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Chapter II
JUDICIAL POWER TO ENFORCE THE CONSTITUTION

Chapter II, pp. 94-100. Delete Vieth v. Jubelirer (2004) and insert the following case:

RUCHO v. COMMON CAUSE
139 S.Ct. ___ (June 27, 2019)

Chief Justice ROBERTS delivered the opinion of the Court.

Voters *** in North Carolina and Maryland challenged their States’ congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State’s districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State’s plan discriminated against Republicans. *** The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well. ***

Article III of the Constitution limits federal courts to deciding “Cases” and “Controversies.” *** Among the political question cases the Court has identified are those that lack “judicially discoverable and manageable standards for resolving [them].” *** The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress, while giving Congress the power to “make or alter” any such regulations. *** Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be “composed of contiguous territory,” in “an attempt to forbid the practice of the gerrymander.” Later statutes added requirements of compactness and equality of population. *** Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.***

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, “a jurisdiction may engage in constitutional political gerrymandering.” *** To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities. The “central problem” is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is “determining when political gerrymandering has gone too far.” *** [O]ur “considerable efforts leave unresolved whether *** claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering.” *** In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy’s counsel***: Any standard for resolving such claims must be grounded in a “limited and precise rationale” and be “clear, manageable, and politically neutral.” ***

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a “norm that does not exist” in our electoral system—“statewide elections for representatives along party lines.”

Partisan gerrymandering claims invariably sound in a desire for proportional representation. *** Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts
to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. *** The initial difficulty in settling on a “clear, manageable and politically neutral” test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of “unfairness” in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party.*** On the other hand, perhaps the ultimate objective of a “fairer” share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its “appropriate” share of “safe” seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to “traditional” districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. *** Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is “fair” in this context would be an “unmoored determination” of the sort characteristic of a political question beyond the competence of the federal courts.

And it is only after determining how to define fairness that you can even begin to answer the determinative question: “How much is too much?” At what point does permissible partisanship become unconstitutional? *** Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support. *** “[V]ote dilution” in the one-person, one-votes cases refers to the idea that each vote must carry equal weight. *** That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. ***

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. “[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country’s long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion.” Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

Appellees and the dissent propose a number of “tests” for evaluating partisan gerrymandering claims, but none *** provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties. *** The dissent proposes using a State’s own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the “median” map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent. *** [But] it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should
not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. *** [T]he dissent’s proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent’s proposed baseline, it would return us to “the original unanswerable question (How much political motivation and effect is too much?).” Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? *** The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve *** a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as “substantial risk” or “substantial harm,” but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches.

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is “incompatible with democratic principles,” does not mean that the solution lies with the federal judiciary. *** Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. *** Our conclusion does not condone excessive partisan gerrymandering. *** The States, for example, are actively addressing the issue on a number of fronts. *** As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. ***

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

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

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

And checking them is not beyond the courts. The majority’s abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority’s own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. *** In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong. *** If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The “power,” James Madison wrote, “is in the people over the Government, and not in the Government over the people.” *** Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. *** Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.
And partisan gerrymandering can make it meaningless *** Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.*** So the only way to understand the majority’s opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals’ rights—in the face of escalating partisan manipulation whose compatibility with this Nation’s values and law no one defends—the majority declines to provide any remedy.***

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. According to the majority, “[p]artisan gerrymandering claims invariably sound in a desire for proportional representation.” But the Constitution does not mandate proportional representation. So, the majority contends, resolving those claims “inevitably” would require courts to decide what is “fair” in the context of districting. They would have “to make their own political judgment about how much representation particular political parties deserve” and “to rearrange the challenged districts to achieve that end.” And second, the majority argues that even after establishing a baseline, a court would have no way to answer “the determinative question: ‘How much is too much?’” No “discernible and manageable” standard is available, the majority claims—and so courts could willy-nilly become embroiled in fixing every districting plan.

I’ll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can’t be done has been done. Over the past several years, federal courts across the country *** have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State’s own criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders. ***

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians’ districting decisions. *** “[P]oliticians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.” Those harms arise because politicians want to stay in office. No one can look to them for effective relief. *** The majority’s most perplexing “solution” is to look to state courts. *** But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn’t we?*** Of all times to abandon the Court’s duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court’s role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

Notes

2. Right and Remedy. The majority concedes the gerrymandering is “egregious” in ways that disadvantage Democrats in one state and Republicans in the other. But it finds no judicial remedy. Is this consistent with
3. Alternatives. Does the majority or dissent have the better of the arguments over these alternatives for fixing partisan gerrymandering problems: (1) state court intervention, (2) state legislative intervention, and (3) Congressional intervention? If “The People” of a state have the option to make legislative and constitutional changes through referendum processes, does that help solve gerrymandering problems? See U.S. Term Limits, infra p. 316.

4. Methodology. Is it fair to say the majority focus is on the framers’ intent and constitutional structure while the dissent’s focus is on first principles and consequentialism?

Chapter III
THE DISTRIBUTION OF NATIONAL POWERS

Chapter III, p. 138: Add the following case and notes after the Zivotofsky notes and before IIIB2:

TRUMP v HAWAII
2018 WL 3116337 (June 26, 2018)

ROBERTS, C.J., delivered the opinion of the Court, in which KENNEDY, THOMAS, ALITO, and GORSUCH, JJ., joined. KENNEDY, J., and THOMAS, J., filed concurring opinions. BREYER, J., filed a dissenting opinion, in which KAGAN, J., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined.

Chief Justice ROBERTS delivered the opinion of the Court.

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry “would be detrimental to the interests of the United States.” 8 U.S.C. § 1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (2017) (Proclamation). The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment. ***

The INA establishes numerous grounds on which an alien abroad may be inadmissible to the United States and ineligible for a visa. Congress has also delegated to the President authority to suspend or restrict the entry of aliens in certain circumstances. The principal source of that authority, enables the President to “suspend the entry of all aliens or any class of aliens” whenever he “finds” that their entry “would be detrimental to the interests of the United States.”

Plaintiffs argue that the Proclamation is not a valid exercise of the President’s authority under the INA. In their view, § 1182(f) confers only a residual power to temporarily halt the entry of a discrete group of aliens engaged in harmful conduct. They also assert that the Proclamation violates another provision of the INA because it discriminates on the basis of nationality in the issuance of immigrant visas.

By its plain language, § 1182(f) grants the President broad discretion to suspend the entry of aliens into the United States. The President lawfully exercised that discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national
interest. And plaintiffs’ attempts to identify a conflict with other provisions in the INA, and their appeal to
the statute’s purposes and legislative history, fail to overcome the clear statutory language.

The text of § 1182(f) states:

“Whenever the President finds that the entry of any aliens or of any class of aliens into
the United States would be detrimental to the interests of the United States, he may by
proclamation, and for such period as he shall deem necessary, suspend the entry of all
aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of
aliens any restrictions he may deem to be appropriate.”

By its terms, § 1182(f) exudes deference to the President in every clause. It entrusts to the President the
decisions whether and when to suspend entry (“[w]henever [he] finds that the entry” of aliens “would be
detrimental” to the national interest); whose entry to suspend (“all aliens or any class of aliens”); for how
long (“for such period as he shall deem necessary”); and on what conditions (“any restrictions he may deem
to be appropriate”). It is therefore unsurprising that we have previously observed that § 1182(f) vests the
President with “ample power” to impose entry restrictions in addition to those elsewhere enumerated in the
INA.

The Proclamation falls well within this comprehensive delegation. The sole prerequisite set forth in § 1182(f)
is that the President “find[ ]” that the entry of the covered aliens “would be detrimental to the interests of
the United States.” The President has undoubtedly fulfilled that requirement here. *** Plaintiffs *** argue,
as an initial matter, that the Proclamation fails to provide a persuasive rationale for why nationality alone
renders the covered foreign nationals a security risk. And they further discount the President’s stated
concern about deficient vetting because the Proclamation allows many aliens from the designated countries
to enter on nonimmigrant visas.

