TEMPLE AMERICAN INN OF COURT – APRIL 2016

First Amendment Cases & Materials

Freedom of Speech:

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942): fighting words (words that by their very utterance inflict injury or tend to incite an immediate breach of the peace) are not protected by the First Amendment

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952): motion pictures are protected by the First Amendment

Roth v. United States, 354 U.S. 476 (1957): obscene material is not protected by the First Amendment

United States v. O'Brien, 391 U.S. 367 (1968): a criminal prohibition against draft-card burning does not violate the First Amendment because its effect on speech is only incidental, and it is justified by the significant governmental interest in maintaining as efficient and effective military draft system

Brandenburg v. Ohio, 395 U.S. 444 (1969): the mere advocacy of the use of force or violating the law is protected by the First Amendment, but inciting others to take direct and immediate unlawful action is not

Buckley v. Valeo, 424 U.S. 1 (1976): spending money to influence elections is a form of constitutionally protected free speech

Hustler Magazine v. Falwell, 485 U.S. 46 (1988): parodies of public figures are protected by the First Amendment, even when they are intended to cause emotional distress

Texas v. Johnson, 491 U.S. 397 (1989): laws criminalizing the desecration of the American flag are unconstitutional in violation of the First Amendment's protection of symbolic speech

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991): public indecency laws regulation nude dancing are constitutional because they further substantial governmental interests in maintaining order and protecting morality

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010): limits on corporate and union political expenditures during election cycles violate the First Amendment

Freedom of Religion:

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943): public schools cannot override the religious beliefs of their students by forcing them to salute the American flag and recite the pledge of allegiance

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993): the government must show a compelling interest to pass a law targeting a religion's ritual, and failing to show such an interest, the prohibition of animal sacrifice is a violation of the Free Exercise Clause

Burwell v. Hobby Lobby Stores, Inc., 573 U.S. __ (2014): closely held, for-profit corporations have free exercise rights under the Religious Freedom Restoration Act of 1993, and the requirement of the Affordable Care Act that employers provide their female employees with access to contraception violates that right

Freedom of Association:

NAACP v. Alabama, 357 U.S. 449 (1958): the freedom to associate with organizations dedicated to the "advancement of beliefs and ideas" is an inseparable part of the Due Process Clause

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995): private citizens organizing a public demonstration have the right to exclude groups whose message they disagree with from participating

Boy Scouts of America v. Dale, 530 U.S. 640 (2000): private organizations are allowed to choose their own membership and expel members based on their sexual orientation even if such discrimination would otherwise be prohibited by anti-discrimination legislation designed to protect minorities in public accommodations

Law Review Articles:

Algorithims and Speech - UPenn – 2013

Associational Speech - Yale – 2011

Constitutional Law in an Age of Proportionality - Yale – 2015

Hate Speech and Political Correctness - Illinois – 1992

Low Value Speech - Harvard – 2015

Origins of Freedom of Religion - Harvard – 1990

Punishment for Prejudice - South Dakota – 1994

Restraining the Heartless - Indiana – 2009

State Restrictions on Violent Expression - Vanderbilt – 1993

The Forgotten Freedom of Assembly - Tulane – 2010

The Hobby Lobby Moment - Harvard – 2014

The Unsettling Well Settled Law of Freedom of Association - Connecticut – 2010

When to Regulate Hate Speech - Penn State – 2006

Other Commentary:

What Does "Freedom of Assembly" Mean for Occupy Wall Street?, HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW, Blog Post, November 5, 2011

ACLU-TN Victory in Protecting Free Speech of Occupy Nashville Protesters Federal Judge Rules State Violated Demonstrators' FirstAmendment Rights, ACLU, June 13, 2013

The Right to Peaceably Assemble: U.S. Constitutional Law and Occupy Wall Street, Constitutional Litigation Clinic at Rutgers School of Law-Newark

Freedom of Religion Cases

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v*. HOBBY LOBBY STORES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 13–354. Argued March 25, 2014—Decided June 30, 2014*

The Religious Freedom Restoration Act of 1993 (RFRA) prohibits the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U. S. C. §§2000bb–1(a), (b). As amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), RFRA covers "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc–5(7)(A).

At issue here are regulations promulgated by the Department of Health and Human Services (HHS) under the Patient Protection and Affordable Care Act of 2010 (ACA), which, as relevant here, requires specified employers' group health plans to furnish "preventive care and screenings" for women without "any cost sharing requirements," 42 U. S. C. §300gg–13(a)(4). Congress did not specify what types of preventive care must be covered; it authorized the Health Resources and Services Administration, a component of HHS, to decide. *Ibid*. Nonexempt employers are generally required to provide coverage for the 20 contraceptive methods approved by the Food and Drug Admin-

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*Together with No. 13–356, *Conestoga Wood Specialties Corp. et al.* v. *Burwell, Secretary of Health and Human Services, et al.,* on certiorari to the United States Court of Appeals for the Third Circuit.

Syllabus

istration, including the 4 that may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. Religious employers, such as churches, are exempt from this contraceptive mandate. HHS has also effectively exempted religious nonprofit organizations with religious objections to providing coverage for contraceptive services. Under this accommodation, the insurance issuer must exclude contraceptive coverage from the employer's plan and provide plan participants with separate payments for contraceptive services without imposing any cost-sharing requirements on the employer, its insurance plan, or its employee beneficiaries.

In these cases, the owners of three closely held for-profit corporations have sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. In separate actions, they sued HHS and other federal officials and agencies (collectively HHS) under RFRA and the Free Exercise Clause, seeking to enjoin application of the contraceptive mandate insofar as it requires them to provide health coverage for the four objectionable contraceptives. In No. 13–356, the District Court denied the Hahns and their company—Conestoga Wood Specialties—a preliminary injunction. Affirming, the Third Circuit held that a for-profit corporation could not "engage in religious exercise" under RFRA or the First Amendment, and that the mandate imposed no requirements on the Hahns in their personal capacity. In No. 13–354, the Greens, their children, and their companies—Hobby Lobby Stores and Mardel—were also denied a preliminary injunction, but the Tenth Circuit reversed. It held that the Greens' businesses are "persons" under RFRA, and that the corporations had established a likelihood of success on their RFRA claim because the contraceptive mandate substantially burdened their exercise of religion and HHS had not demonstrated a compelling interest in enforcing the mandate against them; in the alternative, the court held that HHS had not proved that the mandate was the "least restrictive means" of furthering a compelling governmental interest.

Held: As applied to closely held corporations, the HHS regulations imposing the contraceptive mandate violate RFRA. Pp. 16–49.

(a) RFRA applies to regulations that govern the activities of closely held for-profit corporations like Conestoga, Hobby Lobby, and Mardel. Pp. 16–31.

(1) HHS argues that the companies cannot sue because they are for-profit corporations, and that the owners cannot sue because the regulations apply only to the companies, but that would leave merchants with a difficult choice: give up the right to seek judicial protection of their religious liberty or forgo the benefits of operating as cor-

porations. RFRA's text shows that Congress designed the statute to provide very broad protection for religious liberty and did not intend to put merchants to such a choice. It employed the familiar legal fiction of including corporations within RFRA's definition of "persons," but the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees. Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them. Pp. 16–19.

(2) HHS and the dissent make several unpersuasive arguments. Pp. 19–31.

(i) Nothing in RFRA suggests a congressional intent to depart from the Dictionary Act definition of "person," which "include[s] corporations, . . . as well as individuals." 1 U. S. C. §1. The Court has entertained RFRA and free-exercise claims brought by nonprofit corporations. See, *e.g., Gonzales* v. *O Centro Espírita Beneficiente União do Vegetal*, 546 U. S. 418. And HHS's concession that a nonprofit corporation can be a "person" under RFRA effectively dispatches any argument that the term does not reach for-profit corporations; no conceivable definition of "person" includes natural persons and nonprofit corporations, but not for-profit corporations. Pp. 19–20.

(ii) HHS and the dissent nonetheless argue that RFRA does not cover Conestoga, Hobby Lobby, and Mardel because they cannot "exercise . . . religion." They offer no persuasive explanation for this conclusion. The corporate form alone cannot explain it because RFRA indisputably protects nonprofit corporations. And the profit-making objective of the corporations cannot explain it because the Court has entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants. *Braunfeld* v. *Brown*, 366 U. S. 599. Business practices compelled or limited by the tenets of a religious doctrine fall comfortably within the understanding of the "exercise of religion" that this Court set out in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877. Any suggestion that for-profit corporations are incapable of exercising religion because their purpose is simply to make money flies in the face of modern corporate law. States, including those in which the plaintiff corporations were incorporated, authorize corporations to pursue any lawful purpose or business, including the pursuit of profit in conformity with the owners' religious principles. Pp. 20–25.

(iii) Also flawed is the claim that RFRA offers no protection because it only codified pre-*Smith* Free Exercise Clause precedents, none of which squarely recognized free-exercise rights for for-profit corporations. First, nothing in RFRA as originally enacted suggested that its definition of "exercise of religion" was meant to be tied to pre-

Syllabus

Smith interpretations of the First Amendment. Second, if RFRA's original text were not clear enough, the RLUIPA amendment surely dispels any doubt that Congress intended to separate the definition of the phrase from that in First Amendment case law. Third, the pre-*Smith* case of *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, 366 U. S. 617, suggests, if anything, that for-profit corporations can exercise religion. Finally, the results would be absurd if RFRA, a law enacted to provide very broad protection for religious liberty, merely restored this Court's pre-*Smith* decisions in ossified form and restricted RFRA claims to plaintiffs who fell within a category of plaintiffs whose claims the Court had recognized before *Smith*. Pp. 25–28.

(3) Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because of the difficulty of ascertaining the "beliefs" of large, publicly traded corporations, but HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA's protection. That disputes among the owners of corporations might arise is not a problem unique to this context. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. Courts will turn to that structure and the underlying state law in resolving disputes. Pp. 29–31.

(b) HHS's contraceptive mandate substantially burdens the exercise of religion. Pp. 31–38.

(1) It requires the Hahns and Greens to engage in conduct that seriously violates their sincere religious belief that life begins at conception. If they and their companies refuse to provide contraceptive coverage, they face severe economic consequences: about $475 million per year for Hobby Lobby, $33 million per year for Conestoga, and $15 million per year for Mardel. And if they drop coverage altogether, they could face penalties of roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel. P. 32.

(2) *Amici* supporting HHS argue that the $2,000 per-employee penalty is less than the average cost of providing insurance, and therefore that dropping insurance coverage eliminates any substantial burden imposed by the mandate. HHS has never argued this and the Court does not know its position with respect to the argument. But even if the Court reached the argument, it would find it unpersuasive: It ignores the fact that the plaintiffs have religious reasons for providing health-insurance coverage for their employees, and it is far from clear that the net cost to the companies of providing insur-

ance is more than the cost of dropping their insurance plans and paying the ACA penalty. Pp. 32–35.

(3) HHS argues that the connection between what the objecting parties must do and the end that they find to be morally wrong is too attenuated because it is the employee who will choose the coverage and contraceptive method she uses. But RFRA's question is whether the mandate imposes a substantial burden on the objecting parties' ability to conduct business in accordance with *their religious beliefs*. The belief of the Hahns and Greens implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is immoral for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another. It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable. In fact, this Court considered and rejected a nearly identical argument in *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707. The Court's "narrow function . . . is to determine" whether the plaintiffs' asserted religious belief reflects "an honest conviction," *id.*, at 716, and there is no dispute here that it does. *Tilton* v. *Richardson*, 403 U. S. 672, 689; and *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, 248–249, distinguished. Pp. 35–38.

(c) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is a compelling governmental interest, but the Government has failed to show that the contraceptive mandate is the least restrictive means of furthering that interest. Pp. 38–49.

(1) The Court assumes that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA. Pp. 39–40.

(2) The Government has failed to satisfy RFRA's least-restrictive-means standard. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion. The Government could, *e.g.,* assume the cost of providing the four contraceptives to women unable to obtain coverage due to their employers' religious objections. Or it could extend the accommodation that HHS has already established for religious nonprofit organizations to non-profit employers with religious objections to the contraceptive mandate. That accommodation does not impinge on the plaintiffs' religious beliefs that providing insurance coverage for the contraceptives at issue here violates their religion and it still serves HHS's stated interests. Pp. 40–45.

(3) This decision concerns only the contraceptive mandate and should not be understood to hold that all insurance-coverage man-

Syllabus

dates, *e.g.,* for vaccinations or blood transfusions, must necessarily fall if they conflict with an employer's religious beliefs. Nor does it provide a shield for employers who might cloak illegal discrimination as a religious practice. *United States* v. *Lee*, 455 U. S. 252, which upheld the payment of Social Security taxes despite an employer's religious objection, is not analogous. It turned primarily on the special problems associated with a national system of taxation; and if *Lee* were a RFRA case, the fundamental point would still be that there is no less restrictive alternative to the categorical requirement to pay taxes. Here, there is an alternative to the contraceptive mandate. Pp. 45–49.

No. 13–354, 723 F. 3d 1114, affirmed; No. 13–356, 724 F. 3d 377, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined, and in which BREYER and KAGAN, JJ., joined as to all but Part III–C–1. BREYER and KAGAN, JJ., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 13–354 and 13–356

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS
13–354 *v.*
HOBBY LOBBY STORES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AND

CONESTOGA WOOD SPECIALTIES CORPORATION ET AL., PETITIONERS
13–356 *v.*
SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 30, 2014]

JUSTICE ALITO delivered the opinion of the Court.

We must decide in these cases whether the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb *et seq*., permits the United States Department of Health and Human Services (HHS) to demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners. We hold that the regulations that impose this obligation violate RFRA, which prohibits the

Federal Government from taking any action that substantially burdens the exercise of religion unless that action constitutes the least restrictive means of serving a compelling government interest.

In holding that the HHS mandate is unlawful, we reject HHS's argument that the owners of the companies forfeited all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships. The plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.

Since RFRA applies in these cases, we must decide whether the challenged HHS regulations substantially burden the exercise of religion, and we hold that they do. The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients. If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as $1.3 million per day, or about $475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.

Under RFRA, a Government action that imposes a substantial burden on religious exercise must serve a compelling government interest, and we assume that the HHS regulations satisfy this requirement. But in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test. There are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives.

In fact, HHS has already devised and implemented a system that seeks to respect the religious liberty of religious nonprofit corporations while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives as employees of companies whose owners have no religious objections to providing such coverage. The employees of these religious nonprofit corporations still have access to insurance coverage without cost sharing for all FDA-approved contraceptives; and according to HHS, this system imposes no net economic burden on the insurance companies that are required to provide or secure the coverage.

Although HHS has made this system available to religious nonprofits that have religious objections to the contraceptive mandate, HHS has provided no reason why the same system cannot be made available when the owners of for-profit corporations have similar religious objections. We therefore conclude that this system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty. And under RFRA, that conclusion means that enforcement of the HHS contraceptive mandate against the objecting parties in these cases is unlawful.

As this description of our reasoning shows, our holding is very specific. We do not hold, as the principal dissent alleges, that for-profit corporations and other commercial enterprises can "opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs." *Post*, at 1 (opinion of GINSBURG, J.). Nor do we hold, as the dissent implies, that such corporations have free rein to take steps that impose "disadvantages . . . on others" or that require "the general public [to] pick up the tab." *Post*, at 1–2. And we certainly do not hold or suggest that "RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on . . . thousands of women em-

ployed by Hobby Lobby." *Post,* at 2.[1] The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.

I

A

Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), which largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). In determining whether challenged government actions violated the Free Exercise Clause of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest. Applying this test, the Court held in *Sherbert* that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits. 374 U. S., at 408–409. And in *Yoder,* the Court held that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years. 406 U. S., at 210–211, 234–236.

In *Smith*, however, the Court rejected "the balancing

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[1] See also *post*, at 8 ("The exemption sought by Hobby Lobby and Conestoga . . . would deny [their employees] access to contraceptive coverage that the ACA would otherwise secure")

test set forth in *Sherbert*." 494 U. S., at 883. *Smith* concerned two members of the Native American Church who were fired for ingesting peyote for sacramental purposes. When they sought unemployment benefits, the State of Oregon rejected their claims on the ground that consumption of peyote was a crime, but the Oregon Supreme Court, applying the *Sherbert* test, held that the denial of benefits violated the Free Exercise Clause. 494 U. S., at 875.

This Court then reversed, observing that use of the *Sherbert* test whenever a person objected on religious grounds to the enforcement of a generally applicable law "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." 494 U. S., at 888. The Court therefore held that, under the First Amendment, "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." *City of Boerne* v. *Flores*, 521 U. S. 507, 514 (1997).

Congress responded to *Smith* by enacting RFRA. "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U. S. C. §2000bb(a)(2); see also §2000bb(a)(4). In order to ensure broad protection for religious liberty, RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." §2000bb–1(a).[2] If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling govern-

[2]The Act defines "government" to include any "department" or "agency" of the United States. §2000bb–2(1).

mental interest." §2000bb–1(b).[3]

As enacted in 1993, RFRA applied to both the Federal Government and the States, but the constitutional authority invoked for regulating federal and state agencies differed. As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work,[4] but in attempting to regulate the States and their subdivisions, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment. 521 U. S., at 516–517. In *City of Boerne*, however, we held that Congress had overstepped its Section 5 authority because "[t]he stringent test RFRA demands" "far exceed[ed] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*." *Id.*, at 533–534. See also *id.*, at 532.

Following our decision in *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. §2000cc *et seq*. That statute, enacted under Congress's Commerce and Spending Clause powers, imposes the same general test as RFRA but on a more limited category of governmental actions. See *Cutter* v. *Wilkinson*, 544 U. S. 709, 715–716 (2005). And, what is most relevant for present purposes, RLUIPA amended RFRA's definition of the "exercise of religion." See §2000bb–2(4) (importing RLUIPA definition). Before RLUIPA, RFRA's definition

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[3] In *City of Boerne* v. *Flores*, 521 U. S., 507 (1997), we wrote that RFRA's "least restrictive means requirement was not used in the pre-*Smith* jurisprudence RFRA purported to codify." *Id.*, at 509. On this understanding of our pre-*Smith* cases, RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions.

[4] See, *e.g.*, *Hankins* v. *Lyght*, 441 F. 3d 96, 108 (CA2 2006); *Guam* v. *Guerrero*, 290 F. 3d 1210, 1220 (CA9 2002).

made reference to the First Amendment. See §2000bb–2(4) (1994 ed.) (defining "exercise of religion" as "the exercise of religion under the First Amendment"). In RLUIPA, in an obvious effort to effect a complete separation from First Amendment case law, Congress deleted the reference to the First Amendment and defined the "exercise of religion" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000cc–5(7)(A). And Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." §2000cc–3(g).[5]

B

At issue in these cases are HHS regulations promulgated under the Patient Protection and Affordable Care Act of 2010 (ACA), 124 Stat. 119. ACA generally requires employers with 50 or more full-time employees to offer "a group health plan or group health insurance coverage" that provides "minimum essential coverage." 26 U. S. C. §5000A(f)(2); §§4980H(a), (c)(2). Any covered employer that does not provide such coverage must pay a substantial price. Specifically, if a covered employer provides group health insurance but its plan fails to comply with ACA's group-health-plan requirements, the employer may be required to pay $100 per day for each affected "individ-

[5]The principal dissent appears to contend that this rule of construction should apply only when defining the "exercise of religion" in an RLUIPA case, but not in a RFRA case. See *post*, at 11, n. 10. That argument is plainly wrong. Under this rule of construction, the phrase "exercise of religion," as it appears in RLUIPA, must be interpreted broadly, and RFRA states that the same phrase, as used in RFRA, means "religious exercis[e] as defined in [RLUIPA]." 42 U. S. C. §2000bb–2(4). It necessarily follows that the "exercise of religion" under RFRA must be given the same broad meaning that applies under RLUIPA.

ual." §§4980D(a)–(b). And if the employer decides to stop providing health insurance altogether and at least one full-time employee enrolls in a health plan and qualifies for a subsidy on one of the government-run ACA exchanges, the employer must pay $2,000 per year for each of its full-time employees. §§4980H(a), (c)(1).

Unless an exception applies, ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without "any cost sharing requirements." 42 U. S. C. §300gg–13(a)(4). Congress itself, however, did not specify what types of preventive care must be covered. Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to make that important and sensitive decision. *Ibid.* The HRSA in turn consulted the Institute of Medicine, a nonprofit group of volunteer advisers, in determining which preventive services to require. See 77 Fed. Reg. 8725–8726 (2012).

In August 2011, based on the Institute's recommendations, the HRSA promulgated the Women's Preventive Services Guidelines. See *id.*, at 8725–8726, and n. 1; online at http://hrsa.gov/womensguidelines (all Internet materials as visited June 26, 2014, and available in Clerk of Court's case file). The Guidelines provide that nonexempt employers are generally required to provide "coverage, without cost sharing" for "[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling." 77 Fed. Reg. 8725 (internal quotation marks omitted). Although many of the required, FDA-approved methods of contraception work by preventing the fertilization of an egg, four of those methods (those specifically at issue in these cases) may have the effect of preventing an already fertilized egg from developing any further by inhibiting its attachment to the uterus. See Brief for HHS

in No. 13–354, pp. 9–10, n. 4;[6] FDA, Birth Control: Medicines to Help You.[7]

HHS also authorized the HRSA to establish exemptions from the contraceptive mandate for "religious employers." 45 CFR §147.131(a). That category encompasses "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." See *ibid* (citing 26 U. S. C. §§6033(a)(3)(A)(i), (iii)). In its Guidelines, HRSA exempted these organizations from the requirement to cover contraceptive services. See http://hrsa.gov/womensguidelines.

In addition, HHS has effectively exempted certain religious nonprofit organizations, described under HHS regulations as "eligible organizations," from the contraceptive mandate. See 45 CFR §147.131(b); 78 Fed. Reg. 39874 (2013). An "eligible organization" means a nonprofit organization that "holds itself out as a religious organization" and "opposes providing coverage for some or all of any contraceptive services required to be covered . . . on account of religious objections." 45 CFR §147.131(b). To qualify for this accommodation, an employer must certify that it is such an organization. §147.131(b)(4). When a group-health-insurance issuer receives notice that one of its clients has invoked this provision, the issuer must then exclude contraceptive coverage from the employer's plan

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[6] We will use "Brief for HHS" to refer to the Brief for Petitioners in No. 13–354 and the Brief for Respondents in No. 13–356. The federal parties are the Departments of HHS, Treasury, and Labor, and the Secretaries of those Departments.

[7] Online at http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm. The owners of the companies involved in these cases and others who believe that life begins at conception regard these four methods as causing abortions, but federal regulations, which define pregnancy as beginning at implantation, see, *e.g.*, 62 Fed. Reg. 8611 (1997); 45 CFR §46.202(f) (2013), do not so classify them.

and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. §147.131(c).[8] Although this procedure requires the issuer to bear the cost of these services, HHS has determined that this obligation will not impose any net expense on issuers because its cost will be less than or equal to the cost savings resulting from the services. 78 Fed. Reg. 39877.[9]

In addition to these exemptions for religious organizations, ACA exempts a great many employers from most of its coverage requirements. Employers providing "grandfathered health plans"—those that existed prior to March 23, 2010, and that have not made specified changes after that date—need not comply with many of the Act's requirements, including the contraceptive mandate. 42 U. S. C. §§18011(a), (e). And employers with fewer than 50 employees are not required to provide health insurance

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[8] In the case of self-insured religious organizations entitled to the accommodation, the third-party administrator of the organization must "provide or arrange payments for contraceptive services" for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries. 78 Fed. Reg. 39893 (to be codified in 26 CFR §54.9815–2713A(b)(2)). The regulations establish a mechanism for these third-party administrators to be compensated for their expenses by obtaining a reduction in the fee paid by insurers to participate in the federally facilitated exchanges. See 78 Fed. Reg. 39893 (to be codified in 26 CFR §54.9815–2713A (b)(3)). HHS believes that these fee reductions will not materially affect funding of the exchanges because "payments for contraceptive services will represent only a small portion of total [exchange] user fees." 78 Fed. Reg. 39882.

[9] In a separate challenge to this framework for religious nonprofit organizations, the Court recently ordered that, pending appeal, the eligible organizations be permitted to opt out of the contraceptive mandate by providing written notification of their objections to the Secretary of HHS, rather than to their insurance issuers or third-party administrators. See *Little Sisters of the Poor* v. *Sebelius*, 571 U. S. ___ (2014).

at all. 26 U. S. C. §4980H(c)(2).

All told, the contraceptive mandate "presently does not apply to tens of millions of people." 723 F. 3d 1114, 1143 (CA10 2013). This is attributable, in large part, to grandfathered health plans: Over one-third of the 149 million nonelderly people in America with employer-sponsored health plans were enrolled in grandfathered plans in 2013. Brief for HHS in No. 13–354, at 53; Kaiser Family Foundation & Health Research & Educational Trust, Employer Health Benefits, 2013 Annual Survey 43, 221.[10] The count for employees working for firms that do not have to provide insurance at all because they employ fewer than 50 employees is 34 million workers. See The Whitehouse, Health Reform for Small Businesses: The Affordable Care Act Increases Choice and Saving Money for Small Businesses 1.[11]

II

A

Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination. The Mennonite Church opposes abortion and believes that "[t]he fetus in its earliest stages . . . shares humanity with those who conceived it."[12]

Fifty years ago, Norman Hahn started a wood-working business in his garage, and since then, this company, Conestoga Wood Specialties, has grown and now has 950 employees. Conestoga is organized under Pennsylvania

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[10] While the Government predicts that this number will decline over time, the total number of Americans working for employers to whom the contraceptive mandate does not apply is still substantial, and there is no legal requirement that grandfathered plans ever be phased out.

