurisdiction and thus remain free to advertise, it was recognized that the ban can achieve only "piecemeal conservationism." Still, the Commission adopted the restriction because it was deemed likely to "result in some dampening of unnecessary growth" in energy consumption. *Ibid.*

The Commission's order explicitly permitted "informational" advertising designed to encourage "*shifts* of consumption" from peak demand times to periods of low electricity demand. *Ibid*. (emphasis in original). Informational advertising would not seek to increase aggregate consumption, but would invite a leveling of demand throughout any given 24-hour period. The agency offered to review "specific proposals by the companies for specifically described [advertising] programs that meet these criteria." *Id*., at 38a.

. . . .

Appellant challenged the order in state court, arguing that the Commission had restrained commercial speech in violation of the First and Fourteenth Amendments.[FN3] The Commission's order was upheld by the trial court and at the intermediate appellate level. The New York Court of Appeals affirmed. . . . . We noted probable jurisdiction, 444 U.S. 962, 100 S.Ct. 446, 62 L.Ed.2d 374 (1979), and now reverse.

II

The Commission's order restricts only commercial speech, that is, expression related solely to the economic interests of the speaker and its audience. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363-364, 97 S.Ct. 2691, 2698-2699, 53 L.Ed.2d 810 (1977); *Friedman v. Rogers*, 440 U.S. 1, 11, 99 S.Ct. 887, 895, 59 L.Ed.2d 100 (1979). The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. *Virginia Pharmacy Board*, 425 U.S., at 761-762, 96 S.Ct., at 1825. Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information. In applying the First Amendment to this area, we have rejected the "highly paternalistic" view that government has complete power to suppress or regulate commercial speech. "[P]eople will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them. . . ." *Id.*, at 770, 96 S.Ct., at 1829, see *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 92, 97 S.Ct. 1614, 1618, 50 L.Ed.2d 155 (1977). Even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that some accurate information is better than no information at all. *Bates v. State Bar of Arizona, supra*, at 374, 97 S.Ct., at 2704.

Nevertheless, our decisions have recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978); see *Bates v. State Bar of Arizona, supra*, 433 U.S., at 381, 97 S.Ct., at 2707; see also Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va.L.Rev. 1, 38-39 (1979). The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. 436 U.S., at 456, 457, 98 S.Ct., at 1918, 1919. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.

The First Amendment's concern for commercial speech is based on the informational function of advertising. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 1419, 55 L.Ed.2d 707 (1978). Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, *Friedman v. Rogers, supra*, at 13, 15-16, 99 S.Ct., at 896, 897; *Ohralik v. Ohio State Bar Assn., supra*, at 464-465, 98 S.Ct., at 1923-1925, or commercial speech related to illegal activity, *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973).[FN6]

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Under the first criterion, the Court has declined to uphold regulations that only indirectly advance the state interest involved. In both *Bates* and *Virginia Pharmacy Board*, the Court concluded that an advertising ban could not be imposed to protect the ethical or performance standards of a profession. The Court noted in *Virginia Pharmacy Board* that "[t]he advertising ban does not directly affect professional standards one way or the other." 425 U.S., at 769, 96 S.Ct., at 1829. In *Bates*, the Court overturned an advertising prohibition that was designed to protect the "quality" of a lawyer's work. "Restraints on advertising . . . are an ineffective way of deterring shoddy work." 433 U.S., at 378, 97 S.Ct., at 2706.

The second criterion recognizes that the First Amendment mandates that speech restrictions be "narrowly drawn." *In re Primus*, 436 U.S. 412, 438, 98 S.Ct. 1893, 1908, 56 L.Ed.2d 417 (1978). The regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted state interest, see *First National Bank of Boston v. Bellotti, supra*, at 794-795, 98 S.Ct., at 1425-1426, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well. For example, in *Bates* the Court explicitly did not "foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required" in promotional materials. 433 U.S., at 384, 97 S.Ct., at 2709. See *Virginia Pharmacy Board, supra*, at 773, 96 S.Ct., at 1831. And in *Carey v. Population Services International*, 431 U.S. 678, 701-702, 97 S.Ct. 2010, 2025, 52 L.Ed.2d 675 (1977), we held that the State's "arguments ... do not justify the total suppression of advertising concerning contraceptives." This holding left open the possibility that the State could implement more carefully drawn restrictions. See *id.*, at 712, 97 S.Ct., at 2030 (POWELL, J., concurring in part and in judgment); *id.*, at 716-717, 97 S.Ct., at 2032 (STEVENS, J., concurring in part and in judgment).

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

III

We now apply this four-step analysis for commercial speech to the Commission's arguments in support of its ban on promotional advertising.

A

The Commission does not claim that the expression at issue either is inaccurate or relates to unlawful activity. Yet the New York Court of Appeals questioned whether Central Hudson's advertising is protected commercial speech. Because appellant holds a monopoly over the sale of electricity in its service area, the state court suggested that the Commission's order restricts no commercial speech of any worth. The court stated that advertising in a "noncompetitive market" could not improve the decisionmaking of consumers. 47 N.Y.2d, at 110, 417 N.Y.S.2d, at 39, 390 N.E.2d, at 757. The court saw no constitutional problem with barring commercial speech that it viewed as conveying little useful information.

This reasoning falls short of establishing that appellant's advertising is not commercial speech protected by the First Amendment. Monopoly over the supply of a product provides no protection from competition with substitutes for that product. Electric utilities compete with suppliers of fuel oil and natural gas in several markets, such as those for home heating and industrial power. This Court noted the existence of interfuel competition 45 years ago, see *West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63, 72, 55 S.Ct. 316, 321, 79 L.Ed. 761 (1935). Each energy source continues to offer peculiar advantages and disadvantages that may influence consumer choice. For consumers in those competitive markets, advertising by utilities is just as valuable as advertising by unregulated firms.

. . . .

B

The Commission offers two state interests as justifications for the ban on promotional advertising. The first concerns energy conservation. Any increase in demand for electricity-during peak or off-peak periods-means greater consumption of energy. The Commission argues, and the New York court agreed, that the State's interest in conserving energy is sufficient to support suppression of advertising designed to increase consumption of electricity. In view of our country's dependence on energy resources beyond our control, no one can doubt the importance of energy conservation. Plainly, therefore, the state interest asserted is substantial.

The Commission also argues that promotional advertising will aggravate inequities caused by the failure to base the utilities' rates on marginal cost. The utilities argued to the Commission that if they could promote the use of electricity in periods of low demand, they would improve their utilization of generating capacity. The Commission responded that promotion of off-peak consumption also would increase consumption during peak periods. If peak demand were to rise, the absence of marginal cost rates would mean that the rates charged for the additional power would not reflect the true costs of expanding production. Instead, the extra costs would be borne by all consumers through higher overall rates. Without promotional advertising, the Commission stated, this inequitable turn of events would be less likely to occur. The choice among rate structures involves difficult and important questions of economic supply and distributional fairness. The State's concern that rates be fair and efficient represents a clear and substantial governmental interest.

C

Next, we focus on the relationship between the State's interests and the advertising ban. Under this criterion, the Commission's laudable concern over the equity and efficiency of appellant's rates does not

provide a constitutionally adequate reason for restricting protected speech. The link between the advertising prohibition and appellant's rate structure is, at most, tenuous. The impact of promotional advertising on the equity of appellant's rates is highly speculative. Advertising to increase off-peak usage would have to increase peak usage, while other factors that directly affect the fairness and efficiency of appellant's rates remained constant. Such conditional and remote eventualities simply cannot justify silencing appellant's promotional advertising.

In contrast, the State's interest in energy conservation is directly advanced by the Commission order at issue here. There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

D

We come finally to the critical inquiry in this case: whether the Commission's complete suppression of speech ordinarily protected by the First Amendment is no more extensive than necessary to further the State's interest in energy conservation. The Commission's order reaches all promotional advertising, regardless of the impact of the touted service on overall energy use. But the energy conservation rationale, as important as it is, cannot justify suppressing information about electric devices or services that would cause no net increase in total energy use. In addition, no showing has been made that a more limited restriction on the content of promotional advertising would not serve adequately the State's interests.

Appellant insists that but for the ban, it would advertise products and services that use energy efficiently. These include the "heat pump," which both parties acknowledge to be a major improvement in electric heating, and the use of electric heat as a "backup" to solar and other heat sources. Although the Commission has questioned the efficiency of electric heating before this Court, neither the Commission's Policy Statement nor its order denying rehearing made findings on this issue. In the absence of authoritative findings to the contrary, we must credit as within the realm of possibility the claim that electric heat can be an efficient alternative in some circumstances.

The Commission's order prevents appellant from promoting electric services that would reduce energy use by diverting demand from less efficient sources, or that would consume roughly the same amount of energy as do alternative sources. In neither situation would the utility's advertising endanger conservation or mislead the public. To the extent that the Commission's order suppresses speech that in no way impairs the State's interest in energy conservation, the Commission's order violates the First and Fourteenth Amendments and must be invalidated. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

The Commission also has not demonstrated that its interest in conservation cannot be protected adequately by more limited regulation of appellant's commercial expression. To further its policy of conservation, the Commission could attempt to restrict the format and content of Central Hudson's advertising. It might, for example, require that the advertisements include information about the relative efficiency and expense of the offered service, both under current conditions and for the foreseeable future. Cf. *Banzhaf v. FCC*, 132 U.S.App.D.C. 14, 405 F.2d 1082 (1968), cert. denied *sub nom. Tobacco Institute, Inc. v. FCC*, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed.2d 93 (1969). In the absence of a showing that

more limited speech regulation would be ineffective, we cannot approve the complete suppression of Central Hudson's advertising.

IV

Our decision today in no way disparages the national interest in energy conservation. We accept without reservation the argument that conservation, as well as the development of alternative energy sources, is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the authority-and indeed the duty-to take appropriate action to further this goal. When, however, such action involves the suppression of speech, the First and Fourteenth Amendments require that the restriction be no more extensive than is necessary to serve the state interest. In this case, the record before us fails to show that the total ban on promotional advertising meets this requirement.

Accordingly, the judgment of the New York Court of Appeals is

Reversed.

Mr. Justice REHNQUIST, dissenting.

. . . .
The Court's decision today fails to give due deference to this subordinate position of commercial speech. The Court in so doing returns to the bygone era of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court's own notions of the most appropriate means for the State to implement its considered policies.

I had thought by now it had become well established that a State has broad discretion in imposing economic regulations. As this Court stated in *Nebbia v. New York*, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940 (1934):

"[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects. . . .

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio*. . . . [I]t does not lie with the courts to determine that the rule is unwise."

And Mr. Justice Black, writing for the Court, observed more recently in *Ferguson v. Skrupa*, 372 U.S.

726, 730, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93 (1963):

"The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely-has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

The State of New York has determined here that economic realities require the grant of monopoly status to public utilities in order to distribute efficiently the services they provide, and in granting utilities such status it has made them subject to an extensive regulatory scheme. When the State adopted this scheme and when its Public Service Commission issued its initial ban on promotional advertising in 1973, commercial speech had not been held to fall within the scope of the First Amendment at all. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), however, subsequently accorded commercial speech a limited measure of First Amendment protection.

The Court today holds not only that commercial speech is entitled to First Amendment protection, but also that when it is protected a State may not regulate it unless its reason for doing so amounts to a "substantial" governmental interest, its regulation "directly advances" that interest, and its manner of regulation is "not more extensive than necessary" to serve the interest. *Ante,* at 2351. The test adopted by the Court thus elevates the protection accorded commercial speech that falls within the scope of the First Amendment to a level that is virtually indistinguishable from that of noncommercial speech. I think the Court in so doing has effectively accomplished the "devitalization" of the First Amendment that it counseled against in *Ohralik*. I think it has also, by labeling economic regulation of business conduct as a restraint on "free speech," gone far to resurrect the discredited doctrine of cases such as *Lochner* and *Tyson & Brother v. Banton*, 273 U.S. 418, 47 S.Ct. 426, 71 L.Ed. 718 (1927). New York's order here is in my view more akin to an economic regulation to which virtually complete deference should be accorded by this Court.

I doubt there would be any question as to the constitutionality of New York's conservation effort if the Public Service Commission had chosen to raise the price of electricity, see, *e. g., Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940); *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109 (1936), to condition its sale on specified terms, see, *e. g., Nebbia v. New York, supra*, at 527-528, 54 S.Ct., at 511-512, or to restrict its production, see, *e. g., Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942). In terms of constitutional values, I think that such controls are virtually indistinguishable from the State's ban on promotional advertising.

An ostensible justification for striking down New York's ban on promotional advertising is that this Court has previously "rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech. '[P]eople will perceive their own best interests if only they are well enough informed and . . . the best means to that end is to open the channels of communication, rather than to close them. . . .' " *Ante*, at 2349. Whatever the merits of this view, I think the Court has carried its logic too far here.

The view apparently derives from the Court's frequent reference to the "marketplace of ideas," which was

deemed analogous to the commercial market in which a *laissez-faire* policy would lead to optimum economic decision making under the guidance of the "invisible hand." See, *e. g.* Adam Smith, Wealth of Nations (1776). This notion was expressed by Mr. Justice Holmes in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919), wherein he stated that "the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ." See also, *e. g., Consolidated Edison v. Public Service Comm'n*, 447 U.S., at 534, 100 S.Ct., at 2331; J. Mill, On Liberty (1858); J. Milton, Areopagitica, A Speech for the Liberty of Unlicensed Printing (1644).

While it is true that an important objective of the First Amendment is to foster the free flow of information, identification of speech that falls within its protection is not aided by the metaphorical reference to a "marketplace of ideas." There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market. See, *e. g.,* Baker, Scope of the First Amendment, Freedom of Speech, 25 UCLA L.Rev. 964, 967-981 (1978). Indeed, many types of speech have been held to fall outside the scope of the First Amendment, thereby subject to governmental regulation, despite this Court's references to a marketplace of ideas. See, *e. g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) (fighting words); *Beauharnais v. Illinois*, 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed. 919 (1952) (group libel); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (obscenity). It also has been held that the government has a greater interest in regulating some types of protected speech than others. See, *e. g., FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978) (indecent speech); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, supra* (commercial speech). And as this Court stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344, n. 9, 94 S.Ct. 2997, 3009, n. 9, 41 L.Ed.2d 789 (1974): "Of course, an opportunity for rebuttal seldom suffices to undo [the] harm of a defamatory falsehood. Indeed the law of defamation is rooted in our experience that the truth rarely catches up with a lie." The Court similarly has recognized that false and misleading commercial speech is not entitled to any First Amendment protection. See, *e. g., ante*, at 2351.

The above examples illustrate that in a number of instances government may constitutionally decide that societal interests justify the imposition of restrictions on the free flow of information. When the question is whether a given commercial message is protected, I do not think this Court's determination that the information will "assist" consumers justifies judicial invalidation of a reasonably drafted state restriction on such speech when the restriction is designed to promote a concededly substantial state interest. I consequently disagree with the Court's conclusion that the societal interest in the dissemination of commercial information is sufficient to justify a restriction on the State's authority to regulate promotional advertising by utilities; indeed, in the case of a regulated monopoly, it is difficult for me to distinguish "society" from the state legislature and the Public Service Commission. Nor do I think there is any basis for concluding that individual citizens of the State will recognize the need for and act to promote energy conservation to the extent the government deems appropriate, if only the channels of communication are left open. Thus, even if I were to agree that commercial speech is entitled to some First Amendment protection, I would hold here that the State's decision to ban promotional advertising, in light of the substantial state interest at stake, is a constitutionally permissible exercise of its power to adopt regulations designed to promote the interests of its citizens.
. . . .

I remain of the view that the Court unlocked a Pandora's Box when it "elevated" commercial speech to the level of traditional political speech by according it First Amendment protection in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The line between "commercial speech," and the kind of speech that those who drafted the First Amendment had in mind, may not be a technically or intellectually easy one to draw, but it surely produced far fewer problems than has the development of judicial doctrine in this area since *Virginia Board*. For in the world of political advocacy and *its* marketplace of ideas, there is no such thing as a "fraudulent" idea: there may be useless proposals, totally unworkable schemes, as well as very sound proposals that will receive the imprimatur of the "marketplace of ideas" through our majoritarian system of election and representative government. The free flow of information is important in this context not because it will lead to the discovery of any objective "truth," but because it is essential to our system of self-government.

The notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar, where if applied logically the remedy of one who was defrauded would be merely a statement, available upon request, reciting the Latin maxim "*caveat emptor*." But since "fraudulent speech" in this area is to be remediable under *Virginia Pharmacy Board, supra*, the remedy of one defrauded is a lawsuit or an agency proceeding based on common-law notions of fraud that are separated by a world of difference from the realm of politics and government. What time, legal decisions, and common sense have so widely severed, I declined to join in *Virginia Pharmacy Board*, and regret now to see the Court reaping the seeds that it there sowed. For in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.

Pleasant Grove City, Utah v. Summum

2009 WL 454299 (United States Supreme Court Feb. 25, 2009)

Justice ALITO delivered the opinion of the Court.

This case presents the question whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park in which other donated monuments were previously erected. The Court of Appeals held that the municipality was required to accept the monument because a public park is a traditional public forum. We conclude, however, that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.

I

A

Pioneer Park (or Park) is a 2.5 acre public park located in the Historic District of Pleasant Grove City (or City) in Utah. The Park currently contains 15 permanent displays, at least 11 of which were donated by private groups or individuals. These include an historic granary, a wishing well, the City's first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.

Respondent Summum is a religious organization founded in 1975 and headquartered in Salt Lake City, Utah. On two separate occasions in 2003, Summum's president wrote a letter to the City's mayor requesting permission to erect a "stone monument," which would contain "the Seven Aphorisms of SUMMUM" [FN1] and be similar in size and nature to the Ten Commandments monument. App. 57, 59. The City denied the requests and explained that its practice was to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community."*Id.,* at 61.The following year, the City passed a resolution putting this policy into writing. The resolution also mentioned other criteria, such as safety and esthetics.

> FN1. Respondent's brief describes the church and the Seven Aphorisms as follows:
>
> > "The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.'*See* The Teachings of Summum are the Teachings of Gnostic Christianity, http://www.summum.us/philosophy/ gnosticism.shtml (visited Aug. 15, 2008).

> "Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai .... Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. *See* The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/ tencommandments.shtml (visited Aug. 15, 2008)." Brief for Respondent 1-2.

In May 2005, respondent's president again wrote to the mayor asking to erect a monument, but the letter did not describe the monument, its historical significance, or Summum's connection to the community. The city council rejected this request.

B

In 2005, respondent filed this action against the City and various local officials (petitioners), asserting, among other claims, that petitioners had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument. Respondent sought a preliminary injunction directing the City to permit Summum to erect its monument in Pioneer Park. After the District Court denied Summum's preliminary injunction request, No. 2:05CV00638, 2006 WL 3421838 (D.Utah, Nov.22, 2006), respondent appealed, pressing solely its free speech claim.

A panel of the Tenth Circuit reversed. 483 F.3d 1044 (2007). , , ,

We granted certiorari, 552 U.S. ----, 128 S.Ct. 1737, 170 L.Ed.2d 537 (2008), and now reverse.

II

No prior decision of this Court has addressed the application of the Free Speech Clause to a government entity's acceptance of privately donated, permanent monuments for installation in a public park, and the parties disagree sharply about the line of precedents that governs this situation. Petitioners contend that the pertinent cases are those concerning government speech. Respondent, on the other hand, agrees with the Court of Appeals panel that the applicable cases are those that analyze private speech in a public forum. The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?

A

If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. See *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 553, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005) ("[T]he Government's own speech ... is exempt from First Amendment

scrutiny"); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 139, n. 7, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression"). A government entity has the right to "speak for itself." *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 229, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000)."[I]t is entitled to say what it wishes," *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and to select the views that it wants to express. See *Rust v. Sullivan,* 500 U.S. 173, 194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *National Endowment for Arts v. Finley,* 524 U.S. 569, 598, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998) (SCALIA, J., concurring in judgment) ("It is the very business of government to favor and disfavor points of view").

Indeed, it is not easy to imagine how government could function if it lacked this freedom. "If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed." *Keller v. State Bar of Cal.,* 496 U.S. 1, 12-13, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). See also *Johanns,* 544 U.S., at 574, 125 S.Ct. 2055 (SOUTER, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question" (footnote omitted)).

A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. See *id.,* at 562, 125 S.Ct. 2055 (opinion of the Court) (where the government controls the message, "it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources"); *Rosenberger, supra,* at 833, 115 S.Ct. 2510 (a government entity may "regulate the content of what is or is not expressed ... when it enlists private entities to convey its own message").

This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice. And of course, a government entity is ultimately "accountable to the electorate and the political process for its advocacy." *Southworth,* 529 U.S., at 235, 120 S.Ct. 1346."If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Ibid.*

B

While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property. This Court long ago recognized that members of the public retain strong free speech rights when they venture into public streets and parks, "which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (quoting *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.)). In order to preserve this freedom, government entities are strictly limited in their ability to regulate private speech in such "traditional public fora." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). Reasonable time, place, and manner restrictions are allowed, see *Perry Ed. Assn., supra,* at 45, 103 S.Ct.

948, but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, see *Cornelius, supra,* at 800, 105 S.Ct. 3439, and restrictions based on viewpoint are prohibited, see *Carey v. Brown,* 447 U.S. 455, 463, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

With the concept of the traditional public forum as a starting point, this Court has recognized that members of the public have free speech rights on other types of government property and in certain other government programs that share essential attributes of a traditional public forum. We have held that a government entity may create "a designated public forum" if government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose. See *Cornelius,* 473 U.S., at 802, 105 S.Ct. 3439.Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum. *Id.,* at 800, 105 S.Ct. 3439.

The Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Perry Ed. Assn., supra,* at 46, n. 7, 103 S.Ct. 948.In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral. See *Good News Club v. Milford Central School,* 533 U.S. 98, 106-107, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001).

III

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech.

Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. Neither the Court of Appeals nor respondent disputes the obvious proposition that a monument that is commissioned and financed by a government body for placement on public land constitutes government speech.

Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land. It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely-and reasonably-interpret them as conveying some message on the property owner's behalf. In this context, there is little chance that observers will fail to appreciate the identity of the speaker. This is true whether the monument is located on private property or on public property, such as national, state, or city park land.

We think it is fair to say that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity. A great many of the monuments that adorn the Nation's public parks were financed with private funds or donated by private parties. Sites managed by the National Park Service contain thousands of privately designed or funded commemorative objects, including the Statue of Liberty, the Marine Corps War Memorial (the Iwo Jima monument), and the Vietnam Veterans Memorial. States and cities likewise have received thousands of donated monuments. See, *e.g.,* App. to Brief for International Municipal Lawyers Association as *Amicus Curiae* 15a-29a (hereinafter IMLA Brief) (listing examples); Brief for American Legion et al. as *Amici Curiae* 7, and n. 2 (same). By accepting monuments that are privately funded or donated, government entities save tax dollars and are able to acquire monuments that they could not have afforded to fund on their own.

But while government entities regularly accept privately funded or donated monuments, they have exercised selectivity. An example discussed by the city of New York as *amicus curiae* is illustrative. In the wake of the controversy generated in 1876 when the city turned down a donated monument to honor Daniel Webster, the city adopted rules governing the acceptance of artwork for permanent placement in city parks, requiring, among other things, that "any proposed gift of art had to be viewed either in its finished condition or as a model before acceptance."Brief for City of New York as *Amicus Curiae* 4-5 (hereinafter NYC Brief). Across the country, "municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals."IMLA Brief 21.

Public parks are often closely identified in the public mind with the government unit that owns the land. City parks-ranging from those in small towns, like Pioneer Park in Pleasant Grove City, to those in major metropolises, like Central Park in New York City-commonly play an important role in defining the identity that a city projects to its own residents and to the outside world. Accordingly, cities and other jurisdictions take some care in accepting donated monuments. Government decision makers select the monuments that portray what they view as appropriate for the place in question, taking into account such content-based factors as esthetics, history, and local culture. The monuments that are accepted, therefore, are meant to convey and have the effect of conveying a government message, and they thus constitute government speech.

IV

A

In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park. Respondent does not claim that the City ever opened up the Park for the placement of whatever permanent monuments might be offered by private donors. Rather, the City has "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection. *Johanns,* 544 U.S., at 560-561, 125 S.Ct. 2055.The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park; it has taken ownership of most of the monuments in the Park, including the Ten Commandments monument that is the focus of respondent's concern; and the City has now expressly set

forth the criteria it will use in making future selections.

B

Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint. Respondent's suggested solution is to require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing "the message" that the monument conveys. See Brief for Respondent 33-34, 57.

We see no reason for imposing a requirement of this sort. The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required to escape Free Speech Clause restrictions. Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.

. . . .

Contrary to respondent's apparent belief, it frequently is not possible to identify a single "message" that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. Indeed, when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance. By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.

. . .

C

Respondent and the Court of Appeals analogize the installation of permanent monuments in a public park to the delivery of speeches and the holding of marches and demonstrations, and they thus invoke the rule that a public park is a traditional public forum for these activities. But "public forum principles ... are out of place in the context of this case." *United States v. American Library Assn., Inc.,* 539 U.S. 194, 205, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003). The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program. For example, a park can accommodate many speakers and, over time, many parades and demonstrations. The Combined Federal Campaign permits hundreds of groups to solicit donations from federal employees. See *Cornelius,* 473 U.S., at 804-805, 105 S.Ct. 3439.A public university's student activity fund can provide money for many campus activities. See *Rosenberger,* 515 U.S., at 825, 115 S.Ct. 2510.A public university's buildings may offer meeting space for hundreds of student groups. See *Widmar v. Vincent,* 454 U.S. 263, 274-275, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). A school system's internal mail facilities can support the transmission of many messages to and from teachers and school administrators. See *Perry*

Ed. Assn., 460 U.S., at 39, 46-47, 103 S.Ct. 948.See also *Arkansas Ed. Television Comm'n v. Forbes,* 523 U.S. 666, 680-681, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998) (noting that allowing any candidate to participate in a televised political debate would be burdensome on "logistical grounds" and "would result in less speech, not more").

By contrast, public parks can accommodate only a limited number of permanent monuments. Public parks have been used, " 'time out of mind, ... for purposes of assembly, communicating thoughts between citizens, and discussing public questions,' " *Perry Ed. Assn., supra,* at 45, 103 S.Ct. 948 (quoting *Hague,* 307 U.S., at 515, 59 S.Ct. 954), but "one would be hard pressed to find a 'long tradition' of allowing people to permanently occupy public space with any manner of monuments." 499 F.3d, at 1173 (Lucero, J., dissenting from denial of rehearing en banc).

Speakers, no matter how long-winded, eventually come to the end of their remarks; persons distributing leaflets and carrying signs at some point tire and go home; monuments, however, endure. They monopolize the use of the land on which they stand and interfere permanently with other uses of public space. A public park, over the years, can provide a soapbox for a very large number of orators-often, for all who want to speak-but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Respondent contends that this issue "can be dealt with through content-neutral time, place and manner restrictions, including the option of a ban on all unattended displays."Brief for Respondent 14. On this view, when France presented the Statue of Liberty to the United States in 1884, this country had the option of either (a) declining France's offer or (b) accepting the gift, but providing a comparable location in the harbor of New York for other statues of a similar size and nature (*e.g.,* a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia).

While respondent and some of its *amici* deride the fears expressed about the consequences of the Court of Appeals holding in this case, those concerns are well founded. If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. See 499 F.3d, at 1175 (McConnell, J., dissenting from denial of rehearing en banc). Every jurisdiction that has accepted a donated war memorial may be asked to provide equal treatment for a donated monument questioning the cause for which the veterans fought. New York City, having accepted a donated statue of one heroic dog (Balto, the sled dog who brought medicine to Nome, Alaska, during a diphtheria epidemic) may be pressed to accept monuments for other dogs who are claimed to be equally worthy of commemoration. The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.

Respondent compares the present case to *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995), but that case involved a very different situation-a request by a private group, the Ku Klux Klan, to erect a cross for a period of 16 days on public property that had been opened up for similar temporary displays, including a Christmas tree and a menorah. See *id.*, at 758, 115 S.Ct. 2440.Although some public parks can accommodate and may be made generally available for

temporary private displays, the same is rarely true for permanent monuments.

To be sure, there are limited circumstances in which the forum doctrine might properly be applied to a permanent monument-for example, if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message. But as a general matter, forum analysis simply does not apply to the installation of permanent monuments on public property.

V

In sum, we hold that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause, and the Court of Appeals erred in holding otherwise. We therefore reverse.

It is so ordered.

Justice STEVENS, with whom Justice GINSBURG joins, concurring.

This case involves a property owner's rejection of an offer to place a permanent display on its land. While I join the Court's persuasive opinion, I think the reasons justifying the city's refusal would have been equally valid if its acceptance of the monument, instead of being characterized as "government speech," had merely been deemed an implicit endorsement of the donor's message. See *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 801-802, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (STEVENS, J., dissenting).

To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit. See, *e.g., Garcetti v. Ceballos,* 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *Johanns v. Livestock Marketing Assn.,* 544 U.S. 550, 125 S.Ct. 2055, 161 L.Ed.2d 896 (2005); *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). The Court's opinion in this case signals no expansion of that doctrine. And by joining the Court's opinion, I do not mean to indicate agreement with our earlier decisions. Unlike other decisions relying on the government speech doctrine, our decision in this case excuses no retaliation for, or coercion of, private speech. Cf. *Garcetti,* 547 U.S., at 438, 126 S.Ct. 1951 (SOUTER, J., dissenting); *Rust,* 500 U.S., at 212, 111 S.Ct. 1759 (Blackmun, J., dissenting). Nor is it likely, given the near certainty that observers will associate permanent displays with the governmental property owner, that the government will be able to avoid political accountability for the views that it endorses or expresses through this means. Cf. *Johanns,* 544 U.S., at 571-572, 125 S.Ct. 2055 (SOUTER, J., dissenting). Finally, recognizing permanent displays on public property as government speech will not give the government free license to communicate offensive or partisan messages. For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses. Together with the checks imposed by our democratic processes, these constitutional safeguards ensure that the effect of today's decision will be limited.

Justice BREYER, concurring.

I agree with the Court and join its opinion. I do so, however, on the understanding that the "government speech" doctrine is a rule of thumb, not a rigid category. Were the City to discriminate in the selection of permanent monuments on grounds unrelated to the display's theme, say solely on political grounds, its action might well violate the First Amendment.

In my view, courts must apply categories such as "government speech," "public forums," "limited public forums," and "nonpublic forums" with an eye towards their purposes-lest we turn "free speech" doctrine into a jurisprudence of labels. Cf. *United States v. Kokinda,* 497 U.S. 720, 740-743, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) (Brennan, J., dissenting). Consequently, we must sometimes look beyond an initial categorization. And, in doing so, it helps to ask whether a government action burdens speech disproportionately in light of the action's tendency to further a legitimate government objective. See, e.g., *Ysursa v. Pocatello Ed. Assn.,* --- U.S. ----, at 1-4, --- S.Ct. ----, ---L.Ed.2d ----, 2009 WL 436709 (BREYER, J., concurring in part and dissenting in part); *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 404, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring).