Such arguments are grounded on the premise that § 1182(f) not only requires the President to make a
finding that entry “would be detrimental to the interests of the United States,” but also to explain that
finding with sufficient detail to enable judicial review. That premise is questionable. But even assuming that
some form of review is appropriate, plaintiffs’ attacks on the sufficiency of the President’s findings cannot be
sustained. The 12–page Proclamation—which thoroughly describes the process, agency evaluations, and
recommendations underlying the President’s chosen restrictions—is more detailed than any prior order a
President has issued under § 1182(f). Contrast Presidential Proclamation No. 6958 (1996) (President
Clinton) (explaining in one sentence why suspending entry of members of the Sudanese government and
armed forces “is in the foreign policy interests of the United States”); Presidential Proclamation No. 4865
(1981) (President Reagan) (explaining in five sentences why measures to curtail “the continuing illegal
migration by sea of large numbers of undocumented aliens into the southeastern United States” are
“necessary”).

Moreover, plaintiffs’ request for a searching inquiry into the persuasiveness of the President’s justifications
is inconsistent with the broad statutory text and the deference traditionally accorded the President in this
sphere. *** The Proclamation also comports with the remaining textual limits in § 1182(f). We agree with
plaintiffs that the word “suspend” often connotes a “defer[ral] till later.” But that does not mean that the
President is required to prescribe in advance a fixed end date for the entry restrictions. Section 1182(f)
authorizes the President to suspend entry “for such period as he shall deem necessary.” It follows that when
a President suspends entry in response to a diplomatic dispute or policy concern, he may link the duration of
those restrictions, implicitly or explicitly, to the resolution of the triggering condition. In fact, not one of the
43 suspension orders issued prior to this litigation has specified a precise end date.

Like its predecessors, the Proclamation makes clear that its “conditional restrictions” will remain in force
only so long as necessary to “address” the identified “inadequacies and risks” within the covered nations.
Proclamation Preamble, and § 1(h); see ibid. (explaining that the aim is to “relax[ ] or remove[ ]” the entry
restrictions “as soon as possible”). To that end, the Proclamation establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be modified or terminated. §§ 4(a), (b). Indeed, after the initial review period, the President determined that Chad had made sufficient improvements to its identity-management protocols, and he accordingly lifted the entry suspension on its nationals.

Finally, the Proclamation properly identifies a “class of aliens”—nationals of select countries—whose entry is suspended. Plaintiffs argue that “class” must refer to a well-defined group of individuals who share a common “characteristic” apart from nationality. But the text of § 1182(f), of course, does not say that, and the word “class” comfortably encompasses a group of people linked by nationality. Plaintiffs also contend that the class cannot be “overbroad.” But that simply amounts to an unspoken tailoring requirement found nowhere in Congress’s grant of authority to suspend entry of not only “any class of aliens” but “all aliens.”

In short, the language of § 1182(f) is clear, and the Proclamation does not exceed any textual limit on the President’s authority. ***Confronted with this “facially broad grant of power,” plaintiffs focus their attention on statutory structure and legislative purpose. They seek support in, first, the immigration scheme reflected in the INA as a whole, and, second, the legislative history of § 1182(f) and historical practice. Neither argument justifies departing from the clear text of the statute.***

*** The First Amendment provides, in part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Our cases recognize that “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” Plaintiffs believe that the Proclamation violates this prohibition by singling out Muslims for disfavored treatment. The entry suspension, they contend, operates as a “religious gerrymander,” in part because most of the countries covered by the Proclamation have Muslim-majority populations. And in their view, deviations from the information-sharing baseline criteria suggest that the results of the multi-agency review were “foreordained.” Relying on Establishment Clause precedents concerning laws and policies applied domestically, plaintiffs allege that the primary purpose of the Proclamation was religious animus and that the President’s stated concerns about vetting protocols and national security were but pretexts for discriminating against Muslims.

At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a “Statement on Preventing Muslim Immigration” that called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” That statement remained on his campaign website until May 2017. Then-candidate Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the country.” Shortly after being elected, when asked whether violence in Europe had affected his plans to “ban Muslim immigration,” the President replied, “You know my plans. All along, I’ve been proven to be right.” *** Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.

The case before us differs in numerous respects from the conventional Establishment Clause claim. Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad. Their claim accordingly raises a number of delicate issues regarding the scope of the constitutional right and the manner of proof. The Proclamation, moreover, is facially neutral toward religion. Plaintiffs therefore ask the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements—many of which were made before the President took the oath of office. ***
For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.” The upshot of our cases in this context is clear: “Any rule of constitutional law that would inhibit the flexibility” of the President “to respond to changing world conditions should be adopted only with the greatest caution,” and our inquiry into matters of entry and national security is highly constrained. We need not define the precise contours of that inquiry in this case. For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review. That standard of review considers whether the entry policy is plausibly related to the Government’s stated objective to protect the country and improve vetting processes. As a result, we may consider plaintiffs’ extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a “bare ... desire to harm a politically unpopular group.” The Proclamation does not fit this pattern. It cannot be said that it is impossible to “discern a relationship to legitimate state interests” or that the policy is “inexplicable by anything but animus.” Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

Three additional features of the entry policy support the Government’s claim of a legitimate national security interest. First, since the President introduced entry restrictions in January 2017, three Muslim-majority countries—Iraq, Sudan, and Chad—have been removed from the list of covered countries. The Proclamation emphasizes that its “conditional restrictions” will remain in force only so long as necessary to “address” the identified “inadequacies and risks,” Proclamation Preamble, and § 1(h), and establishes an ongoing process to engage covered nations and assess every 180 days whether the entry restrictions should be terminated, §§ 4(a), (b). In fact, in announcing the termination of restrictions on nationals of Chad, the President also described Libya’s ongoing engagement with the State Department and the steps Libya is taking “to improve its practices.”

Second, for those countries that remain subject to entry restrictions, the Proclamation includes significant exceptions for various categories of foreign nationals. The policy permits nationals from nearly every covered country to travel to the United States on a variety of nonimmigrant visas. These carveouts for nonimmigrant visas are substantial: Over the last three fiscal years—before the Proclamation was in effect—the majority of visas issued to nationals from the covered countries were nonimmigrant visas. The Proclamation also exempts permanent residents and individuals who have been granted asylum.

Third, the Proclamation creates a waiver program open to all covered foreign nationals seeking entry as immigrants or nonimmigrants. According to the Proclamation, consular officers are to consider in each admissibility determination whether the alien demonstrates that (1) denying entry would cause undue hardship; (2) entry would not pose a threat to public safety; and (3) entry would be in the interest of the United States. On its face, this program is similar to the humanitarian exceptions set forth in President Carter’s order during the Iran hostage crisis. The Proclamation also directs DHS and the State Department to issue guidance elaborating upon the circumstances that would justify a waiver.

Finally, the dissent invokes Korematsu v. United States, 323 U.S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, Korematsu has nothing to do with this case. The forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The
entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent's reference to Korematsu, however, affords this Court the opportunity to make express what is already obvious: Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.” *** We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim. ***

THOMAS, J., concurring.

*** Merits aside, I write separately to address the remedy that the plaintiffs sought and obtained in this case. The District Court imposed an injunction that barred the Government from enforcing the President’s Proclamation against anyone, not just the plaintiffs. Injunctions that prohibit the Executive Branch from applying a law or policy against anyone—often called “universal” or “nationwide” injunctions—have become increasingly common. District courts, including the one here, have begun imposing universal injunctions without considering their authority to grant such sweeping relief. These injunctions are beginning to take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch.

I am skeptical that district courts have the authority to enter universal injunctions. These injunctions did not emerge until a century and a half after the founding. And they appear to be inconsistent with longstanding limits on equitable relief and the power of Article III courts. If their popularity continues, this Court must address their legality. ***

Justice BREYER, with whom Justice KAGAN joins, dissenting.

The question before us is whether Proclamation No. 9645 is lawful. If its promulgation or content was significantly affected by religious animus against Muslims, it would violate the relevant statute or the First Amendment itself. If, however, its sole ratio decidendi was one of national security, then it would be unlikely to violate either the statute or the Constitution. Which is it? Members of the Court principally disagree about the answer to this question, i.e., about whether or the extent to which religious animus played a significant role in the Proclamation’s promulgation or content.