[11] Online at http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.

[12] Mennonite Church USA, Statement on Abortion, online at http://www.mennoniteusa.org/resource-center/resources/statements-and-resolutions/statement-on-abortion/.

law as a for-profit corporation. The Hahns exercise sole ownership of the closely held business; they control its board of directors and hold all of its voting shares. One of the Hahn sons serves as the president and CEO.

The Hahns believe that they are required to run their business "in accordance with their religious beliefs and moral principles." 917 F. Supp. 2d 394, 402 (ED Pa. 2013). To that end, the company's mission, as they see it, is to "operate in a professional environment founded upon the highest ethical, moral, and Christian principles." *Ibid.* (internal quotation marks omitted). The company's "Vision and Values Statements" affirms that Conestoga endeavors to "ensur[e] a reasonable profit in [a] manner that reflects [the Hahns'] Christian heritage." App. in No. 13–356, p. 94 (complaint).

As explained in Conestoga's board-adopted "Statement on the Sanctity of Human Life," the Hahns believe that "human life begins at conception." 724 F. 3d 377, 382, and n. 5 (CA3 2013) (internal quotation marks omitted). It is therefore "against [their] moral conviction to be involved in the termination of human life" after conception, which they believe is a "sin against God to which they are held accountable." *Ibid.* (internal quotation marks omitted). The Hahns have accordingly excluded from the group-health-insurance plan they offer to their employees certain contraceptive methods that they consider to be abortifacients. *Id.*, at 382.

The Hahns and Conestoga sued HHS and other federal officials and agencies under RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of ACA's contraceptive mandate insofar as it requires them to provide health-insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg.[13] These include two forms of emergency

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[13]The Hahns and Conestoga also claimed that the contraceptive

contraception commonly called "morning after" pills and two types of intrauterine devices.[14]

In opposing the requirement to provide coverage for the contraceptives to which they object, the Hahns argued that "it is immoral and sinful for [them] to intentionally participate in, pay for, facilitate, or otherwise support these drugs." *Ibid.* The District Court denied a preliminary injunction, see 917 F. Supp. 2d, at 419, and the Third Circuit affirmed in a divided opinion, holding that "for-profit, secular corporations cannot engage in religious exercise" within the meaning of RFRA or the First Amendment. 724 F. 3d, at 381. The Third Circuit also rejected the claims brought by the Hahns themselves because it concluded that the HHS "[m]andate does not impose any requirements on the Hahns" in their personal capacity. *Id.*, at 389.

B

David and Barbara Green and their three children are Christians who own and operate two family businesses. Forty-five years ago, David Green started an arts-and-crafts store that has grown into a nationwide chain called Hobby Lobby. There are now 500 Hobby Lobby stores, and the company has more than 13,000 employees. 723 F. 3d, at 1122. Hobby Lobby is organized as a for-profit corporation under Oklahoma law.

One of David's sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people. *Ibid.* Mardel is also organized as a for-profit corporation under Oklahoma law.

Though these two businesses have expanded over the

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mandate violates the Fifth Amendment and the Administrative Procedure Act, 5 U. S. C. §553, but those claims are not before us.

[14] See, *e.g.*, WebMD Health News, New Morning-After Pill Ella Wins FDA Approval, online at http://www.webmd.com/sex/birth-control/news/20100813/new-morning-after-pill-ella-wins-fda-approval.

years, they remain closely held, and David, Barbara, and their children retain exclusive control of both companies. *Ibid.* David serves as the CEO of Hobby Lobby, and his three children serve as the president, vice president, and vice CEO. See Brief for Respondents in No. 13–354, p. 8.[15]

Hobby Lobby's statement of purpose commits the Greens to "[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles." App. in No. 13–354, pp. 134–135 (complaint). Each family member has signed a pledge to run the businesses in accordance with the family's religious beliefs and to use the family assets to support Christian ministries. 723 F. 3d, at 1122. In accordance with those commitments, Hobby Lobby and Mardel stores close on Sundays, even though the Greens calculate that they lose millions in sales annually by doing so. *Id.*, at 1122; App. in No. 13–354, at 136–137. The businesses refuse to engage in profitable transactions that facilitate or promote alcohol use; they contribute profits to Christian missionaries and ministries; and they buy hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." *Ibid.* (internal quotation marks omitted).

Like the Hahns, the Greens believe that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs or devices that operate after that point. 723 F. 3d, at 1122. They specifically object to the same four contraceptive methods as the Hahns and, like the Hahns, they have no objection to the other 16 FDA-approved methods of birth control. *Id.*, at 1125. Although their group-health-insurance plan predates the enactment of ACA, it is not a grandfathered plan

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[15] The Greens operate Hobby Lobby and Mardel through a management trust, of which each member of the family serves as trustee. 723 F. 3d 1114, 1122 (CA10 2013). The family provided that the trust would also be governed according to their religious principles. *Ibid.*

because Hobby Lobby elected not to retain grandfathered status before the contraceptive mandate was proposed. *Id.*, at 1124.

The Greens, Hobby Lobby, and Mardel sued HHS and other federal agencies and officials to challenge the contraceptive mandate under RFRA and the Free Exercise Clause.[16] The District Court denied a preliminary injunction, see 870 F. Supp. 2d 1278 (WD Okla. 2012), and the plaintiffs appealed, moving for initial en banc consideration. The Tenth Circuit granted that motion and reversed in a divided opinion. Contrary to the conclusion of the Third Circuit, the Tenth Circuit held that the Greens' two for-profit businesses are "persons" within the meaning of RFRA and therefore may bring suit under that law.

The court then held that the corporations had established a likelihood of success on their RFRA claim. 723 F. 3d, at 1140–1147. The court concluded that the contraceptive mandate substantially burdened the exercise of religion by requiring the companies to choose between "compromis[ing] their religious beliefs" and paying a heavy fee—either "close to $475 million more in taxes every year" if they simply refused to provide coverage for the contraceptives at issue, or "roughly $26 million" annually if they "drop[ped] health-insurance benefits for all employees." *Id.*, at 1141.

The court next held that HHS had failed to demonstrate a compelling interest in enforcing the mandate against the Greens' businesses and, in the alternative, that HHS had failed to prove that enforcement of the mandate was the "least restrictive means" of furthering the Government's asserted interests. *Id.*, at 1143–1144 (emphasis deleted; internal quotation marks omitted). After concluding that the companies had "demonstrated irreparable harm," the

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[16] They also raised a claim under the Administrative Procedure Act, 5 U. S. C. §553.

court reversed and remanded for the District Court to consider the remaining factors of the preliminary-injunction test. *Id.*, at 1147.[17]

We granted certiorari. 571 U. S. ___ (2013).

III

A

RFRA prohibits the "Government [from] substantially burden[ing] *a person's* exercise of religion even if the burden results from a rule of general applicability" unless the Government "demonstrates that application of the burden to *the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U. S. C. §§2000bb–1(a), (b) (emphasis added). The first question that we must address is whether this provision applies to regulations that govern the activities of for-profit corporations like Hobby Lobby, Conestoga, and Mardel.

HHS contends that neither these companies nor their owners can even be heard under RFRA. According to HHS, the companies cannot sue because they seek to make a profit for their owners, and the owners cannot be heard because the regulations, at least as a formal matter, apply only to the companies and not to the owners as individuals. HHS's argument would have dramatic consequences.

Consider this Court's decision in *Braunfeld* v. *Brown*,

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[17] Given its RFRA ruling, the court declined to address the plaintiffs' free-exercise claim or the question whether the Greens could bring RFRA claims as individual owners of Hobby Lobby and Mardel. Four judges, however, concluded that the Greens could do so, see 723 F. 3d, at 1156 (Gorsuch, J., concurring); *id.*, at 1184 (Matheson, J., concurring in part and dissenting in part), and three of those judges would have granted plaintiffs a preliminary injunction, see *id.*, at 1156 (Gorsuch, J., concurring).

366 U. S. 599 (1961) (plurality opinion). In that case, five Orthodox Jewish merchants who ran small retail businesses in Philadelphia challenged a Pennsylvania Sunday closing law as a violation of the Free Exercise Clause. Because of their faith, these merchants closed their shops on Saturday, and they argued that requiring them to remain shut on Sunday threatened them with financial ruin. The Court entertained their claim (although it ruled against them on the merits), and if a similar claim were raised today under RFRA against a jurisdiction still subject to the Act (for example, the District of Columbia, see 42 U. S. C. §2000bb–2(2)), the merchants would be entitled to be heard. According to HHS, however, if these merchants chose to incorporate their businesses—without in any way changing the size or nature of their businesses—they would forfeit all RFRA (and free-exercise) rights. HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.

As we have seen, RFRA was designed to provide very broad protection for religious liberty. By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required.[18] Is there any reason to think that the Congress that enacted such sweeping protection put small-business owners to the choice that HHS suggests? An examination of RFRA's text, to which we turn

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[18] As discussed, n. 3, *supra*, in *City of Boerne* we stated that RFRA, by imposing a least-restrictive-means test, went beyond what was required by our pre-*Smith* decisions. Although the author of the principal dissent joined the Court's opinion in *City of Boerne*, she now claims that the statement was incorrect. *Post*, at 12. For present purposes, it is unnecessary to adjudicate this dispute. Even if RFRA simply restored the status quo ante, there is no reason to believe, as HHS and the dissent seem to suggest, that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases. See *infra*, at 25–28.

in the next part of this opinion, reveals that Congress did no such thing.

As we will show, Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of "persons." But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies.

In holding that Conestoga, as a "secular, for-profit corporation," lacks RFRA protection, the Third Circuit wrote as follows:

> "General business corporations do not, *separate and apart from the actions or belief systems of their individual owners or employees,* exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." 724 F. 3d, at 385 (emphasis added).

All of this is true—but quite beside the point. Corpora-

tions, "separate and apart from" the human beings who own, run, and are employed by them, cannot do anything at all.

B

1

As we noted above, RFRA applies to "a person's" exercise of religion, 42 U. S. C. §§2000bb–1(a), (b), and RFRA itself does not define the term "person." We therefore look to the Dictionary Act, which we must consult "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise." 1 U. S. C. §1.

Under the Dictionary Act, "the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Ibid.*; see *FCC* v. *AT&T Inc.*, 562 U. S. ___, ___ (2011) (slip op., at 6) ("We have no doubt that 'person,' in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear"). Thus, unless there is something about the RFRA context that "indicates otherwise," the Dictionary Act provides a quick, clear, and affirmative answer to the question whether the companies involved in these cases may be heard.

We see nothing in RFRA that suggests a congressional intent to depart from the Dictionary Act definition, and HHS makes little effort to argue otherwise. We have entertained RFRA and free-exercise claims brought by nonprofit corporations, see *Gonzales* v. *O Centro Espírita Beneficiente União do Vegetal*, 546 U. S. 418 (2006) (RFRA); *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. ___ (2012) (Free Exercise); *Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993) (Free Exercise), and HHS concedes that a nonprofit corporation can be a "person" within the meaning of RFRA. See Brief for HHS in No. 13–354, at 17;

Reply Brief in No. 13–354, at 7–8.[19]

This concession effectively dispatches any argument that the term "person" as used in RFRA does not reach the closely held corporations involved in these cases. No known understanding of the term "person" includes *some* but not all corporations. The term "person" sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons. But no conceivable definition of the term includes natural persons and nonprofit corporations, but not for-profit corporations.[20] Cf. *Clark* v. *Martinez*, 543 U. S. 371, 378 (2005) ("To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one").

2

The principal argument advanced by HHS and the principal dissent regarding RFRA protection for Hobby Lobby, Conestoga, and Mardel focuses not on the statutory term "person," but on the phrase "exercise of religion." According to HHS and the dissent, these corporations are not protected by RFRA because they cannot exercise religion. Neither HHS nor the dissent, however, provides any persuasive explanation for this conclusion.

Is it because of the corporate form? The corporate form alone cannot provide the explanation because, as we have pointed out, HHS concedes that nonprofit corporations can

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[19] Cf. Brief for Federal Petitioners in *O Centro*, O. T. 2004, No. 04–1084, p. II (stating that the organizational respondent was "a New Mexico Corporation"); Brief for Federal Respondent in *Hosanna-Tabor*, O. T. 2011, No. 10–553, p. 3 (stating that the petitioner was an "ecclesiastical corporation").

[20] Not only does the Government concede that the term "persons" in RFRA includes nonprofit corporations, it goes further and appears to concede that the term might also encompass other artificial entities, namely, general partnerships and unincorporated associations. See Brief for HHS in No. 13–354, at 28, 40.

be protected by RFRA. The dissent suggests that nonprofit corporations are special because furthering their religious "autonomy . . . often furthers individual religious freedom as well." *Post*, at 15 (quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 342 (1987) (Brennan, J., concurring in judgment)). But this principle applies equally to for-profit corporations: Furthering their religious freedom also "furthers individual religious freedom." In these cases, for example, allowing Hobby Lobby, Conestoga, and Mardel to assert RFRA claims protects the religious liberty of the Greens and the Hahns.[21]

If the corporate form is not enough, what about the profit-making objective? In *Braunfeld*, 366 U. S. 599, we entertained the free-exercise claims of individuals who were attempting to make a profit as retail merchants, and the Court never even hinted that this objective precluded their claims. As the Court explained in a later case, the "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons." *Smith*, 494 U. S., at 877. Business practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within that definition. Thus, a law that "operates so as to make the practice of . . . religious beliefs more expensive" in the context of business activities imposes a burden on the exercise of religion. *Braunfeld*, *supra*, at 605; see *United States* v. *Lee*, 455 U. S. 252, 257 (1982) (recognizing that "compulsory participation in the social security system interferes with [Amish employers'] free exercise

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[21] Although the principal dissent seems to think that Justice Brennan's statement in *Amos* provides a ground for holding that for-profit corporations may not assert free-exercise claims, that was not Justice Brennan's view. See *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, 366 U. S. 617, 642 (1961) (dissenting opinion); *infra*, at 26–27.

rights").

If, as *Braunfeld* recognized, a sole proprietorship that seeks to make a profit may assert a free-exercise claim,[22] why can't Hobby Lobby, Conestoga, and Mardel do the same?

Some lower court judges have suggested that RFRA does not protect for-profit corporations because the purpose of such corporations is simply to make money.[23] This

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[22] It is revealing that the principal dissent cannot even bring itself to acknowledge that *Braunfeld* was correct in entertaining the merchants' claims. See *post,* at 19 (dismissing the relevance of *Braunfeld* in part because "[t]he free exercise claim asserted there was promptly rejected on the merits").

[23] See, *e.g.*, 724 F. 3d, at 385 ("We do not see how a for-profit, 'artificial being,' . . . that was created to make money" could exercise religion); *Grote* v. *Sebelius*, 708 F. 3d 850, 857 (CA7 2013) (Rovner, J. dissenting) ("So far as it appears, the mission of Grote Industries, like that of any other for-profit, secular business, is to make money in the commercial sphere"); *Autocam Corp.* v. *Sebelius*, 730 F. 3d 618, 626 (CA7 2013) ("Congress did not intend to include corporations primarily organized for secular, profit-seeking purposes as 'persons' under RFRA"); see also 723 F. 3d, at 1171–1172 (Briscoe, C. J., dissenting) ("[T]he specific purpose for which [a corporation] is created matters greatly to how it will be categorized and treated under the law" and "it is undisputed that Hobby Lobby and Mardel are for-profit corporations focused on selling merchandise to consumers").

The principal dissent makes a similar point, stating that "[f]or-profit corporations are different from religious nonprofits in that they use labor to make a profit, rather than to perpetuate the religious values shared by a community of believers." *Post*, at 18–19 (internal quotation marks omitted). The first half of this statement is a tautology; for-profit corporations do indeed differ from nonprofits insofar as they seek to make a profit for their owners, but the second part is factually untrue. As the activities of the for-profit corporations involved in these cases show, some for-profit corporations do seek "to perpetuate the religious values shared," in these cases, by their owners. Conestoga's Vision and Values Statement declares that the company is dedicated to operating "in [a] manner that reflects our Christian heritage and the highest ethical and moral principles of business." App. in No. 13–356, p. 94. Similarly, Hobby Lobby's statement of purpose proclaims that the company "is committed to . . . Honoring the Lord in all we do by

argument flies in the face of modern corporate law. "Each American jurisdiction today either expressly or by implication authorizes corporations to be formed under its general corporation act for *any lawful purpose* or business." 1 J. Cox & T. Hazen, Treatise of the Law of Corporations §4:1, p. 224 (3d ed. 2010) (emphasis added); see 1A W. Fletcher, Cyclopedia of the Law of Corporations §102 (rev. ed. 2010). While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives. Many examples come readily to mind. So long as its owners agree, a for-profit corporation may take costly pollution-control and energy-conservation measures that go beyond what the law requires. A for-profit corporation that operates facilities in other countries may exceed the requirements of local law regarding working conditions and benefits. If for-profit corporations may pursue such worthy objectives, there is no apparent reason why they may not further religious objectives as well.

HHS would draw a sharp line between nonprofit corpo-

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operating . . . in a manner consistent with Biblical principles." App. in No. 13–354, p. 135. The dissent also believes that history is not on our side because even Blackstone recognized the distinction between "ecclesiastical and lay" corporations. *Post*, at 18. What Blackstone illustrates, however, is that dating back to 1765, there was no sharp divide among corporations in their capacity to exercise religion; Blackstone recognized that even what he termed "lay" corporations might serve "the promotion of piety." 1 W. Blackstone, Commentaries on the Law of England 458–459 (1765). And whatever may have been the case at the time of Blackstone, modern corporate law (and the law of the States in which these three companies are incorporated) allows for-profit corporations to "perpetuat[e] religious values."

rations (which, HHS concedes, are protected by RFRA) and for-profit corporations (which HHS would leave unprotected), but the actual picture is less clear-cut. Not all corporations that decline to organize as nonprofits do so in order to maximize profit. For example, organizations with religious and charitable aims might organize as for-profit corporations because of the potential advantages of that corporate form, such as the freedom to participate in lobbying for legislation or campaigning for political candidates who promote their religious or charitable goals.[24] In fact, recognizing the inherent compatibility between establishing a for-profit corporation and pursuing nonprofit goals, States have increasingly adopted laws formally recognizing hybrid corporate forms. Over half of the States, for instance, now recognize the "benefit corporation," a dual-purpose entity that seeks to achieve both a benefit for the public and a profit for its owners.[25]

In any event, the objectives that may properly be pur-

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[24] See, *e.g.*, M. Sanders, Joint Ventures Involving Tax-Exempt Organizations 555 (4th ed. 2013) (describing Google.org, which "advance[s] its charitable goals" while operating as a for-profit corporation to be able to "invest in for-profit endeavors, lobby for policies that support its philanthropic goals, and tap Google's innovative technology and workforce" (internal quotation marks and alterations omitted)); cf. 26 CFR §1.501(c)(3)–1(c)(3).

[25] See Benefit Corp Information Center, online at http://www.benefitcorp.net/state-by-state-legislative-status; *e.g.*, Va. Code Ann. §§13.1–787, 13.1–626, 13.1–782 (Lexis 2011) ("A benefit corporation shall have as one of its purposes the purpose of creating a general public benefit," and "may identify one or more specific public benefits that it is the purpose of the benefit corporation to create. . . . This purpose is in addition to [the purpose of engaging in any lawful business]." "'Specific public benefit' means a benefit that serves one or more public welfare, religious, charitable, scientific, literary, or educational purposes, or other purpose or benefit beyond the strict interest of the shareholders of the benefit corporation . . . ."); S. C. Code Ann. §§33–38–300 (2012 Cum. Supp.), 33–3–101 (2006), 33–38–130 (2012 Cum. Supp.) (similar).

sued by the companies in these cases are governed by the laws of the States in which they were incorporated—Pennsylvania and Oklahoma—and the laws of those States permit for-profit corporations to pursue "any lawful purpose" or "act," including the pursuit of profit in conformity with the owners' religious principles. 15 Pa. Cons. Stat. §1301 (2001) ("Corporations may be incorporated under this subpart for any lawful purpose or purposes"); Okla. Stat., Tit. 18, §§1002, 1005 (West 2012) ("[E]very corporation, whether profit or not for profit" may "be incorporated or organized . . . to conduct or promote any lawful business or purposes"); see also §1006(A)(3); Brief for State of Oklahoma as *Amicus Curiae* in No. 13–354.

3

HHS and the principal dissent make one additional argument in an effort to show that a for-profit corporation cannot engage in the "exercise of religion" within the meaning of RFRA: HHS argues that RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection. This argument has many flaws.

First, nothing in the text of RFRA as originally enacted suggested that the statutory phrase "exercise of religion under the First Amendment" was meant to be tied to this Court's pre-*Smith* interpretation of that Amendment. When first enacted, RFRA defined the "exercise of religion" to mean "the exercise of religion under the First Amendment"—not the exercise of religion as recognized only by then-existing Supreme Court precedents. 42 U. S. C. §2000bb–2(4) (1994 ed.). When Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so. See, *e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, 28

U. S. C. §2254(d)(1) (authorizing habeas relief from a state-court decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

Second, if the original text of RFRA was not clear enough on this point—and we think it was—the amendment of RFRA through RLUIPA surely dispels any doubt. That amendment deleted the prior reference to the First Amendment, see 42 U. S. C. §2000bb–2(4) (2000 ed.) (incorporating §2000cc–5), and neither HHS nor the principal dissent can explain why Congress did this if it wanted to tie RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases. Moreover, as discussed, the amendment went further, providing that the exercise of religion "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." §2000cc–3(g). It is simply not possible to read these provisions as restricting the concept of the "exercise of religion" to those practices specifically addressed in our pre-*Smith* decisions.

Third, the one pre-*Smith* case involving the free-exercise rights of a for-profit corporation suggests, if anything, that for-profit corporations possess such rights. In *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, 366 U. S. 617 (1961), the Massachusetts Sunday closing law was challenged by a kosher market that was organized as a for-profit corporation, by customers of the market, and by a rabbi. The Commonwealth argued that the corporation lacked "standing" to assert a free-exercise claim,[26] but not one member of the Court expressed agreement with that

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[26] See Brief for Appellants in *Gallagher*, O. T. 1960 No. 11, pp. 16, 28–31 (arguing that corporation "has no 'religious belief' or 'religious liberty,' and had no standing in court to assert that its free exercise of religion was impaired").

argument. The plurality opinion for four Justices rejected the First Amendment claim on the merits based on the reasoning in *Braunfeld*, and reserved decision on the question whether the corporation had "standing" to raise the claim. See 366 U. S., at 631. The three dissenters, Justices Douglas, Brennan, and Stewart, found the law unconstitutional as applied to the corporation and the other challengers and thus implicitly recognized their right to assert a free-exercise claim. See *id.*, at 642 (Brennan, J., joined by Stewart, J., dissenting); *McGowan* v. *Maryland*, 366 U. S. 420, 578–579 (1961) (Douglas, J., dissenting as to related cases including *Gallagher*). Finally, Justice Frankfurter's opinion, which was joined by Justice Harlan, upheld the Massachusetts law on the merits but did not question or reserve decision on the issue of the right of the corporation or any of the other challengers to be heard. See *McGowan*, 366 U. S., at 521–522. It is quite a stretch to argue that RFRA, a law enacted to provide very broad protection for religious liberty, left for-profit corporations unprotected simply because in *Gallagher*—the only pre-*Smith* case in which the issue was raised—a majority of the Justices did not find it necessary to decide whether the kosher market's corporate status barred it from raising a free-exercise claim.

Finally, the results would be absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim that this Court entertained in the years before *Smith*. For example, we are not aware of any pre-*Smith* case in which this Court entertained a free-exercise claim brought by a resident noncitizen. Are such persons also beyond RFRA's protective reach simply because the Court never addressed their rights before *Smith*?

Presumably in recognition of the weakness of this ar-

gument, both HHS and the principal dissent fall back on the broader contention that the Nation lacks a tradition of exempting for-profit corporations from generally applicable laws. By contrast, HHS contends, statutes like Title VII, 42 U. S. C. §2000e–19(A), expressly exempt churches and other nonprofit religious institutions but not for-profit corporations. See Brief for HHS in No. 13–356, p. 26. In making this argument, however, HHS did not call to our attention the fact that some federal statutes *do* exempt categories of entities that include for-profit corporations from laws that would otherwise require these entities to engage in activities to which they object on grounds of conscience. See, *e.g.*, 42 U. S. C. §300a–7(b)(2); §238n(a).[27] If Title VII and similar laws show anything, it is that Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations.

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[27] The principal dissent points out that "the exemption codified in §238n(a) was not enacted until three years after RFRA's passage." *Post*, at 16, n. 15. The dissent takes this to mean that RFRA did not, in fact, "ope[n] all statutory schemes to religion-based challenges by for-profit corporations" because if it had "there would be no need for a statute-specific, post-RFRA exemption of this sort." *Ibid*.