Were we to do so here, we would find-for reasons that the Court sets forth-that the City's action, while preventing Summum from erecting its monument, does not disproportionately restrict Summum's freedom of expression. The City has not closed off its parks to speech; no one claims that the City prevents Summum's members from engaging in speech in a form more transient than a permanent monument. Rather, the City has simply reserved some space in the park for projects designed to further other than free-speech goals. And that is perfectly proper. After all, parks do not serve speech-related interests alone. To the contrary, cities use park space to further a variety of recreational, historical, educational, aesthetic, and other civic interests. To reserve to the City the power to pick and choose among proposed monuments according to criteria reasonably related to one or more of these legitimate ends restricts Summum's expression, but, given the impracticality of alternatives and viewed in light of the City's legitimate needs, the restriction is not disproportionate. Analyzed either way, as "government speech" or as a proportionate restriction on Summum's expression, the City's action here is lawful.

Shelton v. Tucker

364 U.S. 479 (1960)

Mr. Justice STEWART delivered the opinion of the Court.

An Arkansas statute compels every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years. At issue in these two cases is the validity of that statute under the Fourteenth Amendment to the Constitution. No. 14 is an appeal from the judgment of a three-judge Federal District Court upholding the statute's validity, 174 F.Supp. 351. No. 83 is here on writ of certiorari to the Supreme Court of Arkansas, which also held the statute constitutionally valid. 231 Ark. 641, 331 S.W.2d 701.

The statute in question is Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958. The provisions of the Act are summarized in the opinion of the District Court as follows (174 F.Supp. 353):

'Act 10 provides in substance that no person shall be employed or elected to employment as a superintendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appropriate hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is making regular contributions, or to which within the past five years he has paid such dues or made such contributions. The Act further provides, among other things, that any contract entered into with any person who has not filed the prescribed affidavit shall be void; that no public moneys shall be paid to such person as compensation for his services; and that any such funds so paid may be recovered back either from the person receiving such funds or from the board of trustees or other governing body making the payment. The filing of a false affidavit is denounced as perjury, punishable by a fine of not less than five hundred nor more than one thousand dollars, and, in addition, the person filing the false affidavit is to lose his teaching license.' 174 F.Supp. 353-354.

These provisions must be considered against the existing system of teacher employment required by Arkansas law. Teachers there are hired on a year-to-year basis. They are not covered by a civil service system, and they have no job security beyond the end of each school year. The closest approach to tenure is a statutory provision for the automatic renewal of a teacher's contract if he is not notified within ten days after the end of a school year that the contract has not been renewed. Ark.1947 Stat.Ann. s 80-1304(b) (1960); Wabbaseka School District No. 7 of Jefferson County v. Johnson, 225 Ark. 982, 286 S.W.2d 841.

The plaintiffs in the Federal District Court (appellants here) were B. T. Shelton, a teacher employed in the Little Rock Public School System, suing for himself and others similarly situated, together with the Arkansas Teachers Association and its Executive Secretary, suing for the benefit of members of the Association. Shelton had been employed in the Little Rock Special School District for twenty-five years. In the spring of 1959 he was notified that, before he could be employed for the 1959-1960 school year, he must file the affidavit required by Act 10, listing all his organizational connections over the previous five years. He declined to file the affidavit, and his contract for the ensuing school year was not renewed. At the trial the evidence showed that he was not a member of the Communist Party or of any organization

advocating the overthrow of the Government by force, and that he was a member of the National Association for the Advancement of Colored People. The court upheld Act 10, finding the information it required was 'relevant,' and relying on several decisions of this Court, particularly Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317; Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517; Beilan v. Board of Higher Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414; and Lerner v. Casey, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423.

The plaintiffs in the state court proceedings (petitioners here) were Max Carr, an associate professor at the University of Arkansas, and Ernest T. Gephardt, a teacher at Central High School in Little Rock, each suing for himself and others similarly situated. Each refused to execute and file the affidavit required by Act 10. Carr executed an affirmation in which he listed his membership in professional organizations, denied ever having been a member of any subversive organization, and offered to answer any questions which the University authorities might constitutionally ask touching upon his qualifications as a teacher. Gephardt filed an affidavit stating that he had never belonged to a subversive organization, disclosing his membership in the Arkansas Education Association and the American Legion, and also offering to answer any questions which the school authorities might constitutionally ask touching upon his qualifications as a teacher. Both were advised that their failure to comply with the requirements of Act 10 would make impossible their re-employment as teachers for the following school year. The Supreme Court of Arkansas upheld the constitutionality of Act 10, on its face and as applied to the petitioners. 231 Ark. 641, 331 S.W.2d 701.

I.

It is urged here, as it was unsuccessfully urged throughout the proceedings in both the federal and state courts, that Act 10 deprives teachers in Arkansas of their rights to personal, associational, and academic liberty, protected by the Due Process Clause of the Fourteenth Amendment from invasion by state action. In considering this contention, we deal with two basic postulates.

First. There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize.'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.' Adler v. Board of Education, 342 U.S. 485, 493, 72 S.Ct. 380, 385, 96 L.Ed. 517. There is 'no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors.' Beilan v. Board of Education, 357 U.S. 399, 406, 78 S.Ct. 1317, 1322, 2 L.Ed.2d 1414.

This controversy is thus not of a pattern with such cases as N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, and Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480. In those cases the Court held that there was no substantially relevant correlation between the governmental interest asserted and the State's effort to compel disclosure of the membership lists involved. Here, by contrast, there can be no question of the relevance of a State's inquiry into the fitness and competence of its teachers.

Second. It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278; Bates v. Little Rock, supra, 361 U.S. at pages 522-523, 80 S.Ct. at pages 416-417. Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made-those who any year can terminate the teacher's

employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain.

The statute does not provide that the information it requires be kept confidential. Each school board is left free to deal with the information as it wishes. The record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless. Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers * * * has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.' Wieman v. Updegraff, 344 U.S. 183, 195, 73 S.Ct. 215, 221, 97 L.Ed. 216 (concurring opinion).'Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate * * *.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1212, 1 L.Ed.2d 1311.

II.

The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period. The scope of the inquiry required by Act 10 is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires him to list, without number, every conceivable kind of associational tie-social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

In Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, the Court invalidated an ordinance prohibiting all distribution of literature at any time or place in Griffin, Georgia, without a license, pointing out that so broad an interference was unnecessary to accomplish legitimate municipal aims. In Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 150, 84 L.Ed. 155, the Court dealt with ordinances of four different municipalities which either banned or imposed prior restraints upon the distribution of handbills. In holding the ordinances invalid, the Court noted that where legislative abridgment of 'fundamental

personal rights and liberties' is asserted, 'the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.' 308 U.S. at page 161, 60 S.Ct. at page 151. In Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, the Court said that '(c)onduct remains subject to regulation for the protection of society,' but pointed out that in each case 'the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' 310 U.S. at page 304, 60 S.Ct. at page 903. Illustrations of the same constitutional principle are to be found in many other decisions of the Court, among them, Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574; and Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280.

As recently as last Term we held invalid an ordinance prohibiting the distribution of handbills because the breadth of its application went far beyond what was necessary to achieve a legitimate governmental purpose. Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559. In that case the Court noted that it had been 'urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited * * *. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires.' 362 U.S. at page 64, 80 S.Ct. at page 538.

The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers. The judgments in both cases must be reversed.

It is so ordered.

Judgments reversed.

Mr. Justice HARLAN dissenting.

Of course this decision has a natural tendency to enlist support, involving as it does an unusual statute that touches constitutional rights whose protection in the context of the racial situation in various parts of the country demands the unremitting vigilance of the courts. Yet that very circumstance also serves to remind of the restraints that attend constitutional adjudication. It must be emphasized that neither of these cases actually presents an issue of racial discrimination. The statute on its face applies to all Arkansas teachers irrespective of race, and there is no showing that it has been discriminatorily administered.

The issue is whether, consistently with the Fourteenth Amendment, a State may require teachers in its public schools or colleges to disclose, as a condition precedent to their initial or continued employment, all organizations to which they have belonged, paid dues, or contributed within the past five years. Since I believe that such a requirement cannot be said to transgress the constitutional limits of a State's conceded authority to determine the qualifications of those serving it as teachers, I am bound to consider that Arkansas had the right to pass the statute in question, and therefore conceive it my duty to dissent.

The legal framework in which the issue must be judged is clear. The rights of free speech and association embodied in the 'liberty' assured against state action by the Fourteenth Amendment (see De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278; Gitlow v. New York, 268 U.S. 652, 672, 45

S.Ct. 625, 632, 69 L.Ed. 1138, dissenting opinion of Holmes, J.) are not absolute. Near v. Minnesota, 283 U.S. 697, 708, 51 S.Ct. 625, 628, 75 L.Ed. 1357; Whitney v. California, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (concurring opinion of Brandeis, J.). Where official action is claimed to invade these rights, the controlling inquiry is whether such action is justifiable on the basis of a superior governmental interest to which such individual rights must yield. When the action complained of pertains to the realm of investigation, our inquiry has a double aspect: first, whether the investigation relates to a legitimate governmental purpose; second, whether, judged in the light of that purpose, the questioned action has substantial relevance thereto. See Barenblatt v. United States, 360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed.2d 1115; Uphaus v. Wyman, 360 U.S. 72, 79 S.Ct. 1040, 3 L.Ed.2d 1090.

In the two cases at hand, I think both factors are satisfied. It is surely indisputable that a State has the right to choose its teachers on the basis of fitness. And I think it equally clear, as the Court appears to recognize, that information about a teacher's associations may be useful to school authorities in determining the moral, professional, and social qualifications of the teacher, as well as in determining the type of service for which he will be best suited in the educational system. See Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517; Beilan v. Board of Public Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414; see also Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692. Furthermore, I take the Court to acknowledge that, agreeably to our previous decisions, the State may enquire into associations to the extent that the resulting information may be in aid of that legitimate purpose. These cases therefore do not present a situation such as we had in N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, and Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480, where the required disclosure bears no substantial relevance to a legitimate state interest.

Despite these considerations this statute is stricken down because, in the Court's view, it is too broad, because it asks more than may be necessary to effectuate the State's legitimate interest. Such a statute, it is said, cannot justify the inhibition on freedom of association which so blanket an inquiry may entail. Cf. N.A.A.C.P. v. Alabama, supra; Bates v. Little Rock, supra.

I am unable to subscribe to this view because I believe it impossible to determine a priori the place where the line should be drawn between what would be permissible inquiry and over broad inquiry in a situation like this. Certainly the Court does not point that place out. There can be little doubt that much of the associational information called for by the statute will be of little or no use whatever to the school authorities, but I do not understand how those authorities can be expected to fix in advance the terms of their enquiry so that it will yield only relevant information.

I do not mean to say that alternatives such as an inquiry limited to the names of organizations of whose character the State is presently aware, or to a class of organizations defined by their purposes, would not be more consonant with a decent respect for the privacy of the teacher, nor that such alternatives would be utterly unworkable. I do see, however, that these alternatives suffer from deficiencies so obvious where a State is bent upon discovering everything which would be relevant to its proper purposes, that I cannot say that it must, as a matter of constitutional compulsion, adopt some such means instead of those which have been chosen here.

Finally, I need hardly say that if it turns out that this statute is abused, either by an unwarranted publicizing of the required associational disclosures or otherwise, we would have a different kind of case than those presently before us. See Lassiter v. Northampton Elections Board, 360 U.S. 45, 53-54, 79 S.Ct. 985, 991, 3 L.Ed.2d 1072. All that is now here is the validity of the statute on its face, and I am unable to agree that in this posture of things the enactment can be said to be unconstitutional.

Garcetti v. Ceballos.

547 U.S. 410 (2006)

Justice KENNEDY delivered the opinion of the Court.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers,* 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The question presented by the instant case is whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

I

Respondent Richard Ceballos has been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. During the period relevant to this case, Ceballos was a calendar deputy in the office's Pomona branch, and in this capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney said there were inaccuracies in an affidavit used to obtain a critical search warrant. The attorney informed Ceballos that he had filed a motion to traverse, or challenge, the warrant, but he also wanted Ceballos to review the case. According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff from the Los Angeles County Sheriff's Department, but he did not receive a satisfactory explanation for the perceived inaccuracies. He relayed his findings to his supervisors, petitioners Carol Najera and Frank Sundstedt, and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to Sundstedt for his review. A few days later, Ceballos presented Sundstedt with another memo, this one describing a second telephone conversation between Ceballos and the warrant affiant.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. Attendees included Ceballos, Sundstedt, and Najera, as well as the warrant affiant and other employees from the sheriff's department. The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.

Despite Ceballos' concerns, Sundstedt decided to proceed with the prosecution, pending disposition of the defense motion to traverse. The trial court held a hearing on the motion. Ceballos was called by the defense and recounted his observations about the affidavit, but the trial court rejected the challenge to the warrant.

Ceballos claims that in the aftermath of these events he was subjected to a series of retaliatory employment actions. The actions included reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. Ceballos initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation. Unsatisfied, Ceballos sued in the United States District Court for the Central District of California, asserting, as relevant here, a claim under Rev. Stat. § 1979, 42 U.S.C. § 1983. He alleged petitioners violated the First and Fourteenth Amendments by retaliating against him based on his memo of March 2.

Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs. They further contended that, in any event, Ceballos' memo was not protected speech under the First Amendment. Petitioners moved for summary judgment, and the District Court granted their motion. Noting that Ceballos wrote his memo pursuant to his employment duties, the court concluded he was not entitled to First Amendment protection for the memo's contents. It held in the alternative that even if Ceballos' speech was constitutionally protected, petitioners had qualified immunity because the rights Ceballos asserted were not clearly established.

The Court of Appeals for the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment."
. . . .

We granted certiorari, 543 U.S. 1186, 125 S.Ct. 1395, 161 L.Ed.2d 188 (2005), and we now reverse.

II

As the Court's decisions have noted, for many years "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment-including those which restricted the exercise of constitutional rights." *Connick,* 461 U.S., at 143, 103 S.Ct. 1684. That dogma has been qualified in important respects. See *id.,* at 144-145, 103 S.Ct. 1684. The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. See, *e.g., Pickering, supra,* at 568, 88 S.Ct. 1731; *Connick, supra,* at 147, 103 S.Ct. 1684; *Rankin v. McPherson,* 483 U.S. 378, 384, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987); *United States v. Treasury Employees,* 513 U.S. 454, 466, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995).

Pickering provides a useful starting point in explaining the Court's doctrine. There the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board. 391 U.S., at 566, 88 S.Ct. 1731. "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.,* at 568, 88 S.Ct. 1731. The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Id.,* at 572-573, 88 S.Ct. 1731 (footnote omitted). Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.,* at 573, 88 S.Ct. 1731.

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the

constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. See *id.,* at 568, 88 S.Ct. 1731. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick, supra,* at 147, 103 S.Ct. 1684. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. See *Pickering,* 391 U.S., at 568, 88 S.Ct. 1731. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

To be sure, conducting these inquiries sometimes has proved difficult. This is the necessary product of "the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors ... to furnish grounds for dismissal." *Id.,* at 569., 88 S.Ct. 1731 The Court's overarching objectives, though, are evident.

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. See, *e.g., Waters v. Churchill,* 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Cf. *Connick, supra,* at 143, 103 S.Ct. 1684 (" [G]overnment offices could not function if every employment decision became a constitutional matter"). Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

At the same time, the Court has recognized that a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. See *Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. See, *e.g., Connick, supra,* at 147, 103 S.Ct. 1684 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." 391 U.S., at 573, 88 S.Ct. 1731. It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. *Id.,* at 572, 88 S.Ct. 1731. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. See, *e.g., San Diego v. Roe,* 543 U.S. 77, 82, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004)*(per curiam)* ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); cf. *Treasury Employees,* 513 U.S., at 470, 115 S.Ct. 1003 ("The large-scale disincentive to Government

employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions. See, *e.g.,* Rankin, 483 U.S., at 384, 107 S.Ct. 2891 (recognizing "the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"). Underlying our cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance." *Connick,* 461 U.S., at 154, 103 S.Ct. 1684.

III

With these principles in mind we turn to the instant case. Respondent Ceballos believed the affidavit used to obtain a search warrant contained serious misrepresentations. He conveyed his opinion and recommendation in a memo to his supervisor. That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. See, *e.g., Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 414, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," *Pickering,* 391 U.S., at 573, 88 S.Ct. 1731, to hold that all speech within the office is automatically exposed to restriction.

The memo concerned the subject matter of Ceballos' employment, but this, too, is nondispositive. The First Amendment protects some expressions related to the speaker's job. See, *e.g., ibid.; Givhan,supra,* at 414, 99 S.Ct. 693. As the Court noted in *Pickering:* "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." 391 U.S., at 572, 88 S.Ct. 1731. The same is true of many other categories of public employees.

The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor' "). That consideration-the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case-distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Cf. *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) ("[W]hen the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes"). Contrast, for example, the expressions

made by the speaker in *Pickering,* whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.

Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

This result is consistent with our precedents' attention to the potential societal value of employee speech. See *supra,* at 1958 - 1959. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit.

Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.
. . . .

Proper application of our precedents thus leads to the conclusion that the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.

Two final points warrant mentioning. First, as indicated above, the parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. See *post,* at 1965, n. 2 (SOUTER, J., dissenting). The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Second, Justice SOUTER suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. See *post,* at 1969 - 1970. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

IV

Exposing governmental inefficiency and misconduct is a matter of considerable significance. As the Court noted in *Connick,* public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." 461 U.S., at 149, 103 S.Ct. 1684. The dictates of sound judgment are reinforced by the powerful network of legislative enactments-such as whistle-blower protection laws and labor codes-available to those who seek to expose wrongdoing. See, *e.g.,* 5 U.S.C. § 2302(b)(8); Cal. Govt.Code Ann. § 8547.8 (West 2005); Cal. Lab.Code Ann. § 1102.5 (West Supp.2006). Cases involving government attorneys implicate additional safeguards in the form of, for example, rules of conduct and constitutional obligations apart from the First Amendment. See, *e.g.,* Cal. Rule Prof. Conduct 5-110 (2005) ("A member in government service shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause"); *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). These imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions.

We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.

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

It is so ordered.

Justice SOUTER dissenting.

The Court holds that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Ante,* at 1960.I respectfully dissent. I agree with the majority that a government employer has substantial interests in effectuating its chosen policy and objectives, and in demanding competence, honesty, and judgment from employees who speak for it in doing their work. But I would hold that private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government's stake in the efficient implementation of policy, and when they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.

I

Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment. See, *e.g., Schenck v. Pro-Choice Network of Western N. Y.,* 519 U.S. 357, 377, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). At the other extreme, a statement by a government employee complaining about nothing beyond treatment under personnel rules raises no greater claim to constitutional protection against retaliatory response than the remarks of a private employee. See *Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). In between these points lies a public employee's speech unwelcome to the government but on a significant public issue. Such an employee speaking as a citizen, that is, with a citizen's interest, is protected from reprisal unless the statements are too damaging to the government's capacity to conduct public business to be justified by any individual or

public benefit thought to flow from the statements. *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Entitlement to protection is thus not absolute.

This significant, albeit qualified, protection of public employees who irritate the government is understood to flow from the First Amendment, in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker's interest in commenting on a matter of public concern just because the government employs him. Still, the First Amendment safeguard rests on something more, being the value to the public of receiving the opinions and information that a public employee may disclose. "Government employees are often in the best position to know what ails the agencies for which they work." *Waters v. Churchill,* 511 U.S. 661, 674, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994).

The reason that protection of employee speech is qualified is that it can distract co-workers and supervisors from their tasks at hand and thwart the implementation of legitimate policy, the risks of which grow greater the closer the employee's speech gets to commenting on his own workplace and responsibilities. It is one thing for an office clerk to say there is waste in government and quite another to charge that his own department pays full-time salaries to part-time workers. Even so, we have regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer. In *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979), we followed *Pickering* when a teacher was fired for complaining to a superior about the racial composition of the school's administrative, cafeteria, and library staffs, 439 U.S., at 413-414, 99 S.Ct. 693, and the same point was clear in *Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976). That case was decided, in part, with reference to the *Pickering* framework, and the Court there held that a schoolteacher speaking out on behalf of himself and others at a public school board meeting could not be penalized for criticizing pending collective-bargaining negotiations affecting professional employment. *Madison* noted that the teacher "addressed the school board not merely as one of its employees but also as a concerned citizen, seeking to express his views on an important decision of his government." 429 U.S., at 174-175, 97 S.Ct. 421. In each case, the Court realized that a public employee can wear a citizen's hat when speaking on subjects closely tied to the employee's own job, and *Givhan* stands for the same conclusion even when the speech is not addressed to the public at large. Cf. *Pegram v. Herdrich,* 530 U.S. 211, 225, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) (recognizing that, factually, a trustee under the Employee Retirement Income Security Act of 1974 can both act as ERISA fiduciary and act on behalf of the employer).
. . . .

As all agree, the qualified speech protection embodied in *Pickering* balancing resolves the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees. The need for a balance hardly disappears when an employee speaks on matters his job requires him to address; rather, it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties.
. . . .

Nothing, . . . accountable on the individual and public side of the *Pickering* balance changes when an employee speaks "pursuant" to public duties. On the side of the government employer, however, something is different, and to this extent, I agree with the majority of the Court. The majority is rightly concerned that the employee who speaks out on matters subject to comment in doing his own work has

the greater leverage to create office uproars and fracture the government's authority to set policy to be carried out coherently through the ranks. “Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission,”*ante,* at 1960. Up to a point, then, the majority makes good points: government needs civility in the workplace, consistency in policy, and honesty and competence in public service.

But why do the majority's concerns, which we all share, require categorical exclusion of First Amendment protection against any official retaliation for things said on the job? Is it not possible to respect the unchallenged individual and public interests in the speech through a *Pickering* balance without drawing the strange line I mentioned before, *supra,* at 1956 - 1957? This is, to be sure, a matter of judgment, but the judgment has to account for the undoubted value of speech to those, and by those, whose specific public job responsibilities bring them face to face with wrongdoing and incompetence in government, who refuse to avert their eyes and shut their mouths. And it has to account for the need actually to disrupt government if its officials are corrupt or dangerously incompetent. See n. 4, *supra*. It is thus no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit. Even there, the lesson of *Pickering* (and the object of most constitutional adjudication) is still to the point: when constitutionally significant interests clash, resist the demand for winner-take-all; try to make adjustments that serve all of the values at stake.
. . . .

II

The majority seeks support in two lines of argument extraneous to *Pickering* doctrine. The one turns on a fallacious reading of cases on government speech, the other on a mistaken assessment of protection available under whistle-blower statutes.

A

The majority accepts the fallacy propounded by the county petitioners and the Federal Government as *amicus* that any statement made within the scope of public employment is (or should be treated as) the government's own speech, see *ante,* at 1960, and should thus be differentiated as a matter of law from the personal statements the First Amendment protects, see *Broadrick v. Oklahoma,* 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). The majority invokes the interpretation set out in *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), of *Rust v. Sullivan,* 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), which held there was no infringement of the speech rights of Title X funds recipients and their staffs when the Government forbade any on-the-job counseling in favor of abortion as a method of family planning, *id.,* at 192-200, 111 S.Ct. 1759. We have read *Rust* to mean that “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.” *Rosenberger, supra,* at 833, 115 S.Ct. 2510.

The key to understanding the difference between this case and *Rust* lies in the terms of the respective employees' jobs and, in particular, the extent to which those terms require espousal of a substantive position prescribed by the government in advance. Some public employees are hired to “promote a particular policy” by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto. See *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 542, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). There is no claim or indication that Ceballos was hired to perform such a speaking assignment. He was paid to enforce the law by constitutional action: to exercise the county government's prosecutorial power by acting honestly,

competently, and constitutionally. The only sense in which his position apparently required him to hew to a substantive message was at the relatively abstract point of favoring respect for law and its evenhanded enforcement, subjects that are not at the level of controversy in this case and were not in *Rust.* Unlike the doctors in *Rust,* Ceballos was not paid to advance one specific policy among those legitimately available, defined by a specific message or limited by a particular message forbidden. The county government's interest in his speech cannot therefore be equated with the terms of a specific, prescribed, or forbidden substantive position comparable to the Federal Government's interest in *Rust,* and *Rust* is no authority for the notion that government may exercise plenary control over every comment made by a public employee in doing his job.

It is not, of course, that the district attorney lacked interest of a high order in what Ceballos might say. If his speech undercut effective, lawful prosecution, there would have been every reason to rein him in or fire him; a statement that created needless tension among law enforcement agencies would be a fair subject of concern, and the same would be true of inaccurate statements or false ones made in the course of doing his work. But these interests on the government's part are entirely distinct from any claim that Ceballos's speech was government speech with a preset or proscribed content as exemplified in *Rust*. Nor did the county petitioners here even make such a claim in their answer to Ceballos's complaint, see n. 13, *infra*.

The fallacy of the majority's reliance on *Rosenberger's* understanding of *Rust* doctrine, moreover, portends a bloated notion of controllable government speech going well beyond the circumstances of this case. Consider the breadth of the new formulation:

> "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Ante,* at 1960.

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties." See *Grutter v. Bollinger,* 539 U.S. 306, 329, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 603, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools' " (quoting *Shelton v. Tucker,* 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960))); *Sweezy v. New Hampshire,* 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression-areas in which government should be extremely reticent to tread").

B

The majority's second argument for its disputed limitation of *Pickering* doctrine is that the First Amendment has little or no work to do here owing to an assertedly comprehensive complement of state

and national statutes protecting government whistle-blowers from vindictive bosses. See *ante,* at 1961 - 1962. But even if I close my eyes to the tenet that " '[t]he applicability of a provision of the Constitution has never depended on the vagaries of state or federal law,' " *Board of Comm'rs, Wabaunsee Cty. v. Umbehr,* 518 U.S. 668, 680, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996), the majority's counsel to rest easy fails on its own terms.

.

To begin with, speech addressing official wrongdoing may well fall outside protected whistle-blowing, defined in the classic sense of exposing an official's fault to a third party or to the public; the teacher in *Givhan,* for example, who raised the issue of unconstitutional hiring bias, would not have qualified as that sort of whistle-blower, for she was fired after a private conversation with the school principal. In any event, the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief. See D. Westman & N. Modesitt, Whistleblowing: Law of Retaliatory Discharge 67-75, 281-307 (2d ed.2004). Some state statutes protect all government workers, including the employees of municipalities and other subdivisions; others stop at state employees. Some limit protection to employees who tell their bosses before they speak out; [0] others forbid bosses from imposing any requirement to warn. As for the federal Whistleblower Protection Act of 1989, 5 U.S.C. § 1213 *et seq.*, current case law requires an employee complaining of retaliation to show " 'irrefragable proof' " that the person criticized was not acting in good faith and in compliance with the law, see *Lachance v. White,* 174 F.3d 1378, 1381 (C.A.Fed.1999), cert. denied, 528 U.S. 1153, 120 S.Ct. 1157, 145 L.Ed.2d 1069 (2000). And federal employees have been held to have no protection for disclosures made to immediate supervisors, see *Willis v. Department of Agriculture,* 141 F.3d 1139, 1143 (C.A.Fed.1998); *Horton v. Department of Navy,* 66 F.3d 279, 282 (C.A.Fed.1995), cert. denied, 516 U.S. 1176, 116 S.Ct. 1271, 134 L.Ed.2d 218 (1996), or for statements of facts publicly known already, see *Francisco v. Office of Personnel Management,* 295 F.3d 1310, 1314 (C.A.Fed.2002). Most significantly, federal employees have been held to be unprotected for statements made in connection with normal employment duties, *Huffman v. Office of Personnel Management,* 263 F.3d 1341, 1352 (C.A.Fed.2001), the very speech that the majority says will be covered by "the powerful network of legislative enactments ... available to those who seek to expose wrongdoing,"*ante,* at 1962. My point is not to disparage particular statutes or speak here to the merits of interpretations by other federal courts, but merely to show the current understanding of statutory protection: individuals doing the same sorts of governmental jobs and saying the same sorts of things addressed to civic concerns will get different protection depending on the local, state, or federal jurisdictions that happened to employ them.

Justice BREYER, dissenting.

This case asks whether the First Amendment protects public employees when they engage in speech that both (1) involves matters of public concern and (2) takes place in the ordinary course of performing the duties of a government job. I write separately to explain why I cannot fully accept either the Court's or Justice SOUTER's answer to the question presented.

I

. . . .
Like the majority, I understand the need to "affor[d] government employers sufficient discretion to manage their operations." *Ante,* at 1960. And I agree that the Constitution does not seek to "displac[e] ... managerial discretion by judicial supervision." *Ibid*. Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available-to the point where the majority's

fears of department management by lawsuit are misplaced. In such an instance, I believe that courts should apply the *Pickering* standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.

This is such a case. The respondent, a government lawyer, complained of retaliation, in part, on the basis of speech contained in his disposition memorandum that he says fell within the scope of his obligations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The facts present two special circumstances that together justify First Amendment review.

First, the speech at issue is professional speech-the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. Cf. *Legal Services Corporation v. Velazquez,* 531 U.S. 533, 544, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001) ("Restricting LSC [Legal Services Corporation] attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys"). See also *Polk County v. Dodson,* 454 U.S. 312, 321, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) ("[A] public defender is not amenable to administrative direction in the same sense as other employees of the State"). See generally Post, Subsidized Speech, 106 Yale L.J. 151, 172 (1996) ("[P]rofessionals must always qualify their loyalty and commitment to the vertical hierarchy of an organization by their horizontal commitment to general professional norms and standards"). The objective specificity and public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.

Second, the Constitution itself here imposes speech obligations upon the government's professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession. *Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Brady,supra.* So, for example, might a prison doctor have a similar constitutionally related professional obligation to communicate with superiors about seriously unsafe or unsanitary conditions in the cellblock. Cf. *Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). There may well be other examples.

Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available. Hence, I would find that the Constitution mandates special protection of employee speech in such circumstances. Thus I would apply the *Pickering* balancing test here.

III

While I agree with much of Justice SOUTER's analysis, I believe that the constitutional standard he enunciates fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes. The standard would instruct courts to apply *Pickering* balancing in all cases, but says that the government should prevail unless the employee (1) "speaks on a matter of unusual importance," and (2) "satisfies high standards of responsibility in the way he does it." *Ante,* at 1967 (dissenting opinion). Justice SOUTER adds that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor." *Id*., at 1967.

There are, however, far too many issues of public concern, even if defined as "matters of unusual importance," for the screen to screen out very much. Government administration typically involves

matters of public concern.

. . . .

IV

I conclude that the First Amendment sometimes does authorize judicial actions based upon a government employee's speech that both (1) involves a matter of public concern and also (2) takes place in the course of ordinary job-related duties. But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public's affairs. In my view, these conditions are met in this case and *Pickering* balancing is consequently appropriate.

Rutan v. Republican Party of Illinois

497 U.S. 62(1990)

Justice BRENNAN delivered the opinion of the Court.

To the victor belong only those spoils that may be constitutionally obtained. *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), decided that the First Amendment forbids government officials to discharge or threaten to discharge public employees solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved. Today we are asked to decide the constitutionality of several related political patronage practices-whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support. We hold that they may not.