In my view, the Proclamation’s elaborate system of exemptions and waivers can and should help us answer this question. That system provides for case-by-case consideration of persons who may qualify for visas despite the Proclamation’s general ban. Those persons include lawful permanent residents, asylum seekers, refugees, students, children, and numerous others. There are likely many such persons, perhaps in the thousands. And I believe it appropriate to take account of their Proclamation-granted status when considering the Proclamation’s lawfulness.*** Declarations, anecdotal evidence, facts, and numbers taken from amicus briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide. But, given the importance of the decision in this case, the need for assurance that the Proclamation does not rest upon a “Muslim ban,” and the assistance in deciding the issue that answers to the “exemption and waiver” questions may provide, I would send this case back to the District Court for further proceedings.*** If this Court must decide the question without this further litigation, I would, on balance, find the evidence of antireligious bias, including statements on a website taken down only after the President issued the two executive orders preceding the Proclamation, along with the other statements also set forth in Justice SOTOMAYOR’s opinion, a sufficient basis to set the Proclamation aside. And for these reasons, I respectfully dissent.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.
The United States of America is a Nation built upon the promise of religious liberty. Our Founders honored that core promise by embedding the principle of religious neutrality in the First Amendment. The Court's decision today fails to safeguard that fundamental principle. It leaves undisturbed a policy first advertised openly and unequivocally as a "total and complete shutdown of Muslims entering the United States" because the policy now masquerades behind a facade of national-security concerns. But this repackaging does little to cleanse Presidential Proclamation No. 9645 of the appearance of discrimination that the President's words have created. Based on the evidence in the record, a reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus. That alone suffices to show that plaintiffs are likely to succeed on the merits of their Establishment Clause claim. The majority holds otherwise by ignoring the facts, misconstruing our legal precedent, and turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals, many of whom are United States citizens. Because that troubling result runs contrary to the Constitution and our precedent, I dissent.***

Rather than defend the President's problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs' Establishment Clause claim.***

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [is] so discontinuous with the reasons offered for it" that the policy is "inexplicable by anything but animus." The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.

The majority insists that the Proclamation furthers two interrelated national-security interests: "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices." But the Court offers insufficient support for its view "that the entry suspension has a legitimate grounding in [those] national security concerns, quite apart from any religious hostility." Indeed, even a cursory review of the Government's asserted national-security rationale reveals that the Proclamation is nothing more than a "religious gerrymander."***

In sum, none of the features of the Proclamation highlighted by the majority supports the Government's claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the unrebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.***

Notes

1. **Statute and Structural Constitution.** Was the outcome purely statutorily driven? Would Article II have commanded the same result absent a statute? Had the statute purported to restrict the President's authority to deny admissions to aliens for counterterrorism reasons, would the statute have been constitutional?

2. **Court and Constitutional Rights.** What restrictions does Article III impose, if any, on searching judicial examination of the President's purposes in restricting access to particular aliens or groups of aliens?

3. **Judicial Remediation.** Justice Thomas questions the propriety of a nationwide ("universal") injunction issued by a district court? Couldn't the same result be obtained by an injunction of particular parties (the
President and his agents) without specifying the geographical scope?

4. **Follow-on Issues.** A Lawfare piece entitled “Five Unanswered Questions from Trump v. Hawaii.” at https://www.lawfareblog.com/five-unanswered-questions-trump-v-hawaii, addresses in addition to matters in the previous notes, (1) what happens with discovery on remand, (2) how should Courts deal with “this President” versus “The President,” and (3) what constitutional differences are there among aliens, such as those who have crossed and those that have not crossed the U.S. border?

**Chapter III, p. 152:** Add to the end of the note on nondelegation before *INS v. Chadha*.

*United States v. Gundy*, 139 S. Ct. ____ (June 20, 2019), found that there was an “intelligible principal” to a statutory provision allowing the Attorney General to determine the applicability of a federa III sex offender registration statute (SORNA) to pre-Act sex offenders. Finding the Attorney General’s supposed “legislative authority” to be “distinctly small-bore” and clearly within Congressional delegation authority. Three dissenters (Gorsuch, Roberts, and Thomas) would have found SORNA too broad in allowing the Attorney General total leeway as to whom to place within statutory coverage for many years. Broad power over sex offenders without legislative consideration does away, they say, with “one of the most vital of the procedural protections of individual liberty found in our Constitution.”

**Chapter III, bottom p. 183:** Add the following case and notes after the notes to *NLRB v. Noel Canning*.

**LUCIA v. SECURITIES AND EXCHANGE COMMISSION**

2018 WL 3057893 (June 21, 2018)

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, ALITO, and GORSUCH, JJ., joined. THOMAS, J., filed a concurring opinion, in which GORSUCH, J., joined. BREYER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which GINSBURG and SOTOMAYOR, JJ., joined as to Part III. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG, J., joined.

Justice KAGAN delivered the opinion of the Court.

The Appointments Clause of the Constitution lays out the permissible methods of appointing “Officers of the United States,” a class of government officials distinct from mere employees. Art. II, § 2, cl. 2. This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such “Officers.” ***

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

An ALJ assigned to hear an SEC enforcement action has extensive powers—the “authority to do all things necessary and appropriate to discharge his or her duties” and ensure a “fair and orderly” adversarial proceeding. Those powers “include, but are not limited to,” supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally “[r]egulating the course of” the proceeding and the “conduct of the parties and their counsel”; and imposing sanctions for “[c]ontemptuous conduct” or violations of procedural requirements. As that list suggests, an SEC ALJ exercises authority “comparable to” that of a federal district judge conducting a bench trial.
After a hearing ends, the ALJ issues an “initial decision.” That decision must set out “findings and conclusions” about all “material issues of fact [and] law”; it also must include the “appropriate order, sanction, relief, or denial thereof.” The Commission can then review the ALJ’s decision, either upon request or sua sponte. But if it opts against review, the Commission “issue[s] an order that the [ALJ’s] decision has become final.” At that point, the initial decision is “deemed the action of the Commission.”

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

Two decisions set out this Court’s basic framework for distinguishing between officers and employees. Germaine held that “civil surgeons” (doctors hired to perform various physical exams) were mere employees because their duties were “occasional or temporary” rather than “continuing and permanent.” Buckley then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they “exercis[ed] significant authority pursuant to the laws of the United States.” The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

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

The officials at issue in Freytag were the “special trial judges” (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In “comparatively narrow and minor matters,” they could both hear and definitively resolve a case for the Tax Court. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to “prepare proposed findings and an opinion” for a regular Tax Court judge to consider. The proceeding challenged in Freytag was a major one, involving $1.5 billion in alleged tax deficiencies. After conducting a 14–week trial, the STJ drafted a proposed decision in favor of the Government. A regular judge then adopted the STJ’s work as the opinion of the Tax Court. The losing parties argued on appeal that the STJ was not constitutionally appointed.

Freytag says everything necessary to decide this case. To begin, the Commission’s ALJs, like the Tax Court’s STJs, hold a continuing office established by law. Indeed, everyone here—Lucia, the Government, and the amicus—agrees on that point. Far from serving temporarily or episodically, SEC ALJs “receive[ ] a career appointment.” And that appointment is to a position created by statute, down to its “duties, salary, and means of appointment.”

Still more, the Commission’s ALJs exercise the same “significant discretion” when carrying out the same “important functions” as STJs do. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. Consider in order the four specific (if overlapping) powers Freytag mentioned. First, the Commission’s ALJs (like the Tax Court’s STJs) “take testimony.” More precisely, they “[r]eceiv[e] evidence” and “[e]xamine witnesses” at hearings, and may
also take pre-hearing depositions. Second, the ALJs (like STJs) “conduct trials.” As detailed earlier, they administer oaths, rule on motions, and generally “regulat[e] the course of” a hearing, as well as the conduct of parties and counsel. Third, the ALJs (like STJs) “rule on the admissibility of evidence.” They thus critically shape the administrative record (as they also do when issuing document subpoenas). And fourth, the ALJs (like STJs) “have the power to enforce compliance with discovery orders.” In particular, they may punish all “[c]ontemptuous conduct,” including violations of those orders, by means as severe as excluding the offender from the hearing. So point for point—straight from Freytag’s list—the Commission’s ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in Freytag—except with potentially more independent effect. As the Freytag Court recounted, STJs “prepare proposed findings and an opinion” adjudicating charges and assessing tax liabilities. Similarly, the Commission’s ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. And what happens next reveals that the ALJ can play the more autonomous role. In a major case like Freytag, a regular Tax Court judge must always review an STJ’s opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ’s decision itself “becomes final” and is “deemed the action of the Commission.” That last-word capacity makes this an a fortiori case: If the Tax Court’s STJs are officers, as Freytag held, then the Commission’s ALJs must be too.