This argument fails to recognize that the protection provided by §238n(a) differs significantly from the protection provided by RFRA. Section 238n(a) flatly prohibits discrimination against a covered healthcare facility for refusing to engage in certain activities related to abortion. If a covered healthcare facility challenged such discrimination under RFRA, by contrast, the discrimination would be unlawful only if a court concluded, among other things, that there was a less restrictive means of achieving any compelling government interest.

In addition, the dissent's argument proves too much. Section 238n(a) applies evenly to "any health care entity"—whether it is a religious nonprofit entity or a for-profit entity. There is no dispute that RFRA protects religious nonprofit corporations, so if §238n(a) were redundant as applied to for-profit corporations, it would be equally redundant as applied to nonprofits.

Finally, HHS contends that Congress could not have wanted RFRA to apply to for-profit corporations because it is difficult as a practical matter to ascertain the sincere "beliefs" of a corporation. HHS goes so far as to raise the specter of "divisive, polarizing proxy battles over the religious identity of large, publicly traded corporations such as IBM or General Electric." Brief for HHS in No. 13–356, at 30.

These cases, however, do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which HHS refers will often assert RFRA claims. HHS has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring. For example, the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable. In any event, we have no occasion in these cases to consider RFRA's applicability to such companies. The companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.[28]

HHS has also provided no evidence that the purported problem of determining the sincerity of an asserted religious belief moved Congress to exclude for-profit corporations from RFRA's protection. On the contrary, the scope of RLUIPA shows that Congress was confident of the ability of the federal courts to weed out insincere claims. RLUIPA applies to "institutionalized persons," a category

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[28] To qualify for RFRA's protection, an asserted belief must be "sincere"; a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail. Cf., *e.g.*, *United States* v. *Quaintance*, 608 F. 3d 717, 718–719 (CA10 2010).

that consists primarily of prisoners, and by the time of RLUIPA's enactment, the propensity of some prisoners to assert claims of dubious sincerity was well documented.[29] Nevertheless, after our decision in *City of Boerne*, Congress enacted RLUIPA to preserve the right of prisoners to raise religious liberty claims. If Congress thought that the federal courts were up to the job of dealing with insincere prisoner claims, there is no reason to believe that Congress limited RFRA's reach out of concern for the seemingly less difficult task of doing the same in corporate cases. And if, as HHS seems to concede, Congress wanted RFRA to apply to nonprofit corporations, see, Reply Brief in No. 13–354, at 7–8, what reason is there to think that Congress believed that spotting insincere claims would be tougher in cases involving for-profits?

HHS and the principal dissent express concern about the possibility of disputes among the owners of corporations, but that is not a problem that arises because of RFRA or that is unique to this context. The owners of closely held corporations may—and sometimes do—disagree about the conduct of business. 1 Treatise of the Law of Corporations §14:11. And even if RFRA did not exist, the owners of a company might well have a dispute relating to religion. For example, some might want a company's stores to remain open on the Sabbath in order to make more money, and others might want the stores to close for religious reasons. State corporate law provides a ready means for resolving any conflicts by, for example, dictating how a corporation can establish its governing structure. See, *e.g.*, *ibid; id.*, §3:2; Del. Code Ann., Tit. 8, §351 (2011) (providing that certificate of incorporation

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[29] See, *e.g.*, *Ochs* v. *Thalacker*, 90 F. 3d 293, 296 (CA8 1996); *Green* v. *White*, 525 F. Supp. 81, 83–84 (ED Mo. 1981); *Abate* v. *Walton*, 1996 WL 5320, *5 (CA9, Jan. 5, 1996); *Winters* v. *State*, 549 N. W. 2d 819–820 (Iowa 1996).

may provide how "the business of the corporation shall be managed"). Courts will turn to that structure and the underlying state law in resolving disputes.

For all these reasons, we hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.[30]

IV

Because RFRA applies in these cases, we must next ask whether the HHS contraceptive mandate "substantially burden[s]" the exercise of religion. 42 U. S. C. §2000bb–1(a). We have little trouble concluding that it does.

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[30] The principal dissent attaches significance to the fact that the "Senate voted down [a] so-called 'conscience amendment,' which would have enabled any employer or insurance provider to deny coverage based on its asserted religious beliefs or moral convictions." *Post*, at 6. The dissent would evidently glean from that vote an intent by the Senate to prohibit for-profit corporate employers from refusing to offer contraceptive coverage for religious reasons, regardless of whether the contraceptive mandate could pass muster under RFRA's standards. But that is not the only plausible inference from the failed amendment—or even the most likely. For one thing, the text of the amendment was "written so broadly that it would allow any employer to deny any health service to any American for virtually any reason—*not just for religious objections*." 158 Cong. Rec. S1165 (Mar. 1, 2012) (emphasis added). Moreover, the amendment would have authorized a blanket exemption for religious or moral objectors; it would not have subjected religious-based objections to the judicial scrutiny called for by RFRA, in which a court must consider not only the burden of a requirement on religious adherents, but also the government's interest and how narrowly tailored the requirement is. It is thus perfectly reasonable to believe that the amendment was voted down because it extended more broadly than the pre-existing protections of RFRA. And in any event, even if a rejected amendment to a bill could be relevant in other contexts, it surely cannot be relevant here, because any "Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law *explicitly excludes* such application by reference to [RFRA]." 42 U. S. C. §2000bb–3(b) (emphasis added). It is not plausible to find such an explicit reference in the meager legislative history on which the dissent relies.

A

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, see Brief for HHS in No. 13–354, at 9, n. 4, may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed $100 per day for each affected individual. 26 U. S. C. §4980D. For Hobby Lobby, the bill could amount to $1.3 million per day or about $475 million per year; for Conestoga, the assessment could be $90,000 per day or $33 million per year; and for Mardel, it could be $40,000 per day or about $15 million per year. These sums are surely substantial.

It is true that the plaintiffs could avoid these assessments by dropping insurance coverage altogether and thus forcing their employees to obtain health insurance on one of the exchanges established under ACA. But if at least one of their full-time employees were to qualify for a subsidy on one of the government-run exchanges, this course would also entail substantial economic consequences. The companies could face penalties of $2,000 per employee each year. §4980H. These penalties would amount to roughly $26 million for Hobby Lobby, $1.8 million for Conestoga, and $800,000 for Mardel.

B

Although these totals are high, *amici* supporting HHS

have suggested that the $2,000 per-employee penalty is actually less than the average cost of providing health insurance, see Brief for Religious Organizations 22, and therefore, they claim, the companies could readily eliminate any substantial burden by forcing their employees to obtain insurance in the government exchanges. We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party, see *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981); *Bell* v. *Wolfish*, 441 U. S. 520, 532, n. 13 (1979); *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960), and there are strong reasons to adhere to that practice in these cases. HHS, which presumably could have compiled the relevant statistics, has never made this argument—not in its voluminous briefing or at oral argument in this Court nor, to our knowledge, in any of the numerous cases in which the issue now before us has been litigated around the country. As things now stand, we do not even know what the Government's position might be with respect to these *amici's* intensely empirical argument.[31] For this same reason, the plaintiffs have never had an opportunity to respond to this novel claim that—contrary to their longstanding practice and that of most large employers—they would be better off discarding their employer insurance plans altogether.

Even if we were to reach this argument, we would find it unpersuasive. As an initial matter, it entirely ignores the fact that the Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees. Before the advent of ACA, they were not legally compelled to provide insurance, but they nevertheless did so—in part, no doubt, for conventional business

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[31] Indeed, one of HHS's stated reasons for establishing the religious accommodation was to "encourag[e] eligible organizations to *continue* to offer health coverage." 78 Fed. Reg. 39882 (2013) (emphasis added).

reasons, but also in part because their religious beliefs govern their relations with their employees. See App. to Pet. for Cert. in No. 13–356, p. 11g; App. in No. 13–354, at 139.

Putting aside the religious dimension of the decision to provide insurance, moreover, it is far from clear that the net cost to the companies of providing insurance is more than the cost of dropping their insurance plans and paying the ACA penalty. Health insurance is a benefit that employees value. If the companies simply eliminated that benefit and forced employees to purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers. See App. in No. 13–354, at 153.

The companies could attempt to make up for the elimination of a group health plan by increasing wages, but this would be costly. Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to the companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance. 26 U. S. C. §106(a). Likewise, employers can deduct the cost of providing health insurance, see §162(a)(1), but apparently cannot deduct the amount of the penalty that they must pay if insurance is not provided; that difference also must be taken into account. Given these economic incentives, it is far from clear that it would be financially advantageous for an employer to drop coverage and pay the penalty.[32]

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[32] Attempting to compensate for dropped insurance by raising wages would also present administrative difficulties. In order to provide full

In sum, we refuse to sustain the challenged regulations on the ground—never maintained by the Government—that dropping insurance coverage eliminates the substantial burden that the HHS mandate imposes. We doubt that the Congress that enacted RFRA—or, for that matter, ACA—would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.

C

In taking the position that the HHS mandate does not impose a substantial burden on the exercise of religion, HHS's main argument (echoed by the principal dissent) is basically that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated. Brief for HHS in 13–354, pp. 31–34; *post*, at 22–23. HHS and the dissent note that providing the coverage would not itself result in the destruction of an embryo; that would occur only if an employee chose to take advantage of the coverage and to use one of the four methods at issue.[33] *Ibid.*

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compensation for employees, the companies would have to calculate the value to employees of the convenience of retaining their employer-provided coverage and thus being spared the task of attempting to find and sign up for a comparable plan on an exchange. And because some but not all of the companies' employees may qualify for subsidies on an exchange, it would be nearly impossible to calculate a salary increase that would accurately restore the status quo ante for all employees.

[33]This argument is not easy to square with the position taken by HHS in providing exemptions from the contraceptive mandate for religious employers, such as churches, that have the very same religious objections as the Hahns and Greens and their companies. The connection between what these religious employers would be required

This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). The Hahns and Greens believe that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage. This belief implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.[34] Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the princi-

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to do if not exempted (provide insurance coverage for particular contraceptives) and the ultimate event that they find morally wrong (destruction of an embryo) is exactly the same. Nevertheless, as discussed, HHS and the Labor and Treasury Departments authorized the exemption from the contraceptive mandate of group health plans of certain religious employers, and later expanded the exemption to include certain nonprofit organizations with religious objections to contraceptive coverage. 78 Fed. Reg. 39871. When this was done, the Government made clear that its objective was to "protec[t]" these religious objectors "from having to contract, arrange, pay, or refer for such coverage." *Ibid*. Those exemptions would be hard to understand if the plaintiffs' objections here were not substantial.

[34] See, *e.g.*, Oderberg, The Ethics of Co-operation in Wrongdoing, in Modern Moral Philosophy 203–228 (A. O'Hear ed. 2004); T. Higgins, Man as Man: The Science and Art of Ethics 353, 355 (1949) ("The general principles governing cooperation" in wrongdoing—*i.e.*, "physical activity (or its omission) by which a person assists in the evil act of another who is the principal agent"—"present troublesome difficulties in application"); 1 H. Davis, Moral and Pastoral Theology 341 (1935) (Cooperation occurs "when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does").

pal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step. See, *e.g.*, *Smith*, 494 U. S., at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim"); *Hernandez* v. *Commissioner*, 490 U. S. 680, 699 (1989); *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 450 (1969).

Moreover, in *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981), we considered and rejected an argument that is nearly identical to the one now urged by HHS and the dissent. In *Thomas*, a Jehovah's Witness was initially employed making sheet steel for a variety of industrial uses, but he was later transferred to a job making turrets for tanks. *Id.,* at 710. Because he objected on religious grounds to participating in the manufacture of weapons, he lost his job and sought unemployment compensation. Ruling against the employee, the state court had difficulty with the line that the employee drew between work that he found to be consistent with his religious beliefs (helping to manufacture steel that was used in making weapons) and work that he found morally objectionable (helping to make the weapons themselves). This Court, however, held that "it is not for us to say that the line he drew was an unreasonable one." *Id.*, at 715.[35]

Similarly, in these cases, the Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial. Instead, our "narrow function . . . in this context is to

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[35]The principal dissent makes no effort to reconcile its view about the substantial-burden requirement with our decision in *Thomas*.

determine" whether the line drawn reflects "an honest conviction," *id.*, at 716, and there is no dispute that it does.

HHS nevertheless compares these cases to decisions in which we rejected the argument that the use of general tax revenue to subsidize the secular activities of religious institutions violated the Free Exercise Clause. See *Tilton* v. *Richardson*, 403 U. S. 672, 689 (1971) (plurality); *Board of Ed. of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236, 248–249 (1968). But in those cases, while the subsidies were clearly contrary to the challengers' views on a secular issue, namely, proper church-state relations, the challengers never articulated a *religious* objection to the subsidies. As we put it in *Tilton*, they were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." 403 U. S., at 689 (plurality opinion); see *Allen*, *supra*, at 249 ("[A]ppellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion"). Here, in contrast, the plaintiffs do assert that funding the specific contraceptive methods at issue violates their religious beliefs, and HHS does not question their sincerity. Because the contraceptive mandate forces them to pay an enormous sum of money—as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.

V

Since the HHS contraceptive mandate imposes a substantial burden on the exercise of religion, we must move on and decide whether HHS has shown that the mandate both "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U. S. C.

§2000bb–1(b).

A

HHS asserts that the contraceptive mandate serves a variety of important interests, but many of these are couched in very broad terms, such as promoting "public health" and "gender equality." Brief for HHS in No. 13–354, at 46, 49. RFRA, however, contemplates a "more focused" inquiry: It "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O'Centro*, 546 U. S., at 430–431 (quoting §2000bb–1(b)). This requires us to "loo[k] beyond broadly formulated interests" and to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants"—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases. *O Centro*, *supra*, at 431.

In addition to asserting these very broadly framed interests, HHS maintains that the mandate serves a compelling interest in ensuring that all women have access to all FDA-approved contraceptives without cost sharing. See Brief for HHS in No. 13–354, at 14–15, 49; see Brief for HHS in No. 13–356, at 10, 48. Under our cases, women (and men) have a constitutional right to obtain contraceptives, see *Griswold* v. *Connecticut*, 381 U. S. 479, 485–486 (1965), and HHS tells us that "[s]tudies have demonstrated that even moderate copayments for preventive services can deter patients from receiving those services." Brief for HHS in No. 13–354, at 50 (internal quotation marks omitted).

The objecting parties contend that HHS has not shown that the mandate serves a compelling government interest, and it is arguable that there are features of ACA that support that view. As we have noted, many employees—

those covered by grandfathered plans and those who work for employers with fewer than 50 employees—may have no contraceptive coverage without cost sharing at all.

HHS responds that many legal requirements have exceptions and the existence of exceptions does not in itself indicate that the principal interest served by a law is not compelling. Even a compelling interest may be outweighed in some circumstances by another even weightier consideration. In these cases, however, the interest served by one of the biggest exceptions, the exception for grandfathered plans, is simply the interest of employers in avoiding the inconvenience of amending an existing plan. Grandfathered plans are required "to comply with a subset of the Affordable Care Act's health reform provisions" that provide what HHS has described as "particularly significant protections." 75 Fed. Reg. 34540 (2010). But the contraceptive mandate is expressly excluded from this subset. *Ibid*.

We find it unnecessary to adjudicate this issue. We will assume that the interest in guaranteeing cost-free access to the four challenged contraceptive methods is compelling within the meaning of RFRA, and we will proceed to consider the final prong of the RFRA test, *i.e.*, whether HHS has shown that the contraceptive mandate is "the least restrictive means of furthering that compelling governmental interest." §2000bb–1(b)(2).

B

The least-restrictive-means standard is exceptionally demanding, see *City of Boerne*, 521 U. S., at 532, and it is not satisfied here. HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases. See §§2000bb–1(a), (b) (requiring the Government to "demonstrat[e] that application of [a substantial] burden to *the person* . . . is the least

restrictive means of furthering [a] compelling governmental interest" (emphasis added)).

The most straightforward way of doing this would be for the Government to assume the cost of providing the four contraceptives at issue to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections. This would certainly be less restrictive of the plaintiffs' religious liberty, and HHS has not shown, see §2000bb–1(b)(2), that this is not a viable alternative. HHS has not provided any estimate of the average cost per employee of providing access to these contraceptives, two of which, according to the FDA, are designed primarily for emergency use. See Birth Control: Medicines to Help You, online at http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm. Nor has HHS provided any statistics regarding the number of employees who might be affected because they work for corporations like Hobby Lobby, Conestoga, and Mardel. Nor has HHS told us that it is unable to provide such statistics. It seems likely, however, that the cost of providing the forms of contraceptives at issue in these cases (if not all FDA-approved contraceptives) would be minor when compared with the overall cost of ACA. According to one of the Congressional Budget Office's most recent forecasts, ACA's insurance-coverage provisions will cost the Federal Government more than $1.3 trillion through the next decade. See CBO, Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014, p. 2.[36] If, as HHS tells us, providing all women with cost-free access to all FDA-approved methods of contraception is a Government interest of the highest order, it is hard to understand HHS's argument that it cannot be required under RFRA to pay *anything* in order to achieve this

[36] Online at http://cbo.gov/publication/45231.

important goal.

HHS contends that RFRA does not permit us to take this option into account because "RFRA cannot be used to require creation of entirely new programs." Brief for HHS in 13–354, at 15.[37] But we see nothing in RFRA that supports this argument, and drawing the line between the "creation of an entirely new program" and the modification of an existing program (which RFRA surely allows) would be fraught with problems. We do not doubt that cost may

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[37] In a related argument, HHS appears to maintain that a plaintiff cannot prevail on a RFRA claim that seeks an exemption from a legal obligation requiring the plaintiff to confer benefits on third parties. Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals. It is certainly true that in applying RFRA "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005) (applying RLUIPA). That consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest. But it could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties. Otherwise, for example, the Government could decide that all supermarkets must sell alcohol for the convenience of customers (and thereby exclude Muslims with religious objections from owning supermarkets), or it could decide that all restaurants must remain open on Saturdays to give employees an opportunity to earn tips (and thereby exclude Jews with religious objections from owning restaurants). By framing any Government regulation as benefiting a third party, the Government could turn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless. In any event, our decision in these cases need not result in any detrimental effect on any third party. As we explain, see *infra*, at 43–44, the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers' religious objections.

be an important factor in the least-restrictive-means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. Cf. §2000cc–3(c) (RLUIPA: "[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

In the end, however, we need not rely on the option of a new, government-funded program in order to conclude that the HHS regulations fail the least-restrictive-means test. HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs. As we explained above, HHS has already established an accommodation for nonprofit organizations with religious objections. See *supra*, at 9–10, and nn. 8–9. Under that accommodation, the organization can self-certify that it opposes providing coverage for particular contraceptive services. See 45 CFR §§147.131(b)(4), (c)(1); 26 CFR §§54.9815–2713A(a)(4), (b). If the organization makes such a certification, the organization's insurance issuer or third-party administrator must "[e]xpressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "[p]rovide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements . . . on the eligible organization, the group health plan, or plan participants or beneficiaries." 45 CFR §147.131(c)(2); 26 CFR §54.9815–2713A(c)(2).[38]

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[38] HHS has concluded that insurers that insure eligible employers

We do not decide today whether an approach of this type complies with RFRA for purposes of all religious claims.[39] At a minimum, however, it does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well.[40]

The principal dissent identifies no reason why this accommodation would fail to protect the asserted needs of women as effectively as the contraceptive mandate, and there is none.[41] Under the accommodation, the plaintiffs' female employees would continue to receive contraceptive coverage without cost sharing for all FDA-approved contraceptives, and they would continue to "face minimal

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opting out of the contraceptive mandate and that are required to pay for contraceptive coverage under the accommodation will not experience an increase in costs because the "costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health." 78 Fed. Reg. 39877. With respect to self-insured plans, the regulations establish a mechanism for the eligible employers' third-party administrators to obtain a compensating reduction in the fee paid by insurers to participate in the federally facilitated exchanges. HHS believes that this system will not have a material effect on the funding of the exchanges because the "payments for contraceptive services will represent only a small portion of total [federally facilitated exchange] user fees." *Id.,* at 39882; see 26 CFR §54.9815–2713A(b)(3).

[39] See n. 9, *supra*.

[40] The principal dissent faults us for being "noncommital" in refusing to decide a case that is not before us here. *Post*, at 30. The less restrictive approach we describe accommodates the religious beliefs asserted in these cases, and that is the only question we are permitted to address.

[41] In the principal dissent's view, the Government has not had a fair opportunity to address this accommodation, *post*, at 30. n. 27, but the Government itself apparently believes that when it "provides an exception to a general rule for secular reasons (or for only certain religious reasons), [it] must explain why extending a comparable exception to a specific plaintiff for religious reasons would undermine its compelling interests." Brief for the United States as *Amicus Curiae* in *Holt* v. *Hobbs*, No. 13–6827, p. 10, now pending before the Court.

logistical and administrative obstacles," *post*, at 28 (internal quotation marks omitted), because their employers' insurers would be responsible for providing information and coverage, see, *e.g.*, 45 CFR §§147.131(c)–(d); cf. 26 CFR §§54.9815–2713A(b), (d). Ironically, it is the dissent's approach that would "[i]mped[e] women's receipt of benefits by 'requiring them to take steps to learn about, and to sign up for, a new government funded and administered health benefit,'" *post*, at 28, because the dissent would effectively compel religious employers to drop health-insurance coverage altogether, leaving their employees to find individual plans on government-run exchanges or elsewhere. This is indeed "scarcely what Congress contemplated." *Ibid.*

C

HHS and the principal dissent argue that a ruling in favor of the objecting parties in these cases will lead to a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccinations and blood transfusions, but HHS has made no effort to substantiate this prediction.[42] HHS points to no evidence that insurance plans in existence prior to the enactment of ACA excluded coverage for such items. Nor has HHS provided evidence that any significant number of employers sought exemption, on religious grounds, from any of ACA's coverage requirements other than the contraceptive mandate.

It is HHS's apparent belief that no insurance-coverage mandate would violate RFRA—no matter how significantly it impinges on the religious liberties of employers—that would lead to intolerable consequences. Under HHS's view, RFRA would permit the Government to require all

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[42] Cf. 42 U. S. C. §1396s (Federal "program for distribution of pediatric vaccines" for some uninsured and underinsured children).

employers to provide coverage for any medical procedure allowed by law in the jurisdiction in question—for instance, third-trimester abortions or assisted suicide. The owners of many closely held corporations could not in good conscience provide such coverage, and thus HHS would effectively exclude these people from full participation in the economic life of the Nation. RFRA was enacted to prevent such an outcome.

In any event, our decision in these cases is concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them.

The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. See *post*, at 32–33. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.

HHS also raises for the first time in this Court the argument that applying the contraceptive mandate to for-profit employers with sincere religious objections is essential to the comprehensive health-insurance scheme that ACA establishes. HHS analogizes the contraceptive mandate to the requirement to pay Social Security taxes, which we upheld in *Lee* despite the religious objection of an employer, but these cases are quite different. Our holding in *Lee* turned primarily on the special problems

associated with a national system of taxation. We noted that "[t]he obligation to pay the social security tax initially is not fundamentally different from the obligation to pay income taxes." 455 U. S., at 260. Based on that premise, we explained that it was untenable to allow individuals to seek exemptions from taxes based on religious objections to particular Government expenditures: "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax." *Ibid.* We observed that "[t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Ibid.*; see *O Centro*, 546 U. S., at 435.

Lee was a free-exercise, not a RFRA, case, but if the issue in *Lee* were analyzed under the RFRA framework, the fundamental point would be that there simply is no less restrictive alternative to the categorical requirement to pay taxes. Because of the enormous variety of government expenditures funded by tax dollars, allowing taxpayers to withhold a portion of their tax obligations on religious grounds would lead to chaos. Recognizing exemptions from the contraceptive mandate is very different. ACA does not create a large national pool of tax revenue for use in purchasing healthcare coverage. Rather, individual employers like the plaintiffs purchase insurance for their own employees. And contrary to the principal dissent's characterization, the employers' contributions do not necessarily funnel into "undifferentiated funds." *Post*, at 23. The accommodation established by HHS requires issuers to have a mechanism by which to "segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services." 45 CFR §147.131(c)(2)(ii).

Recognizing a religious accommodation under RFRA for particular coverage requirements, therefore, does not threaten the viability of ACA's comprehensive scheme in the way that recognizing religious objections to particular expenditures from general tax revenues would.[43]

In its final pages, the principal dissent reveals that its fundamental objection to the claims of the plaintiffs is an objection to RFRA itself. The dissent worries about forcing the federal courts to apply RFRA to a host of claims made by litigants seeking a religious exemption from generally applicable laws, and the dissent expresses a desire to keep the courts out of this business. See *post*, at 32–35. In making this plea, the dissent reiterates a point made forcefully by the Court in *Smith*. 494 U. S., at 888–889 (applying the *Sherbert* test to all free-exercise claims "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind"). But Congress, in enacting RFRA, took the position that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U. S. C. §2000bb(a)(5). The wisdom of Congress's judgment on this

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[43] HHS highlights certain statements in the opinion in *Lee* that it regards as supporting its position in these cases. In particular, HHS notes the statement that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." 455 U. S., at 261. *Lee* was a free exercise, not a RFRA, case, and the statement to which HHS points, if taken at face value, is squarely inconsistent with the plain meaning of RFRA. Under RFRA, when followers of a particular religion choose to enter into commercial activity, the Government does not have a free hand in imposing obligations that substantially burden their exercise of religion. Rather, the Government can impose such a burden only if the strict RFRA test is met.

matter is not our concern. Our responsibility is to enforce RFRA as written, and under the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful.