I

The petition and cross-petition before us arise from a lawsuit protesting certain employment policies and practices instituted by Governor James Thompson of Illinois. On November 12, 1980, the Governor issued an executive order proclaiming a hiring freeze for every agency, bureau, board, or commission subject to his control. The order prohibits state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action. It affects approximately 60,000 state positions. More than 5,000 of these become available each year as a result of resignations, retirements, deaths, expansions, and reorganizations. The order proclaims that "*no* exceptions" are permitted without the Governor's "express permission after submission of appropriate requests to [his] office." Governor's Executive Order No. 5 (Nov. 12, 1980), Brief for Petitioners and Cross-Respondents 11 (emphasis added).

Requests for the Governor's "express permission" have allegedly become routine. Permission has been granted or withheld through an agency expressly created for this purpose, the Governor's Office of Personnel (Governor's Office). Agencies have been screening applicants under Illinois' civil service system, making their personnel choices, and submitting them as requests to be approved or disapproved by the Governor's Office. Among the employment decisions for which approvals have been required are new hires, promotions, transfers, and recalls after layoffs.

By means of the freeze, according to petitioners and cross-respondents, the Governor has been using the Governor's Office to operate a political patronage system to limit state employment and beneficial employment-related decisions to those who are supported by the Republican Party. In reviewing an agency's request that a particular applicant be approved for a particular position, the Governor's Office has looked at whether the applicant voted in Republican primaries in past election years, whether the applicant has provided financial or other support to the Republican Party and its candidates, whether the applicant has promised to join and work for the Republican Party in the future, and whether the applicant has the support of Republican Party officials at state or local levels.

Five people (including the three petitioners) brought suit against various Illinois and Republican Party officials in the United States District Court for the Central District of Illinois. They alleged that they had suffered discrimination with respect to state employment because they had not been supporters of the State's Republican Party and that this discrimination violates the First Amendment. Cynthia B. Rutan has

been working for the State since 1974 as a rehabilitation counselor. She claims that since 1981 she has been repeatedly denied promotions to supervisory positions for which she was qualified because she had not worked for or supported the Republican Party. Franklin Taylor, who operates road equipment for the Illinois Department of Transportation, claims that he was denied a promotion in 1983 because he did not have the support of the local Republican Party. Taylor also maintains that he was denied a transfer to an office nearer to his home because of opposition from the Republican Party chairmen in the counties in which he worked and to which he requested a transfer. James W. Moore claims that he has been repeatedly denied state employment as a prison guard because he did not have the support of Republican Party officials.

The two other plaintiffs, before the Court as cross-respondents, allege that they were not recalled after layoffs because they lacked Republican credentials. Ricky Standefer was a state garage worker who claims that he was not recalled, although his fellow employees were, because he had voted in a Democratic primary and did not have the support of the Republican Party. Dan O'Brien, formerly a dietary manager with the mental health department, contends that he was not recalled after a layoff because of his party affiliation and that he later obtained a lower paying position with the corrections department only after receiving support from the chairman of the local Republican Party.

II

A

In *Elrod, supra,* we decided that a newly elected Democratic sheriff could not constitutionally engage in the patronage practice of replacing certain office staff with members of his own party "when the existing employees lack or fail to obtain requisite support from, or fail to affiliate with, that party." *Id.,* 427 U.S., at 351, 373, 96 S.Ct., at 2679, 2689 (plurality opinion), and 375, 96 S.Ct., at 2690 (Stewart, J., joined by BLACKMUN, J., concurring in judgment). The plurality explained that conditioning public employment on the provision of support for the favored political party "unquestionably inhibits protected belief and association." *Id.,* at 359, 96 S.Ct., at 2683. It reasoned that conditioning employment on political activity pressures employees to pledge political allegiance to a party with which they prefer not to associate, to work for the election of political candidates they do not support, and to contribute money to be used to further policies with which they do not agree. The latter, the plurality noted, had been recognized by this Court as "tantamount to coerced belief." *Id.,* 427 U.S., at 355, 96 S.Ct., at 2681 (citing *Buckley v. Valeo,* 424 U.S. 1, 19, 96 S.Ct. 612, 634-635, 46 L.Ed.2d 659 (1976)). At the same time, employees are constrained from joining, working for or contributing to the political party and candidates of their own choice. *Elrod, supra,* 427 U.S., at 355-356, 96 S.Ct., at 2681. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment," the plurality emphasized. 427 U.S., at 356, 96 S.Ct., at 2681. Both the plurality and the concurrence drew support from *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), in which this Court held that the State's refusal to renew a teacher's contract because he had been publicly critical of its policies imposed an unconstitutional condition on the receipt of a public benefit. See *Elrod, supra,* 427 U.S., at 359, 96 S.Ct., at 2682 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); see also *Branti, supra,* 445 U.S., at 514-516, 100 S.Ct., at 1292-1293.

The Court then decided that the government interests generally asserted in support of patronage fail to justify this burden on First Amendment rights because patronage dismissals are not the least restrictive means for fostering those interests. See *Elrod, supra,* 427 U.S., at 372-373, 96 S.Ct., at 2689 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment). The plurality acknowledged that a government has a significant interest in ensuring that it has effective and efficient employees. It expressed doubt, however, that "mere difference of political persuasion motivates poor performance" and

concluded that, in any case, the government can ensure employee effectiveness and efficiency through the less drastic means of discharging staff members whose work is inadequate. 427 U.S., at 365-366, 96 S.Ct., at 2685-2686. The plurality also found that a government can meet its need for politically loyal employees to implement its policies by the less intrusive measure of dismissing, on political grounds, only those employees in policymaking positions. *Id.,* at 367, 96 S.Ct., at 2686-2687. Finally, although the plurality recognized that preservation of the democratic process "may in some instances justify limitations on First Amendment freedoms," it concluded that the "process functions as well without the practice, perhaps even better." Patronage, it explained, "can result in the entrenchment of one or a few parties to the exclusion of others" and "is a very effective impediment to the associational and speech freedoms which are essential to a meaningful system of democratic government." *Id.,* at 368-370, 96 S.Ct., at 2688.

Four years later, in *Branti, supra,* we decided that the First Amendment prohibited a newly appointed public defender, who was a Democrat, from discharging assistant public defenders because they did not have the support of the Democratic Party. The Court rejected an attempt to distinguish the case from *Elrod,* deciding that it was immaterial whether the public defender had attempted to coerce employees to change political parties or had only dismissed them on the basis of their private political beliefs. We explained that conditioning continued public employment on an employee's having obtained support from a particular political party violates the First Amendment because of "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job." 445 U.S., at 516, 100 S.Ct., at 1294. "In sum," we said, "there is no requirement that dismissed employees prove that they, or other employees, have been coerced into changing, either actually or ostensibly, their political allegiance." *Id.,* at 517, 100 S.Ct., at 1294. To prevail, we concluded, public employees need show only that they were discharged because they were not affiliated with or sponsored by the Democratic Party. *Ibid.*

B

We first address the claims of the four current or former employees. Respondents urge us to view *Elrod* and *Branti* as inapplicable because the patronage dismissals at issue in those cases are different in kind from failure to promote, failure to transfer, and failure to recall after layoff. Respondents initially contend that the employee petitioners' and cross-respondents' First Amendment rights have not been infringed because they have no entitlement to promotion, transfer, or rehire. We rejected just such an argument in *Elrod,* 427 U.S., at 359-360, 96 S.Ct., at 2683 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment), and *Branti,* 445 U.S., at 514-515, 100 S.Ct., at 1293, as both cases involved state workers who were employees at will with no legal entitlement to continued employment. In *Perry,* 408 U.S., at 596-598, 92 S.Ct., at 2696-2697, we held explicitly that the plaintiff teacher's lack of a contractual or tenure right to re-employment was immaterial to his First Amendment claim. We explained the viability of his First Amendment claim as follows:

"For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall,* 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)]. Such interference with constitutional rights is impermissible." *Id.,* 408 U.S., at 597, 92 S.Ct., at 2697 (emphasis added).

Likewise, we find the assertion here that the employee petitioners and cross-respondents had no legal

entitlement to promotion, transfer, or recall beside the point.

Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees. This is not credible. Employees who find themselves in dead-end positions due to their political backgrounds *are* adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for the Republican Party will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.

The same First Amendment concerns that underlay our decisions in *Elrod, supra,* and *Branti, supra,* are implicated here. Employees who do not compromise their beliefs stand to lose the considerable increases in pay and job satisfaction attendant to promotions, the hours and maintenance expenses that are consumed by long daily commutes, and even their jobs if they are not rehired after a "temporary" layoff. These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment. Unless these patronage practices are narrowly tailored to further vital government interests, we must conclude that they impermissibly encroach on First Amendment freedoms. See *Elrod, supra,* 427 U.S., at 362-363, 96 S.Ct., at 2684 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); *Branti, supra,* 445 U.S., at 515-516, 100 S.Ct., at 1293.

We find, however, that our conclusions in *Elrod, supra,* and *Branti, supra,* are equally applicable to the patronage practices at issue here. A government's interest in securing effective employees can be met by discharging, demoting, or transferring staff members whose work is deficient. A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views. See *Elrod, supra,* 427 U.S., at 365-368, 96 S.Ct., at 2685-2687 (plurality opinion); *Branti, supra,* 445 U.S., at 518, and 520, n. 14, 100 S.Ct., at 1294-1295, and 1295, n. 14. Likewise, the "preservation of the democratic process" is no more furthered by the patronage promotions, transfers, and rehires at issue here than it is by patronage dismissals. First, "political parties are nurtured by other, less intrusive and equally effective methods." *Elrod, supra,* 427 U.S., at 372-373, 96 S.Ct., at 2689 (plurality opinion). Political parties have already survived the substantial decline in patronage employment practices in this century. See *Elrod, supra,* at 369, and n. 23, 96 S.Ct., at 2688, and n. 23 (plurality opinion); see also L. Sabato, Goodbye to Good-time Charlie 67 (2d ed. 1983) ("The number of patronage positions has significantly decreased in virtually every state"); Congressional Quarterly Inc., State Government, CQ's Guide to Current Issues and Activities 134 (T. Beyle ed. 1989-1990) ("Linkage[s] between political parties and government office-holding ... have died out under the pressures of varying forces [including] the declining influence of election workers when compared to media and money-intensive campaigning, such as the distribution of form letters and advertising"); Sorauf, Patronage and Party, 3 Midwest J. Pol. Sci. 115, 118-120 (1959) (many state and local parties have thrived without a patronage system). Second, patronage decidedly impairs the elective process by discouraging free political expression by public employees. See *Elrod,* 427 U.S., at 372, 96 S.Ct., at 2689 (plurality opinion) (explaining that the proper functioning of a democratic system "is indispensably dependent on the unfettered judgment of each citizen on matters of political concern"). Respondents, who include the Governor of Illinois and other state officials, do not suggest any other overriding government interest in favoring Republican Party supporters for promotion, transfer, and rehire.

We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or

support are an impermissible infringement on the First Amendment rights of public employees. In doing so, we reject the Seventh Circuit's view of the appropriate constitutional standard by which to measure alleged patronage practices in government employment. The Seventh Circuit proposed that only those employment decisions that are the "substantial equivalent of a dismissal" violate a public employee's rights under the First Amendment. 868 F.2d, at 954-957. We find this test unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy. See *Elrod, supra,* 427 U.S., at 356-357, 96 S.Ct., at 2681 (plurality opinion); *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). The First Amendment is not a tenure provision, protecting public employees from actual or constructive discharge. The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate.

Whether the four employees were in fact denied promotions, transfers, or rehires for failure to affiliate with and support the Republican Party is for the District Court to decide in the first instance. What we decide today is that such denials are irreconcilable with the Constitution and that the allegations of the four employees state claims under 42 U.S.C. § 1983 (1982 ed.) for violations of the First and Fourteenth Amendments. Therefore, although we affirm the Seventh Circuit's judgment to reverse the District Court's dismissal of these claims and remand them for further proceedings, we do not adopt the Seventh Circuit's reasoning.

C

Petitioner James W. Moore presents the closely related question whether patronage hiring violates the First Amendment. Patronage hiring places burdens on free speech and association similar to those imposed by the patronage practices discussed above. A state job is valuable. Like most employment, it provides regular paychecks, health insurance, and other benefits. In addition, there may be openings with the State when business in the private sector is slow. There are also occupations for which the government is a major (or the only) source of employment, such as social workers, elementary school teachers, and prison guards. Thus, denial of a state job is a serious privation.

Nonetheless, respondents contend that the burden imposed is not of constitutional magnitude. Decades of decisions by this Court belie such a claim. We premised *Torcaso v. Watkins,* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), on our understanding that loss of a job opportunity for failure to compromise one's convictions states a constitutional claim. We held that Maryland could not refuse an appointee a commission for the position of notary public on the ground that he refused to declare his belief in God, because the required oath "unconstitutionally invades the appellant's freedom of belief and religion." *Id.,* at 496, 81 S.Ct., at 1684. In *Keyishian v. Board of Regents of Univ. of New York,* 385 U.S. 589, 609-610, 87 S.Ct. 675, 687, 17 L.Ed.2d 629 (1967), we held a law affecting appointment and retention of teachers invalid because it premised employment on an unconstitutional restriction of political belief and association. In *Elfbrandt v. Russell,* 384 U.S. 11, 19, 86 S.Ct. 1238, 1242, 16 L.Ed.2d 321 (1966), we struck down a loyalty oath which was a prerequisite for public employment.

Almost half a century ago, this Court made clear that the government "may not enact a regulation providing that no Republican ... shall be appointed to federal office." *Public Workers v. Mitchell,* 330 U.S. 75, 100, 67 S.Ct. 556, 569, 91 L.Ed. 754 (1947). What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly. See *Perry,* 408 U.S., at 597, 92 S.Ct., at 2697 (citing *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)); see *supra,* at 2735.Under our sustained precedent, conditioning

hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so. See *Elrod,* 427 U.S., at 362-363, 96 S.Ct., at 2684 (plurality opinion) and 375, 96 S.Ct., at 2690 (Stewart, J., concurring in judgment); *Branti,* 445 U.S., at 515-516, 100 S.Ct., at 1293; see also *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (unemployment benefits); *Speiser v. Randall, supra* (tax exemption). We find no such government interest here, for the same reasons that we found that the government lacks justification for patronage promotions, transfers, or recalls. See *supra,* at 2735-2738.

. . . .

III

We hold that the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support and that all of the petitioners and cross-respondents have stated claims upon which relief may be granted. We affirm the Seventh Circuit insofar as it remanded Rutan's, Taylor's, Standefer's, and O'Brien's claims. However, we reverse the Seventh Circuit's decision to uphold the dismissal of Moore's claim. All five claims are remanded for proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA dissenting.

Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." *Ante,* at 2732. It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. See *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. Something must be wrong here, and I suggest it is the Court.

. . . .

The choice between patronage and the merit principle-or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts-is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution. Fourteen years ago, in *Elrod v. Burns,* 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), the Court did that. *Elrod* was limited however, as was the later decision of *Branti v. Finkel,* 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), to patronage firings, leaving it to state and federal legislatures to determine when and where political affiliation could be taken into account in hirings and promotions. Today the Court makes its constitutional civil service reform absolute, extending to all decisions regarding government employment. Because the First Amendment has never been thought to require this disposition, which may well have disastrous consequences for our political system, I dissent.

II

B

. . . .

The whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives; I do not mean, therefore, to endorse that system. But in order to demonstrate that a legislature could reasonably determine that its benefits outweigh its "coercive" effects, I must describe those benefits as the proponents of patronage see them: As Justice Powell discussed at length in his *Elrod* dissent, patronage stabilizes political parties and prevents excessive political fragmentation-both of which are results in which States have a strong governmental interest. Party strength requires the efforts of the rank and file, especially in "the dull periods between elections," to perform such tasks as organizing precincts, registering new voters, and providing constituent services. *Elrod,* 427 U.S., at 385, 96 S.Ct., at 2695 (dissenting opinion). Even the most enthusiastic supporter of a party's program will shrink before such drudgery, and it is folly to think that ideological conviction alone will motivate sufficient numbers to keep the party going through the off years. "For the most part, as every politician knows, the hope of some reward generates a major portion of the local political activity supporting parties." *Ibid.* Here is the judgment of one such politician, Jacob Arvey (best known as the promoter of Adlai Stevenson): Patronage is " 'a necessary evil if you want a strong organization, because the patronage system permits of discipline, and without discipline, there's no party organization.' " Quoted in M. Tolchin & S. Tolchin, To the Victor 36 (1971). A major study of the patronage system describes the reality as follows:

"[A]lthough men have many motives for entering political life ... the vast underpinning of both major parties is made up of men who seek practical rewards. Tangible advantages constitute the unifying thread of most successful political practitioners"*Id.,* at 22.

"With so little patronage cement, party discipline is relatively low; the rate of participation and amount of service the party can extract from [Montclair] county committeemen are minuscule compared with Cook County. The party considers itself lucky if 50 percent of its committeemen show up at meetings-even those labeled 'urgent'-while even lower percentages turn out at functions intended to produce crowds for visiting candidates." *Id.,* at 123.

See also W. Grimshaw, The Political Economy of Machine Politics, 4 Corruption and Reform 15, 30 (1989); G. Pomper, Voters, Elections, and Parties 255 (1988); Wolfinger, Why Political Machines Have Not Withered Away and Other Revisionist Thoughts, 34 J. Politics 365, 384 (1972).

The Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success. It relies (as did the plurality in *Elrod, supra,* at 369, n. 23, 96 S.Ct., at 2688, n. 23) on a single study of a rural Pennsylvania county by Professor Sorauf, *ante,* at 2738-a work that has been described as "more persuasive about the ineffectuality of Democratic leaders in Centre County than about the generalizability of [its] findings." Wolfinger, *supra,* at 384, n. 39. It is unpersuasive to claim, as the Court does, that party workers are obsolete because campaigns are now conducted through media and other money-intensive means. *Ante,* at 2737. Those techniques have supplemented but not supplanted personal contacts. See Price, Bringing Back the Parties, at 25. Certainly they have not made personal contacts unnecessary in campaigns for the lower level offices that are the foundations of party strength, nor have they replaced the myriad functions performed by party regulars not directly related to campaigning. And to the extent such techniques have replaced older methods of campaigning (partly in response to the limitations the Court has placed on patronage), the political system is not clearly better off. See *Elrod, supra,* at 384, 96 S.Ct., at 2694 (Powell, J., dissenting); *Branti,* 445 U.S., at 528, 100 S.Ct., at 1300 (Powell, J., dissenting). Increased reliance on money-intensive campaign techniques tends

to entrench those in power much more effectively than patronage-but without the attendant benefit of strengthening the party system. A challenger can more easily obtain the support of party workers (who can expect to be rewarded even if the candidate loses-if not this year, then the next) than the financial support of political action committees (which will generally support incumbents, who are likely to prevail).

It is self-evident that eliminating patronage will significantly undermine party discipline; and that as party discipline wanes, so will the strength of the two-party system. But, says the Court, "[p]olitical parties have already survived the substantial decline in patronage employment practices in this century." *Ante,* at 2737. This is almost verbatim what was said in *Elrod,* see 427 U.S., at 369, 96 S.Ct., at 2687. Fourteen years later it seems much less convincing. Indeed, now that we have witnessed, in 18 of the last 22 years, an Executive Branch of the Federal Government under the control of one party while the Congress is entirely or (for two years) partially within the control of the other party; now that we have undergone the most recent federal election, in which 98% of the incumbents, of whatever party, were returned to office; and now that we have seen elected officials changing their political affiliation with unprecedented readiness, Washington Post, Apr. 10, 1990, p. A1, the statement that "political parties have already survived" has a positively whistling-in-the-graveyard character to it. Parties have assuredly survived-but as what? As the forges upon which many of the essential compromises of American political life are hammered out? Or merely as convenient vehicles for the conducting of national Presidential elections?

The patronage system does not, of course, merely foster political parties in general; it fosters the two-party system in particular. When getting a job, as opposed to effectuating a particular substantive policy, is an available incentive for party workers, those attracted by that incentive are likely to work for the party that has the best chance of displacing the "ins," rather than for some splinter group that has a more attractive political philosophy but little hope of success. Not only is a two-party system more likely to emerge, but the differences between those parties are more likely to be moderated, as each has a relatively greater interest in appealing to a majority of the electorate and a relatively lesser interest in furthering philosophies or programs that are far from the mainstream. The stabilizing effects of such a system are obvious. See Toinet & Glenn, Clientelism and Corruption in the "Open" Society, at 208. In the context of electoral laws we have approved the States' pursuit of such stability, and their avoidance of the "splintered parties and unrestrained factionalism [that] may do significant damage to the fabric of government." *Storer v. Brown,* 415 U.S. 724, 736, 94 S.Ct. 1274, 1282, 39 L.Ed.2d 714 (1974) (upholding law disqualifying persons from running as independents if affiliated with a party in the past year).

Equally apparent is the relatively destabilizing nature of a system in which candidates cannot rely upon patronage-based party loyalty for their campaign support, but must attract workers and raise funds by appealing to various interest groups. See Tolchin & Tolchin, To the Victor, at 127-130. There is little doubt that our decisions in *Elrod* and *Branti,* by contributing to the decline of party strength, have also contributed to the growth of interest-group politics in the last decade. See, *e.g.,* Fitts, The Vice of Virtue, 136 U.Pa.L.Rev. 1567, 1603-1607 (1988). Our decision today will greatly accelerate the trend. It is not only campaigns that are affected, of course, but the subsequent behavior of politicians once they are in power. The replacement of a system firmly based in party discipline with one in which each office-holder comes to his own accommodation with competing interest groups produces "a dispersion of political influence that may inhibit a political party from enacting its programs into law." *Branti, supra,* at 531, 100 S.Ct., at 1301 (Powell, J., dissenting).

Patronage, moreover, has been a powerful means of achieving the social and political integration of excluded groups. See, *e.g., Elrod,* 427 U.S. at 379, 96 S.Ct. at 2692 (Powell, J., dissenting); Cornwell, Bosses, Machines and Ethnic Politics, in Ethnic Group Politics 190, 195-197 (H. Bailey, Jr., & E. Katz eds. 1969). By supporting and ultimately dominating a particular party "machine," racial and ethnic

minorities have-on the basis of their politics rather than their race or ethnicity-acquired the patronage awards the machine had power to confer. No one disputes the historical accuracy of this observation, and there is no reason to think that patronage can no longer serve that function. The abolition of patronage, however, prevents groups that have only recently obtained political power, especially blacks, from following this path to economic and social advancement.

" 'Every ethnic group that has achieved political power in American cities has used the bureaucracy to provide jobs in return for political support. It's only when Blacks begin to play the same game that the rules get changed. Now the use of such jobs to build political bases becomes an "evil" activity, and the city insists on taking the control back "downtown." ' " New York Amsterdam News, Apr. 1, 1978, p. A-4, quoted in Hamilton, The Patron-Recipient Relationship and Minority Politics in New York City, 94 Pol. Sci. Q. 211, 212 (1979).

While the patronage system has the benefits argued for above, it also has undoubted disadvantages. It facilitates financial corruption, such as salary kickbacks and partisan political activity on government-paid time. It reduces the efficiency of government, because it creates incentives to hire more and less qualified workers and because highly qualified workers are reluctant to accept jobs that may only last until the next election. And, of course, it applies some greater or lesser inducement for individuals to join and work for the party in power.
. . . .

In emphasizing the advantages and minimizing the disadvantages (or at least minimizing one of the disadvantages) of the patronage system, I do not mean to suggest that that system is best. It may not always be; it may never be. To oppose our *Elrod-Branti* jurisprudence, one need not believe that the patronage system is *necessarily* desirable; nor even that it is always and everywhere *arguably* desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives. The choice in question, I emphasize, is not just between patronage and a merit-based civil service, but rather among various combinations of the two that may suit different political units and different eras: permitting patronage hiring, for example, but prohibiting patronage dismissal; permitting patronage in most municipal agencies but prohibiting it in the police department; or permitting it in the mayor's office but prohibiting it everywhere else. I find it impossible to say that, always and everywhere, all of these choices fail our "balancing" test.

CITIZENS UNITED v. FEDERAL ELECTION COMMISSION

130 U.S. 876 (2010)

Justice KENNEDY delivered the opinion of the Court.

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. § 441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 203-209, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). *Austin* had held that political speech may be banned based on the speaker's corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that " *Austin* was a significant departure from ancient First Amendment principles," *Federal Election Comm'n v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 490, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007)*(WRTL)* (SCALIA, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.

I

A

Citizens United is a nonprofit corporation. It brought this action in the United States District Court for the District of Columbia. A three-judge court later convened to hear the cause. The resulting judgment gives rise to this appeal.

Citizens United has an annual budget of about $12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand.

Video-on-demand allows digital cable subscribers to select programming from various menus, including movies, television shows, sports, news, and music. The viewer can watch the program at any time and can elect to rewind or pause the program. In December 2007, a cable company offered, for a payment of $1.2 million, to make *Hillary* available on a video-on-demand channel called "Elections '08." App. 255a-257a. Some video-on-demand services require viewers to pay a small fee to view a selected program, but here the proposal was to make *Hillary* available to viewers free of charge.

To implement the proposal, Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. Each ad includes a

short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Website address. *Id.,* at 26a-27a. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited-and still does prohibit-corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections. 2 U.S.C. § 441b (2000 ed.); see *McConnell, supra,* at 204, and n. 87, 124 S.Ct. 619;*Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 249, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) *(MCFL).* BCRA § 203 amended § 441b to prohibit any "electioneering communication" as well. 2 U.S.C. § 441b(b)(2) (2006 ed.). An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. § 434(f)(3)(A). The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is "publicly distributed." 11 CFR § 100.29(a)(2) (2009). "In the case of a candidate for nomination for President ... *publicly distributed* means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election ... is being held within 30 days." § 100.29(b)(3)(ii). Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. 2 U.S.C. § 441b(b)(2). The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Ibid.*

C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by § 441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under § 437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) § 441b is unconstitutional as applied to *Hillary;* and (2) BCRA's disclaimer and disclosure requirements, BCRA §§ 201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie.

The District Court denied Citizens United's motion for a preliminary injunction, 530 F.Supp.2d 274 (D.D.C.2008)*(per curiam),* and then granted the FEC's motion for summary judgment, App. 261a-262a. See *id.,* at 261a ("Based on the reasoning of our prior opinion, we find that the [FEC] is entitled to judgment as a matter of law. *See Citizen[s] United v. FEC,* 530 F.Supp.2d 274 (D.D.C.2008) (denying Citizens United's request for a preliminary injunction)"). The court held that § 441b was facially constitutional under *McConnell,* and that § 441b was constitutional as applied to *Hillary* because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." 530 F.Supp.2d, at 279. The court also rejected Citizens United's challenge to BCRA's disclaimer and disclosure requirements. It noted that "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Id.,* at 281.

We noted probable jurisdiction. 555 U.S. ----, 128 S.Ct. 1471, 170 L.Ed.2d 294 (2008). The case was

reargued in this Court after the Court asked the parties to file supplemental briefs addressing whether we should overrule either or both *Austin* and the part of *McConnell* which addresses the facial validity of 2 U.S.C. § 441b. See 557 U.S. ----, 128 S.Ct. 1732, 170 L.Ed.2d 511 (2009).

II

Before considering whether *Austin* should be overruled, we first address whether Citizens United's claim that § 441b cannot be applied to *Hillary* may be resolved on other, narrower grounds.

B

Citizens United argues that *Hillary* is just "a documentary film that examines certain historical events." Brief for Appellant 35. We disagree. The movie's consistent emphasis is on the relevance of these events to Senator Clinton's candidacy for President. . . .

E

[T]he Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment. See *Morse v. Frederick,* 551 U.S. 393, 403, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007). It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling. Here, the lack of a valid basis for an alternative ruling requires full consideration of the continuing effect of the speech suppression upheld in *Austin.*

Citizens United stipulated to dismissing count 5 of its complaint, which raised a facial challenge to § 441b, even though count 3 raised an as-applied challenge. See App. 23a (count 3: "As applied to *Hillary,* [§ 441b] is unconstitutional under the First Amendment guarantees of free expression and association"). The Government argues that Citizens United waived its challenge to *Austin* by dismissing count 5. We disagree.

First, even if a party could somehow waive a facial challenge while preserving an as-applied challenge, that would not prevent the Court from reconsidering *Austin* or addressing the facial validity of § 441b in this case. "Our practice 'permit[s] review of an issue not pressed [below] so long as it has been passed upon....' " *Lebron,* 513 U.S., at 379, 115 S.Ct. 961 (quoting *United States v. Williams,* 504 U.S. 36, 41, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992); first alteration in original). And here, the District Court addressed Citizens United's facial challenge. . . .

Second, throughout the litigation, Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech. All concede that this claim is properly before us. And " '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' " *Lebron, supra,* at 379, 115 S.Ct. 961 (quoting *Yee v. Escondido,* 503 U.S. 519, 534, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); alteration in original). Citizens United's argument that *Austin* should be overruled is "not a new claim." *Lebron,* 513 U.S., at 379, 115 S.Ct. 961. Rather, it is-at most-"a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment." *Ibid.*

Third, the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint. See *United States v. Treasury*

Employees, 513 U.S. 454, 477-478, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) (contrasting "a facial challenge" with "a narrower remedy"). The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved. Citizens United has preserved its First Amendment challenge to § 441b as applied to the facts of its case; and given all the circumstances, we cannot easily address that issue without assuming a premise-the permissibility of restricting corporate political speech-that is itself in doubt. See Fallon, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L.Rev. 1321, 1339 (2000) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases"); *id.,* at 1327-1328. As our request for supplemental briefing implied, Citizens United's claim implicates the validity of *Austin,* which in turn implicates the facial validity of § 441b.

When the statute now at issue came before the Court in *McConnell,* both the majority and the dissenting opinions considered the question of its facial validity. The holding and validity of *Austin* were essential to the reasoning of the *McConnell* majority opinion, which upheld BCRA's extension of § 441b. See 540 U.S., at 205, 124 S.Ct. 619 (quoting *Austin,* 494 U.S., at 660, 110 S.Ct. 1391).*McConnell* permitted federal felony punishment for speech by all corporations, including nonprofit ones, that speak on prohibited subjects shortly before federal elections. See 540 U.S., at 203-209, 124 S.Ct. 619. . . .

The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated. See *WRTL, supra,* at 482-483, 127 S.Ct. 2652 (ALITO, J., concurring); *Thornhill v. Alabama,* 310 U.S. 88, 97-98, 60 S.Ct. 736, 84 L.Ed. 1093 (1940). For these reasons we find it necessary to reconsider *Austin*.

III

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." Laws enacted to control or suppress speech may operate at different points in the speech process. The following are just a few examples of restrictions that have been attempted at different stages of the speech process-all laws found to be invalid: restrictions requiring a permit at the outset, *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton,* 536 U.S. 150, 153, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002); imposing a burden by impounding proceeds on receipts or royalties, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 108, 123, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991); seeking to exact a cost after the speech occurs, *New York Times Co. v. Sullivan,* 376 U.S., at 267, 84 S.Ct. 710; and subjecting the speaker to criminal penalties, *Brandenburg v. Ohio,* 395 U.S. 444, 445, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969)*(per curiam)*.