The amicus offers up two distinctions to support the opposite conclusion. His main argument relates to “the power to enforce compliance with discovery orders”—the fourth of Freytag’s listed functions. The Tax Court’s STJs, he states, had that power “because they had authority to punish contempt” (including discovery violations) through fines or imprisonment. By contrast, he observes, the Commission’s ALJs have less capacious power to sanction misconduct. The amicus’s secondary distinction involves how the Tax Court and Commission, respectively, review the factfinding of STJs and ALJs. The Tax Court’s rules state that an STJ’s findings of fact “shall be presumed” correct. In comparison, the amicus notes, the SEC’s regulations include no such deferential standard.

But those distinctions make no difference for officer status. To start with the amicus’s primary point, Freytag referenced only the general “power to enforce compliance with discovery orders,” not any particular method of doing so. True enough, the power to toss malefactors in jail is an especially muscular means of enforcement—the nuclear option of compliance tools. But just as armies can often enforce their will through conventional weapons, so too can administrative judges. As noted earlier, the Commission’s ALJs can respond to discovery violations and other contemptuous conduct by excluding the wrongdoer (whether party or lawyer) from the proceedings—a powerful disincentive to resist a court order. Similarly, if the offender is an attorney, the ALJ can “[s]ummarily suspend” him from representing his client—not something the typical lawyer wants to invite. And finally, a judge who will, in the end, issue an opinion complete with factual findings, legal conclusions, and sanctions has substantial informal power to ensure the parties stay in line. Contrary to the amicus’s view, all that is enough to satisfy Freytag’s fourth item (even supposing, which we do not decide, that each of those items is necessary for someone conducting adversarial hearings to count as an officer).

*** The Freytag Court never suggested that the deference given to STJs’ factual findings mattered to its Appointments Clause analysis. Indeed, the relevant part of Freytag did not so much as mention the subject (even though it came up at oral argument. And anyway, the Commission often accords a similar deference to its ALJs, even if not by regulation. The Commission has repeatedly stated, as it did below, that its ALJs are in the “best position to make findings of fact” and “resolve any conflicts in the evidence.” And when factfinding derives from credibility judgments, as it frequently does, acceptance is near-automatic. Recognizing ALJs’ “personal experience with the witnesses,” the Commission adopts their “credibility finding[s] absent overwhelming evidence to the contrary.” That practice erases the constitutional line the amicus proposes to draw.
The only issue left is remedial. For all the reasons we have given, and all those Freytag gave before, the Commission’s ALJs are “Officers of the United States,” subject to the Appointments Clause. And as noted earlier, Judge Elliot heard and decided Lucia’s case without the kind of appointment the Clause requires. This Court has held that “one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case” is entitled to relief. Lucia made just such a timely challenge: He contested the validity of Judge Elliot’s appointment before the Commission, and continued pressing that claim in the Court of Appeals and this Court. So what relief follows? This Court has also held that the “appropriate” remedy for an adjudication tainted with an appointments violation is a new “hearing before a properly appointed” official. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia’s case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.

Justice THOMAS, with whom Justice GORSUCH joins, concurring.

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

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

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

The Founders likely understood the term “Officers of the United States” to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty. Applying the original meaning here, the administrative law judges of the Securities and Exchange Commission easily qualify as “Officers of the United States.” These judges exercise many of the agency’s statutory duties, including issuing initial decisions in adversarial proceedings. As explained, the importance or significance of these statutory duties is irrelevant. All that matters is that the judges are continuously responsible for performing them.

In short, the administrative law judges of the Securities Exchange Commission are “Officers of the United States” under the original meaning of the Appointments Clause. They have “‘responsibility for an ongoing statutory duty,’” which is sufficient to resolve this case.

Justice BREYER, with whom Justice GINSBURG and Justice SOTOMAYOR join as to Part III, concurring in the judgment in part and dissenting in part.

I agree with the Court that the Securities and Exchange Commission did not properly appoint the Administrative Law Judge who presided over petitioner Lucia’s hearing. But I disagree with the majority in respect to two matters. First, I would rest our conclusion upon statutory, not constitutional, grounds. I
believe it important to do so because I cannot answer the constitutional question that the majority answers without knowing the answer to a different, embedded constitutional question, which the Solicitor General urged us to answer in this case: the constitutionality of the statutory “for cause” removal protections that Congress provided for administrative law judges. Second, I disagree with the Court in respect to the proper remedy. *** I do not believe that the Administrative Procedure Act permits the Commission to delegate its power to appoint its administrative law judges to its staff. *** The upshot, in my view, is that for statutory, not constitutional, reasons, the Commission did not lawfully appoint the Administrative Law Judge here at issue. And this Court should decide no more than that. ***

The reason why it is important to go no further arises from the holding in a case this Court decided eight years ago, Free Enterprise Fund. The case concerned statutory provisions protecting members of the Public Company Accounting Oversight Board from removal without cause. The Court held in that case that the Executive Vesting Clause of the Constitution, Art. II, § 1 (“[t]he executive Power shall be vested in a President of the United States of America”), forbade Congress from providing members of the Board with “multilevel protection from removal” by the President. Because, in the Court’s view, the relevant statutes (1) granted the Securities and Exchange Commissioners protection from removal without cause, (2) gave the Commissioners sole authority to remove Board members, and (3) protected Board members from removal without cause, the statutes provided Board members with two levels of protection from removal and consequently violated the Constitution. ***

Free Enterprise Fund’s holding may not invalidate the removal protections applicable to the Commission’s administrative law judges even if the judges are inferior “officers of the United States” for purposes of the Appointments Clause. In my dissent in Free Enterprise Fund, I pointed out that under the majority’s analysis, the removal protections applicable to administrative law judges—including specifically the Commission’s administrative law judges—would seem to be unconstitutional. ***

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

Congress’ intent on the question matters, in my view, because the Appointments Clause is properly understood to grant Congress a degree of leeway as to whether particular Government workers are officers or instead mere employees not subject to the Appointments Clause. ***

Separately, I also disagree with the majority’s conclusion that the proper remedy in this case requires a hearing before a different administrative law judge. *** The reversal here is based on a technical constitutional question, and the reversal implies no criticism at all of the original judge or his ability to conduct the new proceedings. For him to preside once again would not violate the structural purposes that we have said the Appointments Clause serves, nor would it, in any obvious way, violate the Due Process Clause. *** I would, at a minimum, ask the Court of Appeals to examine it on remand rather than decide it
here now. ***

The Court’s decision to address the Appointments Clause question separately from the constitutional removal question is problematic. By considering each question in isolation, the Court risks (should the Court later extend Free Enterprise Fund) unraveling, step-by-step, the foundations of the Federal Government’s administrative adjudication system as it has existed for decades, and perhaps of the merit-based civil-service system in general. And the Court risks doing so without considering that potential consequence. For these reasons, I concur in the judgment in part and, with respect, I dissent in part.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

The Court today and scholars acknowledge that this Court’s Appointments Clause jurisprudence offers little guidance on who qualifies as an “Officer of the United States.” *** This Court’s decisions have yet to articulate the types of powers that will be deemed significant enough to constitute “significant authority.”

To provide guidance to Congress and the Executive Branch, I would hold that one requisite component of “significant authority” is the ability to make final, binding decisions on behalf of the Government. Accordingly, a person who merely advises and provides recommendations to an officer would not herself qualify as an officer. *** Turning to the question presented here, it is true that the administrative law judges (ALJs) of the Securities and Exchange Commission wield “extensive powers.” They preside over adversarial proceedings that can lead to the imposition of significant penalties on private parties. In the hearings over which they preside, Commission ALJs also exercise discretion with respect to important matters.

Nevertheless, I would hold that Commission ALJs are not officers because they lack final decision making authority.*** Because I would conclude that Commission ALJs are not officers for purposes of the Appointments Clause, it is not necessary to reach the constitutionality of their removal protections. *** As a final matter, although I would conclude that Commission ALJs are not officers, I share Justice BREYER’s concerns regarding the Court’s choice of remedy, and so I join Part III of his opinion. ***

Notes

1. Officer of the United States. What tests do the various justices use to determine, among those who work for the federal government, who is an “Officer of the United States” for Art. II, § 2, cl. 2 purposes? Which components of the tests are formal and which functional? Should the breadth of the term change over time?