* * *

The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by Conestoga and the Hahns.

The judgment of the Tenth Circuit in No. 13–354 is affirmed; the judgment of the Third Circuit in No. 13–356 is reversed, and that case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 13–354 and 13–356

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS
13–354 *v.*
HOBBY LOBBY STORES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AND

CONESTOGA WOOD SPECIALTIES CORPORATION ET AL., PETITIONERS
13–356 *v.*
SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 30, 2014]

JUSTICE KENNEDY, concurring.

It seems to me appropriate, in joining the Court's opinion, to add these few remarks. At the outset it should be said that the Court's opinion does not have the breadth and sweep ascribed to it by the respectful and powerful dissent. The Court and the dissent disagree on the proper interpretation of the Religious Freedom and Restoration Act of 1993 (RFRA), but do agree on the purpose of that statute. 42 U. S. C. §2000bb *et seq*. It is to ensure that interests in religious freedom are protected. *Ante*, at 5–6; *post*, at 8–9 (GINSBURG, J., dissenting).

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this

course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community. But in a complex society and an era of pervasive governmental regulation, defining the proper realm for free exercise can be difficult. In these cases the plaintiffs deem it necessary to exercise their religious beliefs within the context of their own closely held, for-profit corporations. They claim protection under RFRA, the federal statute discussed with care and in detail in the Court's opinion.

As the Court notes, under our precedents, RFRA imposes a "'stringent test.'" *Ante,* at 6 (quoting *City of Boerne* v. *Flores*, 521 U. S. 507, 533 (1997)). The Government must demonstrate that the application of a substantial burden to a person's exercise of religion "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." §2000bb–1(b).

As to RFRA's first requirement, the Department of Health and Human Services (HHS) makes the case that the mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee. *Ante*, at 39; see, *e.g.*, Brief for HHS in No. 13–354, pp. 14–15. There are many medical conditions for which pregnancy is contraindicated. See, *e.g.*, *id.*, at 47. It is important to confirm that a premise of the Court's opinion is its assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees. *Ante*, at 40.

But the Government has not made the second showing required by RFRA, that the means it uses to regulate is the least restrictive way to further its interest. As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage. That framework is one that HHS has itself devised, that the plaintiffs have not criticized with a specific objection that has been considered in detail by the courts in this litigation, and that is less restrictive than the means challenged by the plaintiffs in these cases. *Ante,* at 9–10, and n. 9, 43–44.

The means the Government chose is the imposition of a direct mandate on the employers in these cases. *Ante,* at 8–9. But in other instances the Government has allowed the same contraception coverage in issue here to be provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities. See *ante,* at 9–10, and n. 9, 43–44. The accommodation works by requiring insurance companies to cover, without cost sharing, contraception coverage for female employees who wish it. That accommodation equally furthers the Government's interest but does not impinge on the plaintiffs' religious beliefs. See *ante,* at 44.

On this record and as explained by the Court, the Government has not met its burden of showing that it cannot accommodate the plaintiffs' similar religious objections under this established framework. RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.

The parties who were the plaintiffs in the District Courts argue that the Government could pay for the methods that are found objectionable. Brief for Respond-

ents in No. 13–354, p. 58. In discussing this alternative, the Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. *Ante,* at 41–43. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In these cases, it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government. As the Court makes clear, this is not a case where it can be established that it is difficult to accommodate the government's interest, and in fact the mechanism for doing so is already in place. *Ante,* at 43–44.

"[T]he American community is today, as it long has been, a rich mosaic of religious faiths." *Town of Greece* v. *Galloway*, 572 U. S. ___, ___ (2014) (KAGAN, J., dissenting) (slip op., at 15). Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling. In these cases the means to reconcile those two priorities are at hand in the existing accommodation the Government has designed, identified, and used for circumstances closely parallel to those presented here. RFRA requires the Government to use this less restrictive means. As the Court explains, this existing model, designed precisely for this problem, might well suffice to distinguish the instant cases from many others in which it is more difficult and expensive to accommodate a governmental program to countless religious claims based on an alleged statutory right of free exercise. *Ante,* at 45–46.

For these reasons and others put forth by the Court, I join its opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 13–354 and 13–356

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS
13–354 *v.*
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SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 30, 2014]

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join as to all but Part III–C–1, dissenting.

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs. See *ante,* at 16–49. Compelling governmental interests in uniform compliance with the law, and disadvantages that religion-based opt-outs impose on others, hold no sway, the Court decides, at least when there is a "less restrictive alternative." And such an alternative, the Court suggests, there always will be whenever, in lieu of tolling an enterprise claiming a

religion-based exemption, the government, *i.e.,* the general public, can pick up the tab. See *ante*, at 41–43.[1]

The Court does not pretend that the First Amendment's Free Exercise Clause demands religion-based accommodations so extreme, for our decisions leave no doubt on that score. See *infra*, at 6–8. Instead, the Court holds that Congress, in the Religious Freedom Restoration Act of 1993 (RFRA), 42 U. S. C. §2000bb *et seq.*, dictated the extraordinary religion-based exemptions today's decision endorses. In the Court's view, RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith—in these cases, thousands of women employed by Hobby Lobby and Conestoga or dependents of persons those corporations employ. Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court's judgment can introduce, I dissent.

I

"The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 856 (1992). Congress acted on that understand-

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[1] The Court insists it has held none of these things, for another less restrictive alternative is at hand: extending an existing accommodation, currently limited to religious nonprofit organizations, to encompass commercial enterprises. See *ante,* at 3–4. With that accommodation extended, the Court asserts, "women would still be entitled to all [Food and Drug Administration]-approved contraceptives without cost sharing." *Ante,* at 4. In the end, however, the Court is not so sure. In stark contrast to the Court's initial emphasis on this accommodation, it ultimately declines to decide whether the highlighted accommodation is even lawful. See *ante,* at 44 ("We do not decide today whether an approach of this type complies with RFRA . . . .").

ing when, as part of a nationwide insurance program intended to be comprehensive, it called for coverage of preventive care responsive to women's needs. Carrying out Congress' direction, the Department of Health and Human Services (HHS), in consultation with public health experts, promulgated regulations requiring group health plans to cover all forms of contraception approved by the Food and Drug Administration (FDA). The genesis of this coverage should enlighten the Court's resolution of these cases.

A

The Affordable Care Act (ACA), in its initial form, specified three categories of preventive care that health plans must cover at no added cost to the plan participant or beneficiary.[2] Particular services were to be recommended by the U. S. Preventive Services Task Force, an independent panel of experts. The scheme had a large gap, however; it left out preventive services that "many women's health advocates and medical professionals believe are critically important." 155 Cong. Rec. 28841 (2009) (statement of Sen. Boxer). To correct this oversight, Senator Barbara Mikulski introduced the Women's Health Amendment, which added to the ACA's minimum coverage requirements a new category of preventive services specific to women's health.

Women paid significantly more than men for preventive care, the amendment's proponents noted; in fact, cost

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[2] See 42 U. S. C. §300gg–13(a)(1)–(3) (group health plans must provide coverage, without cost sharing, for (1) certain "evidence-based items or services" recommended by the U. S. Preventive Services Task Force; (2) immunizations recommended by an advisory committee of the Centers for Disease Control and Prevention; and (3) "with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration").

barriers operated to block many women from obtaining needed care at all. See, *e.g., id.,* at 29070 (statement of Sen. Feinstein) ("Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men."); *id.,* at 29302 (statement of Sen. Mikulski) ("co-payments are [often] so high that [women] avoid getting [preventive and screening services] in the first place"). And increased access to contraceptive services, the sponsors comprehended, would yield important public health gains. See, *e.g., id.,* at 29768 (statement of Sen. Durbin) ("This bill will expand health insurance coverage to the vast majority of [the 17 million women of reproductive age in the United States who are uninsured] . . . . This expanded access will reduce unintended pregnancies.").

As altered by the Women's Health Amendment's passage, the ACA requires new insurance plans to include coverage without cost sharing of "such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]," a unit of HHS. 42 U. S. C. §300gg–13(a)(4). Thus charged, the HRSA developed recommendations in consultation with the Institute of Medicine (IOM). See 77 Fed. Reg. 8725–8726 (2012).[3] The IOM convened a group of independent experts, including "specialists in disease prevention [and] women's health"; those experts prepared a report evaluating the efficacy of a number of preventive services. IOM, Clinical Prevention Services for Women: Closing the Gaps 2 (2011) (hereinafter IOM Report). Consistent with the findings of "[n]umerous health professional associations" and other organizations, the IOM experts determined that preven-

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[3]The IOM is an arm of the National Academy of Sciences, an organization Congress established "for the explicit purpose of furnishing advice to the Government." *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 460, n. 11 (1989) (internal quotation marks omitted).

tive coverage should include the "full range" of FDA-approved contraceptive methods. *Id.,* at 10. See also *id.,* at 102–110.

In making that recommendation, the IOM's report expressed concerns similar to those voiced by congressional proponents of the Women's Health Amendment. The report noted the disproportionate burden women carried for comprehensive health services and the adverse health consequences of excluding contraception from preventive care available to employees without cost sharing. See, *e.g., id.,* at 19 ("[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving . . . medical tests and treatments and to filling prescriptions for themselves and their families."); *id.,* at 103–104, 107 (pregnancy may be contraindicated for women with certain medical conditions, for example, some congenital heart diseases, pulmonary hypertension, and Marfan syndrome, and contraceptives may be used to reduce risk of endometrial cancer, among other serious medical conditions); *id*., at 103 (women with unintended pregnancies are more likely to experience depression and anxiety, and their children face "increased odds of preterm birth and low birth weight").

In line with the IOM's suggestions, the HRSA adopted guidelines recommending coverage of "[a]ll [FDA-] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[4] Thereafter, HHS, the Department of Labor, and the Department of Treasury promulgated regulations requiring group health plans to include coverage of the contraceptive services recommended in the

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[4] HRSA, HHS, Women's Preventive Services Guidelines, available at http://www.hrsa.gov/womensguidelines/ (all Internet materials as visited June 27, 2014, and available in Clerk of Court's case file), reprinted in App. to Brief for Petitioners in No. 13–354, pp. 43–44a. See also 77 Fed. Reg. 8725–8726 (2012).

HRSA guidelines, subject to certain exceptions, described *infra*, at 25–27.[5] This opinion refers to these regulations as the contraceptive coverage requirement.

B

While the Women's Health Amendment succeeded, a countermove proved unavailing. The Senate voted down the so-called "conscience amendment," which would have enabled any employer or insurance provider to deny coverage based on its asserted "religious beliefs or moral convictions." 158 Cong. Rec. S539 (Feb. 9, 2012); see *id.,* at S1162–S1173 (Mar. 1, 2012) (debate and vote).[6] That amendment, Senator Mikulski observed, would have "pu[t] the personal opinion of employers and insurers over the practice of medicine." *Id.,* at S1127 (Feb. 29, 2012). Rejecting the "conscience amendment," Congress left health care decisions—including the choice among contraceptive methods—in the hands of women, with the aid of their health care providers.

II

Any First Amendment Free Exercise Clause claim Hobby Lobby or Conestoga[7] might assert is foreclosed by this Court's decision in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990). In *Smith*, two members of the Native American Church were dis-

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[5] 45 CFR §147.130(a)(1)(iv) (2013) (HHS); 29 CFR §2590.715–2713(a)(1)(iv) (2013) (Labor); 26 CFR §54.9815–2713(a)(1)(iv) (2013) (Treasury).

[6] Separating moral convictions from religious beliefs would be of questionable legitimacy. See *Welsh* v. *United States*, 398 U. S. 333, 357–358 (1970) (Harlan, J., concurring in result).

[7] As the Court explains, see *ante,* at 11–16, these cases arise from two separate lawsuits, one filed by Hobby Lobby, its affiliated business (Mardel), and the family that operates these businesses (the Greens); the other filed by Conestoga and the family that owns and controls that business (the Hahns). Unless otherwise specified, this opinion refers to the respective groups of plaintiffs as Hobby Lobby and Conestoga.

missed from their jobs and denied unemployment benefits because they ingested peyote at, and as an essential element of, a religious ceremony. Oregon law forbade the consumption of peyote, and this Court, relying on that prohibition, rejected the employees' claim that the denial of unemployment benefits violated their free exercise rights. The First Amendment is not offended, *Smith* held, when "prohibiting the exercise of religion . . . is not the object of [governmental regulation] but merely the incidental effect of a generally applicable and otherwise valid provision." *Id.,* at 878; see *id.,* at 878–879 ("an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate"). The ACA's contraceptive coverage requirement applies generally, it is "otherwise valid," it trains on women's well being, not on the exercise of religion, and any effect it has on such exercise is incidental.

Even if *Smith* did not control, the Free Exercise Clause would not require the exemption Hobby Lobby and Conestoga seek. Accommodations to religious beliefs or observances, the Court has clarified, must not significantly impinge on the interests of third parties.[8]

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[8] See *Wisconsin* v. *Yoder*, 406 U. S. 205, 230 (1972) ("This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred."); *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985) (invalidating state statute requiring employers to accommodate an employee's Sabbath observance where that statute failed to take into account the burden such an accommodation would impose on the employer or other employees). Notably, in construing the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. §2000cc *et seq.,* the Court has cautioned that "adequate account" must be taken of "the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005); see *id.,* at 722 ("an accommodation must be measured so that it does not override other significant interests"). A

The exemption sought by Hobby Lobby and Conestoga would override significant interests of the corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure. See *Catholic Charities of Sacramento, Inc.* v. *Superior Court*, 32 Cal. 4th 527, 565, 85 P. 3d 67, 93 (2004) ("We are unaware of any decision in which . . . [the U. S. Supreme Court] has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."). In sum, with respect to free exercise claims no less than free speech claims, "'[y]our right to swing your arms ends just where the other man's nose begins.'" Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 957 (1919).

III

A

Lacking a tenable claim under the Free Exercise Clause, Hobby Lobby and Conestoga rely on RFRA, a statute instructing that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government shows that application of the burden is "the least restrictive means" to further a "compelling governmental interest." 42 U. S. C. §2000bb–1(a), (b)(2). In RFRA, Congress "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418, 424 (2006).

RFRA's purpose is specific and written into the statute itself. The Act was crafted to "restore the compelling

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balanced approach is all the more in order when the Free Exercise Clause itself is at stake, not a statute designed to promote accommodation to religious beliefs and practices.

interest test as set forth in *Sherbert* v. *Verner*, 374 U. S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." §2000bb(b)(1).[9] See also §2000bb(a)(5) ("[T]he compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."); *ante,* at 48 (agreeing that the pre-*Smith* compelling interest test is "workable" and "strike[s] sensible balances").

The legislative history is correspondingly emphatic on RFRA's aim. See, *e.g.,* S. Rep. No. 103–111, p. 12 (1993) (hereinafter Senate Report) (RFRA's purpose was "only to overturn the Supreme Court's decision in *Smith*," not to "unsettle other areas of the law."); 139 Cong. Rec. 26178 (1993) (statement of Sen. Kennedy) (RFRA was "designed to restore the compelling interest test for deciding free exercise claims."). In line with this restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." Senate Report 8. See also H. R. Rep. No. 103–88, pp. 6–7 (1993) (hereinafter House Report) (same). In short, the Act reinstates the law as it was prior to *Smith*, without "creat[ing] . . . new rights for any religious practice or for any potential litigant." 139 Cong. Rec. 26178 (statement of Sen. Kennedy). Given the Act's moderate purpose, it is hardly surprising that RFRA's enactment in 1993 provoked little controversy. See Brief for Senator Murray et al. as *Amici Curiae* 8 (hereinafter Senators

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[9] Under *Sherbert* and *Yoder*, the Court "requir[ed] the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 894 (1990) (O'Connor, J., concurring in judgment).

Brief) (RFRA was approved by a 97-to-3 vote in the Senate and a voice vote in the House of Representatives).

B

Despite these authoritative indications, the Court sees RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence. See *ante,* at 6, n. 3, 7, 17, 25–27. To support its conception of RFRA as a measure detached from this Court's decisions, one that sets a new course, the Court points first to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U. S. C. §2000cc *et seq.,* which altered RFRA's definition of the term "exercise of religion." RFRA, as originally enacted, defined that term to mean "the exercise of religion under the First Amendment to the Constitution." §2000bb–2(4) (1994 ed.). See *ante,* at 6–7. As amended by RLUIPA, RFRA's definition now includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." §2000bb–2(4) (2012 ed.) (cross-referencing §2000cc–5). That definitional change, according to the Court, reflects "an obvious effort to effect a complete separation from First Amendment case law." *Ante,* at 7.

The Court's reading is not plausible. RLUIPA's alteration clarifies that courts should not question the centrality of a particular religious exercise. But the amendment in no way suggests that Congress meant to expand the class of entities qualified to mount religious accommodation claims, nor does it relieve courts of the obligation to inquire whether a government action substantially burdens a religious exercise. See *Rasul* v. *Myers*, 563 F. 3d 527, 535 (CADC 2009) (Brown, J., concurring) ("There is no doubt that RLUIPA's drafters, in changing the definition of 'exercise of religion,' wanted to broaden the scope of the kinds of practices protected by RFRA, not increase the universe of individuals protected by RFRA."); H. R. Rep.

No. 106–219, p. 30 (1999). See also *Gilardi* v. *United States Dept. of Health and Human Servs.*, 733 F. 3d 1208, 1211 (CADC 2013) (RFRA, as amended, "provides us with no helpful definition of 'exercise of religion.'"); *Henderson* v. *Kennedy*, 265 F. 3d 1072, 1073 (CADC 2001) ("The [RLUIPA] amendments did not alter RFRA's basic prohibition that the '[g]overnment shall not substantially burden a person's exercise of religion.'").[10]

Next, the Court highlights RFRA's requirement that the government, if its action substantially burdens a person's religious observance, must demonstrate that it chose the least restrictive means for furthering a compelling interest. "[B]y imposing a least-restrictive-means test," the Court suggests, RFRA "went beyond what was required by our pre-*Smith* decisions." *Ante,* at 17, n. 18 (citing *City of Boerne* v. *Flores*, 521 U. S. 507 (1997)). See also *ante,* at 6, n. 3. But as RFRA's statements of purpose and legislative history make clear, Congress intended only to restore, not to scrap or alter, the balancing test as this Court had applied it pre-*Smith*. See *supra,* at 8–9. See also Senate Report 9 (RFRA's "compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*."); House Report 7 (same).

The Congress that passed RFRA correctly read this Court's pre-*Smith* case law as including within the "compelling interest test" a "least restrictive means" requirement. See, *e.g.,* Senate Report 5 ("Where [a substantial] burden is placed upon the free exercise of religion, the Court ruled [in *Sherbert*], the Government must demon-

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[10] RLUIPA, the Court notes, includes a provision directing that "[t]his chapter [*i.e.*, RLUIPA] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [the Act] and the Constitution." 42 U. S. C. §2000cc–3(g); see *ante,* at 6–7, 26. RFRA incorporates RLUIPA's definition of "exercise of religion," as RLUIPA does, but contains no omnibus rule of construction governing the statute in its entirety.

strate that it is the least restrictive means to achieve a compelling governmental interest."). And the view that the pre-*Smith* test included a "least restrictive means" requirement had been aired in testimony before the Senate Judiciary Committee by experts on religious freedom. See, *e.g.,* Hearing on S. 2969 before the Senate Committee on the Judiciary, 102d Cong., 2d Sess., 78–79 (1993) (statement of Prof. Douglas Laycock).

Our decision in *City of Boerne*, it is true, states that the least restrictive means requirement "was not used in the pre-*Smith* jurisprudence RFRA purported to codify." See *ante,* at 6, n. 3, 17, n. 18. As just indicated, however, that statement does not accurately convey the Court's pre-*Smith* jurisprudence. See *Sherbert*, 374 U. S., at 407 ("[I]t would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat [the problem] without infringing First Amendment rights."); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."). See also Berg, The New Attacks on Religious Freedom Legislation and Why They Are Wrong, 21 Cardozo L. Rev. 415, 424 (1999) ("In *Boerne*, the Court erroneously said that the least restrictive means test 'was not used in the pre-*Smith* jurisprudence.'").[11]

C

With RFRA's restorative purpose in mind, I turn to the

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[11] The Court points out that I joined the majority opinion in *City of Boerne* and did not then question the statement that "least restrictive means . . . was not used [pre-*Smith*]." *Ante,* at 17, n. 18. Concerning that observation, I remind my colleagues of Justice Jackson's sage comment: "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday." *Massachusetts* v. *United States*, 333 U. S. 611, 639–640 (1948) (dissenting opinion).

Act's application to the instant lawsuits. That task, in view of the positions taken by the Court, requires consideration of several questions, each potentially dispositive of Hobby Lobby's and Conestoga's claims: Do for-profit corporations rank among "person[s]" who "exercise . . . religion"? Assuming that they do, does the contraceptive coverage requirement "substantially burden" their religious exercise? If so, is the requirement "in furtherance of a compelling government interest"? And last, does the requirement represent the least restrictive means for furthering that interest?

Misguided by its errant premise that RFRA moved beyond the pre-*Smith* case law, the Court falters at each step of its analysis.

1

RFRA's compelling interest test, as noted, see *supra,* at 8, applies to government actions that "substantially burden *a person's exercise of religion*." 42 U. S. C. §2000bb–1(a) (emphasis added). This reference, the Court submits, incorporates the definition of "person" found in the Dictionary Act, 1 U. S. C. §1, which extends to "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." See *ante,* at 19–20. The Dictionary Act's definition, however, controls only where "context" does not "indicat[e] otherwise." §1. Here, context does so indicate. RFRA speaks of "a person's *exercise of religion*." 42 U. S. C. §2000bb–1(a) (emphasis added). See also §§2000bb–2(4), 2000cc–5(7)(a).[12] Whether

[12] As earlier explained, see *supra,* at 10–11, RLUIPA's amendment of the definition of "exercise of religion" does not bear the weight the Court places on it. Moreover, it is passing strange to attribute to RLUIPA any purpose to cover entities other than "religious assembl[ies] or institution[s]." 42 U. S. C. §2000cc(a)(1). But cf. *ante,* at 26. That law applies to land-use regulation. §2000cc(a)(1). To permit commercial enterprises to challenge zoning and other land-use regula-

a corporation qualifies as a "person" capable of exercising religion is an inquiry one cannot answer without reference to the "full body" of pre-*Smith* "free-exercise caselaw." *Gilardi*, 733 F. 3d, at 1212. There is in that case law no support for the notion that free exercise rights pertain to for-profit corporations.

Until this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under the Free Exercise Clause or RFRA.[13] The absence of such precedent is just what one would expect, for the exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 636 (1819). Corporations, Justice Stevens more recently reminded, "have no consciences, no beliefs, no feelings, no thoughts, no desires." *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 466 (2010) (opinion concurring in part and dissenting in part).

The First Amendment's free exercise protections, the

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tions under RLUIPA would "dramatically expand the statute's reach" and deeply intrude on local prerogatives, contrary to Congress' intent. Brief for National League of Cities et al. as *Amici Curiae* 26.

[13] The Court regards *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, 366 U. S. 617 (1961), as "suggest[ing] . . . that for-profit corporations possess [free-exercise] rights." *Ante,* at 26–27. See also *ante,* at 21, n. 21. The suggestion is barely there. True, one of the five challengers to the Sunday closing law assailed in *Gallagher* was a corporation owned by four Orthodox Jews. The other challengers were human individuals, not artificial, law-created entities, so there was no need to determine whether the corporation could institute the litigation. Accordingly, the plurality stated it could pretermit the question "whether appellees ha[d] standing" because *Braunfeld* v. *Brown*, 366 U. S. 599 (1961), which upheld a similar closing law, was fatal to their claim on the merits. 366 U. S., at 631.

Court has indeed recognized, shelter churches and other nonprofit religion-based organizations.[14] "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community," and "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 342 (1987) (Brennan, J., concurring in judgment). The Court's "special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. ___, ___ (2012) (slip op., at 14), however, is just that. No such solicitude is traditional for commercial organizations.[15] Indeed, until today, religious

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[14] See, *e.g., Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U. S. ___ (2012); *Gonzales* v. *O Centro Espírita Beneficente União do Vegetal*, 546 U. S. 418 (2006); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993); *Jimmy Swaggart Ministries* v. *Board of Equalization of Cal.*, 493 U. S. 378 (1990).

[15] Typically, Congress has accorded to organizations religious in character religion-based exemptions from statutes of general application. *E.g.,* 42 U. S. C. §2000e–1(a) (Title VII exemption from prohibition against employment discrimination based on religion for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities"); 42 U. S. C. §12113(d)(1) (parallel exemption in Americans With Disabilities Act of 1990). It can scarcely be maintained that RFRA enlarges these exemptions to allow Hobby Lobby and Conestoga to hire only persons who share the religious beliefs of the Greens or Hahns. Nor does the Court suggest otherwise. Cf. *ante,* at 28.