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations-including nonprofit advocacy corporations-either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation

can still speak. See *McConnell,* 540 U.S., at 330-333, 124 S.Ct. 619 (opinion of KENNEDY, J.). A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak-and it does not-the option to form PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. . . .

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo,* 424 U.S. 1, 19, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)*. Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. See *McConnell,*http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003909967*supra,* at 251, 124 S.Ct. 619 (opinion of SCALIA, J.) (Government could repress speech by "attacking all levels of the production and dissemination of ideas," for "effective public communication requires the speaker to make use of the services of others"). If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley, supra,* at 14-15, 96 S.Ct. 612 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"). The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 223, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989) (quoting *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971)); see *Buckley, supra,* at 14, 96 S.Ct. 612 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution").

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL,* 551 U.S., at 464, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter, see *Simon & Schuster,* 502 U.S., at 124, 112 S.Ct. 501 (KENNEDY, J., concurring in judgment), the quoted language from *WRTL* provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints. See, *e.g.,United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (striking down content-based restriction). Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others. See *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 784, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). As instruments to censor, these categories are interrelated: Speech restrictions based on the identity of the speaker are all too often simply a means to control content.

Quite apart from the purpose or effect of regulating content, moreover, the Government may commit a

constitutional wrong when by law it identifies certain preferred speakers. By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

. . . .

We find no basis for the proposition that, in the context of political speech, the Government may impose restrictions on certain disfavored speakers. Both history and logic lead us to this conclusion.

A

1

The Court has recognized that First Amendment protection extends to corporations. *Bellotti, supra,* at 778, n. 14, 98 S.Ct. 1407. . . .

This protection has been extended by explicit holdings to the context of political speech. See, *e.g.,Button,* 371 U.S., at 428-429, 83 S.Ct. 328;*Grosjean v. American Press Co.,* 297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660 (1936). Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." *Bellotti, supra,* at 784, 98 S.Ct. 1407; see *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.,* 475 U.S. 1, 8, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986) (plurality opinion) ("The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (quoting *Bellotti,* 435 U.S., at 783, 98 S.Ct. 1407)). The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons." *Id.,* at 776, 98 S.Ct. 1407; see *id.,* at 780, n. 16, 98 S.Ct. 1407. Cf. *id.,* at 828, 98 S.Ct. 1407 (Rehnquist, J., dissenting).

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates. See B. Smith, Unfree Speech: The Folly of Campaign Finance Reform 23 (2001). Yet not until 1947 did Congress first prohibit independent expenditures by corporations and labor unions in § 304 of the Labor Management Relations Act 1947, 61 Stat. 159 (codified at 2 U.S.C. § 251 (1946 ed., Supp. I)). In passing this Act Congress overrode the veto of President Truman, who warned that the expenditure ban was a "dangerous intrusion on free speech." Message from the President of the United States, H.R. Doc. No. 334, 89th Cong., 1st Sess., 9 (1947).

For almost three decades thereafter, the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional. . . .

2

In *Buckley,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, the Court addressed various challenges to the Federal Election Campaign Act of 1971 (FECA) as amended in 1974. These amendments created 18 U.S.C. § 608(e) (1970 ed., Supp. V), see 88 Stat. 1265, an independent expenditure ban separate from § 610 that applied to individuals as well as corporations and labor unions, *Buckley,* 424 U.S., at 23, 39, and n. 45, 96 S.Ct. 612.

Before addressing the constitutionality of § 608(e)'s independent expenditure ban, *Buckley* first upheld § 608(b), FECA's limits on direct contributions to candidates. The *Buckley* Court recognized a "sufficiently important" governmental interest in "the prevention of corruption and the appearance of corruption." *Id.,* at 25, 96 S.Ct. 612; see *id.,* at 26, 96 S.Ct. 612. This followed from the Court's concern that large contributions could be given "to secure a political *quid pro quo*." *Ibid.*

The *Buckley* Court explained that the potential for *quid pro quo* corruption distinguished direct contributions to candidates from independent expenditures. The Court emphasized that "the independent expenditure ceiling ... fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," *id.,* at 47-48, 96 S.Ct. 612, because "[t]he absence of prearrangement and coordination ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate," *id.,* at 47, 96 S.Ct. 612.*Buckley* invalidated § 608(e)'s restrictions on independent expenditures, with only one Justice dissenting. See *Federal Election Comm'n v. National Conservative Political Action Comm.,* 470 U.S. 480, 491, 105 S.Ct. 1459, 84 L.Ed.2d 455, n. 3 (1985)*(NCPAC).*

Buckley did not consider § 610's separate ban on corporate and union independent expenditures, the prohibition that had also been in the background in *CIO,Automobile Workers,* and *Pipefitters*. Had § 610 been challenged in the wake of *Buckley,* however, it could not have been squared with the reasoning and analysis of that precedent. See *WRTL, supra,* at 487, 127 S.Ct. 2652 (opinion of SCALIA, J.) (" *Buckley* might well have been the last word on limitations on independent expenditures"); *Austin,* 494 U.S., at 683, 110 S.Ct. 1391 (SCALIA, J., dissenting). The expenditure ban invalidated in *Buckley*, § 608(e), applied to corporations and unions, 424 U.S., at 23, 39, n. 45, 96 S.Ct. 612; and some of the prevailing plaintiffs in *Buckley* were corporations, *id.,* at 8., 96 S.Ct. 612 The *Buckley* Court did not invoke the First Amendment's overbreadth doctrine, see *Broadrick v. Oklahoma,* 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), to suggest that § 608(e)'s expenditure ban would have been constitutional if it had applied only to corporations and not to individuals, 424 U.S., at 50, 96 S.Ct. 612.*Buckley* cited with approval the *Automobile Workers* dissent, which argued that § 610 was unconstitutional. 424 U.S., at 43, 96 S.Ct. 612 (citing 352 U.S., at 595-596, 77 S.Ct. 529 (opinion of Douglas, J.)).

Notwithstanding this precedent, Congress recodified § 610's corporate and union expenditure ban at 2 U.S.C. § 441b four months after *Buckley* was decided. See 90 Stat. 490. Section 441b is the independent expenditure restriction challenged here.

Less than two years after *Buckley,Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, reaffirmed the First Amendment principle that the Government cannot restrict political speech based on the speaker's corporate identity. *Bellotti* could not have been clearer when it struck down a state-law prohibition on corporate independent expenditures related to referenda issues:

> "We thus find no support in the First ... Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property.... [That proposition] amounts to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues and a requirement that the speaker have a sufficiently great interest in the subject to justify communication.

* * * * * *

> "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.,* at 784-785, 98 S.Ct. 1407.

It is important to note that the reasoning and holding of *Bellotti* did not rest on the existence of a viewpoint-discriminatory statute. It rested on the principle that the Government lacks the power to ban corporations from speaking.

Bellotti did not address the constitutionality of the State's ban on corporate independent expenditures to support candidates. In our view, however, that restriction would have been unconstitutional under *Bellotti*'s central principle: that the First Amendment does not allow political speech restrictions based on a speaker's corporate identity. See *ibid.*

3

Thus the law stood until *Austin*. *Austin* "uph[eld] a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court's] history." 494 U.S., at 695, 110 S.Ct. 1391 (KENNEDY, J., dissenting). There, the Michigan Chamber of Commerce sought to use general treasury funds to run a newspaper ad supporting a specific candidate. Michigan law, however, prohibited corporate independent expenditures that supported or opposed any candidate for state office. A violation of the law was punishable as a felony. The Court sustained the speech prohibition.

To bypass *Buckley* and *Bellotti,* the *Austin* Court identified a new governmental interest in limiting political speech: an antidistortion interest. *Austin* found a compelling governmental interest in preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S., at 660, 110 S.Ct. 1391; see *id.,* at 659, 110 S.Ct. 1391 (citing *MCFL,* 479 U.S., at 257, 107 S.Ct. 616;*NCPAC,* 470 U.S., at 500-501, 105 S.Ct. 1459).

B

The Court is thus confronted with conflicting lines of precedent: a pre- *Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post- *Austin* line that permits them. No case before *Austin* had held that Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity. Before *Austin* Congress had enacted legislation for this purpose, and the Government urged the same proposition before this Court. See *MCFL, supra,* at 257, 107 S.Ct. 616 (FEC posited that Congress intended to "curb the political influence of 'those who exercise control over large aggregations of capital' " (quoting *Automobile Workers, supra,* at 585, 77 S.Ct. 529)); *California Medical Assn. v. Federal Election Comm'n,* 453 U.S. 182, 201, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981) (Congress believed that "differing structures and purposes" of corporations and unions "may require different forms of regulation in order to protect the integrity of the electoral process"). In neither of these cases did the Court adopt the proposition.

In its defense of the corporate-speech restrictions in § 441b, the Government notes the antidistortion rationale on which *Austin* and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support *Austin*'s holding that corporate expenditure restrictions are constitutional: an anticorruption interest, see 494 U.S., at 678, 110 S.Ct. 1391 (STEVENS, J., concurring), and a shareholder-protection interest, see *id.,* at 674-675, 110 S.Ct. 1391 (Brennan, J., concurring). We consider the three points in turn.

As for *Austin*'s antidistortion rationale, the Government does little to defend it. See Tr. of Oral Arg. 45-48 (Sept. 9, 2009). And with good reason, for the rationale cannot support § 441b.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. See Part II-E, *supra;* Tr. of Oral Arg. 66 (Sept. 9, 2009); see also *id.,* at 26-31 (Mar. 24, 2009). If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds "that the FEC has never applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge." Tr. of Oral Arg. 65 (Sept. 9, 2009). This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Bellotti,* 435 U.S., at 777, 98 S.Ct. 1407 (footnote omitted); see *ibid.* (the worth of speech "does not depend upon the identity of its source, whether corporation, association, union, or individual"); *Buckley,* 424 U.S., at 48-49, 96 S.Ct. 612 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"); *Automobile Workers,* 352 U.S., at 597, 77 S.Ct. 529 (Douglas, J., dissenting); *CIO,* 335 U.S., at 154-155, 68 S.Ct. 1349 (Rutledge, J., concurring in result). This protection for speech is inconsistent with *Austin* 's antidistortion rationale. *Austin* sought to defend the antidistortion rationale as a means to prevent corporations from obtaining " 'an unfair advantage in the political marketplace' " by using " 'resources amassed in the economic marketplace.' " 494 U.S., at 659, 110 S.Ct. 1391 (quoting *MCFL, supra,* at 257, 107 S.Ct. 616). But *Buckley* rejected the premise that the Government has an interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S., at 48, 96 S.Ct. 612; see *Bellotti, supra,* at 791, n. 30, 98 S.Ct. 1407.*Buckley* was specific in stating that "the skyrocketing cost of political campaigns" could not sustain the governmental prohibition. 424 U.S., at 26, 96 S.Ct. 612. The First Amendment's protections do not depend on the speaker's "financial ability to engage in public discussion." *Id.,* at 49, 96 S.Ct. 612.

The Court reaffirmed these conclusions when it invalidated the BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. See *Davis v. Federal Election Comm'n,* 554 U.S. ----, ----, 128 S.Ct. 2759, 2774, 171 L.Ed.2d 737 (2008) ("Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the power to choose the Members of the House of Representatives, Art. I, § 2, and it is a dangerous business for Congress to use the election laws to influence the voters' choices"). The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.

Either as support for its antidistortion rationale or as a further argument, the *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that "[s]tate law grants corporations special advantages-such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets." 494 U.S., at 658-659, 110 S.Ct. 1391. This does not suffice, however, to allow

laws prohibiting speech. "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights." *Id.,* at 680, 110 S.Ct. 1391 (SCALIA, J., dissenting).

It is irrelevant for purposes of the First Amendment that corporate funds may "have little or no correlation to the public's support for the corporation's political ideas." *Id.,* at 660, 110 S.Ct. 1391 (majority opinion). All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas. See *id.,* at 707, 110 S.Ct. 1391 (KENNEDY, J., dissenting) ("Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary").

Austin's antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. See *McConnell,* 540 U.S., at 283, 124 S.Ct. 619 (opinion of THOMAS, J.) ("The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press"). Cf. *Tornillo,* 418 U.S., at 250, 94 S.Ct. 2831 (alleging the existence of "vast accumulations of unreviewable power in the modern media empires"). Media corporations are now exempt from § 441b's ban on corporate expenditures. See 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i). Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have "immense aggregations of wealth," and the views expressed by media corporations often "have little or no correlation to the public's support" for those views. *Austin,* 494 U.S., at 660, 110 S.Ct. 1391. Thus, under the Government's reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not. "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers." *Id.,* at 691, 110 S.Ct. 1391 (SCALIA, J., dissenting) (citing *Bellotti,* 435 U.S., at 782, 98 S.Ct. 1407); see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 784, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (Brennan, J., joined by Marshall, Blackmun, and STEVENS, JJ., dissenting); *id.,* at 773, 105 S.Ct. 2939 (White, J., concurring in judgment). With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to ***906** comment on political and social issues becomes far more blurred.

The law's exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. The Framers may not have anticipated modern

business and media corporations. See *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 360-361, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (Thomas, J., concurring in judgment). Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the colonies. See *McConnell,* 540 U.S., at 252-253, 124 S.Ct. 619 (opinion of SCALIA, J.); *Grosjean,* 297 U.S., at 245-248, 56 S.Ct. 444;*Near,* 283 U.S., at 713-714, 51 S.Ct. 625. The great debates between the Federalists and the Anti-Federalists over our founding document were published and expressed in the most important means of mass communication of that era-newspapers owned by individuals. See *McIntyre,* 514 U.S., at 341-343, 115 S.Ct. 1511;*id.,* at 367, 115 S.Ct. 1511 (THOMAS, J., concurring in judgment). At the founding, speech was open, comprehensive, and vital to society's definition of itself; there were no limits on the sources of speech and knowledge. See B. Bailyn, Ideological Origins of the American Revolution 5 (1967) ("Any number of people could join in such proliferating polemics, and rebuttals could come from all sides"); G. Wood, Creation of the American Republic 1776-1787, p. 6 (1969) ("[I]t is not surprising that the intellectual sources of [the Americans'] Revolutionary thought were profuse and various"). The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.

Austin interferes with the "open marketplace" of ideas protected by the First Amendment. *New York State Bd. of Elections v. Lopez Torres,* 552 U.S. 196, 208, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008); see *ibid.* (ideas "may compete" in this marketplace "without government interference"); *McConnell, supra,* at 274, 124 S.Ct. 619 (opinion of THOMAS, J.). It permits the Government to ban the political speech of millions of associations of citizens. See Statistics of Income 2 (5.8 million for-profit corporations filed 2006 tax returns). Most of these are small corporations without large amounts of wealth. See Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 1, 3 (96% of the 3 million businesses that belong to the U.S. Chamber of Commerce have fewer than 100 employees); M. Keightley, Congressional Research Service Report for Congress, Business Organizational Choices: Taxation and Responses to Legislative Changes 10 (2009) (more than 75% of corporations whose income is taxed under federal law, see 26 U.S.C. § 301, have less than $1 million in receipts per year). This fact belies the Government's argument that the statute is justified on the ground that it prevents the "distorting effects of immense aggregations of wealth." *Austin,* 494 U.S., at 660, 110 S.Ct. 1391. It is not even aimed at amassed wealth.

The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." *McConnell, supra,* at 257-258, 124 S.Ct. 619 (opinion of SCALIA, J.). And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." *CIO,* 335 U.S., at 144, 68 S.Ct. 1349 (Rutledge, J., concurring in result). By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease." The Federalist No. 10, p. 130 (B. Wright ed.1961) (J. Madison). Factions should be checked by permitting them all to speak, see *ibid.,* and by entrusting the people to judge what is true and what is false.

The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin*'s antidistortion rationale all the more an aberration. "[T]he First Amendment protects the right of corporations to petition legislative and

administrative bodies." *Bellotti,* 435 U.S., at 792, n. 31, 98 S.Ct. 1407 (citing *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510-511, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-138, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)). Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. An *amici* brief filed on behalf of Montana and 25 other States notes that lobbying and corporate communications with elected officials occur on a regular basis. Brief for State of Montana et al. as *Amici Curiae* 19. When that phenomenon is coupled with § 441b, the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government. That cooperation may sometimes be voluntary, or it may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies. Those kinds of interactions are often unknown and unseen. The speech that § 441b forbids, though, is public, and all can judge its content and purpose. References to massive corporate treasuries should not mask the real operation of this law. Rhetoric ought not obscure reality.

Even if § 441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. See, *e.g.,WRTL,* 551 U.S., at 503-504, 127 S.Ct. 2652 (opinion of SCALIA, J.) ("In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142 million to [26 U.S.C. § 527 organizations]"). Yet certain disfavored associations of citizens-those that have taken on the corporate form-are penalized for engaging in the same political speech.

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

2

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley,* the Court found this interest "sufficiently important" to allow limits on contributions but did not extend that reasoning to expenditure limits. 424 U.S., at 25, 96 S.Ct. 612. When *Buckley* examined an expenditure ban, it found "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures." *Id.,* at 45, 96 S.Ct. 612.

With regard to large direct contributions, *Buckley* reasoned that they could be given "to secure a political *quid pro quo,*" *id.,* at 26, 96 S.Ct. 612, and that "the scope of such pernicious practices can never be reliably ascertained," *id.,* at 27, 96 S.Ct. 612. The practices *Buckley* noted would be covered by bribery laws, see, *e.g.,*18 U.S.C. § 201, if a *quid pro quo* arrangement were proved. See *Buckley, supra,* at 27, and n. 28, 96 S.Ct. 612 (citing *Buckley v. Valeo,* 519 F.2d 821, 839-840, and nn. 36-38 (CADC 1975) (en banc) *(per curiam)*). The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements. *MCFL,* 479 U.S., at 260, 107 S.Ct. 616;*NCPAC,* 470 U.S., at 500, 105 S.Ct. 1459;*Federal Election Comm'n v. National Right to Work Comm.,* 459 U.S. 197, 210, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982)*(NRWC)*. The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to independent expenditures, and the Court does not do so here.

"The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley,* 424 U.S., at 47, 96 S.Ct. 612; see *ibid.* (independent expenditures have a "substantially diminished potential for abuse"). Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States. See Supp. Brief for Appellee 18, n. 3; Supp. Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* 8-9, n. 5.

. . . .

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption. See *McConnell,*http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003909967*supra,* at 296-298, 124 S.Ct. 619 (opinion of KENNEDY, J.) (citing *Buckley, supra,* at 26-28, 30, 46-48, 96 S.Ct. 612);*NCPAC,* 470 U.S., at 497, 105 S.Ct. 1459 ("The hallmark of corruption is the financial *quid pro quo:* dollars for political favors"); *id.,* at 498, 105 S.Ct. 1459. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

> "Favoritism and influence are not ... avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." *McConnell,* 540 U.S., at 297, 124 S.Ct. 619 (opinion of KENNEDY, J.).

Reliance on a "generic favoritism or influence theory ... is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle." *Id.,* at 296, 124 S.Ct. 619.

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. See *Buckley, supra,* at 46, 96 S.Ct. 612. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse " 'to take part in democratic governance' " because of additional political speech made by a corporation or any other speaker. *McConnell, supra,* at 144, 124 S.Ct. 619 (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 390, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000)).

Caperton v. A.T. Massey Coal Co., 556 U.S. ----, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), is not to the contrary. *Caperton* held that a judge was required to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.,* at ----, 129 S.Ct., at 2263-2264. The remedy of recusal was based on a litigant's due process right to a fair trial before an unbiased judge. See *Withrow v. Larkin,* 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). *Caperton* 's holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned.

The *McConnell* record was "over 100,000 pages" long, *McConnell I,* 251 F.Supp.2d, at 209, yet it "does

not have any direct examples of votes being exchanged for ... expenditures," *id.,* at 560 (opinion of Kollar-Kotelly, J.). This confirms *Buckley* 's reasoning that independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. See 251 F.Supp.2d, at 555-557 (opinion of Kollar-Kotelly, J.). Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called "soft money," were made to gain access to elected officials. *McConnell, supra,* at 125, 130-131, 146-152, 124 S.Ct. 619; see *McConnell I,* 251 F.Supp.2d, at 471-481, 491-506 (opinion of Kollar-Kotelly, J.); *id.,* at 842-843, 858-859 (opinion of Leon, J.). This case, however, is about independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

3

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like *Austin*'s antidistortion rationale, would allow the Government to ban the political speech even of media corporations. See *supra,* at 905 - 906. Assume, for example, that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. See *Austin,* 494 U.S., at 687, 110 S.Ct. 1391 (SCALIA, J., dissenting). Under the Government's view, that potential disagreement could give the Government the authority to restrict the media corporation's political speech. The First Amendment does not allow that power. There is, furthermore, little evidence of abuse that cannot be corrected by shareholders "through the procedures of corporate democracy." *Bellotti,* 435 U.S., at 794, 98 S.Ct. 1407; see *id.,* at 794, n. 34, 98 S.Ct. 1407.

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.

4

We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process. Cf. 2 U.S.C. § 441e (contribution and expenditure ban applied to "foreign national[s]"). Section 441b is not limited to corporations or associations that were created in foreign countries or funded predominately by foreign shareholders. Section 441b therefore would be overbroad even if we assumed, *arguendo,* that the Government has a compelling interest in limiting foreign influence over our political process. See *Broadrick,* 413 U.S., at 615, 93 S.Ct. 2908.

C

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana,* 556 U.S. ----, ----, 129 S.Ct. 2079, 2088-2089, 173 L.Ed.2d 955 (2009) (overruling *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)). We have also examined whether "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan,* 555 U.S. ----, ----, 129 S.Ct. 808, 816, 172 L.Ed.2d 565 (2009) (overruling *Saucier v. Katz,* 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

These considerations counsel in favor of rejecting *Austin,* which itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *WRTL,* 551 U.S., at 500, 127 S.Ct. 2652 (opinion of SCALIA, J.). "*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940).

For the reasons above, it must be concluded that *Austin* was not well reasoned. . . .

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. See, *e.g.,McConnell,* 540 U.S., at 176-177, 124 S.Ct. 619 ("Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives ... to exploit [26 U.S.C. § 527] organizations will only increase"). Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology-and the creative dynamic inherent in the concept of free expression-counsel against upholding a law that restricts political speech in certain media or by certain speakers. See Part II-C, *supra*. Today, 30-second television ads may be the most effective way to convey a political message. See *McConnell, supra,* at 261, 124 S.Ct. 619 (opinion of SCALIA, J.). Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet, § 441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. See 2 U.S.C. § 441b(a); *MCFL, supra,* at 249, 107 S.Ct. 616. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

. . . .

Due consideration leads to this conclusion: *Austin,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

D

Austin is overruled, so it provides no basis for allowing the Government to limit corporate independent expenditures. As the Government appears to concede, overruling *Austin* "effectively invalidate[s] not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy." Brief for Appellee 33, n. 12. Section 441b's restrictions on corporate independent expenditures are therefore invalid and cannot be applied to *Hillary*.

Given our conclusion we are further required to overrule the part of *McConnell* that upheld BCRA § 203's extension of § 441b's restrictions on corporate independent expenditures. See 540 U.S., at 203-209, 124 S.Ct. 619. The *McConnell* Court relied on the antidistortion interest recognized in *Austin* to uphold a greater restriction on speech than the restriction upheld in *Austin,* see 540 U.S., at 205, 124 S.Ct. 619, and we have found this interest unconvincing and insufficient. This part of *McConnell* is now overruled.

IV

A

Citizens United next challenges BCRA's disclaimer and disclosure provisions as applied to *Hillary* and the three advertisements for the movie. Under BCRA § 311, televised electioneering communications funded by anyone other than a candidate must include a disclaimer that " '_____ is responsible for the content of this advertising.' " 2 U.S.C. § 441d(d)(2). The required statement must be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. *Ibid.* It must state that the communication "is not authorized by any candidate or candidate's committee"; it must also display the name and address (or Web site address) of the person or group that funded the advertisement. § 441d(a)(3). Under BCRA § 201, any person who spends more than $10,000 on electioneering communications within a calendar year must file a disclosure statement with the FEC. 2 U.S.C. § 434(f)(1). That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of certain contributors. § 434(f)(2).

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley,* 424 U.S., at 64, 96 S.Ct. 612, and "do not prevent anyone from speaking," *McConnell, supra,* at 201, 124 S.Ct. 619 (internal quotation marks and brackets omitted). The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Buckley, supra,* at 64, 66, 96 S.Ct. 612 (internal quotation marks omitted); see *McConnell, supra,* at 231-232, 124 S.Ct. 619.

In *Buckley,* the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. 424 U.S., at 66, 96 S.Ct. 612. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. 540 U.S., at 196, 124 S.Ct. 619. There was evidence in the record that independent groups were running election-related advertisements " 'while hiding behind dubious and misleading names.' " *Id.,* at 197, 124 S.Ct. 619 (quoting *McConnell I,* 251 F.Supp.2d, at 237). The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens " 'make informed choices in the political marketplace.' " 540 U.S., at 197, 124 S.Ct. 619 (quoting *McConnell I, supra,* at 237); see 540 U.S., at 231, 124 S.Ct. 619.

Although both provisions were facially upheld, the Court acknowledged that as-applied challenges would be available if a group could show a " 'reasonable probability' " that disclosure of its contributors' names

" 'will subject them to threats, harassment, or reprisals from either Government officials or private parties.' " *Id.,* at 198, 124 S.Ct. 619 (quoting *Buckley, supra,* at 74, 96 S.Ct. 612).

For the reasons stated below, we find the statute valid as applied to the ads for the movie and to the movie itself.

B

Citizens United sought to broadcast one 30-second and two 10-second ads to promote *Hillary*. Under FEC regulations, a communication that "[p]roposes a commercial transaction" was not subject to 2 U.S.C. § 441b's restrictions on corporate or union funding of electioneering communications. 11 CFR § 114.15(b)(3)(ii). The regulations, however, do not exempt those communications from the disclaimer and disclosure requirements in BCRA §§ 201 and 311. See 72 Fed.Reg. 72901 (2007).

Citizens United argues that the disclaimer requirements in § 311 are unconstitutional as applied to its ads. It contends that the governmental interest in providing information to the electorate does not justify requiring disclaimers for any commercial advertisements, including the ones at issue here. We disagree. The ads fall within BCRA's definition of an "electioneering communication": They referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. See 530 F.Supp.2d, at 276, nn. 2-4. The disclaimers required by § 311 "provid[e] the electorate with information," *McConnell, supra,* at 196, 124 S.Ct. 619, and "insure that the voters are fully informed" about the person or group who is speaking, *Buckley, supra,* at 76, 96 S.Ct. 612; see also *Bellotti,* 435 U.S., at 792, n. 32, 98 S.Ct. 1407 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected"). At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.

Citizens United argues that § 311 is underinclusive because it requires disclaimers for broadcast advertisements but not for print or Internet advertising. It asserts that § 311 decreases both the quantity and effectiveness of the group's speech by forcing it to devote four seconds of each advertisement to the spoken disclaimer. We rejected these arguments in *McConnell, supra,* at 230-231, 124 S.Ct. 619. And we now adhere to that decision as it pertains to the disclosure provisions.

As a final point, Citizens United claims that, in any event, the disclosure requirements in § 201 must be confined to speech that is the functional equivalent of express advocacy. The principal opinion in *WRTL* limited 2 U.S.C. § 441b's restrictions on independent expenditures to express advocacy and its functional equivalent. 551 U.S., at 469-476, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). Citizens United seeks to import a similar distinction into BCRA's disclosure requirements. We reject this contention.

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. See, *e.g.,MCFL,* 479 U.S., at 262, 107 S.Ct. 616. In *Buckley,* the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. 424 U.S., at 75-76, 96 S.Ct. 612. In *McConnell,* three Justices who would have found § 441b to be unconstitutional nonetheless voted to uphold BCRA's disclosure and disclaimer requirements. 540 U.S., at 321, 124 S.Ct. 619 (opinion of KENNEDY, J., joined by Rehnquist, C.J., and SCALIA, J.). And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss,* 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954) (Congress "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose"). For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech

that is the functional equivalent of express advocacy.

Citizens United also disputes that an informational interest justifies the application of § 201 to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace. This is similar to the argument rejected above with respect to disclaimers. Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational interest alone is sufficient to justify application of § 201 to these ads, it is not necessary to consider the Government's other asserted interests.

Last, Citizens United argues that disclosure requirements can chill donations to an organization by exposing donors to retaliation. Some *amici* point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation. See Brief for Institute for Justice as *Amicus Curiae* 13-16; Brief for Alliance Defense Fund as *Amicus Curiae* 16-22. In *McConnell,* the Court recognized that § 201 would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed. 540 U.S., at 198, 124 S.Ct. 619. The examples cited by *amici* are cause for concern. Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.

Shareholder objections raised through the procedures of corporate democracy, see *Bellotti, supra,* at 794, and n. 34, 98 S.Ct. 1407, can be more effective today because modern technology makes disclosures rapid and informative. A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. See *McConnell,* 540 U.S., at 128, 124 S.Ct. 619 ("[T]he public may not have been fully informed about the sponsorship of so-called issue ads"); *id.,* at 196-197, 124 S.Ct. 619 (quoting *McConnell I,* 251 F.Supp.2d, at 237). With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are " 'in the pocket' of so-called moneyed interests." 540 U.S., at 259, 124 S.Ct. 619 (opinion of SCALIA, J.); see *MCFL, supra,* at 261, 107 S.Ct. 616. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

C

For the same reasons we uphold the application of BCRA §§ 201 and 311 to the ads, we affirm their application to *Hillary*. We find no constitutional impediment to the application of BCRA's disclaimer and disclosure requirements to a movie broadcast via video-on-demand. And there has been no showing that, as applied in this case, these requirements would impose a chill on speech or expression.

V

When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution. See Smoodin, "Compulsory" Viewing for Every Citizen: *Mr. Smith* and the Rhetoric of Reception, 35 Cinema Journal 3, 19, and n. 52 (Winter 1996) (citing Mr. Smith Riles Washington, Time, Oct. 30, 1939, p. 49); Nugent,

Capra's Capitol Offense, N.Y. Times, Oct. 29, 1939, p. X5. Under *Austin,* though, officials could have done more than discourage***917** its distribution-they could have banned the film. After all, it, like *Hillary,* was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force.

Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" in order to engage in political speech. 2 U.S.C. § 431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." *McConnell,*http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=708&FindType=Y&SerialNum=2003909967*supra,* at 341, 124 S.Ct. 619 (opinion of KENNEDY, J.).

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. § 441b's restrictions on corporate independent expenditures. The judgment is affirmed with respect to BCRA's disclaimer and disclosure requirements. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice ALITO joins, concurring.

The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the First Amendment that would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations-as the major ones are. First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy.

The Court properly rejects that theory, and I join its opinion in full. The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer. I write separately to address the important principles of judicial restraint and *stare decisis* implicated in this case.

I

Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called upon to perform." *Blodgett v. Holden,* 275 U.S. 142, 147-148, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (Holmes, J., concurring). Because the stakes are so high, our standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us. See *Ashwander v. TVA,* 297 U.S. 288, 346-348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). This policy underlies both our willingness to construe ambiguous statutes to avoid constitutional problems and our practice " 'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *United States v. Raines,* 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)).