2. Constitutionally Similar Terms. The Constitution uses terms similar to the one interpreted in this case elsewhere, but with slight differences, such as “officer,” “Officer under the United States,” “Offices of Honor/Trust/Profit under the United States,” “Public Trust under the United States,” and Office under the Authority of the United States.” Can you discern any differences in these terms? Which of these terms might include (a) the President, (b) the Speaker of the House, and (c) mobilized militia officials? See Seth Barrett Tillman, Originalism & the Scope of the Constitution’s Disqualification Clause, 33 QUINNIPIAC L. REV. 59 (2014), which is usefully reviewed by William Baude, Constitutional Officers: A Very Close Reading, JOTWELL (July 28, 2016).
Chapter IV
ARTICLE I POWERS AND THEIR LIMITS

Chapter IV, p. 294: Add the following case at the end of the section, following the notes to Printz.

MURPHY v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
138 S.Ct. 1461 (May 14, 2018)

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, KAGAN, and GORSUCH, JJ., joined, and in which BREYER, J., joined as to all but Part VI–B. THOMAS, J., filed a concurring opinion. BREYER, J., filed an opinion concurring in part and dissenting in part. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER, J., joined in part.

Justice ALITO delivered the opinion of the Court.

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

By the 1990s, there were signs that the trend that had brought about the legalization of many other forms of gambling might extend to sports gambling, and this sparked federal efforts to stem the tide. Opponents of sports gambling turned to the legislation now before us, the Professional and Amateur Sports Protection Act (PASPA). *** PASPA’s most important provision, part of which is directly at issue in these cases, makes it “unlawful” for a State or any of its subdivisions “to sponsor, operate, advertise, promote, license, or authorize by law or compact ... a lottery, sweepstakes, or other betting, gambling, or wagering scheme based ... on” competitive sporting events. § 3702(1). In parallel, § 3702(2) makes it “unlawful” for “a person to sponsor, operate, advertise, or promote” those same gambling schemes—but only if this is done “pursuant to the law or compact of a governmental entity.” PASPA does not make sports gambling a federal crime (and thus was not anticipated to impose a significant law enforcement burden on the Federal Government). Instead, PASPA allows the Attorney General, as well as professional and amateur sports organizations, to bring civil actions to enjoin violations.

At the time of PASPA’s adoption, a few jurisdictions allowed some form of sports gambling. *** PASPA contains “grandfather” provisions allowing these activities to continue. Another provision gave New Jersey the option of legalizing sports gambling in Atlantic City—provided that it did so within one year of the law’s effective date.

New Jersey did not take advantage of this special option, but by 2011, with Atlantic City facing stiff competition, the State had a change of heart. New Jersey voters approved an amendment to the State Constitution making it lawful for the legislature to authorize sports gambling, and in 2012 the legislature enacted a law doing just that.

The 2012 Act quickly came under attack. The major professional sports leagues and the NCAA brought an action in federal court against the New Jersey Governor and other state officials (hereinafter New Jersey), seeking to enjoin the new law on the ground that it violated PASPA. In response, the State argued, among other things, that PASPA unconstitutionally infringed the State’s sovereign authority to end its sports gambling ban.

In making this argument, the State relied primarily on two cases in which we struck down federal laws
based on what has been dubbed the “anticommandeering” principle. In New York, we held that a federal law unconstitutionally ordered the State to regulate in accordance with federal standards, and in Printz, we found that another federal statute unconstitutionally compelled state officers to enforce federal law.

Relying on these cases, New Jersey argued that PASPA is similarly flawed because it regulates a State’s exercise of its lawmaking power by prohibiting it from modifying or repealing its laws prohibiting sports gambling. The plaintiffs countered that PASPA is critically different from the commandeering cases because it does not command the States to take any affirmative act. Without an affirmative federal command to do something, the plaintiffs insisted, there can be no claim of commandeering. ***

Before considering the constitutionality of the PASPA provision prohibiting States from “authoriz[ing]” sports gambling, we first examine its meaning. *** Petitioners argue that the anti-authorization provision requires States to maintain their existing laws against sports gambling without alteration. *** Respondents interpret the provision more narrowly. They claim that the primary definition of “authorize” requires affirmative action. ***

In our view, *** When a State completely or partially repeals old laws banning sports gambling, it “authorize[s]” that activity. This is clear when the state-law landscape at the time of PASPA’s enactment is taken into account. At that time, all forms of sports gambling were illegal in the great majority of States, and in that context, the competing definitions offered by the parties lead to the same conclusion. The repeal of a state law banning sports gambling not only “permits” sports gambling***; it also gives those now free to conduct a sports betting operation the “right or authority to act”; it “empowers” them ***.

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

The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States. When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority “to do all ... Acts and Things which Independent States may of right do.” The Constitution limited but did not abolish the sovereign powers of the States, which retained “a residuary and inviolable sovereignty.” The Federalist No. 39, p. 245 (C. Rossiter ed. 1961). Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of “dual sovereignty.”

The Constitution limits state sovereignty in several ways. It directly prohibits the States from exercising some attributes of sovereignty. Some grants of power to the Federal Government have been held to impose implicit restrictions on the States. And the Constitution indirectly restricts the States by granting certain legislative powers to Congress, see Art. I, § 8, while providing in the Supremacy Clause that federal law is the “supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding,” Art. VI, cl. 2. This means that when federal and state law conflict, federal law prevails and state law is preempted.

The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority. ***
Our opinions in New York and Printz explained why adherence to the anticommandeering principle is important. Without attempting a complete survey, we mention several reasons that are significant here. *** First, the rule serves as “one of the Constitution’s structural protections of liberty.” *** Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred. Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis.

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.

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

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

Here is an illustration. PASPA includes an exemption for States that permitted sports betting at the time of enactment, but suppose Congress did not adopt such an exemption. Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter. *** The anticommandeering doctrine does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage. ***

Respondents and the United States defend the anti-authorization prohibition on the ground that it constitutes a valid preemption provision, but it is no such thing. Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides “a rule of decision.” It specifies that federal law is supreme in case of a conflict with state law. Therefore, in order for the PASPA provision to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution “confers upon Congress the power to regulate individuals, not States,” the PASPA provision at issue must be best read as one that regulates private actors. ***

Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. (It does not give them a federal right to engage in sports gambling.) Nor does it impose any federal restrictions on private actors. If a private citizen or company started a sports gambling operation, either with or without state authorization, § 3702(1) would not be violated and would not provide any ground for a civil action by the Attorney General or any other party. Thus, there is simply no
way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.

In so holding, we recognize that a closely related provision of PASPA, § 3702(2), does restrict private conduct, but that is not the provision challenged by petitioners. ***

Having concluded that § 3702(1) violates the anticommandeering doctrine, we consider *** whether our decision regarding the anti-authorization provision dooms the remainder of PASPA. *** In order for other PASPA provisions to fall, it must be “evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.”

Under 28 U.S.C. § 3702(1), States are prohibited from “operat[ing],” “sponsor[ing],” or “promot[ing]” sports gambling schemes. If the provisions prohibiting state authorization and licensing are stricken but the prohibition on state “operat[ion]” is left standing, the result would be a scheme sharply different from what Congress contemplated when PASPA was enacted. At that time, Congress knew that New Jersey was considering the legalization of sports gambling in the privately owned Atlantic City casinos and that other States were thinking about the institution of state-run sports lotteries. PASPA addressed both of these potential developments. It gave New Jersey one year to legalize sports gambling in Atlantic City but otherwise banned the authorization of sports gambling in casinos, and it likewise prohibited the spread of state-run lotteries. If Congress had known that States would be free to authorize sports gambling in privately owned casinos, would it have nevertheless wanted to prevent States from running sports lotteries?

That seems most unlikely. State-run lotteries, which sold tickets costing only a few dollars, were thought more benign than other forms of gambling, and that is why they had been adopted in many States. Casino gambling, on the other hand, was generally regarded as far more dangerous. A gambler at a casino can easily incur heavy losses, and the legalization of privately owned casinos was known to create the threat of infiltration by organized crime, as Nevada’s early experience had notoriously shown. To the Congress that adopted PASPA, legalizing sports gambling in privately owned casinos while prohibiting state-run sports lotteries would have seemed exactly backwards.