The Court does identify two statutory exemptions it reads to cover for-profit corporations, 42 U. S. C. §§300a–7(b)(2) and 238n(a), and infers from them that "Congress speaks with specificity when it intends a religious accommodation not to extend to for-profit corporations," *ante,* at 28. The Court's inference is unwarranted. The exemptions the Court cites cover certain medical personnel who object to performing or assisting with abortions. Cf. *ante,* at 28, n. 27 ("the protection provided by §238n(a) differs significantly from the protection provided by

exemptions had never been extended to any entity operating in "the commercial, profit-making world." *Amos*, 483 U. S., at 337.[16]

The reason why is hardly obscure. Religious organizations exist to foster the interests of persons subscribing to the same religious faith. Not so of for-profit corporations. Workers who sustain the operations of those corporations commonly are not drawn from one religious community. Indeed, by law, no religion-based criterion can restrict the

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RFRA"). Notably, the Court does not assert that these exemptions have in fact been afforded to for-profit corporations. See §238n(c) ("health care entity" covered by exemption is a term defined to include "an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions"); Tozzi, Whither Free Exercise: *Employment Division* v. *Smith* and the Rebirth of State Constitutional Free Exercise Clause Jurisprudence?, 48 J. Catholic Legal Studies 269, 296, n. 133 (2009) ("Catholic physicians, but not necessarily hospitals, . . . may be able to invoke [§238n(a)] . . . ."); cf. S. 137, 113th Cong., 1st Sess. (2013) (as introduced) (Abortion Non-Discrimination Act of 2013, which would amend the definition of "health care entity" in §238n to include "hospital[s]," "health insurance plan[s]," and other health care facilities). These provisions are revealing in a way that detracts from one of the Court's main arguments. They show that Congress is not content to rest on the Dictionary Act when it wishes to ensure that particular entities are among those eligible for a religious accommodation.

Moreover, the exemption codified in §238n(a) was not enacted until three years after RFRA's passage. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, §515, 110 Stat. 1321–245. If, as the Court believes, RFRA opened all statutory schemes to religion-based challenges by for-profit corporations, there would be no need for a statute-specific, post-RFRA exemption of this sort.

[16]That is not to say that a category of plaintiffs, such as resident aliens, may bring RFRA claims only if this Court expressly "addressed their [free-exercise] rights before *Smith*." *Ante,* at 27. Continuing with the Court's example, resident aliens, unlike corporations, are flesh-and-blood individuals who plainly count as persons sheltered by the First Amendment, see *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 271 (1990) (citing *Bridges* v. *Wixon*, 326 U. S. 135, 148 (1945)), and *a fortiori*, RFRA.

work force of for-profit corporations. See 42 U. S. C. §§2000e(b), 2000e–1(a), 2000e–2(a); cf. *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 80–81 (1977) (Title VII requires reasonable accommodation of an employee's religious exercise, but such accommodation must not come "at the expense of other[employees]"). The distinction between a community made up of believers in the same religion and one embracing persons of diverse beliefs, clear as it is, constantly escapes the Court's attention.[17] One can only wonder why the Court shuts this key difference from sight.

Reading RFRA, as the Court does, to require extension of religion-based exemptions to for-profit corporations surely is not grounded in the pre-*Smith* precedent Congress sought to preserve. Had Congress intended RFRA to initiate a change so huge, a clarion statement to that effect likely would have been made in the legislation. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). The text of RFRA makes no such statement and the legislative history does not so much as mention for-profit corporations. See *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F. 3d 1114, 1169 (CA10 2013) (Briscoe, C. J., concurring in part and dissenting in part) (legislative record lacks "any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations"). See also Senators Brief 10–13 (none of the

[17] I part ways with JUSTICE KENNEDY on the context relevant here. He sees it as the employers' "exercise [of] their religious beliefs within the context of their own closely held, for-profit corporations." *Ante,* at 2 (concurring opinion). See also *ante,* at 45–46 (opinion of the Court) (similarly concentrating on religious faith of employers without reference to the different beliefs and liberty interests of employees). I see as the relevant context the employers' asserted right to exercise religion within a nationwide program designed to protect against health hazards employees who do not subscribe to their employers' religious beliefs.

cases cited in House or Senate Judiciary Committee reports accompanying RFRA, or mentioned during floor speeches, recognized the free exercise rights of for-profit corporations).

The Court notes that for-profit corporations may support charitable causes and use their funds for religious ends, and therefore questions the distinction between such corporations and religious nonprofit organizations. See *ante,* at 20–25. See also *ante,* at 3 (KENNEDY, J., concurring) (criticizing the Government for "distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation").[18] Again, the Court forgets that religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill. Moreover, history is not on the Court's side. Recognition of the discrete characters of "ecclesiastical and lay" corporations dates back to Blackstone, see 1 W. Blackstone, Commentaries on the Laws of England 458 (1765), and was reiterated by this Court centuries before the enactment of the Internal Revenue Code. See *Terrett* v. *Taylor*, 9 Cranch 43, 49 (1815) (describing religious corporations); *Trustees of Dartmouth College*, 4 Wheat., at 645 (discussing "eleemosynary" corporations, including those "created for the promotion of religion"). To reiterate, "for-profit corporations are different from religious non-

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[18] According to the Court, the Government "concedes" that "nonprofit corporation[s]" are protected by RFRA. *Ante,* at 19. See also *ante,* at 20, 24, 30. That is not an accurate description of the Government's position, which encompasses only "churches," "*religious* institutions," and "*religious* non-profits." Brief for Respondents in No. 13–356, p. 28 (emphasis added). See also Reply Brief in No. 13–354, p. 8 ("RFRA incorporates the longstanding and common-sense distinction between religious organizations, which sometimes have been accorded accommodations under generally applicable laws in recognition of their accepted religious character, and for-profit corporations organized to do business in the commercial world.").

profits in that they use labor to make a profit, rather than to perpetuate [the] religious value[s] [shared by a community of believers]." *Gilardi*, 733 F. 3d, at 1242 (Edwards, J., concurring in part and dissenting in part) (emphasis deleted).

Citing *Braunfeld* v. *Brown*, 366 U. S. 599 (1961), the Court questions why, if "a sole proprietorship that seeks to make a profit may assert a free-exercise claim, [Hobby Lobby and Conestoga] can't . . . do the same?" *Ante,* at 22 (footnote omitted). See also *ante,* at 16–17. But even accepting, *arguendo*, the premise that unincorporated business enterprises may gain religious accommodations under the Free Exercise Clause, the Court's conclusion is unsound. In a sole proprietorship, the business and its owner are one and the same. By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation. In any event, *Braunfeld* is hardly impressive authority for the entitlement Hobby Lobby and Conestoga seek. The free exercise claim asserted there was promptly rejected on the merits.

The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private.[19] Little doubt that RFRA

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[19] The Court does not even begin to explain how one might go about ascertaining the religious scruples of a corporation where shares are sold to the public. No need to speculate on that, the Court says, for "it seems unlikely" that large corporations "will often assert RFRA claims." *Ante,* at 29. Perhaps so, but as Hobby Lobby's case demonstrates, such claims are indeed pursued by large corporations, employing thousands of persons of different faiths, whose ownership is not diffuse. "Closely held" is not synonymous with "small." Hobby Lobby is

claims will proliferate, for the Court's expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.

2

Even if Hobby Lobby and Conestoga were deemed RFRA "person[s]," to gain an exemption, they must demonstrate that the contraceptive coverage requirement "substantially burden[s] [their] exercise of religion." 42 U. S. C. §2000bb–1(a). Congress no doubt meant the modifier "substantially" to carry weight. In the original draft of RFRA, the word "burden" appeared unmodified. The word "substantially" was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. See

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hardly the only enterprise of sizable scale that is family owned or closely held. For example, the family-owned candy giant Mars, Inc., takes in $33 billion in revenues and has some 72,000 employees, and closely held Cargill, Inc., takes in more than $136 billion in revenues and employs some 140,000 persons. See Forbes, America's Largest Private Companies 2013, available at http://www.forbes.com/largest-private-companies/.

Nor does the Court offer any instruction on how to resolve the disputes that may crop up among corporate owners over religious values and accommodations. The Court is satisfied that "[s]tate corporate law provides a ready means for resolving any conflicts," *ante*, at 30, but the authorities cited in support of that proposition are hardly helpful. See Del. Code Ann., Tit. 8, §351 (2011) (certificates of incorporation may specify how the business is managed); 1 J. Cox & T. Hazen, Treatise on the Law of Corporations §3:2 (3d ed. 2010) (section entitled "Selecting the state of incorporation"); *id.,* §14:11 (observing that "[d]espite the frequency of dissension and deadlock in close corporations, in some states neither legislatures nor courts have provided satisfactory solutions"). And even if a dispute settlement mechanism is in place, how is the arbiter of a religion-based intracorporate controversy to resolve the disagreement, given this Court's instruction that "courts have no business addressing [whether an asserted religious belief] is substantial," *ante,* at 36?

139 Cong. Rec. 26180. In proposing the amendment, Senator Kennedy stated that RFRA, in accord with the Court's pre-*Smith* case law, "does not require the Government to justify every action that has some effect on religious exercise." *Ibid.*

The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial. Instead, it rests on the Greens' and Hahns' "belie[f] that providing the coverage demanded by the HHS regulations is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide the coverage." *Ante,* at 36.[20] I agree with the Court that the Green and Hahn families' religious convictions regarding contraception are sincerely held. See *Thomas*, 450 U. S., at 715 (courts are not to question where an individual "dr[aws] the line" in defining which practices run afoul of her religious beliefs). See also 42 U. S. C. §§2000bb–1(a), 2000bb–2(4), 2000cc–5(7)(A).[21] But those beliefs, however deeply held, do not suffice to sustain a RFRA claim. RFRA, properly understood, distinguishes between "factual allegations that [plaintiffs']

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[20] The Court dismisses the argument, advanced by some *amici*, that the $2,000-per-employee tax charged to certain employers that fail to provide health insurance is less than the average cost of offering health insurance, noting that the Government has not provided the statistics that could support such an argument. See *ante,* at 32–34. The Court overlooks, however, that it is not the Government's obligation to prove that an asserted burden is *in*substantial. Instead, it is incumbent upon plaintiffs to demonstrate, in support of a RFRA claim, the substantiality of the alleged burden.

[21] The Court levels a criticism that is as wrongheaded as can be. In no way does the dissent "tell the plaintiffs that their beliefs are flawed." *Ante,* at 37. Right or wrong in this domain is a judgment no Member of this Court, or any civil court, is authorized or equipped to make. What the Court must decide is not "the plausibility of a religious claim," *ante,* at 37 (internal quotation marks omitted), but whether accommodating that claim risks depriving others of rights accorded them by the laws of the United States. See *supra,* at 7–8; *infra*, at 27.

beliefs are sincere and of a religious nature," which a court must accept as true, and the "legal conclusion . . . that [plaintiffs'] religious exercise is substantially burdened," an inquiry the court must undertake. *Kaemmerling* v. *Lappin*, 553 F. 3d 669, 679 (CADC 2008).

That distinction is a facet of the pre-*Smith* jurisprudence RFRA incorporates. *Bowen* v. *Roy*, 476 U. S. 693 (1986), is instructive. There, the Court rejected a free exercise challenge to the Government's use of a Native American child's Social Security number for purposes of administering benefit programs. Without questioning the sincerity of the father's religious belief that "use of [his daughter's Social Security] number may harm [her] spirit," the Court concluded that the Government's internal uses of that number "place[d] [no] restriction on what [the father] may believe or what he may do." *Id.,* at 699. Recognizing that the father's "religious views may not accept" the position that the challenged uses concerned only the Government's internal affairs, the Court explained that "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." *Id.,* at 700–701, n. 6. See also *Hernandez* v. *Commissioner*, 490 U. S. 680, 699 (1989) (distinguishing between, on the one hand, "question[s] [of] the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," and, on the other, "whether the alleged burden imposed [by the challenged government action] is a substantial one"). Inattentive to this guidance, today's decision elides entirely the distinction between the sincerity of a challenger's religious belief and the substantiality of the burden placed on the challenger.

Undertaking the inquiry that the Court forgoes, I would conclude that the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. The re-

quirement carries no command that Hobby Lobby or Conestoga purchase or provide the contraceptives they find objectionable. Instead, it calls on the companies covered by the requirement to direct money into undifferentiated funds that finance a wide variety of benefits under comprehensive health plans. Those plans, in order to comply with the ACA, see *supra,* at 3–6, must offer contraceptive coverage without cost sharing, just as they must cover an array of other preventive services.

Importantly, the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents, in consultation with their health care providers. Should an employee of Hobby Lobby or Conestoga share the religious beliefs of the Greens and Hahns, she is of course under no compulsion to use the contraceptives in question. But "[n]o individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." *Grote* v. *Sebelius*, 708 F. 3d 850, 865 (CA7 2013) (Rovner, J., dissenting). It is doubtful that Congress, when it specified that burdens must be "substantia[l]," had in mind a linkage thus interrupted by independent decisionmakers (the woman and her health counselor) standing between the challenged government action and the religious exercise claimed to be infringed. Any decision to use contraceptives made by a woman covered under Hobby Lobby's or Conestoga's plan will not be propelled by the Government, it will be the woman's autonomous choice, informed by the physician she consults.

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Even if one were to conclude that Hobby Lobby and Conestoga meet the substantial burden requirement, the Government has shown that the contraceptive coverage

for which the ACA provides furthers compelling interests in public health and women's well being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence. To recapitulate, the mandated contraception coverage enables women to avoid the health problems unintended pregnancies may visit on them and their children. See IOM Report 102–107. The coverage helps safeguard the health of women for whom pregnancy may be hazardous, even life threatening. See Brief for American College of Obstetricians and Gynecologists et al. as *Amici Curiae* 14–15. And the mandate secures benefits wholly unrelated to pregnancy, preventing certain cancers, menstrual disorders, and pelvic pain. Brief for Ovarian Cancer National Alliance et al. as *Amici Curiae* 4, 6–7, 15–16; 78 Fed. Reg. 39872 (2013); IOM Report 107.

That Hobby Lobby and Conestoga resist coverage for only 4 of the 20 FDA-approved contraceptives does not lessen these compelling interests. Notably, the corporations exclude intrauterine devices (IUDs), devices significantly more effective, and significantly more expensive than other contraceptive methods. See *id.,* at 105.[22] Moreover, the Court's reasoning appears to permit commercial enterprises like Hobby Lobby and Conestoga to exclude from their group health plans all forms of contraceptives. See Tr. of Oral Arg. 38–39 (counsel for Hobby Lobby acknowledged that his "argument . . . would apply just as well if the employer said 'no contraceptives'" (internal quotation marks added)).

Perhaps the gravity of the interests at stake has led the

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[22] IUDs, which are among the most reliable forms of contraception, generally cost women more than $1,000 when the expenses of the office visit and insertion procedure are taken into account. See Eisenberg, McNicholas, & Peipert, Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents, 52 J. Adolescent Health S59, S60 (2013). See also Winner et al., Effectiveness of Long-Acting Reversible Contraception, 366 New Eng. J. Medicine 1998, 1999 (2012).

Court to assume, for purposes of its RFRA analysis, that the compelling interest criterion is met in these cases. See *ante,* at 40.[23] It bears note in this regard that the cost of an IUD is nearly equivalent to a month's full-time pay for workers earning the minimum wage, Brief for Guttmacher Institute et al. as *Amici Curiae* 16; that almost one-third of women would change their contraceptive method if costs were not a factor, Frost & Darroch, Factors Associated With Contraceptive Choice and Inconsistent Method Use, United States, 2004, 40 Perspectives on Sexual & Reproductive Health 94, 98 (2008); and that only one-fourth of women who request an IUD actually have one inserted after finding out how expensive it would be, Gariepy, Simon, Patel, Creinin, & Schwarz, The Impact of Out-of-Pocket Expense on IUD Utilization Among Women With Private Insurance, 84 Contraception e39, e40 (2011). See also Eisenberg, *supra,* at S60 (recent study found that women who face out-of-pocket IUD costs in excess of $50 were "11-times less likely to obtain an IUD than women who had to pay less than $50"); Postlethwaite, Trussell, Zoolakis, Shabear, & Petitti, A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change, 76 Contraception 360, 361–362 (2007) (when one health system eliminated patient cost sharing for IUDs, use of this form of contraception more than doubled).

Stepping back from its assumption that compelling interests support the contraceptive coverage requirement, the Court notes that small employers and grandfathered plans are not subject to the requirement. If there is a compelling interest in contraceptive coverage, the Court

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[23] Although the Court's opinion makes this assumption grudgingly, see *ante,* at 39–40, one Member of the majority recognizes, without reservation, that "the [contraceptive coverage] mandate serves the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees." *Ante,* at 2 (opinion of KENNEDY, J.).

suggests, Congress would not have created these exclusions. See *ante,* at 39–40.

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes. See, *e.g.,* Family and Medical Leave Act of 1993, 29 U. S. C. §2611(4)(A)(i) (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967, 29 U. S. C. §630(b) (originally exempting employers with fewer than 50 employees, 81 Stat. 605, the statute now governs employers with 20 or more employees); Americans With Disabilities Act, 42 U. S. C. §12111(5)(A) (applicable to employers with 15 or more employees); Title VII, 42 U. S. C. §2000e(b) (originally exempting employers with fewer than 25 employees, see *Arbaugh* v. *Y & H Corp.*, 546 U. S. 500, 505, n. 2 (2006), the statute now governs employers with 15 or more employees).

The ACA's grandfathering provision, 42 U. S. C. §18011, allows a phasing-in period for compliance with a number of the Act's requirements (not just the contraceptive coverage or other preventive services provisions). Once specified changes are made, grandfathered status ceases. See 45 CFR §147.140(g). Hobby Lobby's own situation is illustrative. By the time this litigation commenced, Hobby Lobby did not have grandfathered status. Asked why by the District Court, Hobby Lobby's counsel explained that the "grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing." App. in No. 13–354, pp. 39–40. Counsel acknowledged that, "just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shif[t] over time." *Id.,* at 40.[24] The percentage of employees in grand-

[24] Hobby Lobby's *amicus* National Religious Broadcasters similarly

fathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Foundation & Health Research & Educ. Trust, Employer Benefits 2013 Annual Survey 7, 196. In short, far from ranking as a categorical exemption, the grandfathering provision is "temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 733 F. 3d, at 1241 (Edwards, J., concurring in part and dissenting in part).

The Court ultimately acknowledges a critical point: RFRA's application "*must* take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Ante,* at 42, n. 37 (quoting *Cutter* v. *Wilkinson*, 544 U. S. 709, 720 (2005); emphasis added). No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others—here, the very persons the contraceptive coverage requirement was designed to protect. Cf. *supra,* at 7–8; *Prince* v. *Massachusetts*, 321 U. S. 158, 177 (1944) (Jackson, J., dissenting) ("[The] limitations which of necessity bound religious freedom . . . begin to operate whenever activities begin to affect or collide with liberties of others or of the public.").

4

After assuming the existence of compelling government interests, the Court holds that the contraceptive coverage requirement fails to satisfy RFRA's least restrictive means test. But the Government has shown that there is no less restrictive, equally effective means that would both (1) satisfy the challengers' religious objections to providing

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states that, "[g]iven the nature of employers' needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the 'grandfather' exclusion is *de minimis* and transitory at best." Brief for National Religious Broadcasters as *Amicus Curiae* in No. 13–354, p. 28.

insurance coverage for certain contraceptives (which they believe cause abortions); and (2) carry out the objective of the ACA's contraceptive coverage requirement, to ensure that women employees receive, at no cost to them, the preventive care needed to safeguard their health and well being. A "least restrictive means" cannot require employees to relinquish benefits accorded them by federal law in order to ensure that their commercial employers can adhere unreservedly to their religious tenets. See *supra,* at 7–8, 27.[25]

Then let the government pay (rather than the employees who do not share their employer's faith), the Court suggests. "The most straightforward [alternative]," the Court asserts, "would be for the Government to assume the cost of providing . . . contraceptives . . . to any women who are unable to obtain them under their health-insurance policies due to their employers' religious objections." *Ante,* at 41. The ACA, however, requires coverage of preventive services through the existing employer-based system of health insurance "so that [employees] face minimal logistical and administrative obstacles." 78 Fed. Reg. 39888. Impeding women's receipt of benefits "by requiring them to take steps to learn about, and to sign up for, a new [government funded and administered] health benefit" was scarcely what Congress contemplated. *Ibid.* Moreover, Title X of the Public Health Service Act, 42 U. S. C. §300 *et seq.*, "is the nation's only dedicated source of federal

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[25] As the Court made clear in *Cutter*, the government's license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause. 544 U. S., at 720–722. "[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U. S., at 606, a "rich mosaic of religious faiths," *Town of Greece* v. *Galloway*, 572 U. S. ___, ___ (2014) (KAGAN, J., dissenting) (slip op., at 15). Consequently, one person's right to free exercise must be kept in harmony with the rights of her fellow citizens, and "some religious practices [must] yield to the common good." *United States* v. *Lee*, 455 U. S. 252, 259 (1982).

funding for safety net family planning services." Brief for National Health Law Program et al. as *Amici Curiae* 23. "Safety net programs like Title X are not designed to absorb the unmet needs of . . . insured individuals." *Id.,* at 24. Note, too, that Congress declined to write into law the preferential treatment Hobby Lobby and Conestoga describe as a less restrictive alternative. See *supra,* at 6.

And where is the stopping point to the "let the government pay" alternative? Suppose an employer's sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, see *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 303 (1985), or according women equal pay for substantially similar work, see *Dole* v. *Shenandoah Baptist Church*, 899 F. 2d 1389, 1392 (CA4 1990)? Does it rank as a less restrictive alternative to require the government to provide the money or benefit to which the employer has a religion-based objection?[26] Because the Court cannot easily answer that question, it proposes something else: Extension to commercial enterprises of the accommodation already afforded to nonprofit religion-based organizations. See *ante,* at 3–4, 9–10, 43–45. "At a minimum," according to the Court, such an approach would not "impinge on [Hobby Lobby's and Conestoga's] religious belief." *Ante,* at 44. I have already discussed the "special solicitude" generally accorded nonprofit religion-based organizations that exist to serve a community of believers, solicitude never before accorded to commercial enterprises comprising employees of diverse faiths. See *supra,* at 14–17.

Ultimately, the Court hedges on its proposal to align for-profit enterprises with nonprofit religion-based organiza-

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[26] Cf. *Ashcroft* v. *American Civil Liberties Union*, 542 U. S. 656, 666 (2004) (in context of First Amendment Speech Clause challenge to a content-based speech restriction, courts must determine "whether the challenged regulation is the least restrictive means among *available*, effective alternatives" (emphasis added)).

tions. "We do not decide today whether [the] approach [the opinion advances] complies with RFRA for purposes of all religious claims." *Ante,* at 44. Counsel for Hobby Lobby was similarly noncommittal. Asked at oral argument whether the Court-proposed alternative was acceptable,[27] counsel responded: "We haven't been offered that accommodation, so we haven't had to decide what kind of objection, if any, we would make to that." Tr. of Oral Arg. 86–87.

Conestoga suggests that, if its employees had to acquire and pay for the contraceptives (to which the corporation objects) on their own, a tax credit would qualify as a less restrictive alternative. See Brief for Petitioners in No. 13–356, p. 64. A tax credit, of course, is one variety of "let the government pay." In addition to departing from the existing employer-based system of health insurance, Conestoga's alternative would require a woman to reach into her own pocket in the first instance, and it would do nothing for the woman too poor to be aided by a tax credit.

In sum, in view of what Congress sought to accomplish,

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[27] On brief, Hobby Lobby and Conestoga barely addressed the extension solution, which would bracket commercial enterprises with nonprofit religion-based organizations for religious accommodations purposes. The hesitation is understandable, for challenges to the adequacy of the accommodation accorded religious nonprofit organizations are currently *sub judice*. See, *e.g., Little Sisters of the Poor Home for the Aged* v. *Sebelius*, ___ F. Supp. 2d ___, 2013 WL 6839900 (Colo., Dec. 27, 2013), injunction pending appeal granted, 571 U. S. ___ (2014). At another point in today's decision, the Court refuses to consider an argument neither "raised below [nor] advanced in this Court by any party," giving Hobby Lobby and Conestoga "[no] opportunity to respond to [that] novel claim." *Ante,* at 33. Yet the Court is content to decide this case (and this case only) on the ground that HHS could make an accommodation never suggested in the parties' presentations. RFRA cannot sensibly be read to "requir[e] the government to . . . refute each and every conceivable alternative regulation," *United States* v. *Wilgus*, 638 F. 3d 1274, 1289 (CA10 2011), especially where the alternative on which the Court seizes was not pressed by any challenger.

i.e., comprehensive preventive care for women furnished through employer-based health plans, none of the proffered alternatives would satisfactorily serve the compelling interests to which Congress responded.