The majority and dissent are united in expressing allegiance to these principles. *Ante,* at 892; *post,* at 936 - 937 (STEVENS, J., concurring in part and dissenting in part). But I cannot agree with my dissenting colleagues on how these principles apply in this case.

The majority's step-by-step analysis accords with our standard practice of avoiding broad constitutional questions except when necessary to decide the case before us. . . .

II

The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union. What makes this case difficult is the need to confront our prior decision in *Austin.*

This is the first case in which we have been asked to overrule *Austin,* and thus it is also the first in which we have had reason to consider how much weight to give *stare decisis* in assessing its continued validity. The dissent erroneously declares ***920** that the Court "reaffirmed" *Austin*'s holding in subsequent cases-namely, *Federal Election Comm'n v. Beaumont,* 539 U.S. 146, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003); *McConnell* ; and *WRTL*. *Post,* at 956 - 957. Not so. Not a single party in any of those cases asked us to overrule *Austin,* and as the dissent points out, *post,* at 931 - 932, the Court generally does not consider constitutional arguments that have not properly been raised. *Austin*'s validity was therefore not directly at issue in the cases the dissent cites. The Court's unwillingness to overturn *Austin* in those cases cannot be understood as a *reaffirmation* of that decision.

A

Fidelity to precedent-the policy of *stare decisis*-is vital to the proper exercise of the judicial function. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a "special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

At the same time, *stare decisis* is neither an "inexorable command," *Lawrence v. Texas,* 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), nor "a mechanical formula of adherence to the latest decision," *Helvering v. Hallock,* 309 U.S. 106, 119, 60 S.Ct. 444, 84 L.Ed. 604 (1940), especially in constitutional cases, see *United States v. Scott,* 437 U.S. 82, 101, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978). If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. See *Plessy v. Ferguson,* 163

U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), overruled by *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954); *Adkins v. Children's Hospital of D. C.,* 261 U.S. 525, 43 S.Ct. 394, 67 L.Ed. 785 (1923), overruled by *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937); *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), overruled by *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). As the dissent properly notes, none of us has viewed *stare decisis* in such absolute terms. *Post,* at 938 - 939; see also, *e.g.,Randall v. Sorrell,* 548 U.S. 230, 274-281, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (STEVENS, J., dissenting) (urging the Court to overrule its invalidation of limits on independent expenditures on political speech in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*)).

Stare decisis is instead a "principle of policy." *Helvering, supra,* at 119, 60 S.Ct. 444. When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*. As Justice Jackson explained, this requires a "sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other." Jackson, Decisional Law and *Stare Decisis,* 30 A.B.A.J. 334 (1944).

In conducting this balancing, we must keep in mind that *stare decisis* is not an end in itself. It is instead "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion." . . . . Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects.

Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished.

Justice SCALIA, with whom Justice ALITO joins, and with whom Justice THOMAS joins in part, concurring.
. . . .

I write separately to address Justice STEVENS' discussion of "*Original Understandings,*" *post,* at 948 (opinion concurring in part and dissenting in part) (hereinafter referred to as the dissent). This section of the dissent purports to show that today's decision is not supported by the original understanding of the First Amendment. The dissent attempts this demonstration, however, in splendid isolation from the text of the First Amendment. It never shows why "the freedom of speech" that was the right of Englishmen did not include the freedom to speak in association with other individuals, including association in the corporate form. To be sure, in 1791 (as now) corporations could pursue only the objectives set forth in their charters; but the dissent provides no evidence that their speech in the pursuit of those objectives could be censored.

Instead of taking this straightforward approach to determining the Amendment's meaning, the dissent embarks on a detailed exploration of the Framers' views about the "role of corporations in society." *Post,* at 949. The Framers didn't like corporations, the dissent concludes, and therefore it follows (as night the day) that corporations had no rights of free speech. Of course the Framers' personal affection or disaffection for corporations is relevant only insofar as it can be thought to be reflected in the understood meaning of the text they enacted-not, as the dissent suggests, as a freestanding substitute for that text. But the dissent's distortion of proper analysis is even worse than that. Though faced with a constitutional text that makes no distinction between types of speakers, the dissent feels no necessity to provide even an isolated statement from the founding era to the effect that corporations are *not* covered, but places the burden on petitioners to bring forward statements showing that they *are* ("there is not a scintilla of

evidence to support the notion that anyone believed [the First Amendment] would preclude regulatory distinctions based on the corporate form," *post,* at 948).

. . . .

The dissent says that when the Framers "constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind." *Post,* at 950. That is no doubt true. All the provisions of the Bill of Rights set forth the rights of individual men and women-not, for example, of trees or polar bears. But the individual person's right to speak includes the right to speak *in association with other individual persons*. Surely the dissent does not believe that speech by the Republican Party or the Democratic Party can be censored because it is not the speech of "an individual American." It is the speech of many individual Americans, who have associated in a common cause, giving the leadership of the party the right to speak on their behalf. The association of individuals in a business corporation is no different-or at least it cannot be denied the right to speak on the simplistic ground that it is not "an individual American."

But to return to, and summarize, my principal point, which is the conformity of today's opinion with the original meaning of the First Amendment. The Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals-and the dissent offers no evidence about the original meaning of the text to support any such exclusion. We are therefore simply left with the question whether the speech at issue in this case is "speech" covered by the First Amendment. No one says otherwise. A documentary film critical of a potential Presidential candidate is core political speech, and its nature as such does not change simply because it was funded by a corporation. Nor does the character of that funding produce any reduction whatever in the "inherent worth of the speech" and "its capacity for informing the public," *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 777, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Indeed, to exclude or impede corporate speech is to muzzle the principal agents of the modern free economy. We should celebrate rather than condemn the addition of this speech to the public debate.

Justice STEVENS, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring in part and dissenting in part.

The real issue in this case concerns how, not if, the appellant may finance its electioneering. Citizens United is a wealthy nonprofit corporation that runs a political action committee (PAC) with millions of dollars in assets. Under the Bipartisan Campaign Reform Act of 2002 (BCRA), it could have used those assets to televise and promote *Hillary: The Movie* wherever and whenever it wanted to. It also could have spent unrestricted sums to broadcast *Hillary* at any time other than the 30 days before the last primary election. Neither Citizens United's nor any other corporation's speech has been "banned," *ante,* at 886. All that the parties dispute is whether Citizens United had a right to use the funds in its general treasury to pay for broadcasts during the 30-day period. The notion that the First Amendment dictates an affirmative answer to that question is, in my judgment, profoundly misguided. Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case.

The basic premise underlying the Court's ruling is its iteration, and constant reiteration, of the proposition that the First Amendment bars regulatory distinctions based on a speaker's identity, including its "identity" as a corporation. While that glittering generality has rhetorical appeal, it is not a correct

statement of the law. Nor does it tell us when a corporation may engage in electioneering that some of its shareholders oppose. It does not even resolve the specific question whether Citizens United may be required to finance some of its messages with the money in its PAC. The conceit that corporations must be treated identically to natural persons in the political sphere is not only inaccurate but also inadequate to justify the Court's disposition of this case.

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

The majority's approach to corporate electioneering marks a dramatic break from our past. Congress has placed special limitations on campaign spending by corporations ever since the passage of the Tillman Act in 1907, ch. 420, 34 Stat. 864. We have unanimously concluded that this "reflects a permissible assessment of the dangers posed by those entities to the electoral process," *FEC v. National Right to Work Comm.,* 459 U.S. 197, 209, 103 S.Ct. 552, 74 L.Ed.2d 364 (1982)*(NRWC),* and have accepted the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *id.,* at 209-210, 103 S.Ct. 552. The Court today rejects a century of history when it treats the distinction between corporate and individual campaign spending as an invidious novelty born of *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990). Relying largely on individual dissenting opinions, the majority blazes through our precedents, overruling or disavowing a body of case law including *FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 127 S.Ct. 2652, 168 L.Ed.2d 329 (2007)*(WRTL),McConnell v. FEC,* 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003), *FEC v. Beaumont,* 539 U.S. 146, 123 S.Ct. 2200, 156 L.Ed.2d 179 (2003), *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986)*(MCFL),NRWC,* 459 U.S. 197, 103 S.Ct. 552, 74 L.Ed.2d 364, and *California Medical Assn. v. FEC,* 453 U.S. 182, 101 S.Ct. 2712, 69 L.Ed.2d 567 (1981).

In his landmark concurrence in *Ashwander v. TVA,* 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936), Justice Brandeis stressed the importance of adhering to rules the Court has "developed ... for its own governance" when deciding constitutional questions. Because departures from those rules always enhance the risk of error, I shall review the background of this case in some detail before explaining why the Court's analysis rests on a faulty understanding of *Austin* and *McConnell* and of our campaign finance jurisprudence more generally. I regret the length of what follows, but the importance and novelty of the Court's opinion require a full response. Although I concur in the Court's decision to sustain BCRA's disclosure provisions and join Part IV of its opinion, I emphatically dissent from its principal holding.

I

The Court's ruling threatens to undermine the integrity of elected institutions across the Nation. The path it has taken to reach its outcome will, I fear, do damage to this institution. Before turning to the question whether to overrule *Austin* and part of *McConnell,* it is important to explain why the Court should not be deciding that question.

Scope of the Case

The first reason is that the question was not properly brought before us. In declaring § 203 of BCRA facially unconstitutional on the ground that corporations' electoral expenditures may not be regulated any more stringently than those of individuals, the majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation. This procedure is unusual and inadvisable for a court. Our colleagues' suggestion that "we are asked to reconsider *Austin* and, in effect, *McConnell,*" *ante,* at 886, would be more accurate if rephrased to state that "we have asked ourselves" to reconsider those cases.

. . . .

As-Applied and Facial Challenges

This Court has repeatedly emphasized in recent years that "[f]acial challenges are disfavored." *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008); see also *Ayotte v. Planned Parenthood of Northern New Eng.,* 546 U.S. 320, 329, 126 S.Ct. 961, 163 L.Ed.2d 812 (2006) ("[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact' " (quoting *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 504, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985); alteration in original)). By declaring § 203 facially unconstitutional, our colleagues have turned an as-applied challenge into a facial challenge, in defiance of this principle.

This is not merely a technical defect in the Court's decision. The unnecessary resort to a facial inquiry "run[s] contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Washington State Grange,* 552 U.S., at 450, 128 S.Ct. 1184 (internal quotation marks omitted). Scanting that principle "threaten[s] to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.,* at 451, 128 S.Ct. 1184. These concerns are heightened when judges overrule settled doctrine upon which the legislature has relied. The Court operates with a sledge hammer rather than a scalpel when it strikes down one of Congress' most significant efforts to regulate the role that corporations and unions play in electoral politics. It compounds the offense by implicitly striking down a great many state laws as well.

The problem goes still deeper, for the Court does all of this on the basis of pure speculation. Had Citizens United maintained a facial challenge, and thus argued that there are virtually no circumstances in which BCRA § 203 can be applied constitutionally, the parties could have developed, through the normal process of litigation, a record about the *actual* effects of § 203, its actual burdens and its actual benefits, on *all* manner of corporations and unions. . . .

. . .

Narrower Grounds

It is all the more distressing that our colleagues have manufactured a facial challenge, because the parties have advanced numerous ways to resolve the case that would facilitate electioneering by nonprofit advocacy corporations such as Citizens United, without toppling statutes and precedents. Which is to say, the majority has transgressed yet another "cardinal" principle of the judicial process: "[I]f it is not necessary to decide more, it is necessary not to decide more," *PDK Labs., Inc. v. Drug Enforcement Admin.,* 362 F.3d 786, 799 (C.A.D.C.2004) (Roberts, J., concurring in part and concurring in judgment).

. . . .

II

The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis,* in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 864, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.

. . . .

We have recognized that "*[s]tare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.' " *Hubbard v. United States,* 514 U.S. 695, 714, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995) (quoting *Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991)). *Stare decisis* protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion. Today's decision takes away a power that we have long permitted these branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering, confirmed in *Austin,* for more than a century. The Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and debating BCRA. The total record it compiled was *100,000 pages* long.[FN21] Pulling out the rug beneath Congress after affirming the constitutionality of § 203 six years ago shows great disrespect for a coequal branch.

FN21. Magleby, The Importance of the Record in *McConnell v. FEC,* 3 Election L. J. 285 (2004).

By removing one of its central components, today's ruling makes a hash out of BCRA's "delicate and interconnected regulatory scheme." *McConnell,* 540 U.S., at 172, 124 S.Ct. 619. Consider just one example of the distortions that will follow: Political parties are barred under BCRA from soliciting or spending "soft money," funds that are not subject to the statute's disclosure requirements or its source and amount limitations. 2 U.S.C. § 441i; *McConnell,* 540 U.S., at 122-126, 124 S.Ct. 619. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court's ruling thus dramatically enhances the role of corporations and unions-and the narrow interests they represent-vis-à-vis the role of political parties-and the broad coalitions they represent-in determining who will hold public office.

Beyond the reliance interests at stake, the other *stare decisis* factors also cut against the Court. Considerations of antiquity are significant for similar reasons. *McConnell* is only six years old, but *Austin* has been on the books for two decades, and many of the statutes called into question by today's opinion have been on the books for a half-century or more. The Court points to no intervening change in circumstances that warrants revisiting *Austin.* Certainly nothing relevant has changed since we decided *WRTL* two Terms ago. And the Court gives no reason to think that *Austin* and *McConnell* are unworkable.

In fact, no one has argued to us that *Austin*'s rule has proved impracticable, and not a single for-profit

corporation, union, or State has asked us to overrule it. . . .

In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis,* "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery,* 474 U.S. 254, 265, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986).

III

The novelty of the Court's procedural dereliction and its approach to *stare decisis* is matched by the novelty of its ruling on the merits. The ruling rests on several premises. First, the Court claims that *Austin* and *McConnell* have "banned" corporate speech. Second, it claims that the First Amendment precludes regulatory distinctions based on speaker identity, including the speaker's identity as a corporation. Third, it claims that *Austin* and *McConnell* were radical outliers in our First Amendment tradition and our campaign finance jurisprudence. Each of these claims is wrong.

The So-Called "Ban"

Pervading the Court's analysis is the ominous image of a "categorical ba[n]" on corporate speech. *Ante,* at 910. Indeed, the majority invokes the specter of a "ban" on nearly every page of its opinion. *Ante,* at 886 - 887, 889, 891 - 892, 894, 896 - 898, 900 - 907, 909 - 912, 915, 916. This characterization is highly misleading, and needs to be corrected.

In fact it already has been. Our cases have repeatedly pointed out that, "[c]ontrary to the [majority's] critical assumptions," the statutes upheld in *Austin* and *McConnell* do "not impose an *absolute* ban on all forms of corporate political spending." *Austin,* 494 U.S., at 660, 110 S.Ct. 1391; see also *McConnell,* 540 U.S., at 203-204, 124 S.Ct. 619;*Beaumont,* 539 U.S., at 162-163, 123 S.Ct. 2200. For starters, both statutes provide exemptions for PACs, separate segregated funds established by a corporation for political purposes. See 2 U.S.C. § 441b(b)(2)(C); Mich. Comp. Laws Ann. § 169.255 (West 2005). "The ability to form and administer separate segregated funds," we observed in *McConnell,* "has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy. That has been this Court's unanimous view." 540 U.S., at 203, 124 S.Ct. 619.

Under BCRA, any corporation's "stockholders and their families and its executive or administrative personnel and their families" can pool their resources to finance electioneering communications. 2 U.S.C. § 441b(b)(4)(A)(i). A significant and growing number of corporations avail themselves of this option; during the most recent election cycle, corporate and union PACs raised nearly a billion dollars. Administering a PAC entails some administrative burden, but so does complying with the disclaimer, disclosure, and reporting requirements that the Court today upholds, see *ante,* at 914, and no one has suggested that the burden is severe for a sophisticated for-profit corporation. To the extent the majority is worried about this issue, it is important to keep in mind that we have no record to show how substantial the burden really is, just the majority's own unsupported factfinding, see *ante,* at 897 - 898. Like all other natural persons, every shareholder of every corporation remains entirely free under *Austin* and *McConnell* to do however much electioneering she pleases outside of the corporate form. The owners of a "mom & pop" store can simply place ads in their own names, rather than the store's. If ideologically aligned individuals wish to make unlimited expenditures through the corporate form, they may utilize an *MCFL*

organization that has policies in place to avoid becoming a conduit for business or union interests. See *MCFL,* 479 U.S., at 263-264, 107 S.Ct. 616.

The laws upheld in *Austin* and *McConnell* leave open many additional avenues for corporations' political speech. Consider the statutory provision we are ostensibly evaluating in this case, BCRA § 203. It has no application to genuine issue advertising-a category of corporate speech Congress found to be far more substantial than election-related advertising, see *McConnell,* 540 U.S., at 207, 124 S.Ct. 619-or to Internet, telephone, and print advocacy. Like numerous statutes, it exempts media companies' news stories, commentaries, and editorials from its electioneering restrictions, in recognition of the unique role played by the institutional press in sustaining public debate.[FN32] See 2 U.S.C. § 434(f)(3)(B)(i); *McConnell,* 540 U.S., at 208-209, 124 S.Ct. 619; see also *Austin,* 494 U.S., at 666-668, 110 S.Ct. 1391. It also allows corporations to spend unlimited sums on political communications with their executives and shareholders, § 441b(b)(2)(A); 11 CFR § 114.3(a)(1), to fund additional PAC activity through trade associations, 2 U.S.C. § 441b(b)(4)(D), to distribute voting guides and voting records, 11 CFR §§ 114.4(c)(4)- (5), to underwrite voter registration and voter turnout activities, § 114.3(c)(4); § 114.4(c)(2), to host fundraising events for candidates within certain limits, § 114.4(c); § 114.2(f)(2), and to publicly endorse candidates through a press release and press conference, § 114.4(c)(6).

> FN32. As the Government points out, with a media corporation there is also a lesser risk that investors will not understand, learn about, or support the advocacy messages that the corporation disseminates. Supp. Reply Brief for Appellee 10. Everyone knows and expects that media outlets may seek to influence elections in this way.

At the time Citizens United brought this lawsuit, the only types of speech that could be regulated under § 203 were: (1) broadcast, cable, or satellite communications; (2) capable of reaching at least 50,000 persons in the relevant electorate; (3) made within 30 days of a primary or 60 days of a general federal election; (4) by a labor union or a non- *MCFL,* nonmedia corporation; (5) paid for with general treasury funds; and (6) "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The category of communications meeting all of these criteria is not trivial, but the notion that corporate political speech has been "suppress[ed] ... altogether," *ante,* at 886, that corporations have been "exclu[ded] ... from the general public dialogue," *ante,* at 899, or that a work of fiction such as *Mr. Smith Goes to Washington* might be covered, *ante,* at 916 - 917, is nonsense. Even the plaintiffs in *McConnell,* who had every incentive to depict BCRA as negatively as possible, declined to argue that § 203's prohibition on certain uses of general treasury funds amounts to a complete ban. See 540 U.S., at 204, 124 S.Ct. 619.

In many ways, then, § 203 functions as a source restriction or a time, place, and manner restriction. It applies in a viewpoint-neutral fashion to a narrow subset of advocacy messages about clearly identified candidates for federal office, made during discrete time periods through discrete channels. In the case at hand, all Citizens United needed to do to broadcast *Hillary* right before the primary was to abjure business contributions or use the funds in its PAC, which by its own account is "one of the most active conservative PACs in America," Citizens United Political Victory Fund, http:// www. cupvf. org/.

So let us be clear: Neither *Austin* nor *McConnell* held or implied that corporations may be silenced; the FEC is not a "censor"; and in the years since these cases were decided, corporations have continued to play a major role in the national dialogue. Laws such as § 203 target a class of communications that is especially likely to corrupt the political process, that is at least one degree removed from the views of individual citizens, and that may not even reflect the views of those who pay for it. Such laws burden political speech, and that is always a serious matter, demanding careful scrutiny. But the majority's incessant talk of a "ban" aims at a straw man.

Identity-Based Distinctions

The second pillar of the Court's opinion is its assertion that "the Government cannot restrict political speech based on the speaker's ... identity." *Ante,* at 902; accord, *ante,* at 886, 898, 900, 902 - 904, 912 - 913. The case on which it relies for this proposition is *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). As I shall explain, *infra,* at 958 - 960, the holding in that case was far narrower than the Court implies. Like its paeans to unfettered discourse, the Court's denunciation of identity-based distinctions may have rhetorical appeal but it obscures reality.

"Our jurisprudence over the past 216 years has rejected an absolutist interpretation" of the First Amendment. *WRTL,* 551 U.S., at 482, 127 S.Ct. 2652 (opinion of ROBERTS, C.J.). The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech, or of the press." Apart perhaps from measures designed to protect the press, that text might seem to permit no distinctions of any kind. Yet in a variety of contexts, we have held that speech can be regulated differentially on account of the speaker's identity, when identity is understood in categorical or institutional terms. The Government routinely places special restrictions on the speech rights of students,[FN41] prisoners,[FN42] members of the Armed Forces,[FN43] foreigners,[FN44] and its own employees.[FN45] When such restrictions are justified by a legitimate governmental interest, they do not necessarily raise constitutional problems.[FN46] In contrast to the blanket rule that the majority espouses, our cases recognize that the Government's interests may be more or less compelling with respect to different classes of speakers,[FN47] cf. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 585, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983) ("[D]ifferential treatment" is constitutionally suspect "*unless* justified by some special characteristic" of the regulated class of speakers (emphasis added)), and that the constitutional rights of certain categories of speakers, in certain contexts, " 'are not automatically coextensive with the rights' " that are normally accorded to members of our society, *Morse v. Frederick,* 551 U.S. 393, 396-397, 404, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (quoting *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)).

> FN41. See, *e.g.,Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").
>
> FN42. See, *e.g.,Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 129, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) ("In a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system" (internal quotation marks omitted)).
>
> FN43. See, *e.g.,Parker v. Levy,* 417 U.S. 733, 758, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections").
>
> FN44. See, *e.g.,*2 U.S.C. § 441e(a)(1) (foreign nationals may not directly or indirectly make contributions or independent expenditures in connection with a U.S. election).
>
> FN45. See, *e.g.,Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (upholding statute prohibiting Executive Branch employees from taking "any active part in political management or in political campaigns" (internal quotation marks omitted)); *Public Workers v. Mitchell,* 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) (same); *United States*

v. Wurzbach, 280 U.S. 396, 50 S.Ct. 167, 74 L.Ed. 508 (1930) (upholding statute prohibiting federal employees from making contributions to Members of Congress for "any political purpose whatever" (internal quotation marks omitted)); *Ex parte Curtis,* 106 U.S. 371, 1 S.Ct. 381, 27 L.Ed. 232 (1882) (upholding statute prohibiting certain federal employees from giving money to other employees for political purposes).

FN46. The majority states that the cases just cited are "inapposite" because they "stand only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." *Ante,* at 899. The majority's creative suggestion that these cases stand only for that one proposition is quite implausible. In any event, the proposition lies at the heart of this case, as Congress and half the state legislatures have concluded, over many decades, that their core functions of administering elections and passing legislation cannot operate effectively without some narrow restrictions on corporate electioneering paid for by general treasury funds.

FN47. Outside of the law, of course, it is a commonplace that the identity and incentives of the speaker might be relevant to an assessment of his speech. See Aristotle, Poetics 43-44 (M. Heath transl. 1996) ("In evaluating any utterance or action, one must take into account not just the moral qualities of what is actually done or said, but also the identity of the agent or speaker, the addressee, the occasion, the means, and the motive"). The insight that the identity of speakers is a proper subject of regulatory concern, it bears noting, motivates the disclaimer and disclosure provisions that the Court today upholds.

The free speech guarantee thus does not render every other public interest an illegitimate basis for qualifying a speaker's autonomy; society could scarcely function if it did. It is fair to say that our First Amendment doctrine has "frowned on" certain identity-based distinctions, *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32, 47, n. 4, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999) (STEVENS, J., dissenting), particularly those that may reflect invidious discrimination or preferential treatment of a politically powerful group. But it is simply incorrect to suggest that we have prohibited all legislative distinctions based on identity or content. Not even close.

The election context is distinctive in many ways, and the Court, of course, is right that the First Amendment closely guards political speech. But in this context, too, the authority of legislatures to enact viewpoint-neutral regulations based on content and identity is well settled. We have, for example, allowed state-run broadcasters to exclude independent candidates from televised debates. *Arkansas Ed. Television Comm'n v. Forbes,* 523 U.S. 666, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998). We have upheld statutes that prohibit the distribution or display of campaign materials near a polling place. *Burson v. Freeman,* 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). Although we have not reviewed them directly, we have never cast doubt on laws that place special restrictions on campaign spending by foreign nationals. See, *e.g.,*2 U.S.C. § 441e(a)(1). And we have consistently approved laws that bar Government employees, but not others, from contributing to or participating in political activities. See n. 45, *supra*. These statutes burden the political expression of one class of speakers, namely, civil servants. Yet we have sustained them on the basis of longstanding practice and Congress' reasoned judgment that certain regulations which leave "untouched full participation ... in political decisions at the ballot box," *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 556, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (internal quotation marks omitted), help ensure that public officials are "sufficiently free from improper influences," *id.,* at 564, 93 S.Ct. 2880, and that "confidence in the system of representative Government is not ... eroded to a disastrous extent," *id.,* at 565, 93 S.Ct. 2880.

The same logic applies to this case with additional force because it is the identity of corporations, rather

than individuals, that the Legislature has taken into account. As we have unanimously observed, legislatures are entitled to decide "that the special characteristics of the corporate structure require particularly careful regulation" in an electoral context. *NRWC,* 459 U.S., at 209-210, 103 S.Ct. 552.[FN50] Not only has the distinctive potential of corporations to corrupt the electoral process long been recognized, but within the area of campaign finance, corporate spending is also "furthest from the core of political expression, since corporations' First Amendment speech and association interests are derived largely from those of their members and of the public in receiving information," *Beaumont,* 539 U.S., at 161, n. 8, 123 S.Ct. 2200 (citation omitted). Campaign finance distinctions based on corporate identity tend to be less worrisome, in other words, because the "speakers" are not natural persons, much less members of our political community, and the governmental interests are of the highest order. Furthermore, when corporations, as a class, are distinguished from noncorporations, as a class, there is a lesser risk that regulatory distinctions will reflect invidious discrimination or political favoritism.

> FN50. They are likewise entitled to regulate media corporations differently from other corporations "to ensure that the law 'does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events.' " *McConnell,* 540 U.S., at 208, 124 S.Ct. 619 (quoting *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 668, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990)).

If taken seriously, our colleagues' assumption that the identity of a speaker has *no* relevance to the Government's ability to regulate political speech would lead to some remarkable conclusions. Such an assumption would have accorded the propaganda broadcasts to our troops by "Tokyo Rose" during World War II the same protection as speech by Allied commanders. More pertinently, it would appear to afford the same protection to multinational corporations controlled by foreigners as to individual Americans: To do otherwise, after all, could " 'enhance the relative voice' " of some (*i.e.,* humans) over others (*i.e.,* nonhumans). *Ante,* at 904 (quoting *Buckley,* 424 U.S., at 49, 96 S.Ct. 612).[FN51] Under the majority's view, I suppose it may be a First Amendment problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech.[FN52]

> FN51. The Court all but confesses that a categorical approach to speaker identity is untenable when it acknowledges that Congress might be allowed to take measures aimed at "preventing foreign individuals or associations from influencing our Nation's political process." *Ante,* at 911. Such measures have been a part of U.S. campaign finance law for many years. The notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers, whose "obsession with foreign influence derived from a fear that foreign powers and individuals had no basic investment in the well-being of the country." Teachout, The Anti-Corruption Principle, 94 Cornell L.Rev. 341, 393, n. 245 (2009) (hereinafter Teachout); see also U.S. Const., Art. I, § 9, cl. 8 ("[N]o Person holding any Office of Profit or Trust ... shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State"). Professor Teachout observes that a corporation might be analogized to a foreign power in this respect, "inasmuch as its legal loyalties necessarily exclude patriotism." Teachout 393, n. 245.

> FN52. See A. Bickel, The Supreme Court and the Idea of Progress 59-60 (1978); A. Meiklejohn, Political Freedom: The Constitutional Powers of the People 39-40 (1965); Tokaji, First Amendment Equal Protection: On Discretion, Inequality, and Participation, 101 Mich. L.Rev. 2409, 2508-2509 (2003). Of course, voting is not speech in a pure or formal sense, but then again neither is a campaign expenditure; both are nevertheless communicative acts aimed at influencing electoral outcomes. Cf. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L.Rev. 1369, 1383-1384 (1994) (hereinafter Strauss).

In short, the Court dramatically overstates its critique of identity-based distinctions, without ever explaining why corporate identity demands the same treatment as individual identity. Only the most wooden approach to the First Amendment could justify the unprecedented line it seeks to draw.

Our First Amendment Tradition

A third fulcrum of the Court's opinion is the idea that *Austin* and *McConnell* are radical outliers, "aberration[s]," in our First Amendment tradition. *Ante,* at 907; see also *ante,* at 910, 916 - 917 (professing fidelity to "our law and our tradition"). The Court has it exactly backwards. It is today's holding that is the radical departure from what had been settled First Amendment law. To see why, it is useful to take a long view.

1. *Original Understandings*

Let us start from the beginning. The Court invokes "ancient First Amendment principles," *ante,* at 886 (internal quotation marks omitted), and original understandings, *ante,* at 906 - 907, to defend today's ruling, yet it makes only a perfunctory attempt to ground its analysis in the principles or understandings of those who drafted and ratified the Amendment. Perhaps this is because there is not a scintilla of evidence to support the notion that anyone believed it would preclude regulatory distinctions based on the corporate form. To the extent that the Framers' views are discernible and relevant to the disposition of this case, they would appear to cut strongly against the majority's position.

This is not only because the Framers and their contemporaries conceived of speech more narrowly than we now think of it, see Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 22 (1971), but also because they held very different views about the nature of the First Amendment right and the role of corporations in society. Those few corporations that existed at the founding were authorized by grant of a special legislative charter. Corporate sponsors would petition the legislature, and the legislature, if amenable, would issue a charter that specified the corporation's powers and purposes and "authoritatively fixed the scope and content of corporate organization," including "the internal structure of the corporation." J. Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970, pp. 15-16 (1970) (reprint 2004). Corporations were created, supervised, and conceptualized as quasi-public entities, "designed to serve a social function for the state." Handlin & Handlin, Origin of the American Business Corporation, 5 J. Econ. Hist. 1, 22 (1945). It was "assumed that [they] were legally privileged organizations that had to be closely scrutinized by the legislature because their purposes had to be made consistent with public welfare." R. Seavoy, Origins of the American Business Corporation, 1784-1855, p. 5 (1982).

The individualized charter mode of incorporation reflected the "cloud of disfavor under which corporations labored" in the early years of this Nation. 1 W. Fletcher, Cyclopedia of the Law of Corporations § 2, p. 8 (rev. ed.2006); see also *Louis K. Liggett Co. v. Lee,* 288 U.S. 517, 548-549, 53 S.Ct. 481, 77 L.Ed. 929 (1933) (Brandeis, J., dissenting) (discussing fears of the "evils" of business corporations); L. Friedman, A History of American Law 194 (2d ed.1985) ("The word 'soulless' constantly recurs in debates over corporations.... Corporations, it was feared, could concentrate the worst urges of whole groups of men"). Thomas Jefferson famously fretted that corporations would subvert the Republic.[FN54] General incorporation statutes, and widespread acceptance of business corporations as socially useful actors, did not emerge until the 1800's. See Hansmann & Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 440 (2001) (hereinafter Hansmann & Kraakman) ("[A]ll general business corporation statutes appear to date from well after 1800").