Prohibiting the States from engaging in commercial activities that are permitted for private parties would also have been unusual, and it is unclear what might justify such disparate treatment. Respondents suggest that Congress wanted to prevent States from taking steps that the public might interpret as the endorsement of sports gambling, Brief for Respondents 39, but we have never held that the Constitution permits the Federal Government to prevent a state legislature from expressing its views on subjects of public importance. For these reasons, we do not think that the provision barring state operation of sports gambling can be severed.

We reach the same conclusion with respect to the provisions prohibiting state “sponsor[ship]” and “promot[ion].” The line between authorization, licensing, and operation, on the one hand, and sponsorship or promotion, on the other, is too uncertain. It is unlikely that Congress would have wanted to prohibit such an ill-defined category of state conduct.

Nor do we think that Congress would have wanted to sever the PASPA provisions that prohibit a private actor from “sponsor[ing],” “operat[ing],” or “promot[ing]” sports gambling schemes “pursuant to” state law. § 3702(2). These provisions were obviously meant to work together with the provisions in § 3702(1) that impose similar restrictions on governmental entities. If Congress had known that the latter provisions would fall, we do not think it would have wanted the former to stand alone.

The present cases illustrate exactly how Congress must have intended § 3702(1) and § 3702(2) to work. If a State attempted to authorize particular private entities to engage in sports gambling, the State could be sued under § 3702(1), and the private entity could be sued at the same time under § 3702(2). The two sets of provisions were meant to be deployed in tandem to stop what PASPA aimed to prevent: state legalization of
sports gambling. But if, as we now hold, Congress lacks the authority to prohibit a State from legalizing sports gambling, the prohibition of private conduct under § 3702(2) ceases to implement any coherent federal policy.

Under § 3702(2), private conduct violates federal law only if it is permitted by state law. That strange rule is exactly the opposite of the general federal approach to gambling. Under 18 U.S.C. § 1955, operating a gambling business violates federal law only if that conduct is illegal under state or local law. Similarly, 18 U.S.C. § 1953, which criminalizes the interstate transmission of wagering paraphernalia, and 18 U.S.C. § 1084, which outlaws the interstate transmission of information that assists in the placing of a bet on a sporting event, apply only if the underlying gambling is illegal under state law. See also 18 U.S.C. § 1952 (making it illegal to travel in interstate commerce to further a gambling business that is illegal under applicable state law).

These provisions implement a coherent federal policy: They respect the policy choices of the people of each State on the controversial issue of gambling. By contrast, if § 3702(2) is severed from § 3702(1), it implements a perverse policy that undermines whatever policy is favored by the people of a State. If the people of a State support the legalization of sports gambling, federal law would make the activity illegal. But if a State outlaws sports gambling, that activity would be lawful under § 3702(2). We do not think that Congress ever contemplated that such a weird result would come to pass.

PASPA’s enforcement scheme reinforces this conclusion. PASPA authorizes civil suits by the Attorney General and sports organizations but does not make sports gambling a federal crime or provide civil penalties for violations. This enforcement scheme is suited for challenging state authorization or licensing or a small number of private operations, but the scheme would break down if a State broadly decriminalized sports gambling. It is revealing that the Congressional Budget Office estimated that PASPA would impose “no cost” on the Federal Government, a conclusion that would certainly be incorrect if enforcement required a multiplicity of civil suits and applications to hold illegal bookies and other private parties in contempt. ***

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

Justice THOMAS, concurring.

I join the Court’s opinion in its entirety. I write separately, however, to express my growing discomfort with our modern severability precedents. *** Because PASPA is at least partially unconstitutional, our precedents instruct us to determine “which portions of the ... statute we must sever and excise.” The Court must make this severability determination by asking a counterfactual question: “Would Congress still have passed’ the valid sections ‘had it known’ about the constitutional invalidity of the other portions of the statute?” I join the Court’s opinion because it gives the best answer it can to this question, and no party has asked us to apply a different test. But in a future case, we should take another look at our severability precedents.

Those precedents appear to be in tension with traditional limits on judicial authority. *** Because courts cannot take a blue pencil to statutes, the severability doctrine must be an exercise in statutory interpretation. In other words, the severability doctrine has courts decide how a statute operates once they conclude that part of it cannot be constitutionally enforced. But even under this view, the severability doctrine is still dubious for at least two reasons.

First, the severability doctrine does not follow basic principles of statutory interpretation. Instead of requiring courts to determine what a statute means, the severability doctrine requires courts to make “a
nebulous inquiry into hypothetical congressional intent.” It requires judges to determine what Congress would have intended had it known that part of its statute was unconstitutional.” But it seems unlikely that the enacting Congress had any intent on this question; Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional. Without any actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be. More fundamentally, even if courts could discern Congress’ hypothetical intentions, intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment. Because we have “‘a Government of laws, not of men.’” we are governed by “legislated text,” not “legislators’ intentions”—and especially not legislators’ hypothetical intentions. Yet hypothetical intent is exactly what the severability doctrine turns on, at least when Congress has not expressed itsfallback position in the text.

Second, the severability doctrine often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions. If one provision of a statute is deemed unconstitutional, the severability doctrine places every other provision at risk of being declared nonseverable and thus inoperative; our precedents do not ask whether the plaintiff has standing to challenge those other provisions. True, the plaintiff had standing to challenge the unconstitutional part of the statute. But the severability doctrine comes into play only after the court has resolved that issue—typically the only live controversy between the parties. In every other context, a plaintiff must demonstrate standing for each part of the statute that he wants to challenge. The severability doctrine is thus an unexplained exception to the normal rules of standing, as well as the separation-of-powers principles that those rules protect.

In sum, our modern severability precedents are in tension with longstanding limits on the judicial power. And, though no party in this case has asked us to reconsider these precedents, at some point, it behooves us to do so.

Justice BREYER, concurring in part and dissenting in part.

I agree with Justice GINSBURG that 28 U.S.C. § 3702(2) is severable from the challenged portion of § 3702(1). The challenged part of subsection (1) prohibits a State from “author[izing]” or “licens[ing]” sports gambling schemes; subsection (2) prohibits individuals from “sponsor[ing], operat[ing], advertis[ing], or promot[ing]” sports gambling schemes “pursuant to the law ... of a governmental entity.” The first says that a State cannot authorize sports gambling schemes under state law; the second says that (just in case a State finds a way to do so) sports gambling schemes that a State authorizes are unlawful under federal law regardless. As Justice GINSBURG makes clear, the latter section can live comfortably on its own without the first.

Why would Congress enact both these provisions? The obvious answer is that Congress wanted to “keep sports gambling from spreading.” It feared that widespread sports gambling would “threaten [n] to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling.” And it may have preferred that state authorities enforce state law forbidding sports gambling over require federal authorities to bring civil suits to enforce federal law forbidding about the same thing. Alternatively, Congress might have seen subsection (2) as a backup, called into play if subsection (1)'s requirements, directed to the States, turned out to be unconstitutional—which, of course, is just what has happened. Neither of these objectives is unreasonable.

So read, the two subsections both forbid sports gambling but § 3702(2) applies federal policy directly to individuals while the challenged part of § 3702(1) forces the States to prohibit sports gambling schemes (thereby shifting the burden of enforcing federal regulatory policy from the Federal Government to state governments). Section 3702(2), addressed to individuals, standing alone seeks to achieve Congress' objective of halting the spread of sports gambling schemes by “regulat[ing] interstate commerce directly.” But the challenged part of subsection (1) seeks the same end indirectly by “regulat[ing] state governments’
regulation of interstate commerce.” And it does so by addressing the States (not individuals) directly and
telling state legislatures what laws they must (or cannot) enact. Under our precedent, the first provision
(directly and unconditionally telling States what laws they must enact) is unconstitutional, but the second
(directly telling individuals what they cannot do) is not.

As so interpreted, the statutes would make New Jersey’s victory here mostly Pyrrhic. But that is because the
only problem with the challenged part of § 3702(1) lies in its means, not its end. Congress has the
constitutional power to prohibit sports gambling schemes, and no party here argues that there is any
constitutional defect in § 3702(2)’s alternative means of doing so.