IV

Among the pathmarking pre-*Smith* decisions RFRA preserved is *United States* v. *Lee*, 455 U. S. 252 (1982). Lee, a sole proprietor engaged in farming and carpentry, was a member of the Old Order Amish. He sincerely believed that withholding Social Security taxes from his employees or paying the employer's share of such taxes would violate the Amish faith. This Court held that, although the obligations imposed by the Social Security system conflicted with Lee's religious beliefs, the burden was not unconstitutional. *Id.,* at 260–261. See also *id.,* at 258 (recognizing the important governmental interest in providing a "nationwide . . . comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees").[28] The Government urges that *Lee* should control the challenges brought by Hobby Lobby and Conestoga. See Brief for Respondents in No. 13–356, p. 18. In contrast, today's Court dismisses *Lee* as a tax case. See *ante,* at 46–47. Indeed, it was a tax case and the Court in *Lee* homed in on "[t]he difficulty in attempting to accommodate religious beliefs in the area of taxation." 455 U. S., at 259.

But the *Lee* Court made two key points one cannot confine to tax cases. "When followers of a particular sect enter into commercial activity as a matter of choice," the Court observed, "the limits they accept on their own conduct as a matter of conscience and faith are not to be

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[28] As a sole proprietor, Lee was subject to personal liability for violating the law of general application he opposed. His claim to a religion-based exemption would have been even thinner had he conducted his business as a corporation, thus avoiding personal liability.

superimposed on statutory schemes which are binding on others in that activity." *Id.,* at 261. The statutory scheme of employer-based comprehensive health coverage involved in these cases is surely binding on others engaged in the same trade or business as the corporate challengers here, Hobby Lobby and Conestoga. Further, the Court recognized in *Lee* that allowing a religion-based exemption to a commercial employer would "operat[e] to impose the employer's religious faith on the employees." *Ibid.*[29] No doubt the Greens and Hahns and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door,[30] at least in the absence of directions from the Legislature or Administration to do so.

Why should decisions of this order be made by Congress or the regulatory authority, and not this Court? Hobby Lobby and Conestoga surely do not stand alone as commercial enterprises seeking exemptions from generally applicable laws on the basis of their religious beliefs. See, *e.g., Newman* v. *Piggie Park Enterprises, Inc.*, 256 F. Supp.

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[29] Congress amended the Social Security Act in response to *Lee*. The amended statute permits Amish sole proprietors and partnerships (but not Amish-owned corporations) to obtain an exemption from the obligation to pay Social Security taxes only for employees who are co-religionists and who likewise seek an exemption and agree to give up their Social Security benefits. See 26 U. S. C. §3127(a)(2), (b)(1). Thus, employers with sincere religious beliefs have no right to a religion-based exemption that would deprive employees of Social Security benefits without the employee's consent—an exemption analogous to the one Hobby Lobby and Conestoga seek here.

[30] Cf. *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 299 (1985) (disallowing religion-based exemption that "would undoubtedly give [the commercial enterprise seeking the exemption] and similar organizations an advantage over their competitors").

941, 945 (SC 1966) (owner of restaurant chain refused to serve black patrons based on his religious beliefs opposing racial integration), aff'd in relevant part and rev'd in part on other grounds, 377 F. 2d 433 (CA4 1967), aff'd and modified on other grounds, 390 U. S. 400 (1968); *In re Minnesota ex rel. McClure,* 370 N. W. 2d 844, 847 (Minn. 1985) (born-again Christians who owned closely held, for-profit health clubs believed that the Bible proscribed hiring or retaining an "individua[l] living with but not married to a person of the opposite sex," "a young, single woman working without her father's consent or a married woman working without her husband's consent," and any person "antagonistic to the Bible," including "fornicators and homosexuals" (internal quotation marks omitted)), appeal dismissed, 478 U. S. 1015 (1986); *Elane Photography, LLC* v. *Willock*, 2013–NMSC–040, ___ N. M. ___, 309 P. 3d 53 (for-profit photography business owned by a husband and wife refused to photograph a lesbian couple's commitment ceremony based on the religious beliefs of the company's owners), cert. denied, 572 U. S. ___ (2014). Would RFRA require exemptions in cases of this ilk? And if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not? Isn't the Court disarmed from making such a judgment given its recognition that "courts must not presume to determine . . . the plausibility of a religious claim"? *Ante,* at 37.

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian

Scientists, among others)?[31] According to counsel for Hobby Lobby, "each one of these cases . . . would have to be evaluated on its own . . . apply[ing] the compelling interest-least restrictive alternative test." Tr. of Oral Arg. 6. Not much help there for the lower courts bound by today's decision.

The Court, however, sees nothing to worry about. Today's cases, the Court concludes, are "concerned solely with the contraceptive mandate. Our decision should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs. Other coverage requirements, such as immunizations, may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means of providing them." *Ante,* at 46. But the Court has assumed, for RFRA purposes, that the interest in women's health and well being is compelling and has come up with no means adequate to serve that interest, the one motivating Congress to adopt the Women's Health Amendment.

There is an overriding interest, I believe, in keeping the courts "out of the business of evaluating the relative merits of differing religious claims," *Lee*, 455 U. S., at 263, n. 2 (Stevens, J., concurring in judgment), or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be "perceived as favoring one religion over another," the very "risk the Establishment Clause was designed to preclude." *Ibid.* The Court, I fear,

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[31] Religious objections to immunization programs are not hypothetical. See *Phillips* v. *New York*, ___ F. Supp. 2d ___, 2014 WL 2547584 (EDNY, June 5, 2014) (dismissing free exercise challenges to New York's vaccination practices); Liberty Counsel, Compulsory Vaccinations Threaten Religious Freedom (2007), available at http://www.lc.org/media/9980/attachments/memo_vaccination.pdf.

has ventured into a minefield, cf. *Spencer* v. *World Vision, Inc.*, 633 F. 3d 723, 730 (CA9 2010) (O'Scannlain, J., concurring), by its immoderate reading of RFRA. I would confine religious exemptions under that Act to organizations formed "for a religious purpose," "engage[d] primarily in carrying out that religious purpose," and not "engaged . . . substantially in the exchange of goods or services for money beyond nominal amounts." See *id.,* at 748 (Kleinfeld, J., concurring).

* * *

For the reasons stated, I would reverse the judgment of the Court of Appeals for the Tenth Circuit and affirm the judgment of the Court of Appeals for the Third Circuit.

SUPREME COURT OF THE UNITED STATES

Nos. 13–354 and 13–356

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS
13–354 *v.*
HOBBY LOBBY STORES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AND

CONESTOGA WOOD SPECIALTIES CORPORATION ET AL., PETITIONERS
13–356 *v.*
SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 30, 2014]

JUSTICE BREYER and JUSTICE KAGAN, dissenting.

We agree with JUSTICE GINSBURG that the plaintiffs' challenge to the contraceptive coverage requirement fails on the merits. We need not and do not decide whether either for-profit corporations or their owners may bring claims under the Religious Freedom Restoration Act of 1993. Accordingly, we join all but Part III–C–1 of JUSTICE GINSBURG's dissenting opinion.

Syllabus

CHURCH OF THE LUKUMI BABALU AYE, INC., ET AL. *v.* CITY OF HIALEAH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91–948. Argued November 4, 1992—Decided June 11, 1993

Petitioner church and its congregants practice the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion. The animals are killed by cutting their carotid arteries and are cooked and eaten following all Santeria rituals except healing and death rites. After the church leased land in respondent city and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed, among other enactments, Resolution 87–66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices; Ordinance 87–40, which incorporates the Florida animal cruelty laws and broadly punishes "[w]hoever . . . unnecessarily or cruelly . . . kills any animal," and has been interpreted to reach killings for religious reasons; Ordinance 87–52, which defines "sacrifice" as "to unnecessarily kill . . . an animal in a . . . ritual . . . not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed [food] establishment" if the killing is otherwise permitted by law; Ordinance 87–71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87–52; and Ordinance 87–72, which defines "slaughter" as "the killing of animals for food" and prohibits slaughter outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law. Petitioners filed this suit under 42 U. S. C. § 1983, alleging violations of their rights under, *inter alia*, the Free Exercise Clause of the First Amendment. Although acknowledging that the foregoing ordinances are not religiously neutral, the District Court ruled for the city, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest because any more narrow restrictions would

Syllabus

be unenforceable as a result of the Santeria religion's secret nature. The Court of Appeals affirmed.

Held: The judgment is reversed.

936 F. 2d 586, reversed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II–A–1, II–A–3, II–B, III, and IV, concluding that the laws in question were enacted contrary to free exercise principles, and they are void. Pp. 531–540, 542–547.

(a) Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872. However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. Pp. 531–532.

(b) The ordinances' texts and operation demonstrate that they are not neutral, but have as their object the suppression of Santeria's central element, animal sacrifice. That this religious exercise has been targeted is evidenced by Resolution 87–66's statements of "concern" and "commitment," and by the use of the words "sacrifice" and "ritual" in Ordinances 87–40, 87–52, and 87–71. Moreover, the latter ordinances' various prohibitions, definitions, and exemptions demonstrate that they were "gerrymandered" with care to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings. They also suppress much more religious conduct than is necessary to achieve their stated ends. The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice, such as general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter. Although Ordinance 87–72 appears to apply to substantial nonreligious conduct and not to be overbroad, it must also be invalidated because it functions in tandem with the other ordinances to suppress Santeria religious worship. Pp. 533–540.

(c) Each of the ordinances pursues the city's governmental interests only against conduct motivated by religious belief and thereby violates the requirement that laws burdening religious practice must be of general applicability. Ordinances 87–40, 87–52, and 87–71 are substantially underinclusive with regard to the city's interest in preventing cruelty

to animals, since they are drafted with care to forbid few animal killings but those occasioned by religious sacrifice, while many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. The city's assertions that it is "self-evident" that killing for food is "important," that the eradication of insects and pests is "obviously justified," and that euthanasia of excess animals "makes sense" do not explain why religion alone must bear the burden of the ordinances. These ordinances are also substantially underinclusive with regard to the city's public health interests in preventing the disposal of animal carcasses in open public places and the consumption of uninspected meat, since neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. Ordinance 87–72 is underinclusive on its face, since it does not regulate nonreligious slaughter for food in like manner, and respondent has not explained why the commercial slaughter of "small numbers" of cattle and hogs does not implicate its professed desire to prevent cruelty to animals and preserve the public health. Pp. 542–546.

(d) The ordinances cannot withstand the strict scrutiny that is required upon their failure to meet the *Smith* standard. They are not narrowly tailored to accomplish the asserted governmental interests. All four are overbroad or underinclusive in substantial respects because the proffered objectives are not pursued with respect to analogous nonreligious conduct and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. Moreover, where, as here, government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the governmental interests given in justification of the restriction cannot be regarded as compelling. Pp. 546–547.

KENNEDY, J., delivered the opinion of the Court with respect to Parts I, III, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined, the opinion of the Court with respect to Part II–B, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, and THOMAS, JJ., joined, the opinion of the Court with respect to Parts II–A–1 and II–A–3, in which REHNQUIST, C. J., and STEVENS, SCALIA, and THOMAS, JJ., joined, and an opinion with respect to Part II–A–2, in which STEVENS, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., joined, *post*, p. 557. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 559. BLACKMUN, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 577.

Douglas Laycock argued the cause for petitioners. With him on the briefs were *Jeanne Baker, Steven R. Shapiro,* and *Jorge A. Duarte.*

Richard G. Garrett argued the cause for respondent. With him on the brief were *Stuart H. Singer* and *Steven M. Goldsmith.**

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–A–2.†

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Cf. *McDaniel* v. *Paty,* 435 U. S. 618 (1978); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953). Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari. 503 U. S. 935 (1992).

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*Briefs of *amici curiae* urging reversal were filed for Americans United for Separation of Church and State et al. by *Edward McGlynn Gaffney, Jr., Steven T. McFarland, Bradley P. Jacob,* and *Michael W. McConnell;* for the Council on Religious Freedom by *Lee Boothby, Robert W. Nixon, Walter E. Carson,* and *Rolland Truman;* and for the Rutherford Institute by *John W. Whitehead.*

Briefs of *amici curiae* urging affirmance were filed for the International Society for Animal Rights et al. by *Henry Mark Holzer;* for People for the Ethical Treatment of Animals et al. by *Gary L. Francione;* and for the Washington Humane Society by *E. Edward Bruce.*

Briefs of *amici curiae* were filed for the United States Catholic Conference by *Mark E. Chopko* and *John A. Liekweg;* for the Humane Society of the United States et al. by *Peter Buscemi, Maureen Beyers, Roger A. Kindler,* and *Eugene Underwood, Jr.;* for the Institute for Animal Rights Law et al. by *Henry Mark Holzer;* and for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin* and *Dennis Rapps.*

†THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join all but Part II–A–2 of this opinion. JUSTICE WHITE joins all but Part II–A of this opinion. JUSTICE SOUTER joins only Parts I, III, and IV of this opinion.

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas*, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments. 723 F. Supp. 1467, 1469–1470 (SD Fla. 1989); 13 Encyclopedia of Religion 66 (M. Eliade ed. 1987); 1 Encyclopedia of the American Religious Experience 183 (C. Lippy & P. Williams eds. 1988).

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas*. The basis of the Santeria religion is the nurture of a personal relation with the *orishas*, and one of the principal forms of devotion is an animal sacrifice. 13 Encyclopedia of Religion, *supra*, at 66. The sacrifice of animals as part of religious rituals has ancient roots. See generally 12 *id.*, at 554–556. Animal sacrifice is mentioned throughout the Old Testament, see 14 Encyclopaedia Judaica 600, 600–

605 (1971), and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem, see *id.*, at 605–612. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son. See C. Glassé, Concise Encyclopedia of Islam 178 (1989); 7 Encyclopedia of Religion, *supra*, at 456.

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals. See 723 F. Supp., at 1471–1472; 13 Encyclopedia of Religion, *supra*, at 66; M. González-Wippler, The Santería Experience 105 (1982).

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. See 723 F. Supp., at 1470; 13 Encyclopedia of Religion, *supra*, at 67; M. González-Wippler, Santería: The Religion 3–4 (1989). The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today. See 723 F. Supp., at 1470.

B

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of *Italero*, the second highest in the Santeria faith. In April 1987, the Church leased land in

the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church's goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the Church's efforts at obtaining the necessary licenses and permits were far from smooth, see 723 F. Supp., at 1477–1478, it appears that it received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987. The resolutions and ordinances passed at that and later meetings are set forth in the Appendix following this opinion.

A summary suffices here, beginning with the enactments passed at the June 9 meeting. First, the city council adopted Resolution 87–66, which noted the "concern" expressed by residents of the city "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Next, the council approved an emergency ordinance, Ordinance 87–40, which incorporated in full, except as to penalty, Florida's animal cruelty laws. Fla. Stat. ch. 828 (1987). Among other things, the incorporated state law subjected to criminal punishment "[w]hoever . . . unnecessarily or cruelly . . . kills any animal." § 828.12.

The city council desired to undertake further legislative action, but Florida law prohibited a municipality from enacting legislation relating to animal cruelty that conflicted with

state law. § 828.27(4). To obtain clarification, Hialeah's city attorney requested an opinion from the attorney general of Florida as to whether § 828.12 prohibited "a religious group from sacrificing an animal in a religious ritual or practice" and whether the city could enact ordinances "making religious animal sacrifice unlawful." The attorney general responded in mid-July. He concluded that the "ritual sacrifice of animals for purposes other than food consumption" was not a "necessary" killing and so was prohibited by § 828.12. Fla. Op. Atty. Gen. 87–56, Annual Report of the Atty. Gen. 146, 147, 149 (1988). The attorney general appeared to define "unnecessary" as "done without any useful motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful to the person killing the animal." *Id.*, at 149, n. 11. He advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict. *Id.*, at 151.

The city council responded at first with a hortatory enactment, Resolution 87–90, that noted its residents' "great concern regarding the possibility of public ritualistic animal sacrifices" and the state-law prohibition. The resolution declared the city policy "to oppose the ritual sacrifices of animals" within Hialeah and announced that any person or organization practicing animal sacrifice "will be prosecuted."

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87–52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance

contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." Declaring, moreover, that the city council "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," the city council adopted Ordinance 87–71. That ordinance defined "sacrifice" as had Ordinance 87–52, and then provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87–72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action pursuant to 42 U. S. C. § 1983 in the United States District Court for the Southern District of Florida. Named as defendants were the city of Hialeah and its mayor and members of its city council in their individual capacities. Alleging violations of petitioners' rights under, *inter alia,* the Free Exercise Clause, the complaint sought a declaratory judgment and injunctive and monetary relief. The District Court granted summary judgment to the individual defendants, finding that they had absolute immunity for their legislative acts and that the ordinances and resolutions adopted by the council did not constitute an official policy of harassment, as alleged by petitioners. 688 F. Supp. 1522 (SD Fla. 1988).

After a 9-day bench trial on the remaining claims, the District Court ruled for the city, finding no violation of petition-

ers' rights under the Free Exercise Clause. 723 F. Supp. 1467 (SD Fla. 1989). (The court rejected as well petitioners' other claims, which are not at issue here.) Although acknowledging that "the ordinances are not religiously neutral," *id.*, at 1476, and that the city's concern about animal sacrifice was "prompted" by the establishment of the Church in the city, *id.*, at 1479, the District Court concluded that the purpose of the ordinances was not to exclude the Church from the city but to end the practice of animal sacrifice, for whatever reason practiced, *id.*, at 1479, 1483. The court also found that the ordinances did not target religious conduct "on their face," though it noted that in any event "specifically regulating [religious] conduct" does not violate the First Amendment "when [the conduct] is deemed inconsistent with public health and welfare." *Id.*, at 1483–1484. Thus, the court concluded that, at most, the ordinances' effect on petitioners' religious conduct was "incidental to [their] secular purpose and effect." *Id.*, at 1484.

The District Court proceeded to determine whether the governmental interests underlying the ordinances were compelling and, if so, to balance the "governmental and religious interests." The court noted that "[t]his 'balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity.'" *Ibid.*, quoting *Grosz* v. *City of Miami Beach*, 721 F. 2d 729, 734 (CA11 1983), cert. denied, 469 U. S. 827 (1984). The court found four compelling interests. First, the court found that animal sacrifices present a substantial health risk, both to participants and the general public. According to the court, animals that are to be sacrificed are often kept in unsanitary conditions and are uninspected, and animal remains are found in public places. 723 F. Supp., at 1474–1475, 1485. Second, the court found emotional injury to children who witness the sacrifice of animals. *Id.*, at 1475–1476, 1485–1486. Third, the court found compelling the city's in-

terest in protecting animals from cruel and unnecessary killing. The court determined that the method of killing used in Santeria sacrifice was "unreliable and not humane, and that the animals, before being sacrificed, are often kept in conditions that produce a great deal of fear and stress in the animal." *Id.*, at 1472–1473, 1486. Fourth, the District Court found compelling the city's interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use. *Id.*, at 1486. This legal determination was not accompanied by factual findings.

Balancing the competing governmental and religious interests, the District Court concluded the compelling governmental interests "fully justify the absolute prohibition on ritual sacrifice" accomplished by the ordinances. *Id.*, at 1487. The court also concluded that an exception to the sacrifice prohibition for religious conduct would "'unduly interfere with fulfillment of the governmental interest'" because any more narrow restrictions—*e. g.*, regulation of disposal of animal carcasses—would be unenforceable as a result of the secret nature of the Santeria religion. *Id.*, at 1486–1487, and nn. 57–59. A religious exemption from the city's ordinances, concluded the court, would defeat the city's compelling interests in enforcing the prohibition. *Id.*, at 1487.

The Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph *per curiam* opinion. Judgt. order reported at 936 F. 2d 586 (1991). Choosing not to rely on the District Court's recitation of a compelling interest in promoting the welfare of children, the Court of Appeals stated simply that it concluded the ordinances were consistent with the Constitution. App. to Pet. for Cert. A2. It declined to address the effect of *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), decided after the District Court's opinion, because the District Court "employed an arguably stricter standard" than that applied in *Smith*. App. to Pet. for Cert. A2, n. 1.

II

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, see *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." (Emphasis added.) The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 714 (1981). Given the historical association between animal sacrifice and religious worship, see *supra*, at 524–525, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829, 834, n. 2 (1989). Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, *supra*. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance

that interest. These ordinances fail to satisfy the *Smith* requirements. We begin by discussing neutrality.

A

In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. See, *e. g.*, *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 248 (1990) (plurality opinion); *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 389 (1985); *Wallace* v. *Jaffree*, 472 U. S. 38, 56 (1985); *Epperson* v. *Arkansas*, 393 U. S. 97, 106–107 (1968); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 225 (1963); *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15–16 (1947). These cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. See, *e. g.*, *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961) (plurality opinion); *Fowler* v. *Rhode Island*, 345 U. S., at 69–70. Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen* v. *Roy*, 476 U. S. 693, 703 (1986) (opinion of Burger, C. J.). See J. Story, Commentaries on the Constitution of the United States §§ 991–992 (abridged ed. 1833) (reprint 1987); T. Cooley, Constitutional Limitations 467 (1868) (reprint 1972); *McGowan* v. *Maryland*, 366 U. S. 420, 464, and n. 2 (1961) (opinion of Frankfurter, J.); *Douglas* v. *Jeannette*, 319 U. S. 157, 179 (1943) (Jackson, J., concurring in re-

sult); *Davis* v. *Beason*, 133 U. S. 333, 342 (1890). These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel* v. *Paty*, 435 U. S. 618 (1978), for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it "impose[d] special disabilities on the basis of . . . religious status," *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 877. On the same principle, in *Fowler* v. *Rhode Island*, *supra*, we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service. See also *Niemotko* v. *Maryland*, 340 U. S. 268, 272–273 (1951). Cf. *Larson* v. *Valente*, 456 U. S. 228 (1982) (state statute that treated some religious denominations more favorably than others violated the Establishment Clause).

1

Although a law targeting religious beliefs as such is never permissible, *McDaniel* v. *Paty*, *supra*, at 626 (plurality opinion); *Cantwell* v. *Connecticut*, *supra*, at 303–304, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, *supra*, at 878–879; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words

"sacrifice" and "ritual," words with strong religious connotations. Brief for Petitioners 16–17. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings. See Webster's Third New International Dictionary 1961, 1996 (1971). See also 12 Encyclopedia of Religion, at 556 ("[T]he word *sacrifice* ultimately became very much a secular term in common usage"). The ordinances, furthermore, define "sacrifice" in secular terms, without referring to religious practices.

We reject the contention advanced by the city, see Brief for Respondent 15, that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette* v. *United States*, 401 U. S. 437, 452 (1971), and "covert suppression of particular religious beliefs," *Bowen* v. *Roy*, *supra*, at 703 (opinion of Burger, C. J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 696 (1970) (Harlan, J., concurring).

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words "sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria.

Resolution 87–66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. *McGowan* v. *Maryland*, 366 U. S., at 442. See, *e. g.*, *Reynolds* v. *United States*, 98 U. S. 145 (1879); *Davis* v. *Beason*, 133 U. S. 333 (1890). See also Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1319 (1970). The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander," *Walz* v. *Tax Comm'n of New York City*, *supra*, at 696 (Harlan, J., concurring), an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87–40, 87–52, and 87–71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87–71. It prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the

primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter, see 723 F. Supp., at 1480. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. Cf. *Larson* v. *Valente*, 456 U. S., at 244–246. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas*, not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87–52, which prohibits the "possess[ion], sacrifice, or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is—unlike most Santeria sacrifices—unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87–52; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if

the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

Ordinance 87–40 incorporates the Florida animal cruelty statute, Fla. Stat. § 828.12 (1987). Its prohibition is broad on its face, punishing "[w]hoever . . . unnecessarily . . . kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. Brief for Respondent 13–14. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a *per se* basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. See *id.*, at 22. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases decided under § 828.12 concludes that the use of live rabbits to train greyhounds is not unnecessary. See *Kiper* v. *State*, 310 So. 2d 42 (Fla. App.), cert. denied, 328 So. 2d 845 (Fla. 1975). Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct," *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 884. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Ibid.*, quoting *Bowen* v. *Roy*, 476 U. S., at 708 (opinion of Burger, C. J.). Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonre-

ligious reasons. Thus, religious practice is being singled out for discriminatory treatment. *Id.*, at 722, and n. 17 (STEVENS, J., concurring in part and concurring in result); *id.*, at 708 (opinion of Burger, C. J.); *United States* v. *Lee*, 455 U. S. 252, 264, n. 3 (1982) (STEVENS, J., concurring in judgment).

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits "gratuitous restrictions" on religious conduct, *McGowan* v. *Maryland*, 366 U. S., at 520 (opinion of Frankfurter, J.), seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice.* If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Tr. of Oral Arg. 45. See also *id.*, at 42, 48. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's

*Respondent advances the additional governmental interest in prohibiting the slaughter or sacrifice of animals in areas of the city not zoned for slaughterhouses, see Brief for Respondent 28–31, and the District Court found this interest to be compelling, see 723 F. Supp. 1467, 1486 (SD Fla. 1989). This interest cannot justify Ordinances 87–40, 87–52, and 87–71, for they apply to conduct without regard to where it occurs. Ordinance 87–72 does impose a locational restriction, but this asserted governmental interest is a mere restatement of the prohibition itself, not a justification for it. In our discussion, therefore, we put aside this asserted interest.

interest in the public health. The District Court accepted the argument that narrower regulation would be unenforceable because of the secrecy in the Santeria rituals and the lack of any central religious authority to require compliance with secular disposal regulations. See 723 F. Supp., at 1486–1487, and nn. 58–59. It is difficult to understand, however, how a prohibition of the sacrifices themselves, which occur in private, is enforceable if a ban on improper disposal, which occurs in public, is not. The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation. See, *e. g.*, *Schneider* v. *State,* 308 U. S. 147, 162 (1939).