FN54. See Letter from Thomas Jefferson to Tom Logan (Nov. 12, 1816), in 12 The Works of Thomas Jefferson 42, 44 (P. Ford ed. 1905) ("I hope we shall ... crush in [its] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country").

The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. While individuals might join together to exercise their speech rights, business corporations, at least, were plainly not seen as facilitating such associational or expressive ends. Even "the notion that business corporations could invoke the First Amendment would probably have been quite a novelty," given that "at the time, the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign." Shelledy, Autonomy, Debate, and Corporate Speech, 18 Hastings Const. L.Q. 541, 578 (1991); cf. *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 636, 4 L.Ed. 629 (1819) (Marshall, C.J.) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it"); Eule, Promoting Speaker Diversity: Austin and Metro Broadcasting, 1990 S.Ct. Rev. 105, 129 ("The framers of the First Amendment could scarcely have anticipated its application to the corporation form. That, of course, ought not to be dispositive. What is compelling, however, is an understanding of who was supposed to be the beneficiary of the free speech guaranty-the individual"). In light of these background practices and understandings, it seems to me implausible that the Framers believed "the freedom of speech" would extend equally to all corporate speakers, much less that it would preclude legislatures from taking limited measures to guard against corporate capture of elections.

The Court observes that the Framers drew on diverse intellectual sources, communicated through newspapers, and aimed to provide greater freedom of speech than had existed in England. *Ante,* at 906. From these (accurate) observations, the Court concludes that "[t]he First Amendment was certainly not understood to condone the suppression of political speech in society's most salient media." *Ibid.* This conclusion is far from certain, given that many historians believe the Framers were focused on prior restraints on publication and did not understand the First Amendment to "prevent the subsequent punishment of such [publications] as may be deemed contrary to the public welfare." *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 714, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Yet, even if the majority's conclusion were correct, it would tell us only that the First Amendment was understood to protect political speech *in* certain media. It would tell us little about whether the Amendment was understood to protect general treasury electioneering expenditures *by* corporations, *and to what extent*.

As a matter of original expectations, then, it seems absurd to think that the First Amendment prohibits legislatures from taking into account the corporate identity of a sponsor of electoral advocacy. As a matter of original meaning, it likewise seems baseless-unless one evaluates the First Amendment's "principles," *ante,* at 886, 912, or its "purpose," *ante,* at 919 -920 (opinion of ROBERTS, C.J.), at such a high level of generality that the historical understandings of the Amendment cease to be a meaningful constraint on the judicial task. This case sheds a revelatory light on the assumption of some that an impartial judge's application of an originalist methodology is likely to yield more determinate answers, or to play a more decisive role in the decisional process, than his or her views about sound policy.

Justice SCALIA criticizes the foregoing discussion for failing to adduce statements from the founding era showing that corporations were understood to be excluded from the First Amendment's free speech guarantee. *Ante,* at 925 - 926, 929. Of course, Justice SCALIA adduces no statements to suggest the

contrary proposition, or even to suggest that the contrary proposition better reflects the kind of right that the drafters and ratifiers of the Free Speech Clause thought they were enshrining. Although Justice SCALIA makes a perfectly sensible argument that an individual's right to speak entails a right to speak with others for a common cause, cf. *MCFL,* 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, he does not explain why those two rights must be precisely identical, or why that principle applies to electioneering by corporations that serve no "common cause." *Ante,* at 928. Nothing in his account dislodges my basic point that members of the founding generation held a cautious view of corporate power and a narrow view of corporate rights (not that they "despised" corporations, *ante,* at 925), and that they conceptualized speech in individualistic terms. If no prominent Framer bothered to articulate that corporate speech would have lesser status than individual speech, that may well be because the contrary proposition-if not also the very notion of "corporate speech"-was inconceivable.

. . . .

The truth is we cannot be certain how a law such as BCRA § 203 meshes with the original meaning of the First Amendment.[FN58] I have given several reasons why I believe the Constitution would have been understood then, and ought to be understood now, to permit reasonable restrictions on corporate electioneering, and I will give many more reasons in the pages to come. The Court enlists the Framers in its defense without seriously grappling with their understandings of corporations or the free speech right, or with the republican principles that underlay those understandings.

> FN58. Cf. L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 4 (1960) ("The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us" as the Free Speech and Press Clause).

In fairness, our campaign finance jurisprudence has never attended very closely to the views of the Framers, see *Randall v. Sorrell,* 548 U.S. 230, 280, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (STEVENS, J., dissenting), whose political universe differed profoundly from that of today. We have long since held that corporations are covered by the First Amendment, and many legal scholars have long since rejected the concession theory of the corporation. But "historical context is usually relevant," *ibid.* (internal quotation marks omitted), and in light of the Court's effort to cast itself as guardian of ancient values, it pays to remember that nothing in our constitutional history dictates today's outcome. To the contrary, this history helps illuminate just how extraordinarily dissonant the decision is.

2. *Legislative and Judicial Interpretation*

A century of more recent history puts to rest any notion that today's ruling is faithful to our First Amendment tradition. At the federal level, the express distinction between corporate and individual political spending on elections stretches back to 1907, when Congress passed the Tillman Act, ch. 420, 34 Stat. 864, banning all corporate contributions to candidates. The Senate Report on the legislation observed that "[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials." S.Rep. No. 3056, 59th Cong., 1st Sess., 2 (1906). President Roosevelt, in his 1905 annual message to Congress, declared:

> " 'All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts.' " *United States v. Automobile Workers,* 352 U.S. 567, 572, 77

S.Ct. 529, 1 L.Ed.2d 563 (1957) (quoting 40 Cong. Rec. 96).

The Court has surveyed the history leading up to the Tillman Act several times, see *WRTL,* 551 U.S., at 508-510, 127 S.Ct. 2652 (Souter, J., dissenting); *McConnell,* 540 U.S., at 115, 124 S.Ct. 619;*Automobile Workers,* 352 U.S., at 570-575, 77 S.Ct. 529, and I will refrain from doing so again. It is enough to say that the Act was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed. See *ibid.;United States v. CIO,* 335 U.S. 106, 113, 68 S.Ct. 1349, 92 L.Ed. 1849 (1948); Winkler, "Other People's Money": Corporations, Agency Costs, and Campaign Finance Law, 92 Geo. L.J. 871 (2004).

Over the years, the limitations on corporate political spending have been modified in a number of ways, as Congress responded to changes in the American economy and political practices that threatened to displace the commonweal. . . . .

This principle was carried forward when Congress enacted comprehensive campaign finance reform in the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3, which retained the restriction on using general treasury funds for contributions and expenditures, 2 U.S.C. § 441b(a). FECA codified the option for corporations and unions to create PACs to finance contributions and expenditures forbidden to the corporation or union itself. § 441b(b).

By the time Congress passed FECA in 1971, the bar on corporate contributions and expenditures had become such an accepted part of federal campaign finance regulation that when a large number of plaintiffs, including several nonprofit corporations, challenged virtually every aspect of the Act in *Buckley,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, no one even bothered to argue that the bar as such was unconstitutional. *Buckley* famously (or infamously) distinguished direct contributions from independent expenditures, *id.,* at 58-59, 96 S.Ct. 612, but its silence on corporations only reinforced the understanding that corporate expenditures could be treated differently from individual expenditures. "Since our decision in *Buckley,* Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell,* 540 U.S., at 203, 124 S.Ct. 619.

Thus, it was unremarkable, in a 1982 case holding that Congress could bar nonprofit corporations from soliciting nonmembers for PAC funds, that then-Justice Rehnquist wrote for a unanimous Court that Congress' "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations ... warrants considerable deference," and "reflects a permissible assessment of the dangers posed by those entities to the electoral process." *NRWC,* 459 U.S., at 209, 103 S.Ct. 552 (internal quotation marks and citation omitted). "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized," the unanimous Court observed, "and there is no reason why it may not ... be accomplished by treating ... corporations ... differently from individuals." *Id.,* at 210-211, 103 S.Ct. 552.

The corporate/individual distinction was not questioned by the Court's disposition, in 1986, of a challenge to the expenditure restriction as applied to a distinctive type of nonprofit corporation. In *MCFL,* 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539, we stated again "that 'the special characteristics of the corporate structure require particularly careful regulation,' " *id.,* at 256, 107 S.Ct. 616 (quoting *NRWC,* 459 U.S., at 209-210, 103 S.Ct. 552), and again we acknowledged that the Government has a legitimate interest in "regulat[ing] the substantial aggregations of wealth amassed by the special advantages which go with the

corporate form," 479 U.S., at 257, 107 S.Ct. 616 (internal quotation marks omitted). Those aggregations can distort the "free trade in ideas" crucial to candidate elections, *ibid.,* at the expense of members or shareholders who may disagree with the object of the expenditures, *id.,* at 260, 107 S.Ct. 616 (internal quotation marks omitted). What the Court held by a 5-to-4 vote was that a limited class of corporations must be allowed to use their general treasury funds for independent expenditures, because Congress' interests in protecting shareholders and "restrict[ing] 'the influence of political war chests funneled through the corporate form,' " *id.,* at 257, 107 S.Ct. 616 (quoting *FEC v. National Conservative Political Action Comm.,* 470 U.S. 480, 501, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985)*(NCPAC)*), did not apply to corporations that were structurally insulated from those concerns.

. . . .

Four years later, in *Austin,* 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652, we considered whether corporations falling outside the *MCFL* exception could be barred from using general treasury funds to make independent expenditures in support of, or in opposition to, candidates. We held they could be. Once again recognizing the importance of "the integrity of the marketplace of political ideas" in candidate elections, *MCFL,* 479 U.S., at 257, 107 S.Ct. 616, we noted that corporations have "special advantages-such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," 494 U.S., at 658-659, 110 S.Ct. 1391-that allow them to spend prodigious general treasury sums on campaign messages that have "little or no correlation" with the beliefs held by actual persons, *id.,* at 660, 110 S.Ct. 1391. In light of the corrupting effects such spending might have on the political process, *ibid.,* we permitted the State of Michigan to limit corporate expenditures on candidate elections to corporations' PACs, which rely on voluntary contributions and thus "reflect actual public support for the political ideals espoused by corporations," *ibid.* Notwithstanding our colleagues' insinuations that *Austin* deprived the public of general "ideas," "facts," and "knowledge," *ante,* at 906 - 907, the decision addressed only candidate-focused expenditures and gave the State no license to regulate corporate spending on other matters.

In the 20 years since *Austin,* we have reaffirmed its holding and rationale a number of times, see, *e.g.,Beaumont,* 539 U.S., at 153-156, 123 S.Ct. 2200, most importantly in *McConnell,* 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491, where we upheld the provision challenged here, § 203 of BCRA. Congress crafted § 203 in response to a problem created by *Buckley*. The *Buckley* Court had construed FECA's definition of prohibited "expenditures" narrowly to avoid any problems of constitutional vagueness, holding it applicable only to "communications that expressly advocate the election or defeat of a clearly identified candidate," 424 U.S., at 80, 96 S.Ct. 612,*i.e.,* statements containing so-called "magic words" like " 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [or] 'reject,' " *id.,* at 43-44, and n. 52, 96 S.Ct. 612. After *Buckley,* corporations and unions figured out how to circumvent the limits on express advocacy by using sham "issue ads" that "eschewed the use of magic words" but nonetheless "advocate[d] the election or defeat of clearly identified federal candidates." *McConnell,* 540 U.S., at 126, 124 S.Ct. 619. "Corporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads." *Id.,* at 127, 124 S.Ct. 619. Congress passed § 203 to address this circumvention, prohibiting corporations and unions from using general treasury funds for electioneering communications that "refe[r] to a clearly identified candidate," whether or not those communications use the magic words. 2 U.S.C. § 434(f)(3)(A)(i)(I).

When we asked in *McConnell* "whether a compelling governmental interest justifie[d]" § 203, we found the question "easily answered": "We have repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.' " 540 U.S., at 205, 124 S.Ct. 619 (quoting *Austin,* 494 U.S., at 660, 110 S.Ct. 1391). These precedents

"represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." 540 U.S., at 205, 124 S.Ct. 619 (internal quotation marks omitted). "Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against ' "circumvention of [valid] contribution limits." ' " *Ibid.* (quoting *Beaumont,* 539 U.S., at 155, 123 S.Ct. 2200, in turn quoting *FEC v. Colorado Republican Federal Campaign Comm.,* 533 U.S. 431, 456, and n. 18, 121 S.Ct. 2351, 150 L.Ed.2d 461 (2001)*(Colorado II);* alteration in original). BCRA, we found, is faithful to the compelling governmental interests in " 'preserving the integrity of the electoral process, preventing corruption, ... sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government,' " and maintaining " 'the individual citizen's confidence in government.' " 540 U.S., at 206-207, n. 88, 124 S.Ct. 619 (quoting *Bellotti,* 435 U.S., at 788-789, 98 S.Ct. 1407; some internal quotation marks and brackets omitted). What made the answer even easier than it might have been otherwise was the option to form PACs, which give corporations, at the least, "a constitutionally sufficient opportunity to engage in" independent expenditures. 540 U.S., at 203, 124 S.Ct. 619.

3. *Buckley and Bellotti*

Against this extensive background of congressional regulation of corporate campaign spending, and our repeated affirmation of this regulation as constitutionally sound, the majority dismisses *Austin* as "a significant departure from ancient First Amendment principles," *ante,* at 886 (internal quotation marks omitted). How does the majority attempt to justify this claim? Selected passages from two cases, *Buckley,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659, and *Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, do all of the work. In the Court's view, *Buckley* and *Bellotti* decisively rejected the possibility of distinguishing corporations from natural persons in the 1970's; it just so happens that in every single case in which the Court has reviewed campaign finance legislation in the decades since, the majority failed to grasp this truth. The Federal Congress and dozens of state legislatures, we now know, have been similarly deluded.

The majority emphasizes *Buckley* 's statement that " '[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.' " *Ante,* at 904 (quoting 424 U.S., at 48-49, 96 S.Ct. 612);*ante,* at 921 (opinion of ROBERTS, C.J.). But this elegant phrase cannot bear the weight that our colleagues have placed on it. For one thing, the Constitution does, in fact, permit numerous "restrictions on the speech of some in order to prevent a few from drowning out the many": for example, restrictions on ballot access and on legislators' floor time. *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 402, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring). For another, the *Buckley* Court used this line in evaluating "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S., at 48, 96 S.Ct. 612. It is not apparent why this is relevant to the case before us. . . .

The case on which the majority places even greater weight than *Buckley,* however, is *Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, claiming it "could not have been clearer" that *Bellotti*'s holding forbade distinctions between corporate and individual expenditures like the one at issue here, *ante,* at 902. The Court's reliance is odd. The only thing about *Bellotti* that could not be clearer is that it declined to adopt the majority's position. *Bellotti* ruled, in an explicit limitation on the scope of its holding, that "our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." 435 U.S., at 788, n. 26, 98 S.Ct. 1407; see also *id.,* at 787-788, 98 S.Ct. 1407 (acknowledging that the interests in preserving public confidence in Government and protecting dissenting shareholders may be "weighty ... in the context of partisan candidate elections"). *Bellotti,* in other words, did not touch the

question presented in *Austin* and *McConnell,* and the opinion squarely disavowed the proposition for which the majority cites it.

The majority attempts to explain away the distinction *Bellotti* drew-between general corporate speech and campaign speech intended to promote or prevent the election of specific candidates for office- as inconsistent with the rest of the opinion and with *Buckley.Ante,* at 903, 909 - 910. Yet the basis for this distinction is perfectly coherent: The anticorruption interests that animate regulations of corporate participation in candidate elections, the "importance" of which "has never been doubted," 435 U.S., at 788, n. 26, 98 S.Ct. 1407, do not apply equally to regulations of corporate participation in referenda. A referendum cannot owe a political debt to a corporation, seek to curry favor with a corporation, or fear the corporation's retaliation. Cf. *Austin,* 494 U.S., at 678, 110 S.Ct. 1391 (STEVENS, J., concurring); *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley,* 454 U.S. 290, 299, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). The majority likewise overlooks the fact that, over the past 30 years, our cases have repeatedly recognized the candidate/issue distinction. See, *e.g.,Austin,* 494 U.S., at 659, 110 S.Ct. 1391;*NCPAC,* 470 U.S., at 495-496, 105 S.Ct. 1459;*FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 371, n. 9, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984); *NRWC,* 459 U.S., at 210, n. 7, 103 S.Ct. 552. The Court's critique of *Bellotti*'s footnote 26 puts it in the strange position of trying to elevate *Bellotti* to canonical status, while simultaneously disparaging a critical piece of its analysis as unsupported and irreconcilable with *Buckley.Bellotti,* apparently, is both the font of all wisdom and internally incoherent.

The *Bellotti* Court confronted a dramatically different factual situation from the one that confronts us in this case: a state statute that barred business corporations' expenditures on some referenda but not others. Specifically, the statute barred a business corporation "from making contributions or expenditures 'for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation,' " 435 U.S., at 768, 98 S.Ct. 1407 (quoting Mass. Gen. Laws Ann., ch. 55, § 8 (West Supp.1977); alteration in original), and it went so far as to provide that referenda related to income taxation would not " 'be deemed materially to affect the property, business or assets of the corporation,' " 435 U.S., at 768, 98 S.Ct. 1407. As might be guessed, the legislature had enacted this statute in order to limit corporate speech on a proposed state constitutional amendment to authorize a graduated income tax. The statute was a transparent attempt to prevent corporations from spending money to defeat this amendment, which was favored by a majority of legislators but had been repeatedly rejected by the voters. See *id.,* at 769-770, and n. 3, 98 S.Ct. 1407. We said that "where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Id.,* at 785-786, 98 S.Ct. 1407 (footnote omitted).

Bellotti thus involved a *viewpoint-discriminatory* statute, created to effect a particular policy outcome. . . . To make matters worse, the law at issue did not make any allowance for corporations to spend money through PACs. *Id.,* at 768, n. 2, 98 S.Ct. 1407 (opinion of the Court). This really was a complete ban on a specific, preidentified subject. See *MCFL,* 479 U.S., at 259, n. 12, 107 S.Ct. 616 (stating that 2 U.S.C. § 441b's expenditure restriction "is *of course distinguishable* from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in ... *Bellotti*" (emphasis added)).

The majority grasps a quotational straw from *Bellotti,* that speech does not fall entirely outside the protection of the First Amendment merely because it comes from a corporation. *Ante,* at 902 - 903. Of course not, but no one suggests the contrary and neither *Austin* nor *McConnell* held otherwise. They held that even though the expenditures at issue were subject to First Amendment scrutiny, the restrictions on those expenditures were justified by a compelling state interest. See *McConnell,* 540 U.S., at 205, 124 S.Ct. 619;*Austin,* 494 U.S., at 658, 660, 110 S.Ct. 1391. We acknowledged in *Bellotti* that numerous

"interests of the highest importance" can justify campaign finance regulation. 435 U.S., at 788-789, 98 S.Ct. 1407. But we found no evidence that these interests were served by the Massachusetts law. *Id.,* at 789, 98 S.Ct. 1407. We left open the possibility that our decision might have been different if there had been "record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests." *Ibid.*

Austin and *McConnell,* then, sit perfectly well with *Bellotti*. Indeed, all six Members of the *Austin* majority had been on the Court at the time of *Bellotti,* and none so much as hinted in *Austin* that they saw any tension between the decisions. The difference between the cases is not that *Austin* and *McConnell* rejected First Amendment protection for corporations whereas *Bellotti* accepted it. The difference is that the statute at issue in *Bellotti* smacked of viewpoint discrimination, targeted one class of corporations, and provided no PAC option; and the State has a greater interest in regulating independent corporate expenditures on candidate elections than on referenda, because in a functioning democracy the public must have faith that its representatives owe their positions to the people, not to the corporations with the deepest pockets.

* * *

In sum, over the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to " '[p]reserv[e] the integrity of the electoral process, preven[t] corruption, ... sustai[n] the active, alert responsibility of the individual citizen,' " protect the expressive interests of shareholders, and " '[p]reserv [e] ... the individual citizen's confidence in government.' " *McConnell,* 540 U.S., at 206-207, n. 88, 124 S.Ct. 619 (quoting *Bellotti,* 435 U.S., at 788-789, 98 S.Ct. 1407; first alteration in original). These understandings provided the combined impetus behind the Tillman Act in 1907, see *Automobile Workers,* 352 U.S., at 570-575, 77 S.Ct. 529, the Taft-Hartley Act in 1947, see *WRTL,* 551 U.S., at 511, 127 S.Ct. 2652 (Souter, J., dissenting), FECA in 1971, see *NRWC,* 459 U.S., at 209-210, 103 S.Ct. 552, and BCRA in 2002, see *McConnell,* 540 U.S., at 126-132, 124 S.Ct. 619. Continuously for over 100 years, this line of "[c]ampaign finance reform has been a series of reactions to documented threats to electoral integrity obvious to any voter, posed by large sums of money from corporate or union treasuries." *WRTL,* 551 U.S., at 522, 127 S.Ct. 2652 (Souter, J., dissenting). Time and again, we have recognized these realities in approving measures that Congress and the States have taken. None of the cases the majority cites is to the contrary. The only thing new about *Austin* was the dissent, with its stunning failure to appreciate the legitimacy of interests recognized in the name of democratic integrity since the days of the Progressives.

IV

Having explained why this is not an appropriate case in which to revisit *Austin* and *McConnell* and why these decisions sit perfectly well with "First Amendment principles," *ante,* at 886, 912, I come at last to the interests that are at stake. The majority recognizes that *Austin* and *McConnell* may be defended on anticorruption, antidistortion, and shareholder protection rationales. *Ante,* at 903 - 911. It badly errs both in explaining the nature of these rationales, which overlap and complement each other, and in applying them to the case at hand.

The Anticorruption Interest

Undergirding the majority's approach to the merits is the claim that the only "sufficiently important governmental interest in preventing corruption or the appearance of corruption" is one that is "limited to *quid pro quo* corruption." *Ante,* at 909 - 910. This is the same "crabbed view of corruption" that was espoused by Justice KENNEDY in *McConnell* and squarely rejected by the Court in that case. 540 U.S.,

at 152, 124 S.Ct. 619. While it is true that we have not always spoken about corruption in a clear or consistent voice, the approach taken by the majority cannot be right, in my judgment. It disregards our constitutional history and the fundamental demands of a democratic society.

On numerous occasions we have recognized Congress' legitimate interest in preventing the money that is spent on elections from exerting an " 'undue influence on an officeholder's judgment' " and from creating " 'the appearance of such influence,' " beyond the sphere of *quid pro quo* relationships. *Id.,* at 150, 124 S.Ct. 619; see also, *e.g.,id.,* at 143-144, 152-154, 124 S.Ct. 619;*Colorado II,* 533 U.S., at 441, 121 S.Ct. 2351;*Shrink Missouri,* 528 U.S., at 389, 120 S.Ct. 897. Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one's behalf. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics. It certainly does not accord with the record Congress developed in passing BCRA, a record that stands as a remarkable testament to the energy and ingenuity with which corporations, unions, lobbyists, and politicians may go about scratching each other's backs-and which amply supported Congress' determination to target a limited set of especially destructive practices.

The District Court that adjudicated the initial challenge to BCRA pored over this record. In a careful analysis, Judge Kollar-Kotelly made numerous findings about the corrupting consequences of corporate and union independent expenditures in the years preceding BCRA's passage. See *McConnell,* 251 F.Supp.2d, at 555-560, 622-625; see also *id.,* at 804-805, 813, n. 143 (Leon, J.) (indicating agreement). As summarized in her own words:

> "The factual findings of the Court illustrate that corporations and labor unions routinely notify Members of Congress as soon as they air electioneering communications relevant to the Members' elections. The record also indicates that Members express appreciation to organizations for the airing of these election-related advertisements. Indeed, Members of Congress are particularly grateful when negative issue advertisements are run by these organizations, leaving the candidates free to run positive advertisements and be seen as 'above the fray.' Political consultants testify that campaigns are quite aware of who is running advertisements on the candidate's behalf, when they are being run, and where they are being run. Likewise, a prominent lobbyist testifies that these organizations use issue advocacy as a means to influence various Members of Congress.
>
> "The Findings also demonstrate that Members of Congress seek to have corporations and unions run these advertisements on their behalf. The Findings show that Members suggest that corporations or individuals make donations to interest groups with the understanding that the money contributed to these groups will assist the Member in a campaign. After the election, these organizations often seek credit for their support.... Finally, a large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these corporations and organizations." *Id.,* at 623-624 (citations and footnote omitted).

Many of the relationships of dependency found by Judge Kollar-Kotelly seemed to have a *quid pro quo* basis, but other arrangements were more subtle. Her analysis shows the great difficulty in delimiting the precise scope of the *quid pro quo* category, as well as the adverse consequences that *all* such arrangements may have. There are threats of corruption that are far more destructive to a democratic society than the odd bribe. Yet the majority's understanding of corruption would leave lawmakers impotent to address all but the most discrete abuses.

Our "undue influence" cases have allowed the American people to cast a wider net through legislative experiments designed to ensure, to some minimal extent, "that officeholders will decide issues ... on the merits or the desires of their constituencies," and not "according to the wishes of those who have made large financial contributions"-or expenditures-"valued by the officeholder." *McConnell,* 540 U.S., at 153, 124 S.Ct. 619. When private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns, the result can depart so thoroughly "from what is pure or correct" in the conduct of Government, Webster's Third New International Dictionary 512 (1966) (defining "corruption"), that it amounts to a "subversion ... of the electoral process," *Automobile Workers,* 352 U.S., at 575, 77 S.Ct. 529. At stake in the legislative efforts to address this threat is therefore not only the legitimacy and quality of Government but also the public's faith therein, not only "the capacity of this democracy to represent its constituents [but also] the confidence of its citizens in their capacity to govern themselves," *WRTL,* 551 U.S., at 507, 127 S.Ct. 2652 (Souter, J., dissenting). "Take away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.' " *McConnell,* 540 U.S., at 144, 124 S.Ct. 619 (quoting *Shrink Missouri,* 528 U.S., at 390, 120 S.Ct. 897).

The cluster of interrelated interests threatened by such undue influence and its appearance has been well captured under the rubric of "democratic integrity." *WRTL,* 551 U.S., at 522, 127 S.Ct. 2652 (Souter, J., dissenting). This value has underlined a century of state and federal efforts to regulate the role of corporations in the electoral process.[FN65]

> FN65. Quite distinct from the interest in preventing improper influences on the electoral process, I have long believed that "a number of [other] purposes, both legitimate and substantial, may justify the imposition of reasonable limitations on the expenditures permitted during the course of any single campaign." *Davis v. FEC,* 554 U.S. ----, ----, 128 S.Ct. 2759, 2779, 171 L.Ed.2d 737 (2008) (opinion concurring in part and dissenting in part). In my judgment, such limitations may be justified to the extent they are tailored to "improving the quality of the exposition of ideas" that voters receive, *ibid.,* "free[ing] candidates and their staffs from the interminable burden of fundraising," *ibid.* (internal quotation marks omitted), and "protect[ing] equal access to the political arena," *Randall v. Sorrell,* 548 U.S. 230, 278, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) (STEVENS, J., dissenting) (internal quotation marks omitted). I continue to adhere to these beliefs, but they have not been briefed by the parties or *amici* in this case, and their soundness is immaterial to its proper disposition.

Unlike the majority's myopic focus on *quid pro quo* scenarios and the free-floating "First Amendment principles" on which it rests so much weight, *ante,* at 886, 912, this broader understanding of corruption has deep roots in the Nation's history. "During debates on the earliest [campaign finance] reform acts, the terms 'corruption' and 'undue influence' were used nearly interchangeably." Pasquale, Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform, 2008 U. Ill. L.Rev. 599, 601. Long before *Buckley,* we appreciated that "[t]o say that Congress is without power to pass appropriate legislation to safeguard ... an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *Burroughs v. United States,* 290 U.S. 534, 545, 54 S.Ct. 287, 78 L.Ed. 484 (1934). And whereas we have no evidence to support the notion that the Framers would have wanted corporations to have the same rights as natural persons in the electoral context, we have ample evidence to suggest that they would have been appalled by the evidence of corruption that Congress unearthed in developing BCRA and that the Court today discounts to irrelevance. It is fair to say that "[t]he Framers were obsessed with corruption," Teachout 348, which they understood to encompass the dependency of public officeholders on private interests, see *id.,* at 373-374; see also *Randall,* 548 U.S., at 280, 126 S.Ct. 2479 (STEVENS, J., dissenting). They discussed corruption

"more often in the Constitutional Convention than factions, violence, or instability." Teachout 352. When they brought our constitutional order into being, the Framers had their minds trained on a threat to republican self-government that this Court has lost sight of.

Quid Pro Quo *Corruption*

There is no need to take my side in the debate over the scope of the anticorruption interest to see that the Court's merits holding is wrong. Even under the majority's "crabbed view of corruption," *McConnell,* 540 U.S., at 152, 124 S.Ct. 619, the Government should not lose this case.

"The importance of the governmental interest in preventing [corruption through the creation of political debts] has never been doubted." *Bellotti,* 435 U.S., at 788, n. 26, 98 S.Ct. 1407. Even in the cases that have construed the anticorruption interest most narrowly, we have never suggested that such *quid pro quo* debts must take the form of outright vote buying or bribes, which have long been distinct crimes. Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder. See *McConnell,* 540 U.S., at 143, 124 S.Ct. 619 ("We have not limited [the anticorruption] interest to the elimination of cash-for-votes exchanges. In *Buckley,* we expressly rejected the argument that antibribery laws provided a less restrictive alternative to FECA's contribution limits, noting that such laws 'deal[t] with only the most blatant and specific attempts of those with money to influence governmental action' " (quoting 424 U.S., at 28, 96 S.Ct. 612; alteration in original)). It has likewise never been doubted that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption." *Id.,* at 27, 96 S.Ct. 612. Congress may "legitimately conclude that the avoidance of the appearance of improper influence is also critical ... if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Ibid.* (internal quotation marks omitted; alteration in original). A democracy cannot function effectively when its constituent members believe laws are being bought and sold.

. . . .

The *Austin* Court did not rest its holding on *quid pro quo* corruption, as it found the broader corruption implicated by the antidistortion and shareholder protection rationales a sufficient basis for Michigan's restriction on corporate electioneering. 494 U.S., at 658-660, 110 S.Ct. 1391. Concurring in that opinion, I took the position that "the danger of either the fact, or the appearance, of *quid pro quo* relationships [also] provides an adequate justification for state regulation" of these independent expenditures. *Id.,* at 678, 110 S.Ct. 1391. I did not see this position as inconsistent with *Buckley* 's analysis of individual expenditures. Corporations, as a class, tend to be more attuned to the complexities of the legislative process and more directly affected by tax and appropriations measures that receive little public scrutiny; they also have vastly more money with which to try to buy access and votes. See Supp. Brief for Appellee 17 (stating that the Fortune 100 companies earned revenues of $13.1 trillion during the last election cycle). Business corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort, I believed, make *quid pro quo* corruption and its appearance inherently more likely when they (or their conduits or trade groups) spend unrestricted sums on elections.