I consequently join Justice GINSBURG’s dissenting opinion in part, and all but Part VI–B of the Court’s
opinion.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, and with whom Justice BREYER joins in part,
dissenting.

The petition for certiorari filed by the Governor of New Jersey invited the Court to consider a sole question:
“Does a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct
impermissibly commandeer the regulatory power of States ***

Assuming, arguendo, a “yes” answer to that question, there would be no cause to deploy a wrecking ball
destroying the Professional and Amateur Sports Protection Act (PASPA) in its entirety, as the Court does
today. Leaving out the alleged infirmity, i.e., “commandeering” state regulatory action by prohibiting the
States from “authoriz[ing]” and “licens[ing]” sports-gambling schemes, two federal edicts should remain
intact. First, PASPA bans States themselves (or their agencies) from “sponsor[ing], operat[ing],
advertis[ing], [or] promot[ing]” sports-gambling schemes. Second, PASPA stops private parties from
“sponsor[ing], operat[ing], advertis[ing], or promot[ing]” sports-gambling schemes if state law authorizes
them to do so. Nothing in these § 3702(1) and § 3702(2) prohibitions commands States to do anything other
than desist from conduct federal law proscribes. Nor is there any doubt that Congress has power to regulate
gambling on a nationwide basis, authority Congress exercised in PASPA.

Surely, the accountability concern that gave birth to the anticommandeering doctrine is not implicated in
any federal proscription other than the bans on States’ authorizing and licensing sports-gambling schemes.
The concern triggering the doctrine arises only “where the Federal Government compels States to regulate”
or to enforce federal law, thereby creating the appearance that state officials are responsible for policies
Congress forced them to enact. If States themselves and private parties may not operate sports-gambling
schemes, responsibility for the proscriptions is hardly blurred. It cannot be maintained credibly that state
officials have anything to do with the restraints. Unmistakably, the foreclosure of sports-gambling schemes,
whether state run or privately operated, is chargeable to congressional, not state, legislative action.

When a statute reveals a constitutional flaw, the Court ordinarily engages in a salvage rather than a
demolition operation: It “limit[s] the solution [to] severing any problematic portions while leaving the
remainder intact.” The relevant question is whether the Legislature would have wanted unproblematic
aspects of the legislation to survive or would want them to fall along with the infirmity.3 As the Court stated
in New York, “[u]nless it is evident that the Legislature would not have enacted those provisions which are
within its power, ... the invalid part may be dropped if what is left is fully operative as a law.” Here, it is
scarcely arguable that Congress “would have preferred no statute at all,” over one that simply stops States
and private parties alike from operating sports-gambling schemes.

The Court wields an ax to cut down § 3702 instead of using a scalpel to trim the statute. It does so
apparently in the mistaken assumption that private sports-gambling schemes would become lawful in the
wake of its decision. In particular, the Court holds that the prohibition on state “operat [ion]” of sports-
gambling schemes cannot survive, because it does not believe Congress would have “wanted to prevent
States from running sports lotteries” “had [it] known that States would be free to authorize sports gambling in privately owned casinos.” In so reasoning, the Court shutters § 3702(2), under which private parties are prohibited from operating sports-gambling schemes precisely when state law authorizes them to do so. In so reasoning, the Court shutters § 3702(2), under which private parties are prohibited from operating sports-gambling schemes precisely when state law authorizes them to do so.4

This plain error pervasively infects the Court’s severability analysis. The Court strikes Congress’ ban on state “sponsor[ship]” and “promot[ion]” of sports-gambling schemes because it has (mistakenly) struck Congress’ prohibition on state “operat[ion]” of such schemes. It strikes Congress’ prohibitions on private “sponsor[ship],” “operat [ion],” and “promot[ion]” of sports-gambling schemes because it has (mistakenly) struck those same prohibitions on the States. And it strikes Congress’ prohibition on “advertis[ing]” sports-gambling schemes because it has struck everything else.

Notes

1. New Law? What, if anything, does this case add to New York and Printz? Does it expand the anti-commandeering rule into new territory?

2. Formalism and Functionalism. Which of these approaches do various justices use in their opinions?

Add as n. 5, top p. 305 before FMC v. SCSPA:

5. Update on Suits of States in Other States. Franchise Board of California v. Hyatt, 139 S.Ct ___ (2019) held, 5-4, that the Constitution does not permit a State to be sued by a private party without its consent in the courts of a different State, overruling Nevada v. Hall, 440 U.S. 410 (1979).

Chapter V

JUDICIAL PROTECTION OF INTERSTATE COMMERCE

Chapter VI, p. 350, add as n. 5 to Granholm v. Heald:

5. Update on Granholm. In Tennessee Wine & Spirits Ass’n v. Thomas, 139 S. Ct. ____ (June 26, 2019), the Court followed the methodology of Granholm v. Heald to strike down as discriminatory towards interstate commerce duration residency requirements on operators of retail liquor stores. The 7-2 majority, finding commercial discrimination inimical to the framers of the Constitution, found Tennessee’s residency requirement not “narrowly tailored” to serve a “legitimate local interest.” The blatantly discriminatory law was not saved by the Twenty-First Amendment. Justices Thomas and Gorsuch, in dissent, chastised the majority for using a nontextual constitutional antidiscrimination doctrine to trump the clear text of the Twenty-First Amendment.
Add to n. 2, p. 410, the following update:

In *Manhattan Community Access Corporation v. Halleck*, 139 S. Ct. 1921 (2019), the Court emphasized the narrowness of the “public functions” doctrine of state action in holding that a privately owned public access television channel, despite being heavily regulated, was not subject to First Amendment constraints. The test, said Justice Kavanaugh for the majority, is whether the government “traditionally and exclusively performed the function.”

**Chapter VIII**

**DUE PROCESS, PROCEDURAL AND SUBSTANTIVE**

*Chapter VIII, p. 550:* Add the following case and notes after the notes to *Obergefell v. Hodges*.

**MASTERPIECE CAKESHOP, LTD. v. COLORADO CIVIL RIGHTS COMMISSION**

138 S.Ct. 1719 (June 4, 2018)

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. KAGAN, J., filed a concurring opinion, in which BREYER, J., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

Justice KENNEDY delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.
One of the difficulties in this case is that the parties disagree as to the extent of the baker’s refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker’s creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker’s refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission’s consideration of this case was inconsistent with the State’s obligation of religious neutrality. The reason and motive for the baker’s refusal were based on his sincere religious beliefs and convictions. The Court’s precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission’s actions here violated the Free Exercise Clause; and its order must be set aside.***

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in Obergefell v. Hodges, 576 U.S. ———, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.” Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods and services under a neutral and generally applicable public accommodations law.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a
strong case under this Court’s precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers’ rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips’ dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. At the time of the events in question, this Court had not issued its decisions either in United States v. Windsor, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), or Obergefell. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers’ creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages.

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying “no goods or services will be sold if they will be used for gay marriages,” something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission’s formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips’ case. At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado’s business community. One commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he’s got an issue with the—the law’s impacting his personal belief system, he needs to look at being able to compromise.” Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor’s personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips’ free exercise rights and the dilemma he
faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting’s discussion but said far more to disparage Phillips’ beliefs. The commissioner stated:

“I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”

To describe a man’s faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission’s decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission’s adjudication of Phillips’ case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips’ case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included “wording and images [the baker] deemed derogatory,” featured “language and images [the baker] deemed hateful,” or displayed a message the baker “deemed as discriminatory.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission’s treatment of Phillips’ objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips’ willingness to sell “birthday cakes, shower cakes, [and] cookies and brownies” to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other
bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that “[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed” when they refused to create the requested cakes. In those cases, the court continued, there was no impermissible discrimination because “the Division found that the bakeries ... refuse[d] the patron’s request ... because of the offensive nature of the requested message.”

A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. The Colorado court’s attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips’ religious beliefs. The court’s footnote does not, therefore, answer the baker’s concern that the State’s practice was to disfavor the religious basis of his objection.

For the reasons just described, the Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In Church of Lukumi Babalu Aye, supra, the Court made clear that the government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even “subtle departures from neutrality” on matters of religion. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips’ religious beliefs. The Constitution “commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.”

Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.” In view of these factors the record here demonstrates that the Commission’s consideration of Phillips’ case was neither tolerant nor respectful of Phillips’ religious beliefs. The Commission gave “every appearance,” of adjudicating Phillips’ religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips’ conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State’s interest could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission’s disparate consideration of Phillips’ case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

The Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in
which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission’s order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market. ***

Justice KAGAN, with whom Justice BREYER joins, concurring.

“[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views “neutral and respectful consideration.” I join the Court’s opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. ***

Justice GORSUCH, with whom Justice ALITO joins, concurring.

*** As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips’s religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer’s request that would have required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer’s request that would have required him to violate his religious beliefs. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips’s religious beliefs “offensive.” Ibid. That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full. ***

Justice THOMAS, with whom Justice GORSUCH joins, concurring in part and concurring in the judgment.

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips’ right to freely exercise his religion.*** While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. Specifically, the parties dispute whether Phillips refused to create a custom wedding cake for the individual respondents, or whether he refused to sell them any wedding cake (including a premade one). But the Colorado Court of Appeals resolved this factual dispute in Phillips’ favor. The court described his conduct as a refusal to “design and create a cake to celebrate [a] same-sex wedding.” And it noted that the Commission’s order required Phillips to sell “ ‘any product [he] would sell to heterosexual couples,’ ” including custom wedding cakes.

Even after describing his conduct this way, the Court of Appeals concluded that Phillips’ conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado’s public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment. ***

Once a court concludes that conduct is expressive, the Constitution limits the government’s authority to restrict or compel it. “[O]ne important manifestation of the principle of free speech is that one who chooses to
speak may also decide ‘what not to say’ ” and “tailor” the content of his message as he sees fit. This rule “applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.” And it “makes no difference” whether the government is regulating the “creati[on], distributi[on], or consum[ption]” of the speech.***

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist’s paint palette with a paintbrush and baker’s whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece’s website.

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that “a wedding has occurred, a marriage has begun, and the couple should be celebrated.”

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, “[w]edding cakes are so packed with symbolism that it is hard to know where to begin.” If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is “so standardised and inevitable a part of getting married that few ever think to question it.” Almost no wedding, no matter how spartan, is missing the cake. See id., at 98. “A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards.” Although the cake is eventually eaten, that is not its primary purpose. The cake’s purpose is to mark the beginning of a new marriage and to celebrate the couple.2

Accordingly, Phillips’ creation of custom wedding cakes is expressive. *** By forcing Phillips to create custom wedding cakes for same-sex weddings, Colorado’s public-accommodations law “alter[s] the expressive content” of his message. The meaning of expressive conduct, this Court has explained, depends on “the context in which it occur[s].” Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are “weddings” and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to “bear witness to [these] fact[s],”, or to “affir [m] ... a belief with which [he] disagrees”. ***

The Colorado Court of Appeals was wrong to conclude that Phillips’ conduct was not expressive because a reasonable observer would think he is merely complying with Colorado’s public-accommodations law. This argument would justify any law that compelled protected speech. ***

Because Phillips’ conduct (as described by the Colorado Court of Appeals) was expressive, Colorado’s public-accommodations law cannot penalize it unless the law withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in O’Brien,4 that test does not apply unless the government would have punished the conduct regardless of its expressive component. Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand “‘the most exacting scrutiny.’”
The Court of Appeals did not address whether Colorado’s law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado’s law. According to the individual respondents, Colorado can compel Phillips’ speech to prevent him from “‘denigrat[ing] the dignity’” of same-sex couples, “‘assert[ing] [their] inferiority,’” and subjecting them to “‘humiliation, frustration, and embarrassment.’” These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. “If there is a bedrock principle underlying the First Amendment, it is that the As the Court reiterates today, “it is not ... the role of the State or its officials to prescribe what shall be offensive.” ***

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, “‘I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.’” It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say “God Hates Fags”—all of which this Court has deemed protected by the First Amendment. Moreover, it is also hard to see how Phillips’ statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about “dignity” and “stigma” did not carry the day when this Court affirmed the right of white supremacists to burn a 25–foot cross; conduct a rally on Martin Luther King Jr.’s birthday; or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to “‘Bury the niggers,’”

Nor does the fact that this Court has now decided Obergefell v. Hodges, 576 U.S. ———, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), somehow diminish Phillips’ right to free speech. “It is one thing ... to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted” and entitled to express a different view This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of Obergefell and the morality of same-sex marriage. Obergefell itself emphasized that the traditional understanding of marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.” If Phillips’ continued adherence to that understanding makes him a minority after Obergefell, that is all the more reason to insist that his speech be protected.

***

In Obergefell, I warned that the Court’s decision would “inevitab[ly] ... come into conflict” with religious liberty, “as individuals ... are confronted with demands to participate in and endorse civil marriages between same-sex couples.” This case proves that the conflict has already emerged. Because the Court’s decision vindicates Phillips’ right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing Obergefell from being used to “stamp out every vestige of dissent” and “vilify Americans who are unwilling to assent to the new orthodoxy.” If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals’ must be rejected.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

There is much in the Court’s opinion with which I agree. “[I]t is a general rule that religious and philosophical objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.” “Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public.” “[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying ‘no goods or services will be sold if they will be
used for gay marriages.’” Gay persons may be spared from “indignities when they seek goods and services in an open market.” I strongly disagree, however, with the Court’s conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that “Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.” This conclusion rests on evidence said to show the Colorado Civil Rights Commission’s (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted “disparate consideration of Phillips' case compared to the cases of” three other bakers who refused to make cakes requested by William Jack, an amicus here. The Court also finds hostility in statements made at two public hearings on Phillips’ appeal to the Commission. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below. ***

Statements made at the Commission’s public hearings on Phillips’ case provide no firmer support for the Court’s holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips’ refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties’ cross-motions for summary judgment. Third, the Commission heard Phillips’ appeal. Fourth, after the Commission’s ruling, the Colorado Court of Appeals considered the case de novo. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips’ case is thus far removed from the only precedent upon which the Court relies, where the government action that implicated a sole decisionmaking body, the city council. ***(S)ensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals’ judgment. I would so rule.

Notes

1. **Who won?** The Supreme Court ruled in favor of the bakery owner, Jack Phillips. Phillips had argued to be exempted under the First Amendment’s freedoms of speech and religion from Colorado’s nondiscrimination law. The majority did not rule for or against him on either ground. Instead, it ruled that the Colorado Civil Rights Commission exhibited such bias against Phillips’ religion that its judgement was unconstitutional. It did not invalidate the state’s nondiscrimination law, however, so if Phillips refused the next day to sell a cake to a gay couple, Colorado could enforce its nondiscrimination law. Who won? Why?

2. **Who will win similar future cases?** For decades, the Supreme Court has rejected arguments like those made by the bakery owner that the Constitution exempts religious objectors from nondiscrimination laws in economic life. Discriminatory conduct by business entities “has never been accorded affirmative constitutional protections.” *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)). Remember how the Court rejected claims that a motel owner has a right not to rent rooms to African American customers in *Heart of Atlanta Motel?* As Justice O’Connor explained: “The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O’Connor, J., concurring). Does the decision in *Masterpiece* change that? If so, how? After this case, will those seeking religious exemption to nondiscrimination laws be in a better or worse position? Why?

3. **Limiting principles.** This case is often thought to be about whether businesses (or people more broadly) can opt out of laws they oppose on either expressive or religious grounds. Analysts assumed the Court took this case to extend an opt-out right to the baker—perhaps on his argument that selling a cake to a gay couple expresses support for gay marriage and he could not be compelled to express that message. If the baker had
won on those grounds, could another baker refuse to sell a cake to an interracial or interfaith couple? Could a religious employer refuse to hire women or an anti-Semitic employer refuse to hire Jews? Could a sandwich counter refuse to sell sandwiches to African Americans or immigrants because doing so expressed support for their equal place in society? What is the best argument for an exemption for the baker? What limiting principle would you apply and why? The Trump Administration argued that businesses have a constitutional right to deny service to any class of people (LGBT people, women, people with disabilities, etc.), though the Constitution "may" permit states to prohibit race discrimination because of our nation's unique history with regard to race.