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87–40, which incorporates Florida law in this regard, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument"—the method used in kosher slaughter—is approved as humane. See 7 U. S. C. § 1902(b); Fla. Stat. § 828.23(7)(b) (1991); Ordinance 87–40, § 1. The District Court found that, though Santeria sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. See 723 F. Supp., at 1472–1473. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

Ordinance 87–72—unlike the three other ordinances—does appear to apply to substantial nonreligious conduct and

not to be overbroad. For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87–72 was passed the same day as Ordinance 87–71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87–72, had as their object the suppression of religion. We need not decide whether Ordinance 87–72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.

2

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." *Walz* v. *Tax Comm'n of New York City*, 397 U. S., at 696 (concurring opinion). Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Relevant evidence includes, among other things, 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. *Id.*, at 267–268. These objective factors bear on the question of discriminatory object. *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279, n. 24 (1979).

That the ordinances were enacted "'because of,' not merely 'in spite of,'" their suppression of Santeria religious practice, *id.*, at 279, is revealed by the events preceding their enactment. Although respondent claimed at oral argument

that it had experienced significant problems resulting from the sacrifice of animals within the city before the announced opening of the Church, Tr. of Oral Arg. 27, 46, the city council made no attempt to address the supposed problem before its meeting in June 1987, just weeks after the Church announced plans to open. The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in pre-revolution Cuba "people were put in jail for practicing this religion," the audience applauded. Taped excerpts of Hialeah City Council Meeting, June 9, 1987.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?"

Various Hialeah city officials made comparable comments. The chaplain of the Hialeah Police Department told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons." He advised

the city council: "We need to be helping people and sharing with them the truth that is found in Jesus Christ." He concluded: "I would exhort you . . . not to permit this Church to exist." The city attorney commented that Resolution 87–66 indicated: "This community will not tolerate religious practices which are abhorrent to its citizens . . . ." *Ibid.* Similar comments were made by the deputy city attorney. This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation.

3

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

B

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 879–881. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment," *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 148 (1987) (STEVENS, J., concurring in judgment), and inequality results when a legislature decides that

the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence. See, *e. g., Cohen* v. *Cowles Media Co.*, 501 U. S. 663, 669–670 (1991); *University of Pennsylvania* v. *EEOC*, 493 U. S. 182, 201 (1990); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585 (1983); *Larson* v. *Valente*, 456 U. S., at 245–246; *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449 (1969). In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.

Respondent claims that Ordinances 87–40, 87–52, and 87–71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing—which occurs in Hialeah, see A. Khedouri & F. Khedouri, South Florida Inside Out 57 (1991)—is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87–40 sanctions

euthanasia of "stray, neglected, abandoned, or unwanted animals," Fla. Stat. § 828.058 (1987); destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value," § 828.073(4)(c)(2); the infliction of pain or suffering "in the interest of medical science," § 828.02; the placing of poison in one's yard or enclosure, § 828.08; and the use of a live animal "to pursue or take wildlife or to participate in any hunting," § 828.122(6)(b), and "to hunt wild hogs," § 828.122(6)(e).

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." Brief for Respondent 21. It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. *Ibid.* According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." *Id.*, at 22. These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals.

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat, see Brief for Respondent 32, citing 723 F. Supp., at 1474–1475, 1485. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, see 11 Record 566,

590–591, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, 723 F. Supp., at 1485, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and "members of his household and nonpaying guests and employees." Fla. Stat. § 585.88(1)(a) (1991). The asserted interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

Ordinance 87–72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." See Fla. Stat. § 828.24(3) (1991). Respondent has not explained why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." *Florida Star* v. *B. J. F.*, 491 U. S. 524, 542 (1989) (SCALIA, J., concurring in part and concurring in judgment). This

precise evil is what the requirement of general applicability is designed to prevent.

III

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. *McDaniel* v. *Paty*, 435 U. S., at 628, quoting *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972). The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] . . . down" but "really means what it says." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 888. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, see *supra*, at 538–540, 543–546, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances. See *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 232 (1987).

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible

measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star* v. *B. J. F.*, *supra*, at 541–542 (SCALIA, J., concurring in part and concurring in judgment) (citation omitted). See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 119–120 (1991). Cf. *Florida Star* v. *B. J. F.*, *supra*, at 540–541; *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 104–105 (1979); *id.*, at 110 (REHNQUIST, J., concurring in judgment). As we show above, see *supra*, at 543–546, the ordinances are underinclusive to a substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.

IV

The Free Exercise Clause 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. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.

APPENDIX TO OPINION OF THE COURT

City of Hialeah, Florida, Resolution No. 87–66, adopted June 9, 1987, provides:

> "WHEREAS, residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety, and
>
> "WHEREAS, the Florida Constitution, Article I, Declaration of Rights, Section 3, Religious Freedom, specifically states that religious freedom shall not justify practices inconsistent with public morals, peace or safety.
>
> "NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
>
> "1. The City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety."

City of Hialeah, Florida, Ordinance No. 87–40, adopted June 9, 1987, provides:

> "WHEREAS, the citizens of the City of Hialeah, Florida, have expressed great concern over the potential for animal sacrifices being conducted in the City of Hialeah; and
>
> "WHEREAS, Section 828.27, Florida Statutes, provides that 'nothing contained in this section shall prevent any county or municipality from enacting any ordinance relating to animal control or cruelty to animals which is identical to the provisions of this Chapter . . . except as to penalty.'
>
> "NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* The Mayor and City Council of the City of Hialeah, Florida, hereby adopt Florida Statute, Chapter 828—'Cruelty to Animals' (copy attached hereto and made a part hereof), in its entirety (relating to animal control or cruelty to animals), except as to penalty.

"*Section 2.* Repeal of Ordinances in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 3.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 4.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 5.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judge or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

"*Section 6.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

City of Hialeah Resolution No. 87–90, adopted August 11, 1987, provides:

"WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regard-

ing the possibility of public ritualistic animal sacrifices in the City of Hialeah, Florida; and

"WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifices is *[sic]* a violation of the Florida State Statute on Cruelty to Animals; and

"WHEREAS, the Attorney General further held that the sacrificial killing of animals other than for the primary purpose of food consumption is prohibited under state law; and

"WHEREAS, the City of Hialeah, Florida, has enacted an ordinance mirroring state law prohibiting cruelty to animals.

"NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* It is the policy of the Mayor and City Council of the City of Hialeah, Florida, to oppose the ritual sacrifices of animals within the City of Hialeah, FLorida *[sic]*. Any individual or organization that seeks to practice animal sacrifice in violation of state and local law will be prosecuted."

City of Hialeah, Florida, Ordinance No. 87–52, adopted September 8, 1987, provides:

"WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah, Florida; and

"WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifice, other than for the primary purpose of food consumption, is a violation of state law; and

"WHEREAS, the City of Hialeah, Florida, has enacted an ordinance (Ordinance No. 87–40), mirroring the state law prohibiting cruelty to animals.

"WHEREAS, the City of Hialeah, Florida, now wishes to specifically prohibit the possession of animals for slaughter or sacrifice within the City of Hialeah, Florida.

"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* Chapter 6 of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended by adding thereto two (2) new Sections 6–8 'Definitions' and 6–9 'Prohibition Against Possession Of Animals For Slaughter Or Sacrifice', which is to read as follows:

"Section 6–8. Definitions

"1. Animal—any living dumb creature.

"2. Sacrifice—to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

"3. Slaughter—the killing of animals for food.

"Section 6–9. Prohibition Against Possession of Animals for Slaughter Or Sacrifice.

"1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.

"2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.

"3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically

raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

"*Section 2.* Repeal of Ordinance in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 3.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 4.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 5.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgement or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

"*Section 6.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

City of Hialeah, Florida, Ordinance No. 87–71, adopted September 22, 1987, provides:

"WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals

within the city limits is contrary to the public health, safety, welfare and morals of the community; and

"WHEREAS, the City Council of the City of Hialeah, Florida, desires to have qualified societies or corporations organized under the laws of the State of Florida, to be authorized to investigate and prosecute any violation(s) of the ordinance herein after set forth, and for the registration of the agents of said societies.

"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

"*Section 2.* For the purpose of this ordinance, the word animal shall mean: any living dumb creature.

"*Section 3.* It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.

"*Section 4.* All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i. e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosection of any violation of this Ordinance.

"*Section 5.* Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.

"*Section 6.* Repeal of Ordinances in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 7.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 8.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 9.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this Ordinance.

"*Section 10.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

City of Hialeah, Florida, Ordinance No. 87–72, adopted September 22, 1987, provides:

"WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the slaughtering of animals on the premises other than those properly zoned as a slaughter house, is contrary to the public health, safety and welfare of the citizens of Hialeah, Florida.

"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* For the purpose of this Ordinance, the word slaughter shall mean: the killing of animals for food.

"*Section 2.* For the purpose of this Ordinance, the word animal shall mean: any living dumb creature.

"*Section 3.* It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.

"*Section 4.* All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i. e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosection of any violations of this Ordinance.

"*Section 5.* Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.

"*Section 6.* This Ordinance shall not apply to any person, group, or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.

"*Section 7.* Repeal of Ordinances in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 8.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 9.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 10.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

"*Section 11.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

The Court analyzes the "neutrality" and the "general applicability" of the Hialeah ordinances in separate sections (Parts II–A and II–B, respectively), and allocates various invalidating factors to one or the other of those sections. If it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court's. But I think it is not necessary, and would frankly acknowledge that the terms are not only "interrelated," *ante*, at 531, but substantially overlap.

The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law . . . prohibiting the free exercise" of religion within the meaning of the First Amendment. In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e. g.*, a law excluding members of a certain sect from public benefits, cf. *McDaniel* v. *Paty*, 435 U. S. 618 (1978)), see *Bowen* v. *Roy*, 476 U. S. 693, 703–704 (1986) (opinion of Burger, C. J.); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment, see *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953). But certainly a law that is not of general applicability (in the sense

I have described) can be considered "nonneutral"; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric ("neutrality," Part II–A, or "general applicability," Part II–B) each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II–A.

I do not join that section because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*, *i. e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body, see, *e. g.*, *Edwards* v. *Aguillard*, 482 U. S. 578, 636–639 (1987) (dissenting opinion), and this Court has a long tradition of refraining from such inquiries, see, *e. g.*, *Fletcher* v. *Peck*, 6 Cranch 87, 130–131 (1810) (Marshall, C. J.); *United States* v. *O'Brien*, 391 U. S. 367, 383–384 (1968).

Perhaps there are contexts in which determination of legislative motive *must* be undertaken. See, *e. g.*, *United States* v. *Lovett*, 328 U. S. 303 (1946). But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). See *Edwards* v. *Aguillard*, *supra*, at 639 (SCALIA, J., dissenting). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of

religion. Nor, in my view, does it matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.

JUSTICE SOUTER, concurring in part and concurring in the judgment.

This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal-sacrifice laws violate that principle, and I concur in that holding without reservation.

Because prohibiting religious exercise is the object of the laws at hand, this case does not present the more difficult issue addressed in our last free-exercise case, *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule in dicta, and despite my general agreement with the Court's opinion I do not join Part II, where the dicta appear, for I have doubts about whether the *Smith* rule merits adherence. I write separately to explain why the *Smith* rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should reexamine the rule *Smith* declared.

I

According to *Smith*, if prohibiting the exercise of religion results from enforcing a "neutral, generally applicable" law, the Free Exercise Clause has not been offended. *Id.*, at 878–880. I call this the *Smith* rule to distinguish it from the noncontroversial principle, also expressed in *Smith* though

established long before, that the Free Exercise Clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable. It is this noncontroversial principle, that the Free Exercise Clause requires neutrality and general applicability, that is at issue here. But before turning to the relationship of *Smith* to this case, it will help to get the terms in order, for the significance of the *Smith* rule is not only in its statement that the Free Exercise Clause requires no more than "neutrality" and "general applicability," but also in its adoption of a particular, narrow conception of free-exercise neutrality.

That the Free Exercise Clause contains a "requirement for governmental neutrality," *Wisconsin* v. *Yoder*, 406 U. S. 205, 220 (1972), is hardly a novel proposition; though the term does not appear in the First Amendment, our cases have used it as shorthand to describe, at least in part, what the Clause commands. See, *e. g.*, *Jimmy Swaggart Ministries* v. *Board of Equalization of Cal.*, 493 U. S. 378, 384 (1990); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 717 (1981); *Yoder*, *supra*, at 220; *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 792–793 (1973); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 222 (1963); see also *McDaniel* v. *Paty*, 435 U. S. 618, 627–629 (1978) (plurality opinion) (invalidating a nonneutral law without using the term). Nor is there anything unusual about the notion that the Free Exercise Clause requires general applicability, though the Court, until today, has not used exactly that term in stating a reason for invalidation. See *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); cf. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585 (1983); *Larson* v. *Valente*, 456 U. S. 228, 245–246 (1982).[1]

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[1] A law that is not generally applicable according to the Court's definition (one that "selective[ly] impose[s] burdens only on conduct motivated by religious belief," *ante*, at 543) would, it seems to me, fail almost any test for neutrality. Accordingly, the cases stating that the Free Exercise

While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing. Cf. *Lee* v. *Weisman*, 505 U. S. 577, 627 (1992) (SOUTER, J., concurring) (considering Establishment Clause neutrality). A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids. Cf. McConnell & Posner, An Economic Approach to Issues of Religious Freedom, 56 U. Chi. L. Rev. 1, 35 (1989) ("[A] regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities"). A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.[2]

It does not necessarily follow from that observation, of course, that the First Amendment requires an exemption from Prohibition; that depends on the meaning of neutrality as the Free Exercise Clause embraces it. The point here is the unremarkable one that our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement

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Clause requires neutrality are also fairly read for the proposition that the Clause requires general applicability.

[2] Our cases make clear, to look at this from a different perspective, that an exemption for sacramental wine use would not deprive Prohibition of neutrality. Rather, "[s]uch an accommodation [would] 'reflec[t] nothing more than the governmental obligation of neutrality in the face of religious differences.'" *Wisconsin* v. *Yoder*, 406 U. S. 205, 235, n. 22 (1972) (quoting *Sherbert* v. *Verner*, 374 U. S. 398, 409 (1963)); see also *Lee* v. *Weisman*, 505 U. S. 577, 627 (1992) (SOUTER, J., concurring). The prohibition law in place earlier this century did in fact exempt "wine for sacramental purposes." National Prohibition Act, Title II, § 3, 41 Stat. 308.

would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws. See generally Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990). If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.[3]

Though *Smith* used the term "neutrality" without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose "object" is to prohibit religious exercise and those that prohibit religious exercise as an "incidental effect," *Smith* placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, *Smith* would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application. 494 U. S., at 878. The four Justices who rejected the *Smith* rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality. The enforcement of a law "neutral on its face," they said, may "nonetheless offend [the Free Exercise Clause's] requirement

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[3] One might further distinguish between formal neutrality and facial neutrality. While facial neutrality would permit discovery of a law's object or purpose only by analysis of the law's words, structure, and operation, formal neutrality would permit enquiry also into the intentions of those who enacted the law. Compare *ante*, at 540–542 (opinion of KENNEDY, J., joined by STEVENS, J.) with *ante*, p. 557 (opinion of SCALIA, J., joined by REHNQUIST, C. J.). For present purposes, the distinction between formal and facial neutrality is less important than the distinction between those conceptions of neutrality and substantive neutrality.

for government neutrality if it unduly burdens the free exercise of religion." *Id.*, at 896 (opinion of O'CONNOR, J., joined by Brennan, Marshall, and BLACKMUN, JJ.) (internal quotation marks and citations omitted). The rule these Justices saw as flowing from free-exercise neutrality, in contrast to the *Smith* rule, "requir[es] the government to justify *any* substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Id.*, at 894 (emphasis added).

The proposition for which the *Smith* rule stands, then, is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause. That proposition is not at issue in this case, however, for Hialeah's animal-sacrifice ordinances are not neutral under any definition, any more than they are generally applicable. This case, rather, involves the noncontroversial principle repeated in *Smith*, that formal neutrality and general applicability are necessary conditions for free-exercise constitutionality. It is only "this fundamental nonpersecution principle of the First Amendment [that is] implicated here," *ante*, at 523, and it is to that principle that the Court adverts when it holds that Hialeah's ordinances "fail to satisfy the *Smith* requirements," *ante*, at 532. In applying that principle the Court does not tread on troublesome ground.

In considering, for example, whether Hialeah's animal-sacrifice laws violate free-exercise neutrality, the Court rightly observes that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *ibid.*, and correctly finds Hialeah's laws to fail those standards. The question whether the protections of the Free Exercise Clause also pertain if the law at issue, though nondiscriminatory in its object, has the effect nonetheless of placing a burden on religious exercise is not before the Court

today, and the Court's intimations on the matter are therefore dicta.

The Court also rightly finds Hialeah's laws to fail the test of general applicability, and as the Court "need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights," *ante*, at 543, it need not discuss the rules that apply to prohibitions found to be generally applicable. The question whether "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability," *Yoder*, 406 U. S., at 220, is not before the Court in this case, and, again, suggestions on that score are dicta.

II

In being so readily susceptible to resolution by applying the Free Exercise Clause's "fundamental nonpersecution principle," *ante*, at 523, this is far from a representative free-exercise case. While, as the Court observes, the Hialeah City Council has provided a rare example of a law actually aimed at suppressing religious exercise, *ante*, at 523–524, *Smith* was typical of our free-exercise cases, involving as it did a formally neutral, generally applicable law. The rule *Smith* announced, however, was decidedly untypical of the cases involving the same type of law. Because *Smith* left those prior cases standing, we are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed, and that may legitimately be addressed, by reexamining the *Smith* rule in the next case that would turn upon its application.

A

In developing standards to judge the enforceability of formally neutral, generally applicable laws against the mandates of the Free Exercise Clause, the Court has addressed

the concepts of neutrality and general applicability by indicating, in language hard to read as not foreclosing the *Smith* rule, that the Free Exercise Clause embraces more than mere formal neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality:

> "In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'" *Thomas*, 450 U. S., at 717 (quoting *Yoder*, *supra*, at 220).
>
> "[T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." 450 U. S., at 717.

Not long before the *Smith* decision, indeed, the Court specifically rejected the argument that "neutral and uniform" requirements for governmental benefits need satisfy only a reasonableness standard, in part because "[s]uch a test has no basis in precedent." *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 141 (1987) (internal quotation marks omitted). Rather, we have said, "[o]ur cases have established that '[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" *Swaggart Ministries*, 493 U. S., at 384–385 (quoting *Hernandez* v. *Commissioner*, 490 U. S. 680, 699 (1989)).

Thus we have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious ex-

ercise: "'only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.'" *McDaniel* v. *Paty*, 435 U. S., at 628 (plurality opinion) (quoting *Yoder*, *supra*, at 215). Compare *McDaniel*, *supra*, at 628–629 (plurality opinion) (applying that test to a law aimed at religious conduct) with *Yoder*, *supra*, at 215–229 (applying that test to a formally neutral, general law). Other cases in which the Court has applied heightened scrutiny to the enforcement of formally neutral, generally applicable laws that burden religious exercise include *Hernandez* v. *Commissioner*, *supra*, at 699; *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829, 835 (1989); *Hobbie* v. *Unemployment Appeals Comm'n*, *supra*, at 141; *Bob Jones Univ.* v. *United States*, 461 U. S. 574, 604 (1983); *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982); *Thomas*, *supra*, at 718; *Sherbert* v. *Verner*, 374 U. S. 398, 403 (1963); and *Cantwell* v. *Connecticut*, 310 U. S. 296, 304–307 (1940).

Though *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, see 494 U. S., at 881–885, I am not persuaded. *Wisconsin* v. *Yoder*, and *Cantwell* v. *Connecticut*, according to *Smith*, were not true free-exercise cases but "hybrid[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Smith*, *supra*, at 881, 882. Neither opinion, however, leaves any doubt that "fundamental claims of religious freedom [were] at stake." *Yoder*, *supra*, at 221; see also *Cantwell*, *supra*, at 303–307.[4]

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[4] *Yoder*, which involved a challenge by Amish parents to the enforcement against them of a compulsory school attendance law, mentioned the parental rights recognized in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), as *Smith* pointed out. See *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 881, n. 1 (citing *Yoder*, 406 U. S., at 233). But *Yoder* did so only to distinguish *Pierce*, which involved a

And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Smith sought to confine the remaining free-exercise exemption victories, which involved unemployment compensa-

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substantive due process challenge to a compulsory school attendance law and which required merely a showing of "'reasonable[ness].'" 406 U. S., at 233 (quoting *Pierce, supra*, at 535). Where parents make a "free exercise claim," the *Yoder* Court said, the *Pierce* reasonableness test is inapplicable and the State's action must be measured by a stricter test, the test developed under the Free Exercise Clause and discussed at length earlier in the opinion. See 406 U. S., at 233; *id.*, at 213–229. Quickly after the reference to parental rights, the *Yoder* opinion makes clear that the case involves "the central values underlying the Religion Clauses." *Id.*, at 234. The Yoders raised only a free-exercise defense to their prosecution under the school-attendance law, *id.*, at 209, and n. 4; certiorari was granted only on the free-exercise issue, *id.*, at 207; and the Court plainly understood the case to involve "conduct protected by the Free Exercise Clause" even against enforcement of a "regulatio[n] of general applicability," *id.*, at 220.

As for *Cantwell*, *Smith* pointed out that the case explicitly mentions freedom of speech. See 494 U. S., at 881, n. 1 (citing *Cantwell* v. *Connecticut*, 310 U. S., at 307). But the quote to which *Smith* refers occurs in a portion of the *Cantwell* opinion (titled: "*[s]econd,*" and dealing with a breach-of-peace conviction for playing phonograph records, see 310 U. S., at 307) that discusses an entirely different issue from the section of *Cantwell* that *Smith* cites as involving a "neutral, generally applicable law" (titled: "*[f]irst,*" and dealing with a licensing system for solicitations, see *Cantwell, supra*, at 303–307). See *Smith, supra*, at 881.

tion systems, see *Frazee, supra; Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136 (1987); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); and *Sherbert, supra,* as "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U. S., at 884. But prior to *Smith* the Court had already refused to accept that explanation of the unemployment compensation cases. See *Hobbie, supra,* at 142, n. 7; *Bowen* v. *Roy,* 476 U. S. 693, 715–716 (1986) (opinion of BLACKMUN, J.); *id.*, at 727–732 (opinion of O'CONNOR, J., joined by Brennan and Marshall, JJ.); *id.*, at 733 (WHITE, J., dissenting). And, again, the distinction fails to exclude *Smith:* "If *Smith* is viewed as an unemployment compensation case, the distinction is obviously spurious. If *Smith* is viewed as a hypothetical criminal prosecution for peyote use, there would be an individual governmental assessment of the defendants' motives and actions in the form of a criminal trial." McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1124 (1990). *Smith* also distinguished the unemployment compensation cases on the ground that they did not involve "an across-the-board criminal prohibition on a particular form of conduct." 494 U. S., at 884. But even Chief Justice Burger's plurality opinion in *Bowen* v. *Roy,* on which *Smith* drew for its analysis of the unemployment compensation cases, would have applied its reasonableness test only to "denial of government benefits" and not to "governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons," *Bowen* v. *Roy, supra,* at 706 (opinion of Burger, C. J., joined by Powell and REHNQUIST, JJ.); to the latter category of governmental action, it would have applied the test employed in *Yoder,* which involved an across-the-board criminal prohibition and which Chief Justice Burger's opinion treated as an ordinary free-

exercise case. See *Bowen* v. *Roy*, 476 U. S., at 706–707; *id.*, at 705, n. 15; *Yoder*, 406 U. S., at 218; see also *McDaniel* v. *Paty*, 435 U. S., at 628, n. 8 (noting cases in which courts considered claims for exemptions from general criminal prohibitions, cases the Court thought were "illustrative of the general nature of free-exercise protections and the delicate balancing required by our decisions in [*Sherbert* and *Yoder*,] when an important state interest is shown").

As for the cases on which *Smith* primarily relied as establishing the rule it embraced, *Reynolds* v. *United States*, 98 U. S. 145 (1879), and *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940), see *Smith*, *supra*, at 879, their subsequent treatment by the Court would seem to require rejection of the *Smith* rule. *Reynolds*, which in upholding the polygamy conviction of a Mormon stressed the evils it saw as associated with polygamy, see 98 U. S., at 166 ("polygamy leads to the patriarchal principle, and . . . fetters the people in stationary despotism"); *id.*, at 165, 168, has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct "pose[s] some substantial threat to public safety, peace or order." *Sherbert* v. *Verner*, 374 U. S., at 403; see also *United States* v. *Lee*, 455 U. S., at 257–258; *Bob Jones University*, 461 U. S., at 603; *Yoder*, *supra*, at 230. And *Gobitis*, after three Justices who originally joined the opinion renounced it for disregarding the government's constitutional obligation "to accommodate itself to the religious views of minorities," *Jones* v. *Opelika*, 316 U. S. 584, 624 (1942) (opinion of Black, Douglas, and Murphy, JJ.), was explicitly overruled in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943); see also *id.*, at 643–644 (Black and Douglas, JJ., concurring).