. . . .

The majority appears to think it decisive that the BCRA record does not contain "direct examples of votes being exchanged for ... expenditures." *Ante,* at 910 (internal quotation marks omitted). It would have been quite remarkable if Congress had created a record detailing such behavior by its own Members. Proving

that a specific vote was exchanged for a specific expenditure has always been next to impossible: Elected officials have diverse motivations, and no one will acknowledge that he sold a vote. Yet, even if "[i]ngratiation and access ... are not corruption" themselves, *ibid.,* they are necessary prerequisites to it; they can create both the opportunity for, and the appearance of, *quid pro quo* arrangements. The influx of unlimited corporate money into the electoral realm also creates new opportunities for the mirror image of *quid pro quo* deals: threats, both explicit and implicit. Starting today, corporations with large war chests to deploy on electioneering may find democratically elected bodies becoming much more attuned to their interests. The majority both misreads the facts and draws the wrong conclusions when it suggests that the BCRA record provides "only scant evidence that independent expenditures ... ingratiate," and that, "in any event," none of it matters. *Ibid.*

. . . .

The majority's rejection of the *Buckley* anticorruption rationale on the ground that independent corporate expenditures "do not give rise to [*quid pro quo*] corruption or the appearance of corruption," *ante,* at 909, is thus unfair as well as unreasonable. Congress and outside experts have generated significant evidence corroborating this rationale, and the only reason we do not have any of the relevant materials before us is that the Government had no reason to develop a record at trial for a facial challenge the plaintiff had abandoned. The Court cannot both *sua sponte* choose to relitigate *McConnell* on appeal and then complain that the Government has failed to substantiate its case. If our colleagues were really serious about the interest in preventing *quid pro quo* corruption, they would remand to the District Court with instructions to commence evidentiary proceedings.

The insight that even technically independent expenditures can be corrupting in much the same way as direct contributions is bolstered by our decision last year in *Caperton v. A.T. Massey Coal Co.,* 556 U.S. ----, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). In that case, Don Blankenship, the chief executive officer of a corporation with a lawsuit pending before the West Virginia high court, spent large sums on behalf of a particular candidate, Brent Benjamin, running for a seat on that court. "In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to 'And For The Sake Of The Kids,' " a § 527 corporation that ran ads targeting Benjamin's opponent. *Id.,* at ----, 129 S.Ct., at 2257. "This was not all. Blankenship spent, in addition, just over $500,000 on independent expenditures ... ' "to support ... Brent Benjamin." ' " *Id.,* at ----, 129 S.Ct., at 2257 (second alteration in original). Applying its common sense, this Court accepted petitioners' argument that Blankenship's "pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias" when Benjamin later declined to recuse himself from the appeal by Blankenship's corporation. *Id.,* at ----, 129 S.Ct., at 2262. "Though n[o] ... bribe or criminal influence" was involved, we recognized that "Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected." *Ibid.* "The difficulties of inquiring into actual bias," we further noted, "simply underscore the need for objective rules," *id.,* at ----, 129 S.Ct., at 2263-rules which will perforce turn on the appearance of bias rather than its actual existence.

In *Caperton,* then, we accepted the premise that, at least in some circumstances, independent expenditures on candidate elections will raise an intolerable specter of *quid pro quo* corruption. Indeed, this premise struck the Court as so intuitive that it repeatedly referred to Blankenship's spending on behalf of Benjamin-spending that consisted of 99.97% independent expenditures ($3 million) and 0.03% direct contributions ($1,000)-as a "contribution." See, *e.g.,id.,* at ----, 129 S.Ct., at 2257 ("The basis for the [recusal] motion was that the justice had received campaign contributions in an extraordinary amount from" Blankenship); *id.,* at ----, 129 S.Ct., at 2258 (referencing "Blankenship's $3 million in contributions"); *id.,* at ----, 129 S.Ct., at 2264 ("Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin"); *id.,* at ----, 129 S.Ct., at 2264 ("Blankenship's campaign

contributions ... had a significant and disproportionate influence on the electoral outcome"). The reason the Court so thoroughly conflated expenditures and contributions, one assumes, is that it realized that some expenditures may be functionally equivalent to contributions in the way they influence the outcome of a race, the way they are interpreted by the candidates and the public, and the way they taint the decisions that the officeholder thereafter takes.

Caperton is illuminating in several additional respects. It underscores the old insight that, on account of the extreme difficulty of proving corruption, "prophylactic measures, reaching some [campaign spending] not corrupt in purpose or effect, [may be] nonetheless required to guard against corruption." *Buckley,* 424 U.S., at 30, 96 S.Ct. 612; see also *Shrink Missouri,* 528 U.S., at 392, n. 5, 120 S.Ct. 897. It underscores that "certain restrictions on corporate electoral involvement" may likewise be needed to "hedge against circumvention of valid contribution limits." *McConnell,* 540 U.S., at 205, 124 S.Ct. 619 (internal quotation marks and brackets omitted); see also *Colorado II,* 533 U.S., at 456, 121 S.Ct. 2351 ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption"). It underscores that for-profit corporations associated with electioneering communications will often prefer to use nonprofit conduits with "misleading names," such as And For The Sake Of The Kids, "to conceal their identity" as the sponsor of those communications, thereby frustrating the utility of disclosure laws. *McConnell,* 540 U.S., at 128, 124 S.Ct. 619; see also *id.,* at 196-197, 124 S.Ct. 619.

And it underscores that the consequences of today's holding will not be limited to the legislative or executive context. The majority of the States select their judges through popular elections. At a time when concerns about the conduct of judicial elections have reached a fever pitch, see, *e.g.,* O'Connor, Justice for Sale, Wall St. Journal, Nov. 15, 2007, p. A25; Brief for Justice at Stake et al. as *Amici Curiae* 2, the Court today unleashes the floodgates of corporate and union general treasury spending in these races. Perhaps " *Caperton* motions" will catch some of the worst abuses. This will be small comfort to those States that, after today, may no longer have the ability to place modest limits on corporate electioneering even if they believe such limits to be critical to maintaining the integrity of their judicial systems.

Deference and Incumbent Self-Protection

Rather than show any deference to a coordinate branch of Government, the majority thus rejects the anticorruption rationale without serious analysis. Today's opinion provides no clear rationale for being so dismissive of Congress, but the prior individual opinions on which it relies have offered one: the incentives of the legislators who passed BCRA. Section 203, our colleagues have suggested, may be little more than "an incumbency protection plan," *McConnell,* 540 U.S., at 306, 124 S.Ct. 619 (KENNEDY, J., concurring in judgment in part and dissenting in part); see also *id.,* at 249-250, 260-263, 124 S.Ct. 619 (SCALIA, J., concurring in part, concurring in judgment in part, and dissenting in part), a disreputable attempt at legislative self-dealing rather than an earnest effort to facilitate First Amendment values and safeguard the legitimacy of our political system. This possibility, the Court apparently believes, licenses it to run roughshod over Congress' handiwork.

In my view, we should instead start by acknowledging that "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Colorado Republican Federal Campaign Comm. v. FEC,* 518 U.S. 604, 650, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (STEVENS, J., dissenting). Many of our campaign finance precedents explicitly and forcefully affirm the propriety of such presumptive deference. See, *e.g.,McConnell,* 540 U.S., at 158, 124 S.Ct. 619;*Beaumont,* 539 U.S., at 155-156, 123 S.Ct. 2200;*NRWC,* 459 U.S., at 209-210, 103 S.Ct. 552. Moreover, "[j]udicial deference is particularly warranted where, as here, we deal with a congressional judgment that has remained essentially unchanged throughout a century of careful legislative adjustment." *Beaumont,* 539 U.S., at 162, n. 9, 123 S.Ct. 2200 (internal quotation marks omitted); cf. *Shrink Missouri,* 528 U.S., at 391, 120 S.Ct. 897 ("The quantum of

empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). In America, incumbent legislators pass the laws that govern campaign finance, just like all other laws. To apply a level of scrutiny that effectively bars them from regulating electioneering whenever there is the faintest whiff of self-interest, is to deprive them of the ability to regulate electioneering.

This is not to say that deference would be appropriate if there were a solid basis for believing that a legislative action was motivated by the desire to protect incumbents or that it will degrade the competitiveness of the electoral process. See *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 447, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (STEVENS, J., concurring in part and dissenting in part); *Vieth v. Jubelirer,* 541 U.S. 267, 317, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (STEVENS, J., dissenting). Along with our duty to balance competing constitutional concerns, we have a vital role to play in ensuring that elections remain at least minimally open, fair, and competitive. But it is the height of recklessness to dismiss Congress' years of bipartisan deliberation and its reasoned judgment on this basis, without first confirming that the statute in question was intended to be, or will function as, a restraint on electoral competition. "Absent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley,* 424 U.S., at 31, 96 S.Ct. 612.

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Austin and Corporate Expenditures

Just as the majority gives short shrift to the general societal interests at stake in campaign finance regulation, it also overlooks the distinctive considerations raised by the regulation of *corporate* expenditures. The majority fails to appreciate that *Austin*'s antidistortion rationale is itself an anticorruption rationale, see 494 U.S., at 660, 110 S.Ct. 1391 (describing "a different type of corruption"), tied to the special concerns raised by corporations. Understood properly, "antidistortion" is simply a variant on the classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process. It is manifestly not just an " 'equalizing' " ideal in disguise. *Ante,* at 904 (quoting *Buckley,* 424 U.S., at 48, 96 S.Ct. 612).

1. *Antidistortion*

The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it. *Austin* set forth some of the basic differences. Unlike natural persons, corporations have "limited liability" for their owners and managers, "perpetual life," separation of ownership and control, "and favorable treatment of the accumulation and distribution of assets ... that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments." 494 U.S., at 658-659, 110 S.Ct. 1391. Unlike voters in U.S. elections, corporations may be foreign controlled. Unlike other interest groups, business corporations have been "effectively delegated responsibility for ensuring society's economic welfare"; they inescapably structure the life of every citizen. " '[T]he resources in the treasury of a business corporation,' " furthermore, " 'are not an indication of popular support for the corporation's political ideas.' " *Id.,* at 659, 110 S.Ct. 1391 (quoting *MCFL,* 479 U.S., at 258, 107 S.Ct. 616). " 'They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.' " 494 U.S., at 659, 110 S.Ct. 1391 (quoting *MCFL,* 479 U.S., at 258, 107 S.Ct. 616).

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.

These basic points help explain why corporate electioneering is not only more likely to impair compelling governmental interests, but also why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms. One fundamental concern of the First Amendment is to "protec[t] the individual's interest in self-expression." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 534, n. 2, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); see also *Bellotti,* 435 U.S., at 777, n. 12, 98 S.Ct. 1407. Freedom of speech helps "make men free to develop their faculties," *Whitney v. California,* 274 U.S. 357, 375, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring), it respects their "dignity and choice," *Cohen v. California,* 403 U.S. 15, 24, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), and it facilitates the value of "individual self-realization," Redish, The Value of Free Speech, 130 U. Pa. L.Rev. 591, 594 (1982). Corporate speech, however, is derivative speech, speech by proxy. A regulation such as BCRA § 203 may affect the way in which individuals disseminate certain messages through the corporate form, but it does not prevent anyone from speaking in his or her own voice. "Within the realm of [campaign spending] generally," corporate spending is "furthest from the core of political expression." *Beaumont,* 539 U.S., at 161, n. 8, 123 S.Ct. 2200.

It is an interesting question "who" is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends. Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will *conflict* with their personal convictions. Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.

Corporate expenditures are distinguishable from individual expenditures in this respect. I have taken the view that a legislature may place reasonable restrictions on individuals' electioneering expenditures in the service of the governmental interests explained above, and in recognition of the fact that such restrictions are not direct restraints on speech but rather on its financing. See, *e.g. Randall,* 548 U.S., at 273, 126 S.Ct. 2479 (dissenting opinion). But those restrictions concededly present a tougher case, because the primary conduct of actual, flesh-and-blood persons is involved. Some of those individuals might feel that they need to spend large sums of money on behalf of a particular candidate to vindicate the intensity of their electoral preferences. This is obviously not the situation with business corporations, as their routine practice of giving "substantial sums to *both* major national parties" makes pellucidly clear. *McConnell,* 540 U.S., at 148, 124 S.Ct. 619. "[C]orporate participation" in elections, any business executive will tell you, "is more transactional than ideological." Supp. Brief for Committee for Economic Development as *Amicus Curiae* 10.

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In short, regulations such as § 203 and the statute upheld in *Austin* impose only a limited burden on First Amendment freedoms not only because they target a narrow subset of expenditures and leave untouched the broader "public dialogue," *ante,* at 899, but also because they leave untouched the speech of natural

persons. Recognizing the weakness of a speaker-based critique of *Austin,* the Court places primary emphasis not on the corporation's right to electioneer, but rather on the listener's interest in hearing what every possible speaker may have to say. The Court's central argument is that laws such as § 203 have " 'deprived [the electorate] of information, knowledge and opinion vital to its function,' " *ante,* at 907 (quoting *CIO,* 335 U.S., at 144, 68 S.Ct. 1349 (Rutledge, J., concurring in judgment)), and this, in turn, "interferes with the 'open marketplace' of ideas protected by the First Amendment," *ante,* at 906 (quoting *New York State Bd. of Elections v. Lopez Torres,* 552 U.S. 196, 208, 128 S.Ct. 791, 169 L.Ed.2d 665 (2008)).

There are many flaws in this argument. If the overriding concern depends on the interests of the audience, surely the public's perception of the value of corporate speech should be given important weight. That perception today is the same as it was a century ago when Theodore Roosevelt delivered the speeches to Congress that, in time, led to the limited prohibition on corporate campaign expenditures that is overruled today. See *WRTL,* 551 U.S., at 509-510, 127 S.Ct. 2652 (Souter, J., dissenting) (summarizing President Roosevelt's remarks). The distinctive threat to democratic integrity posed by corporate domination of politics was recognized at "the inception of the republic" and "has been a persistent theme in American political life" ever since. Regan 302. It is only certain Members of this Court, not the listeners themselves, who have agitated for more corporate electioneering.

Austin recognized that there are substantial reasons why a legislature might conclude that unregulated general treasury expenditures will give corporations "unfai[r] influence" in the electoral process, 494 U.S., at 660, 110 S.Ct. 1391, and distort public debate in ways that undermine rather than advance the interests of listeners. The legal structure of corporations allows them to amass and deploy financial resources on a scale few natural persons can match. The structure of a business corporation, furthermore, draws a line between the corporation's economic interests and the political preferences of the individuals associated with the corporation; the corporation must engage the electoral process with the aim "to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities," Brief for American Independent Business Alliance as *Amicus Curiae* 11; see also ALI, Principles of Corporate Governance: Analysis and Recommendations § 2.01(a), p. 55 (1992) ("[A] corporation ... should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain"). In a state election such as the one at issue in *Austin,* the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good, 494 U.S., at 660, 110 S.Ct. 1391. The opinions of real people may be marginalized. "The expenditure restrictions of [2 U.S.C.] § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas." *MCFL,* 479 U.S., at 259, 107 S.Ct. 616.

In addition to this immediate drowning out of noncorporate voices, there may be deleterious effects that follow soon thereafter. Corporate "domination" of electioneering, *Austin,* 494 U.S., at 659, 110 S.Ct. 1391, can generate the impression that corporations dominate our democracy. When citizens turn on their televisions and radios before an election and hear only corporate electioneering, they may lose faith in their capacity, as citizens, to influence public policy. A Government captured by corporate interests, they may come to believe, will be neither responsive to their needs nor willing to give their views a fair hearing. The predictable result is cynicism and disenchantment: an increased perception that large spenders " 'call the tune' " and a reduced " 'willingness of voters to take part in democratic governance.' " *McConnell,* 540 U.S., at 144, 124 S.Ct. 619 (quoting *Shrink Missouri,* 528 U.S., at 390, 120 S.Ct. 897). To the extent that corporations are allowed to exert undue influence in electoral races, the speech of the eventual winners of those races may also be chilled. Politicians who fear that a certain corporation can

make or break their reelection chances may be cowed into silence about that corporation. On a variety of levels, unregulated corporate electioneering might diminish the ability of citizens to "hold officials accountable to the people," *ante,* at 898, and disserve the goal of a public debate that is "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). At the least, I stress again, a legislature is entitled to credit these concerns and to take tailored measures in response.

The majority's unwillingness to distinguish between corporations and humans similarly blinds it to the possibility that corporations' "war chests" and their special "advantages" in the legal realm, *Austin,* 494 U.S., at 659, 110 S.Ct. 1391, may translate into special advantages in the market for legislation. When large numbers of citizens have a common stake in a measure that is under consideration, it may be very difficult for them to coordinate resources on behalf of their position. The corporate form, by contrast, "provides a simple way to channel rents to only those who have paid their dues, as it were. If you do not own stock, you do not benefit from the larger dividends or appreciation in the stock price caused by the passage of private interest legislation." Sitkoff, Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters, 69 U. Chi. L.Rev. 1103, 1113 (2002). Corporations, that is, are uniquely equipped to seek laws that favor their owners, not simply because they have a lot of money but because of their legal and organizational structure. Remove all restrictions on their electioneering, and the door may be opened to a type of rent seeking that is "far more destructive" than what noncorporations are capable of. *Ibid.* It is for reasons such as these that our campaign finance jurisprudence has long appreciated that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.' " *NRWC,* 459 U.S., at 210, 103 S.Ct. 552 (quoting *California Medical Assn.,* 453 U.S., at 201, 101 S.Ct. 2712).

The Court's facile depiction of corporate electioneering assumes away all of these complexities. . . .

None of this is to suggest that corporations can or should be denied an opportunity to participate in election campaigns or in any other public forum (much less that a work of art such as *Mr. Smith Goes to Washington* may be banned), or to deny that some corporate speech may contribute significantly to public debate. What it shows, however, is that *Austin* 's "concern about corporate domination of the political process," 494 U.S., at 659, 110 S.Ct. 1391, reflects more than a concern to protect governmental interests outside of the First Amendment. It also reflects a concern to *facilitate* First Amendment values by preserving some breathing room around the electoral "marketplace" of ideas, *ante,* at 896, 904, 906, 914, 915, the marketplace in which the actual people of this Nation determine how they will govern themselves. The majority seems oblivious to the simple truth that laws such as § 203 do not merely pit the anticorruption interest against the First Amendment, but also pit competing First Amendment values against each other. There are, to be sure, serious concerns with any effort to balance the First Amendment rights of speakers against the First Amendment rights of listeners. But when the speakers in question are not real people and when the appeal to "First Amendment principles" depends almost entirely on the listeners' perspective, *ante,* at 886, 912, it becomes necessary to consider how listeners will actually be affected.

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2. *Shareholder Protection*

There is yet another way in which laws such as § 203 can serve First Amendment values. Interwoven with *Austin*'s concern to protect the integrity of the electoral process is a concern to protect the rights of shareholders from a kind of coerced speech: electioneering expenditures that do not "reflec [t] [their] support." 494 U.S., at 660-661, 110 S.Ct. 1391. When corporations use general treasury funds to praise or

attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions.

The PAC mechanism, by contrast, helps assure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas. *Ibid.* It " 'allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members.' " *McConnell,* 540 U.S., at 204, 124 S.Ct. 619 (quoting *Beaumont,* 539 U.S., at 163, 123 S.Ct. 2200). A rule that privileges the use of PACs thus does more than facilitate the political speech of like-minded shareholders; it also curbs the rent seeking behavior of executives and respects the views of dissenters. *Austin*'s acceptance of restrictions on general treasury spending "simply allows people who have invested in the business corporation for purely economic reasons"-the vast majority of investors, one assumes-"to avoid being taken advantage of, without sacrificing their economic objectives." Winkler, Beyond *Bellotti,*32 Loyola (LA) L.Rev. 133, 201 (1998).

The concern to protect dissenting shareholders and union members has a long history in campaign finance reform. It provided a central motivation for the Tillman Act in 1907 and subsequent legislation, see *Pipefitters v. United States,* 407 U.S. 385, 414-415, 92 S.Ct. 2247, 33 L.Ed.2d 11 (1972); Winkler, 92 Geo. L. J., at 887-900, and it has been endorsed in a long line of our cases, see, *e.g.,McConnell,* 540 U.S., at 204-205, 124 S.Ct. 619;*Beaumont,* 539 U.S., at 152-154, 123 S.Ct. 2200;*MCFL,* 479 U.S., at 258, 107 S.Ct. 616;*NRWC,* 459 U.S., at 207-208, 103 S.Ct. 552; *Pipefitters,* 407 U.S., at 414-416, 92 S.Ct. 2247; see also n. 60, *supra*. Indeed, we have unanimously recognized the governmental interest in "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC,* 459 U.S., at 207-208, 103 S.Ct. 552.

The Court dismisses this interest on the ground that abuses of shareholder money can be corrected "through the procedures of corporate democracy," *ante,* at 911 (internal quotation marks omitted), and, it seems, through Internet-based disclosures, *ante,* at 916. I fail to understand how this addresses the concerns of dissenting union members, who will also be affected by today's ruling, and I fail to understand why the Court is so confident in these mechanisms. By "corporate democracy," presumably the Court means the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty. In practice, however, many corporate lawyers will tell you that "these rights are so limited as to be almost nonexistent," given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule. Blair & Stout 320; see also *id.,* at 298-315; Winkler, 32 Loyola (LA) L.Rev., at 165-166, 199-200. Modern technology may help make it easier to track corporate activity, including electoral advocacy, but it is utopian to believe that it solves the problem. Most American households that own stock do so through intermediaries such as mutual funds and pension plans, see Evans, A Requiem for the Retail Investor? 95 Va. L.Rev. 1105 (2009), which makes it more difficult both to monitor and to alter particular holdings. Studies show that a majority of individual investors make no trades at all during a given year. *Id.,* at 1117. Moreover, if the corporation in question operates a PAC, an investor who sees the company's ads may not know whether they are being funded through the PAC or through the general treasury.

If and when shareholders learn that a corporation has been spending general treasury money on objectionable electioneering, they can divest. Even assuming that they reliably learn as much, however, this solution is only partial. The injury to the shareholders' expressive rights has already occurred; they might have preferred to keep that corporation's stock in their portfolio for any number of economic reasons; and they may incur a capital gains tax or other penalty from selling their shares, changing their

pension plan, or the like. The shareholder protection rationale has been criticized as underinclusive, in that corporations also spend money on lobbying and charitable contributions in ways that any particular shareholder might disapprove. But those expenditures do not implicate the selection of public officials, an area in which "the interests of unwilling ... corporate shareholders [in not being] forced to subsidize that speech" "are at their zenith." *Austin,* 494 U.S., at 677, 110 S.Ct. 1391 (Brennan, J., concurring). And in any event, the question is whether shareholder protection provides a basis for regulating expenditures in the weeks before an election, not whether additional types of corporate communications ***979** might similarly be conditioned on voluntariness.

Recognizing the limits of the shareholder protection rationale, the *Austin* Court did not hold it out as an adequate and independent ground for sustaining the statute in question. Rather, the Court applied it to reinforce the antidistortion rationale, in two main ways. First, the problem of dissenting shareholders shows that even if electioneering expenditures can advance the political views of some members of a corporation, they will often compromise the views of others. See, *e.g.,id.,* at 663, 110 S.Ct. 1391 (discussing risk that corporation's "members may be ... reluctant to withdraw as members even if they disagree with [its] political expression"). Second, it provides an additional reason, beyond the distinctive legal attributes of the corporate form, for doubting that these "expenditures reflect actual public support for the political ideas espoused," *id.,* at 660, 110 S.Ct. 1391. The shareholder protection rationale, in other words, bolsters the conclusion that restrictions on corporate electioneering can serve both speakers' and listeners' interests, as well as the anticorruption interest. And it supplies yet another reason why corporate expenditures merit less protection than individual expenditures.

V

Today's decision is backwards in many senses. It elevates the majority's agenda over the litigants' submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at the conclusion that *Austin* must be overruled and that § 203 is facially unconstitutional only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court's lawmaking power. Their conclusion that the societal interest in avoiding corruption and the appearance of corruption does not provide an adequate justification for regulating corporate expenditures on candidate elections relies on an incorrect description of that interest, along with a failure to acknowledge the relevance of established facts and the considered judgments of state and federal legislatures over many decades.

In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority's rejection of this principle "elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests." *Bellotti,* 435 U.S., at 817, n. 13, 98 S.Ct. 1407 (White, J., dissenting). At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

I would affirm the judgment of the District Court.

Justice THOMAS, concurring in part and dissenting in part.

I join all but Part IV of the Court's opinion.

Political speech is entitled to robust protection under the First Amendment. Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) has never been reconcilable with that protection. By striking down § 203, the Court takes an important first step toward restoring full constitutional protection to speech that is "indispensable to the effective and intelligent use of the processes of popular government." *McConnell v. Federal Election Comm'n,* 540 U.S. 93, 265, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part) (internal quotation marks omitted). I dissent from Part IV of the Court's opinion, however, because the Court's constitutional analysis does not go far enough. The disclosure, disclaimer, and reporting requirements in BCRA §§ 201 and 311 are also unconstitutional. See *id.,* at 275-277, and n. 10, 124 S.Ct. 619.

Congress may not abridge the "right to anonymous speech" based on the " 'simple interest in providing voters with additional relevant information,' " *id.,* at 276, 124 S.Ct. 619 (quoting *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 348, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)).. . . .

Irony aside, the Court's promise that as-applied challenges will adequately protect speech is a hollow assurance. Now more than ever, §§ 201 and 311 will chill protected speech because-as California voters can attest-"the advent of the Internet" enables "prompt disclosure of expenditures," which "provide[s]" political opponents "with the information needed" to intimidate and retaliate against their foes. *Ante,* at 916. Thus, "disclosure permits citizens ... to react to the speech of [their political opponents] in a proper"-or undeniably *improper*-"way" long before a plaintiff could prevail on an as-applied challenge. *Ibid.*

I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in "core political speech, the 'primary object of First Amendment protection.' " *McConnell,* 540 U.S., at 264, 124 S.Ct. 619 (THOMAS, J., concurring in part, concurring in judgment in part, and dissenting in part) (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 410-411, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (THOMAS, J., dissenting)). Accordingly, I respectfully dissent from the Court's judgment upholding BCRA §§ 201 and 311.

Miami Herald Publishing Company v. Tornillo

418 U.S. 241 (1974)

Mr. Chief Justice BURGER delivered the opinion of the Court.

The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper violates the guarantees of a free press.

I

In the fall of 1972, appellee, Executive Director of the Classroom Teachers Association, apparently a teachers' collective-bargaining agent, was a candidate for the Florida House of Representatives. On September 20, 1972, and again on September 29, 1972, appellant printed editorials critical of appellee's candidacy. In response to these editorials appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of $5,000. The action was premised on Florida Statute s 104.38 (1973), F.S.A., a 'right of reply' statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.

Appellant sought a declaration that s 104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction could properly issue against the commission of a crime, and held that s 104.38 was unconstitutional as an infringement on the freedom of the press under the First and Fourteenth Amendmens to the Constitution. 38 Fla.Supp. 80 (1972). The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving 'to restrict and stifle protected expression.'Id., at 83. Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed, holding that s 104.38 did not violate constitutional guarantees. 287 So.2d 78 (1973).

III

A

The challenged statute creates a right to reply to press criticism of a candidate for nomination or election. The statute was enacted in 1913, and this is only the second recorded case decided under its provisions.

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also

contended that the statute fails to distinguish between critical comment which is and which is not defamatory.

B

The appellee and supporting advocates of an enforceable right of access to the press vigoously argue that government has an obligation to ensure that a wide variety of views reach the public. The contentions of access proponents will be set out in some detail. It is urged that at the time the First Amendment to the Constitution was ratified in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers. A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the spectre of a 'wired' nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. Major metropolitan newspapers have collaborated to establish news services national in scope. Such national news organizations provide syndicated 'interpretive reporting' as well as syndicated features and commentary, all of which can serve as part of the new school of 'advocacy journalism.'

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper's being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical analysis of the media except in professional journals of very limited readership.

'This concentration of nationwide news organizations-like other large institutions-has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them.'Report of the Task Force in Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 4 (1973).

Appellee cites the report of the Commission on Freedom of the Press, chaired by Robert M. Hutchins, in which it was stated, as long ago as 1947, that '(t)he right of free public expression has . . . lost its earlier reality.' Commission on Freedom of the Press, A Free and Responsible Press 15 (1947).

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be 'surrogates for the public' carries with it a concomitant fiduciary obligation to account for that stewardship. From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action. The First Amendment interest of the public in being informed is said to be in peril because the 'marketplace of ideas' is today a monopoly controlled by the owners of the market.

Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. In Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945), the Court, in rejecting the argument that the press is immune from the antitrust laws by virtue of the First Amendment, stated:

'The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.'(Footnote omitted.)

In New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964), the Court spoke of 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'It is argued that the 'uninhibited, robust' debate is not 'wide-open' but open only to a monopoly in control of the press. Appellee cites the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47, and n. 15, 91 S.Ct. 1811, 1821, 29 L.Ed.2d 296 (1971), which he suggests seemed to invite experimentation by the State in right-to-access regulation of the press.

Access advocates note that Mr. Justice Douglas a decade ago expressed his deep concern regarding the effects of newspaper monopolies:

'Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line using its monopoly position not to educate people, not to promote debate, but to inculcate in its readers one philosophy, one attitude-and to make money'.

'The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse . . ..' The Great Rights 124-125, 127 (E. Cahn ed. 1963).

They also claim the qualified support of Professor Thomas I. Emerson, who has written that '(a) limited right of access to the press can be safely enforced,' although he believes that '(g)overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a

preferable course of action.’T. Emerson, The System of Freedom of Expression 671 (1970).

IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years.

The Court foresaw the problems relating to government-enforced access as early as its decision in Associated Press v. United States, supra.There it carefully contrasted the private ‘compulsion to print’ called for by the Association's bylaws with the provisions of the District Court decree against appellants which ‘does not compel AP or its members to permit publication of anything which their ‘reason’ tells them should not be published.' 326 U.S., at 20 n. 18, 65 S.Ct., at 1425. In Branzburg v. Hayes, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed.2d 626 (1972), we emphasized that the cases then before us ‘involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold.’In Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 117, 93 S.Ct. 2080, 2094, 36 L.Ed.2d 772 (1973), the plurality opinion as to Part III noted:

‘The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers-and hence advertisers-to assure financial success; and, second, the journalistic integrity of its editors and publishers.’

An attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by other Members of this Court in their separate opinions in that case. Id., at 145, 93 S.Ct., at 2107 (Stewart, J., concurring); id., at 182 n. 12, 93 S.Ct., at 2126 (Brennan, J., joined by Marshall, J., dissenting). Recently, while approving a bar against employment advertising specifying ‘male’ or ‘female’ preference, the Court's opinion in Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 391, 93 S.Ct. 2553, 2561, 37 L.Ed.2d 669 (1973), took pains to limit its holding within narrow bounds:
‘Nor, a fortiori, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.’

Dissenting in Pittsburgh Press, Mr. Justice Stewart, joined by Mr. Justice Douglas, expressed the view that no ‘government agency-local, state, or federal-can tell a newspaper in advance what it can print and what it cannot.’ Id., at 400, 93 S.Ct., at 2566.See Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 135 (CA9 1971).

We see the beginning with Associated Press, supra, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such compulsion to publish that which “reason' tells them should not be published' is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because ‘the statute in question here has not prevented the Miami Herald from saying anything it wished' begs the core question. Compelling editors or publishers to publish that which “reason’ tells them should

not be published' is what is at issue in this case. The Florida statute operates as a command in the same sense as a statue or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. Grosjean v. American Press Co., 297 U.S. 233, 244-245, 56 S.Ct. 444, 446, 80 L.Ed. 660 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.[2]

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electrol coverage would be blunted or reduced. Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate,' New York Times Co. v. Sullivan, supra, 376 U.S., at 279, 84 S.Ct., at 725. The Court, in Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437 (1966), stated:

'[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates . . ..'

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials-whether fair or unfair-constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

It is so ordered.

Reversed.

Mr. Justice BRENNAN, with whom Mr. Justice REHNQUIST joins, concurring.

I join the Court's opinion which, as I understand it, addresses only 'right of reply' statutes and implies no view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction. See generally Note, Vindication of the Reputation of a Public Official, 80 Harv.L.Rev. 1730, 1739-1747 (1967).

Branzburg v. Hayes

408 U.S. 665 (1972)

Opinion of the Court by Mr. Justice WHITE.

The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not.

I

[This appeal consolidated three cases. In the first, Branzburg a reporter for a Louisville newspaper, had written an article about drug use and wrote about several young persons synthesizing hashish form marihuana. He refused to give their identity to a grand jury. Pappas, a television reporter who covered the Black Panthers, likewise, refused to testify before a grand jury about what he learned in his investigative reporting. Caldwell, a New York Times reporter, similarly refused to testify before a grand jury about his coverage of the Black Panthters. All claimed that their reporting was privileged under the First Amendment.]

II

Petitioners Branzburg and Pappas and respondent Caldwell press First Amendment claims that may be simply put: that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless *forced to reveal these confidences to a grand jury, the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment. Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure. Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government, decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is ‘compelling’ or ‘paramount, and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association. The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.

We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not quality for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue

here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence. The claim is, however, that reporters are exempt from these obligations because if forced to respond to subpoenas and identify their sources or disclose other confidences, their informants will refuse or be reluctant to furnish newsworthy information in the future. This asserted burden on news gathering is said to make compelled testimony from newsmen constitutionally suspect and to require a privileged position for them.

It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that '(t)he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' Associated Press v. NLRB, 301 U.S. 103, 132-133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937). It was there held that the Associated Press, a news-gathering and disseminating organization, was not exempt from the requirements of the National Labor Relations Act. . . . Likewise, a newspaper may be subjected to nondiscriminatory forms of general taxation. Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936); Murdock v. Pennsylvania, 319 U.S. 105, 112, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943).

The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may deter or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, 84 S.Ct. 710, 725-726, 11 L.Ed.2d 686 (1964); Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130, 147, 87 S.Ct. 1975, 1987, 18 L.Ed.2d 1094 (1967) (opinion of Harlan, J.,); Monitor Patriot Co. v. Roy, 401 U.S. 265, 277, 91 S.Ct. 621, 628, 28 L.Ed.2d 35 (1971). A newspaper or a journalist may also be punished for contempt of court, in appropriate circumstances. Craig v. Harney, 331 U.S. 367, 377-378, 67 S.Ct. 1249, 1255-1256, 91 L.Ed. 1546 (1947).

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. Zemel v. Rusk, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-1281, 14 L.Ed.2d 179 (1965); New York Times Co. v. United States, 403 U.S. 713, 728-730, 91 S.Ct. 2140, 2148-2149, 29 L.Ed.2d 822 (1971), (Stewart, J., concurring); Tribune Review Publishing Co. v. Thomas, 254 F.2d 883, 885 (CA3 1958); In the Matter of United Press Assns. v. Valente, 308 N.Y. 71, 77, 123 N.E.2d 777, 778 (1954). In Zemel v. Rusk, supra, for example, the Court sustained the Government's refusal to validate passports to Cuba even though that restriction 'render(ed) less than wholly free the flow of information concerning that country.' 381 U.S., at 16, 85 S.Ct., at 1281. The ban on travel was held constitutional, for '(t)he right to speak and publish does not carry with it the unrestrained right to gather information.' Id., at 17, 85 S.Ct., at 1281.

Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and

the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. . . .

It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation. At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury. . . .

The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. Grand jury proceedings are constitutionally mandated for the institution of federal criminal prosecutions for capital or other serious crimes, and 'its constitutional prerogatives are rooted in long centuries of Anglo-American history.' Hannah v. Larche, 363 U.S. 420, 489-490, 80 S.Ct. 1502, 1544, 4 L.Ed.2d 1307 (1960). (Frankfurter, J., concurring in result). The Fifth Amendment provides that '(n)o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.' The adoption of the grand jury 'in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.' Costello v. United States, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956). Although state systems of criminal procedure differ greatly among themselves, the grand jury is similarly guaranteed by many state constitutions and plays an important role in fair and effective law enforcement in the overwhelming majority of the States. Because its task is to inquire into the Existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. 'It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.' Blair v. United States, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). Hence, the grand jury's authority to subpoena witnesses is not only historic, id., at 279-281, 39 S.Ct., at 470-471, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, United States v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 730, 94 L.Ed. 884 (1950); Blackmer v. United States, 284 U.S. 421, 438, 52 S.Ct. 252, 255, 76 L.Ed. 375 (1932); 8 J. Wigmore, Evidence s 2192 (McNaughton rev. 1961), is particularly applicable to grand jury proceedings.

A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas. Nothing before us indicates that a large number or percentage of all confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.

. . . .

The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury. . . .

Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

. . . .

We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.

. . . .

The privilege claimed here is conditional, not absolute; given the suggested preliminary showings and compelling need, the reporter would be required to testify. Presumably, such a rule would reduce the instances in which reporters could be required to appear, but predicting in advance when and in what circumstances they could be compelled to do so would be difficult. Such a rule would also have implications for the issuance of compulsory process to reporters at civil and criminal trials and at legislative hearings. If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice.

We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Cf. In re Grand Jury Witnesses, 322 F.Supp. 573, 574 (ND Cal.1970). Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of

information and opinion.' Lovell v. City of Griffin, 303 U.S. 444, 450, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938). See also Mills v. Alabama, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966); Murdock v. Pennsylvania, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943). The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public, that he relies on confidential sources of information, and that these sources will be silenced if he is forced to make disclosures before a grand jury.

In each instance where a reporter is subpoenaed to testify, the courts would also be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid for the reporter's appearance: Is there probable cause to believe a crime has been committed? Is it likely that the reporter has useful information gained in confidence? Could the grand jury obtain the information elsewhere? Is the official interest sufficient to outweigh the claimed privilege?

Thus, in the end, by considering whether enforcement of a particular law served a 'compelling' governmental interest, the courts would be inextricably involved in distinguishing between the value of enforcing different criminal laws. By requiring testimony from a reporter in investigations involving some crimes but not in others, they would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths.

At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute.

In addition, there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm. Furthermore, if what the newsmen urged in these cases is true-that law enforcement cannot hope to gain and may suffer from subpoenaing newsmen before grand juries-prosecutors will be loath to risk so much for so little. Thus, at the federal level the Attorney General has already fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries or at criminal trials. These rules are a major step in the direction the reporters herein desire to move. They may prove wholly sufficient to resolve the bulk of disagreements and controversies between press and federal officials.

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.

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Mr. Justice STEWART, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

I

The reporter's constitutional right to a confidential relationship with his source stems from the broad societal interest in a full and free flow of information to the public. It is this basic concern that underlies the Constitution's protection of a free press, Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660; New York Times Co. v. Sullivan, 376 U.S. 254, 269, 84 S.Ct. 710, 720, 11 L.Ed.2d 686,[FN1] because the guarantee is 'not for the benefit of the press so much as for the benefit of all of us.' Time, Inc. v. Hill, 385 U.S. 374, 389, 87 S.Ct. 534, 543, 17 L.Ed.2d 456.

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government. The press 'has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences . . ..' Estes v. Texas, 381 U.S. 532, 539, 85 S.Ct. 1628, 1631, 14 L.Ed.2d 543; Mills v. Alabama, 384 U.S. 214, 219, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484; Grosjean, supra, 297 U.S. at 250, 56 S.Ct. at 449. As private and public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.

A

In keeping with this tradition, we have held that the right to publish is central to the First Amendment and basic to the existence of constitutional democracy. Grosjean, supra, at 250, 56 S.Ct. at 449; New York Times, supra, 376 U.S. at 270, 84 S.Ct. at 720.

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. . . . .
. . . .

B

The right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality-the promise or understanding that names or certain aspects of communications will be kept off the record-is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power-the absence of a constitutional right protecting, in any way, a confidential relationship from compulsary process-will either deter sources from divulging information or deter reporters from gathering and publishing information.

It is obvious that informants are necessary to the news-gathering process as we know it today. If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts. Familiarity with the people and circumstances involved in the myriad background activities that result in the final product called ‘news' is vital to complete and responsible journalism, unless the press is to be a captive mouthpiece of ‘newsmakers.'

It is equally obvious that the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. An officeholder may fear his superior; a member of the bureaucracy, his associates; a dissident, the scorn of majority opinion. All may have information valuable to the public discourse, yet each may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of a reasonable fear of reprisals or censure for unorthodox views. The First Amendment concern must not be with the motives of any particular news source, but rather with the conditions in which informants of all shades of the spectrum may make information available through the press to the public. Cf. Talley v. California, 362 U.S. 60, 65, 80 S.Ct. 536, 539, 4 L.Ed.2d 559; Bates v. City of Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488.
. . . .

Finally, and most important, when governmental officials possess an unchecked power to compel newsmen to disclose information received in confidence, sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it, because uncertainty about exercise of the power will lead to ‘self-censorship.’ Smith v. California, 361 U.S. 147, 149-154, 80 S.Ct. 215, 216-219, 4 L.Ed.2d 205; New York Times Co. v. Sullivan, 376 U.S., at 279, 84 S.Ct., at 725. The uncertainty arises, of course, because the judiciary has traditionally imposed virtually no limitations on the grand jury's broad investigatory powers. See Antell, The Modern Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965). See also Part II, infra.

After today's decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman. A public-spirited person inside government, who is not implicated in any crime, will now be fearful of revealing corruption or other governmental wrongdoing, because he will now know he can subsequently be identified by use of compulsory process. The potential source must, therefore, choose between risking exposure by giving information or avoiding the risk by remaining silent.

The reporter must speculate about whether contact with a controversial source or publication of controversial material will lead to a subpoena. In the event of a subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics and impairing his resourcefulness as a reporter if he discloses confidential information.
. . . .

II

Posed against the First Amendment's protection of the newsman's confidential relationships in these cases is society's interest in the use of the grand jury to administer justice fairly and effectively. The grand jury serves two important functions: ‘to examine into the commission of crimes' and ‘to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will.’ Hale v. Henkel, 201 U.S. 43, 59, 26 S.Ct. 370, 373, 50 L.Ed. 652. And to perform these functions the grand jury must have available to it every man's relevant evidence. See Blair v. United States, 250 U.S 273, 281, 39 S.Ct. 468, 471, 63 L.Ed. 979; Blackmer v.

United States, 284 U.S. 421, 438, 52 S.Ct. 252, 255, 76 L.Ed. 375.

Yet the longstanding rule making every person's evidence available to the grand jury is not absolute. The rule has been limited by the Fifth Amendment, the Fourth Amendment, and the evidentiary privileges of the common law. So it was that in Blair, supra, after recognizing that the right against compulsory self-incrimination prohibited certain inquiries, the Court noted that 'some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.' Id., 250 U.S. at 281, 39 S.Ct. at 471 (emphasis supplied). And in United States v. Bryan, 339 U.S. 323, 70 S.Ct. 724,94 L.Ed. 844, the Court observed that any exemption from the duty to testify before the grand jury 'presupposes a very real interest to be protected.' Id., at 332, 70 S.Ct. at 731.

. . . .

In striking the proper balance between the public interest in the efficient administration of justice and the First Amendment guarantee of the fullest flow of information, we must begin with the basic proposition that because of their 'delicate and vulnerable' nature, NAACP v. Button, 371 U.S., at 433, 83 S.Ct., at 338, and their transcendent importance for the just functioning of our society, First Amendment rights require special safeguards.

A

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The established method of 'carefully' circumscribing investigative powers is to place a heavy burden of justification on government officials when First Amendment rights are impaired. The decisions of this Court have 'consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.' NAACP v. Button, 371 U.S., at 438, 83 S.Ct., at 341. And 'it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.' Gibson v. Florida Legislative Investigation Committee, 372 U.S., at 546, 83 S.Ct., at 894 (emphasis supplied). See also DeGregory v. Attorney General of New Hampshire, 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488;Sweezy, supra; Watkins, supra.

Thus, when an investigation impinges on First Amendment rights, the government must not only show that the inquiry is of 'compelling and overriding importance' but it must also 'convincingly' demonstrate that the investigation is 'substantially related' to the information sought.

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Richmond Newspapers, Inc. v. Virginia

448 U.S. 555 (1980)

Mr. Chief Justice BURGER announced the judgment of the Court and delivered an opinion, in which Mr. Justice WHITE and Mr. Justice STEVENS joined.

The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.

I

In March 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975. Tried promptly in July 1976, Stevenson was convicted of second-degree murder in the Circuit Court of Hanover County, Va. The Virginia Supreme Court reversed the conviction in October 1977, holding that a bloodstained shirt purportedly belonging to Stevenson had been improperly admitted into evidence. *Stevenson v. Commonwealth*, 218 Va. 462, 237 S.E.2d 779.

Stevenson was retried in the same court. This second trial ended in a mistrial on May 30, 1978, when a juror asked to be excused after trial had begun and no alternate was available.

A third trial, which began in the same court on June 6, 1978, also ended in a mistrial. It appears that the mistrial may have been declared because a prospective juror had read about Stevenson's previous trials in a newspaper and had told other prospective jurors about the case before the retrial began. See App. 35a-36a.

Stevenson was tried in the same court for a fourth time beginning on September 11, 1978. Present in the courtroom when the case was called were appellants Wheeler and McCarthy, reporters for appellant Richmond Newspapers, Inc. Before the trial began, counsel for the defendant moved that it be closed to the public:

> "[T]here was this woman that was with the family of the deceased when we were here before. She had sat in the Courtroom. I would like to ask that everybody be excluded from the Courtroom because I don't want any information being shuffled back and forth when we have a recess as to what-who testified to what." Tr. of Sept. 11, 1978 Hearing on Defendant's Motion to Close Trial to the Public 2-3.

The trial judge, who had presided over two of the three previous trials, asked if the prosecution had any objection to clearing the courtroom. The prosecutor stated he had no objection and would leave it to the discretion of the court. *Id.*, at 4. Presumably referring to Va.Code § 19.2-266 (Supp.1980), the trial judge then announced: "[T]he statute gives me that power specifically and the defendant has made the motion." He then ordered "that the Courtroom be kept clear of all parties except the witnesses when they testify." Tr., *supra*, at 4-5. The record does not show that any objections to the closure order were made by anyone present at the time, including appellants Wheeler and McCarthy.

Later that same day, however, appellants sought a hearing on a motion to vacate the closure order. The trial judge granted the request and scheduled a hearing to follow the close of the day's proceedings. When the hearing began, the court ruled that the hearing was to be treated as part of the trial; accordingly, he again ordered the reporters to leave the courtroom, and they complied.

. . . .
The court denied the motion to vacate and ordered the trial to continue the following morning "with the press and public excluded." *Id.*, at 27; App. 21a.
. . . .

II

We begin consideration of this case by noting that the precise issue presented here has not previously been before this Court for decision. In *Gannett Co. v. DePasquale*, *supra*, the Court was not required to decide whether a right of access to *trials*, as distinguished from hearings on *pre* trial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre* trial suppression hearing. One concurring opinion specifically emphasized that "a hearing on a motion before trial to suppress evidence is not a *trial* . . . ." 443 U.S., at 394, 99 S.Ct., at 2913 (BURGER, C. J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials, *id.*, at 392 and n. 24, 99 S.Ct., at 2912, and n. 24; nor did the dissenting opinion reach this issue. *Id.*, at 447, 99 S.Ct., at 2940 (opinion of BLACKMUN, J.).

In prior cases the Court has treated questions involving conflicts between publicity and a defendant's right to a fair trial; as we observed in *Nebraska Press Assn. v. Stuart, supra*, at 547, 97 S.Ct., at 2797,"[t]he problems presented by this [conflict] are almost as old as the Republic." See also, *e. g., Gannett, supra; Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965). But here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.

A

The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. We need not here review all details of its development, but a summary of that history is instructive. What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe.

In the days before the Norman Conquest, cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community. Pollock, English Law Before the Norman Conquest, in 1 Select Essays in Anglo-American Legal History 88, 89 (1907). Somewhat like modern jury duty, attendance at these early meetings was compulsory on the part of the freemen, who were called upon to render judgment. *Id.*, at 89-90; see also 1 W. Holdsworth, A History of English Law 10, 12 (1927).

With the gradual evolution of the jury system in the years after the Norman Conquest, see, *e. g., id.*, at 316, the duty of all freemen to attend trials to render judgment was relaxed, but there is no indication that criminal trials did not remain public. When certain groups were excused from compelled attendance, see the Statute of Marlborough, 52 Hen. 3, ch. 10 (1267); 1 Holdsworth, *supra*, at 79, and n. 4, the statutory exemption did not prevent them from attending; Lord Coke observed that those excused "are not compellable to come, but left to their own liberty." 2 E. Coke, Institutes of the Laws of England 121 (6th ed. 1681).

. . . .

Three centuries later, Sir Frederick Pollock was able to state of the "rule of publicity" that, "[h]ere we have one tradition, at any rate, which has persisted through all changes." F. Pollock, the Expansion of the Common Law 31-32 (1904). See also E. Jenks, The Book of English Law 73-74 (6th ed. 1967): "[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial."

We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call "one of the essential qualities of a court of justice," *Daubney v. Cooper*, 10 B. & C. 237, 240, 109 Eng.Rep. 438, 440 (K. B. 1829), was not also an attribute of the judicial systems of colonial America. In Virginia, for example, such records as there are of early criminal trials indicate that they were open, and nothing to the contrary has been cited. See A. Scott, Criminal Law in Colonial Virginia 128-129 (1930); Reinsch, The English Common Law in the Early American Colonies, in 1 Select Essays in Anglo-American Legal History 367, 405 (1907). Indeed, when in the mid-1600's the Virginia Assembly felt that the respect due the courts was "by the clamorous unmannerlynes of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it selfe neglected," the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them. See Scott, *supra*, at 132.
. . . .

B

As we have shown, and as was shown in both the Court's opinion and the dissent in *Gannett*, 443 U.S., at 384, 386, n. 15, 418-425, 99 S.Ct., at 2908, 2909, n. 15, 2925-2929, the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensible attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality. See, *e. g.*, M. Hale, The History of the Common Law of England 343-345 (6th ed. 1820); 3 W. Blackstone, Commentaries *372-*373. Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone:

"Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 1 J. Bentham, Rationale of Judicial Evidence 524 (1827).
. . . . .

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done-or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." *Supra*, at 2823. It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99

L.Ed. 11 (1954), and the appearance of justice can best be provided by allowing people to observe it.
. . . . .

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:

> "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." 6 Wigmore, *supra*, at 438. See also 1 J. Bentham, Rationale of Judicial Evidence, at 525.

. . . . .

C

From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. This conclusion is hardly novel; without a direct holding on the issue, the Court has voiced its recognition of it in a variety of contexts over the years. Even while holding, in *Levine v. United States*, 362 U.S. 610, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960), that a criminal contempt proceeding was not a "criminal prosecution" within the meaning of the Sixth Amendment, the Court was careful to note that more than the Sixth Amendment was involved:

> "[W]hile the right to a 'public trial' is explicitly guaranteed by the Sixth Amendment only for 'criminal prosecutions,' that provision is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' . . . [D]ue process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt . . . as it does for all adjudications through the exercise of the judicial power, barring narrowly limited categories of exceptions . . . ." *Id.*, at 616, 80 S.Ct., at 1042.

And recently in *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), both the majority, *id.*, at 384, 386, n. 15, 99 S.Ct., at 2908, 2909, n. 15, and dissenting opinion, *id.*, at 423, 99 S.Ct., at 2928, agreed that open trials were part of the common-law tradition.

Despite the history of criminal trials being presumptively open since long before the Constitution, the State presses its contention that neither the Constitution nor the Bill of Rights contains any provision which by its terms guarantees to the public the right to attend criminal trials. Standing alone, this is correct, but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.

III

A

The First Amendment, in conjunction with the Fourteenth, prohibits governments from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this

pervades the centuries-old history of open trials and the opinions of this Court. *Supra*, at 2821-2826, and n. 9.

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chuse to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." 1 Journals 106, 107. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. "[T]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783, 98 S.Ct. 1407, 1419, 55 L.Ed.2d 707 (1978). Free speech carries with it some freedom to listen. "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' " *Kleindienst v. Mandel*, 408 U.S. 753, 762, 92 S.Ct. 2576, 2581, 33 L.Ed.2d 683 (1972). What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted. "For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges v. California*, 314 U.S. 252, 263, 62 S.Ct. 190, 194, 86 L.Ed. 192 (1941) (footnote omitted).

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," cf. *Gannett*, *supra*, 443 U.S., at 397, 99 S.Ct., at 2914 (POWELL, J., concurring); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), or a "right to gather information," for we have recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed.2d 626 (1972). The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

B

The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278 (1937). People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may "assembl[e] for any lawful purpose," *Hague v. CIO*, 307 U.S. 496, 519, 59 S.Ct. 954, 965, 83 L.Ed. 1423 (1939) (opinion of Stone, J.). Subject to the traditional time, place, and manner restrictions, see, *e. g.*, *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); see also *Cox v. Louisiana*, 379 U.S. 559, 560-564, 85 S.Ct. 476, 478-480, 13 L.Ed.2d 487 (1965), streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, see *Hague v. CIO, supra*, at 515, 59 S.Ct., at 963 (opinion of Roberts, J.); a trial courtroom also is a public place where the people generally-and representatives of the media-have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.

C

The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected. The possibility that such a contention could be made did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that because of this danger no Bill of Rights should be adopted. See, *e. g.*, The Federalist No. 84 (A. Hamilton). In a letter to Thomas Jefferson in October 1788, James Madison explained why he, although "in favor of a bill of rights," had "not viewed it in an important light" up to that time: "I conceive that in a certain degree . . . the rights in question are reserved by the manner in which the federal powers are granted." He went on to state that "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude." 5 Writings of James Madison 271 (G. Hunt ed. 1904).

But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." *Branzburg*, 408 U.S., at 681, 92 S.Ct., at 2656.

D

Having concluded there was a guaranteed right of the public under the First and Fourteenth Amendments to attend the trial of Stevenson's case, we return to the closure order challenged by appellants. The Court in *Gannett* made clear that although the Sixth Amendment guarantees the accused a right to a public trial, it does not give a right to a private trial. 443 U.S., at 382, 99 S.Ct., at 2907. Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial. In contrast to the pretrial proceeding dealt with in *Gannett*, there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness. See *e. g.*, *Nebraska Press Assn. v. Stuart*, 427 U.S., at 563-565, 96 S.Ct., at 2804-2805; *Sheppard v. Maxwell*, 384 U.S., at 357-362, 86 S.Ct., at 1519-1522. There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. See *id.*, at 359, 86 S.Ct., at 1520. Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. Accordingly, the judgment under review is

Mr. Justice STEVENS, concurring.

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. An additional word of emphasis is therefore appropriate.

Twice before, the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large. In a dissent joined by Mr. Justice BRENNAN and Mr. Justice MARSHALL in *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850, 94 S.Ct. 2811, 2815, 41 L.Ed.2d 514, Mr. Justice POWELL unequivocally rejected the conclusion that "*any* governmental restriction of press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern." *Id.*, at 857, 94 S.Ct., at 2818, (emphasis in original). And in *Houchins v. KQED, Inc.*, 438 U.S. 1, 19-40, 98 S.Ct. 2588, 2599-2610, 57 L.Ed.2d 553, I explained at length why Mr. Justice BRENNAN, Mr. Justice POWELL, and I were convinced that "[a]n official prison policy of concealing . . . knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution." *Id.*, at 38, 98 S.Ct., at 2609. Since Mr. Justice MARSHALL and Mr. Justice BLACKMUN were unable to participate in that case, a majority of the Court neither accepted nor rejected that conclusion or the contrary conclusion expressed in the prevailing opinions. Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, concurring in the judgment.

Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), held that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press. The instant case raises the question whether the First Amendment, of its own force and as applied to the States through the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. Because I believe that the First Amendment-of itself and as applied to the States through the Fourteenth Amendment-secures such a public right of access, I agree with those of my Brethren who hold that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public.

III.

Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. See *Gannett, supra*, 443 U.S. at 428-429, 99 S.Ct., at 2930-2931 (BLACKMUN, J., concurring and dissenting).

But the trial is more than a demonstrably just method of adjudicating disputes and protecting rights. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers-a coordinate branch of *government*. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing

constitutional rights. Thus, so far as the trial is the mechanism for judicial fact finding, as well as the initial forum for legal decision making, it is a genuine governmental proceeding.

It follows that the conduct of the trial is pre-eminently a matter of public interest. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S., at 491-492, 95 S.Ct., at 1044; *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920, 70 S.Ct. 252, 255, 94 L.Ed. 562 (1950) (opinion of FRANKFURTER, J., respecting denial of certiorari). More importantly, public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," *In re Oliver*, 333 U.S., at 270, 68 S.Ct., at 506-an abuse that, in many cases, would have ramifications beyond the impact upon the parties before the court. Indeed, " '[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.' " *Id.*, at 271, 68 S.Ct., at 506, quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827); see 3 W. Blackstone, Commentaries 372; M. Hale, History of the Common Law of England 344 (6th ed. 1820); 1 J. Bryce, The American Commonwealth 514 (rev. 1931).

Finally, with some limitations, a trial aims at true and accurate fact finding. Of course, proper fact finding is to the benefit of criminal defendants and of the parties in civil proceedings. But other, comparably urgent, interests are also often at stake. A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society. Also, mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant. Facilitation of the trial fact finding process, therefore, is of concern to the public as well as to the parties.

Popular attendance at trials, in sum, substantially furthers the particular public purposes of that critical judicial proceeding. In that sense, public access is an indispensable element of the trial process itself. Trial access, therefore, assumes structural importance in our "government of laws, "*Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

Mr. Justice STEWART, concurring in the judgment.

. . . . .

But this does not mean that the First Amendment right of members of the public and representatives of the press to attend civil and criminal trials is absolute. Just as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public. Cf. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600. Much more than a city street, a trial courtroom must be a quiet and orderly place. Compare *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513, with *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353, and *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543. Moreover, every courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so. And while there exist many alternative ways to satisfy the constitutional demands of a fair trial, those demands may also sometimes justify limitations upon the unrestricted presence of spectators in the courtroom.

Griswold v. Connecticut

381 U.S. 479 (1965)

Douglass, J., delivered the opinion of the Court:

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven -- a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to married persons as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free. The statutes whose constitutionality is involved in this appeal are §§ 53-32 and 54-196 of the General Statutes of Connecticut (1958 rev.). The former provides:

"Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54-196 provides:

"Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined $ 100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A. 2d 479. We noted probable jurisdiction. 379 U.S. 926.

* * * *

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that Lochner v. New York, 198 U.S. 45, should be our guide. But we decline that invitation as we did in West Coast Hotel Co. v. Parrish, 300 U.S. 379; Olsen v. Nebraska, 313 U.S. 236; Lincoln Union v. Northwestern Co., 335 U.S. 525; Williamson v. Lee Optical Co., 348 U.S. 483; Giboney v. Empire Storage Co., 336 U.S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice -- whether public or private or parochial -- is also not

mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights. By Pierce v. Society of Sisters, supra, the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By Meyer v. Nebraska, supra, the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (Martin v. Struthers, 319 U.S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (see Wieman v. Updegraff, 344 U.S. 183, 195) -- indeed the freedom of the entire university community. Sweezy v. New Hampshire, 354 U.S. 234, 249-250, 261-263; Barenblatt v. United States, 360 U.S. 109, 112; Baggett v. Bullitt, 377 U.S. 360, 369. Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the Pierce and the Meyer cases.

In NAACP v. Alabama, 357 U.S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." Ibid. In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. NAACP v. Button, 371 U.S. 415, 430-431. In Schware v. Board of Bar Examiners, 353 U.S. 232, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (id., at 244) and was not action of a kind proving bad moral character. Id., at 245-246.

Those cases involved more than the "right of assembly" -- a right that extends to all irrespective of their race or ideology. De Jonge v. Oregon, 299 U.S. 353. The right of "association," like the right of belief (Board of Education v. Barnette, 319 U.S. 624), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See Poe v. Ullman, 367 U.S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in Boyd v. United States, 116 U.S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." * We recently referred in Mapp v. Ohio, 367 U.S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).

* * * *

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. We deal with a right of privacy older than the Bill of Rights -- older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Goldberg, J., concurring:

* * * *

My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution is supported both by numerous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, ante, at 484. I add these words to emphasize the relevance of that Amendment to the Court's holding.

* * * *

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill

of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.

* * * *

While this Court has had little occasion to interpret the Ninth Amendment, "it cannot be presumed that any clause in the constitution is intended to be without effect." Marbury v. Madison, 1 Cranch 137, 174. In interpreting the Constitution, "real effect should be given to all the words it uses." Myers v. United States, 272 U.S. 52, 151. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." (Emphasis added.)

* * * *

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a State's infringement of a fundamental right. While the Ninth Amendment -- and indeed the entire Bill of Rights -- originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. United Public Workers v. Mitchell, 330 U.S. 75, 94-95.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." Snyder v. Massachusetts, 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ." Powell v. Alabama, 287 U.S. 45, 67. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." Poe v. Ullman, 367 U.S. 497, 517 (dissenting opinion of Mr. Justice Douglas).

* * * *

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family -- a relation as old and as fundamental as our entire civilization -- surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

* * * *

Harlan, J., concurring

* * * *

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in Poe v. Ullman, supra, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

Black, J., dissenting:

* * * *

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

* * * *

While I completely subscribe to the holding of Marbury v. Madison, 1 Cranch 137, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination -- a power which was specifically denied to federal courts by the convention that framed the Constitution.

* * * *

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, e. g., Lochner v. New York, 198 U.S. 45. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like West Coast Hotel Co. v. Parrish, 300 U.S. 379; Olsen v. Nebraska ex rel. Western Reference & Bond Assn., 313 U.S. 236, and many other opinions.

* * * *

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," made the statement, with which I fully agree, that:

"For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.