Since holding in 1940 that the Free Exercise Clause applies to the States, see *Cantwell* v. *Connecticut*, 310 U. S. 296, the Court repeatedly has stated that the Clause sets strict limits on the government's power to burden religious exercise, whether it is a law's object to do so or its unantici-

pated effect. *Smith* responded to these statements by suggesting that the Court did not really mean what it said, detecting in at least the most recent opinions a lack of commitment to the compelling-interest test in the context of formally neutral laws. *Smith, supra,* at 884–885. But even if the Court's commitment were that palid, it would argue only for moderating the language of the test, not for eliminating constitutional scrutiny altogether. In any event, I would have trouble concluding that the Court has not meant what it has said in more than a dozen cases over several decades, particularly when in the same period it repeatedly applied the compelling-interest test to require exemptions, even in a case decided the year before *Smith.* See *Frazee* v. *Illinois Dept. of Employment Security,* 489 U. S. 829 (1989).[5] In sum, it seems to me difficult to escape the con-

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[5] Though *Smith* implied that the Court, in considering claims for exemptions from formally neutral, generally applicable laws, has applied a "wa-ter[ed] down" version of strict scrutiny, 494 U. S., at 888, that appraisal confuses the cases in which we purported to apply strict scrutiny with the cases in which we did not. We did not purport to apply strict scrutiny in several cases involving discrete categories of governmental action in which there are special reasons to defer to the judgment of the political branches, and the opinions in those cases said in no uncertain terms that traditional heightened scrutiny applies outside those categories. See *O'Lone* v. *Estate of Shabazz,* 482 U. S. 342, 349 (1987) ("[P]rison regulations . . . are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"); *Goldman* v. *Weinberger,* 475 U. S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); see also *Johnson* v. *Robison,* 415 U. S. 361, 385–386 (1974); *Gillette* v. *United States,* 401 U. S. 437, 462 (1971). We also did not purport to apply strict scrutiny in several cases in which the claimants failed to establish a constitutionally cognizable burden on religious exercise, and again the opinions in those cases left no doubt that heightened scrutiny applies to the enforcement of formally neutral, general laws that do burden free exercise. See *Jimmy Swaggart Ministries* v. *Board of Equalization of Cal.,* 493 U. S. 378, 384–385 (1990) ("Our cases have established that [t]he free exercise inquiry asks whether government

clusion that, whatever *Smith*'s virtues, they do not include a comfortable fit with settled law.

B

The *Smith* rule, in my view, may be reexamined consistently with principles of *stare decisis*. To begin with, the *Smith* rule was not subject to "full-dress argument" prior to its announcement. *Mapp* v. *Ohio*, 367 U. S. 643, 676–677 (1961) (Harlan, J., dissenting). The State of Oregon in *Smith* contended that its refusal to exempt religious peyote use survived the strict scrutiny required by "settled free exercise principles," inasmuch as the State had "a compelling interest in regulating" the practice of peyote use and could not "accommodate the religious practice without compromis-

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has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden") (internal quotation marks and citation omitted); *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to [the] scrutiny" employed in *Sherbert* v. *Verner*, 374 U. S. 398 (1963); see also *Braunfeld* v. *Brown*, 366 U. S. 599, 606–607 (1961) (plurality opinion). Among the cases in which we have purported to apply strict scrutiny, we have required free-exercise exemptions more often than we have denied them. Compare *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829 (1989); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136 (1987); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), with *Hernandez* v. *Commissioner*, 490 U. S. 680 (1989); *Bob Jones Univ.* v. *United States*, 461 U. S. 574 (1983); *United States* v. *Lee*, 455 U. S. 252 (1982). And of the three cases in which we found that denial of an exemption survived strict scrutiny (all tax cases), one involved the government's "fundamental, overriding interest in eradicating racial discrimination in education," *Bob Jones University, supra*, at 604; in a second the Court "doubt[ed] whether the alleged burden . . . [was] a substantial one," *Hernandez, supra*, at 699; and the Court seemed to be of the same view in the third, see *Lee, supra*, at 261, n. 12. These cases, I think, provide slim grounds for concluding that the Court has not been true to its word.

ing its interest." Brief for Petitioners in *Smith*, O. T. 1989, No. 88–1213, p. 5; see also *id.*, at 5–36; Reply Brief for Petitioners in *Smith*, pp. 6–20. Respondents joined issue on the outcome of strict scrutiny on the facts before the Court, see Brief for Respondents in *Smith*, pp. 14–41, and neither party squarely addressed the proposition the Court was to embrace, that the Free Exercise Clause was irrelevant to the dispute. Sound judicial decisionmaking requires "both a vigorous prosecution and a vigorous defense" of the issues in dispute, *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 419 (1978), and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument. Cf. *Ladner* v. *United States*, 358 U. S. 169, 173 (1958) (declining to address "an important and complex" issue concerning the scope of collateral attack upon criminal sentences because it had received "only meagre argument" from the parties, and the Court thought it "should have the benefit of a full argument before dealing with the question").

The *Smith* rule's vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in that case. JUSTICE O'CONNOR reached the same result as the majority by applying, as the parties had requested, "our established free exercise jurisprudence," 494 U. S., at 903, and the majority never determined that the case could not be resolved on the narrower ground, going instead straight to the broader constitutional rule. But the Court's better practice, one supported by the same principles of restraint that underlie the rule of *stare decisis*, is not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885)). While I am not suggesting that the *Smith* Court lacked the power to announce its rule, I think a rule of law unnecessary to the outcome of a case, especially one not put

into play by the parties, approaches without more the sort of "*dicta* . . . which may be followed if sufficiently persuasive but which are not controlling." *Humphrey's Executor* v. *United States*, 295 U. S. 602, 627 (1935); see also *Kastigar* v. *United States*, 406 U. S. 441, 454–455 (1972).

I do not, of course, mean to imply that a broad constitutional rule announced without full briefing and argument necessarily lacks precedential weight. Over time, such a decision may become "part of the tissue of the law," *Radovich* v. *National Football League*, 352 U. S. 445, 455 (1957) (Frankfurter, J., dissenting), and may be subject to reliance in a way that new and unexpected decisions are not. Cf. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992). *Smith*, however, is not such a case. By the same token, by pointing out *Smith*'s recent vintage I do not mean to suggest that novelty alone is enough to justify reconsideration. "*[S]tare decisis*," as Justice Frankfurter wrote, "is a principle of policy and not a mechanical formula," *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940), and the decision whether to adhere to a prior decision, particularly a constitutional decision, is a complex and difficult one that does not lend itself to resolution by application of simple, categorical rules, but that must account for a variety of often competing considerations.

The considerations of full briefing, necessity, and novelty thus do not exhaust the legitimate reasons for reexamining prior decisions, or even for reexamining the *Smith* rule. One important further consideration warrants mention here, however, because it demands the reexamination I have in mind. *Smith* presents not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow, for *Smith* refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared. *Smith*, indeed, announced its rule by relying squarely upon

the precedent of prior cases. See 494 U. S., at 878 ("Our decisions reveal that the . . . reading" of the Free Exercise Clause contained in the *Smith* rule "is the correct one"). Since that precedent is nonetheless at odds with the *Smith* rule, as I have discussed above, the result is an intolerable tension in free-exercise law which may be resolved, consistently with principles of *stare decisis*, in a case in which the tension is presented and its resolution pivotal.

While the tension on which I rely exists within the body of our extant case law, a rereading of that case law will not, of course, mark the limits of any enquiry directed to reexamining the *Smith* rule, which should be reviewed in light not only of the precedent on which it was rested but also of the text of the Free Exercise Clause and its origins. As for text, *Smith* did not assert that the plain language of the Free Exercise Clause compelled its rule, but only that the rule was "a permissible reading" of the Clause. *Ibid.* Suffice it to say that a respectable argument may be made that the pre-*Smith* law comes closer to fulfilling the language of the Free Exercise Clause than the rule *Smith* announced. "[T]he Free Exercise Clause . . . , by its terms, gives special protection to the exercise of religion," *Thomas*, 450 U. S., at 713, specifying an activity and then flatly protecting it against government prohibition. The Clause draws no distinction between laws whose object is to prohibit religious exercise and laws with that effect, on its face seemingly applying to both.

Nor did *Smith* consider the original meaning of the Free Exercise Clause, though overlooking the opportunity was no unique transgression. Save in a handful of passing remarks, the Court has not explored the history of the Clause since its early attempts in 1879 and 1890, see *Reynolds* v. *United States*, 98 U. S., at 162–166, and *Davis* v. *Beason*, 133 U. S. 333, 342 (1890), attempts that recent scholarship makes clear were incomplete. See generally McConnell, The Origins and Historical Understanding of Free Exercise of Religion,

103 Harv. L. Rev. 1409 (1990).[6] The curious absence of history from our free-exercise decisions creates a stark contrast with our cases under the Establishment Clause, where historical analysis has been so prominent.[7]

This is not the place to explore the history that a century of free-exercise opinions have overlooked, and it is enough to note that, when the opportunity to reexamine *Smith* presents itself, we may consider recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, *supra;* Durham, Religious Liberty and the Call of Conscience, 42 DePaul L. Rev. 71, 79–85 (1992); see also Office of Legal Policy, U. S. Dept. of Justice, Report to the Attorney General, Religious Liberty under the Free Exercise Clause 38–42 (1986) (predating *Smith*). There appears to be a strong argument from the

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[6] *Reynolds* denied the free-exercise claim of a Mormon convicted of polygamy, and *Davis* v. *Beason* upheld against a free-exercise challenge a law denying the right to vote or hold public office to members of organizations that practice or encourage polygamy. Exactly what the two cases took from the Free Exercise Clause's origins is unclear. The cases are open to the reading that the Clause sometimes protects religious conduct from enforcement of generally applicable laws, see *supra,* at 569 (citing cases); that the Clause never protects religious conduct from the enforcement of generally applicable laws, see *Smith,* 494 U. S., at 879; or that the Clause does not protect religious conduct at all, see *Yoder,* 406 U. S., at 247 (Douglas, J., dissenting in part); McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1488, and n. 404 (1990).

[7] See *Engel* v. *Vitale,* 370 U. S. 421, 425–436 (1962); *McGowan* v. *Maryland,* 366 U. S. 420, 431–443 (1961); *Everson* v. *Board of Ed. of Ewing,* 330 U. S. 1, 8–16 (1947); see also *Lee* v. *Weisman,* 505 U. S. 577, 612–616, 622–626 (1992) (SOUTER, J., concurring); *Wallace* v. *Jaffree,* 472 U. S. 38, 91–107 (1985) (REHNQUIST, J., dissenting); *School Dist. of Abington* v. *Schempp,* 374 U. S. 203, 232–239 (1963) (Brennan, J., concurring); *McGowan* v. *Maryland, supra,* at 459–495 (Frankfurter, J., concurring); *Everson, supra,* at 31–43 (Rutledge, J., dissenting).

Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State. If, as this scholarship suggests, the Free Exercise Clause's original "purpose [was] to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority," *School Dist. of Abington* v. *Schempp*, 374 U. S., at 223, then there would be powerful reason to interpret the Clause to accord with its natural reading, as applying to all laws prohibiting religious exercise in fact, not just those aimed at its prohibition, and to hold the neutrality needed to implement such a purpose to be the substantive neutrality of our pre-*Smith* cases, not the formal neutrality sufficient for constitutionality under *Smith*.[8]

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[8] The Court today observes that "historical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause." *Ante*, at 532 (internal quotation marks and citations omitted). That is no doubt true, and of course it supports the proposition for which it was summoned, that the Free Exercise Clause forbids religious persecution. But the Court's remark merits this observation: the fact that the Framers were concerned about victims of religious persecution by no means demonstrates that the Framers intended the Free Exercise Clause to forbid only persecution, the inference the *Smith* rule requires. On the contrary, the eradication of persecution would mean precious little to a member of a formerly persecuted sect who was nevertheless prevented from practicing his religion by the enforcement of "neutral, generally applicable" laws. If what drove the Framers was a desire to protect an activity they deemed special, and if "the [Framers] were well aware of potential conflicts between religious conviction and social duties," A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty 61 (1990), they may well have hoped to bar not only prohibitions of religious exercise fueled by the hostility of the majority, but prohibitions flowing from the indifference or ignorance of the majority as well.

The scholarship on the original understanding of the Free Exercise Clause is, to be sure, not uniform. See, *e. g.*, Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992); Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L. Rev. 245 (1991). And there are differences of opinion as to the weight appropriately accorded original meaning. But whether or not one considers the original designs of the Clause binding, the interpretive significance of those designs surely ranks in the hierarchy of issues to be explored in resolving the tension inherent in free-exercise law as it stands today.

III

The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the nonadherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly decided without resolving the existing tension, which remains for another day when it may be squarely faced.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

The Court holds today that the city of Hialeah violated the First and Fourteenth Amendments when it passed a set of restrictive ordinances explicitly directed at petitioners' religious practice. With this holding I agree. I write separately to emphasize that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular reli-

gion) for disfavored treatment, as is done in this case. In my view, a statute that burdens the free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 907 (1990) (dissenting opinion). The Court, however, applies a different test. It applies the test announced in *Smith*, under which "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Ante*, at 531. I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle. See 494 U. S., at 908–909. Thus, while I agree with the result the Court reaches in this case, I arrive at that result by a different route.

When the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by "showing that it is the least restrictive means of achieving some compelling state interest." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 718 (1981). See also *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972). A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal. In the latter circumstance, the broad scope of the statute is unnecessary to serve the interest, and the statute fails for that reason. In the former situation, the fact that allegedly harmful conduct falls outside the statute's scope belies a governmental assertion that it has genuinely pursued an interest "of the highest order." *Ibid.* If the State's goal is important enough to prohibit religiously motivated activity, it

will not and must not stop at religiously motivated activity. Cf. *Zablocki* v. *Redhail*, 434 U. S. 374, 390 (1978) (invalidating certain restrictions on marriage as "grossly underinclusive with respect to [their] purpose"); *Supreme Court of N. H.* v. *Piper*, 470 U. S. 274, 285, n. 19 (1985) (a rule excluding nonresidents from the bar of New Hampshire "is underinclusive . . . because it permits lawyers who move away from the State to retain their membership in the bar").

In this case, the ordinances at issue are both overinclusive and underinclusive in relation to the state interests they purportedly serve. They are overinclusive, as the majority correctly explains, because the "legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice." *Ante*, at 538. They are underinclusive as well, because "[d]espite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice." *Ante*, at 543. Moreover, the "ordinances are also underinclusive with regard to the city's interest in public health . . . ." *Ante*, at 544.

When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under *Sherbert* v. *Verner*, 374 U. S. 398, 402–403, 407 (1963) (holding that governmental regulation that imposes a burden upon religious practice must be narrowly tailored to advance a compelling state interest). This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest.

Thus, unlike the majority, I do not believe that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Ante*, at 546. In my view, regulation that targets religion in this way, *ipso facto*, fails strict scrutiny. It is for this reason

that a statute that explicitly restricts religious practices violates the First Amendment. Otherwise, however, "[t]he First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Smith*, 494 U. S., at 894 (opinion concurring in judgment).

It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. See *ibid.* Because respondent here does single out religion in this way, the present case is an easy one to decide.

A harder case would be presented if petitioners were requesting an exemption from a generally applicable anti-cruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment. The number of organizations that have filed *amicus* briefs on behalf of this interest,* however, demonstrates that it is not a concern to be treated lightly.

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*See Brief for Washington Humane Society in support of Respondent; Brief for People for the Ethical Treatment of Animals, New Jersey Animal Rights Alliance, and Foundation for Animal Rights Advocacy in support of Respondent; Brief for Humane Society of the United States, American Humane Association, American Society for the Prevention of Cruelty to Animals, Animal Legal Defense Fund, Inc., and Massachusetts Society for the Prevention of Cruelty to Animals in support of Respondent; Brief for the International Society for Animal Rights, Citizens for Animals, Farm Animal Reform Movement, In Defense of Animals, Performing Animal Welfare Society, and Student Action Corps for Animals in support of Respondent; and Brief for the Institute for Animal Rights Law, American Fund for Alternatives to Animal Research, Farm Sanctuary, Jews for Animal Rights, United Animal Nations, and United Poultry Concerns in support of Respondent.

mental subdivisions. Those matters, as well as the character, extent and duration of tax exemptions for the Indians, are questions of policy for the consideration of Congress, not the courts. *Board of Commissioners* v. *Seber, supra.* Our inquiry is not with what Congress might or should have done, but with what it has done. That inquiry can be answered here only by holding that the restricted funds in these estates, as well as the lands which the Court holds immune, were not subject to Oklahoma's estate tax.

The CHIEF JUSTICE, MR. JUSTICE REED and MR. JUSTICE FRANKFURTER join in this dissent.

WEST VIRGINIA STATE BOARD OF EDUCATION ET AL. *v.* BARNETTE ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

No. 591. Argued March 11, 1943.—Decided June 14, 1943.

1. State action against which the Fourteenth Amendment protects includes action by a state board of education. P. 637.
2. The action of a State in making it compulsory for children in the public schools to salute the flag and pledge allegiance—by extending the right arm, palm upward, and declaring, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all"—violates the First and Fourteenth Amendments. P. 642.

   So *held* as applied to children who were expelled for refusal to comply, and whose absence thereby became "unlawful," subjecting them and their parents or guardians to punishment.
3. That those who refused compliance did so on religious grounds does not control the decision of this question; and it is unnecessary to inquire into the sincerity of their views. P. 634.
4. Under the Federal Constitution, compulsion as here employed is not a permissible means of achieving "national unity." P. 640.

5. *Minersville School Dist.* v. *Gobitis,* 310 U. S. 586, overruled; *Hamilton* v. *Regents,* 293 U. S. 245, distinguished. Pp. 642, 632.
47 F. Supp. 251, affirmed.

APPEAL from a decree of a District Court of three judges enjoining the enforcement of a regulation of the West Virginia State Board of Education requiring children in the public schools to salute the American flag.

Mr. W. Holt Wooddell, Assistant Attorney General of West Virginia, with whom *Mr. Ira J. Partlow* was on the brief, for appellants.

Mr. Hayden C. Covington for appellees.

Briefs of *amici curiae* were filed on behalf of the Committee on the Bill of Rights, of the American Bar Association, consisting of *Messrs. Douglas Arant, Julius Birge, William D. Campbell, Zechariah Chafee, Jr., L. Stanley Ford, Abe Fortas, George I. Haight, H. Austin Hauxhurst, Monte M. Lemann, Alvin Richards, Earl F. Morris, Burton W. Musser,* and *Basil O'Connor;* and by *Messrs. Osmond K. Fraenkel, Arthur Garfield Hays,* and *Howard B. Lee,* on behalf of the American Civil Liberties Union,—urging affirmance; and by *Mr. Ralph B. Gregg,* on behalf of the American Legion, urging reversal.

MR. JUSTICE JACKSON delivered the opinion of the Court.

Following the decision by this Court on June 3, 1940, in *Minersville School District* v. *Gobitis,* 310 U. S. 586, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appel-

lant Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study "similar to those required for the public schools." [1]

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly." [2]

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[1] § 1734, West Virginia Code (1941 Supp.):

"In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the State of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools."

[2] The text is as follows:

"WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amend-

The resolution originally required the "commonly accepted salute to the Flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl

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ment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

"WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

"WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitution; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

"WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development

Scouts, the Red Cross, and the Federation of Women's Clubs.[3] Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses.[4] What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of

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in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

"Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'—now becomes a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute, honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

[3] The National Headquarters of the United States Flag Association takes the position that the extension of the right arm in this salute to the flag is not the Nazi-Fascist salute, "although quite similar to it. In the Pledge to the Flag the right arm is extended and raised, palm UPWARD, whereas the Nazis extend the arm practically *straight to the front* (the finger tips being about even with the eyes), *palm* DOWNWARD, and the Fascists do the same except they raise the arm slightly higher." James A. Moss, The Flag of the United States: Its History and Symbolism (1914) 108.

[4] They have offered in lieu of participating in the flag salute ceremony "periodically and publicly" to give the following pledge:

"I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.

"I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.

"I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible."

America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" [5] and may be proceeded against as a delinquent.[6] His parents or guardians are liable to prosecution,[7] and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.[8]

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

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[5] § 1851 (1), West Virginia Code (1941 Supp.):

"If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

[6] § 4904 (4), West Virginia Code (1941 Supp.).

[7] See Note 5, *supra*.

[8] §§ 1847, 1851, West Virginia Code (1941 Supp.).

Children of this faith have been expelled from school and are threatened with exclusion for no other cause. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.

The Board of Education moved to dismiss the complaint setting forth these facts and alleging that the law and regulations are an unconstitutional denial of religious freedom, and of freedom of speech, and are invalid under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution. The cause was submitted on the pleadings to a District Court of three judges. It restrained enforcement as to the plaintiffs and those of that class. The Board of Education brought the case here by direct appeal.[9]

This case calls upon us to reconsider a precedent decision, as the Court throughout its history often has been required to do.[10] Before turning to the *Gobitis* case, however, it is desirable to notice certain characteristics by which this controversy is distinguished.

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce

[9] § 266 of the Judicial Code, 28 U. S. C. § 380.

[10] See authorities cited in *Helvering* v. *Griffiths*, 318 U. S. 371, 401, note 52.

attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." 310 U. S. at 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected [11] route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.[12] This issue is not prejudiced by

[11] See the nation-wide survey of the study of American history conducted by the New York Times, the results of which are published in the issue of June 21, 1942, and are there summarized on p. 1, col. 1, as follows:

"82 per cent of the institutions of higher learning in the United States do not require the study of United States history for the undergraduate degree. Eighteen per cent of the colleges and universities require such history courses before a degree is awarded. It was found that many students complete their four years in college without taking any history courses dealing with this country.

"Seventy-two per cent of the colleges and universities do not require United States history for admission, while 28 per cent require it. As a result, the survey revealed, many students go through high school, college and then to the professional or graduate institution without having explored courses in the history of their country.

"Less than 10 per cent of the total undergraduate body was enrolled in United States history classes during the Spring semester just ended. Only 8 per cent of the freshman class took courses in United States history, although 30 per cent was enrolled in European or world history courses."

[12] The Resolution of the Board of Education did not adopt the flag salute because it was claimed to have educational value. It seems to have been concerned with promotion of national unity (see footnote

the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton* v. *Regents*, 293 U. S. 245. In the present case attendance is not optional. That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens.

There is no doubt that, in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee. A person gets from a

2), which justification is considered later in this opinion. No information as to its educational aspect is called to our attention except Olander, Children's Knowledge of the Flag Salute, 35 Journal of Educational Research 300, 305, which sets forth a study of the ability of a large and representative number of children to remember and state the meaning of the flag salute which they recited each day in school. His conclusion was that it revealed "a rather pathetic picture of our attempts to teach children not only the words but the meaning of our Flag Salute."

symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution. *Stromberg* v. *California,* 283 U. S. 359. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.[18]

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of com-

[18] Early Christians were frequently persecuted for their refusal to participate in ceremonies before the statue of the emperor or other symbol of imperial authority. The story of William Tell's sentence to shoot an apple off his son's head for refusal to salute a bailiff's hat is an ancient one. 21 Encyclopedia Britannica (14th ed.) 911–912. The Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority. Braithwaite, The Beginnings of Quakerism (1912) 200, 229–230, 232–233, 447, 451; Fox, Quakers Courageous (1941) 113.

pulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear and present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good, bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations.[14] If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question.

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views

[14] For example: Use of "Republic," if rendered to distinguish our government from a "democracy," or the words "one Nation," if intended to distinguish it from a "federation," open up old and bitter controversies in our political history; "liberty and justice for all," if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement.

hold such a compulsory rite to infringe constitutional liberty of the individual.[15] It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty.

The *Gobitis* decision, however, *assumed,* as did the argument in that case and in this, that power exists in the State to impose the flag salute discipline upon school children in general. The Court only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule.[16] The question which underlies the

[15] Cushman, Constitutional Law in 1939–40, 35 American Political Science Review 250, 271, observes: "All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public." For further criticism of the opinion in the *Gobitis* case by persons who do not share the faith of the Witnesses see: Powell, Conscience and the Constitution, in Democracy and National Unity (University of Chicago Press, 1941) 1; Wilkinson, Some Aspects of the Constitutional Guarantees of Civil Liberty, 11 Fordham Law Review 50; Fennell, The "Reconstructed Court" and Religious Freedom: The Gobitis Case in Retrospect, 19 New York University Law Quarterly Review 31; Green, Liberty under the Fourteenth Amendment, 27 Washington University Law Quarterly 497; 9 International Juridical Association Bulletin 1; 39 Michigan Law Review 149; 15 St. John's Law Review 95.

[16] The opinion says "That the flag-salute is an allowable portion of a school program *for those who do not invoke conscientious scruples* is *surely not debatable.* But for us to insist that, *though the ceremony may be required, exceptional immunity must be given to dissidents,* is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise." (Italics ours.) 310 U. S. at 599–600. And elsewhere the question under consideration was stated, "When does the constitutional guarantee *compel exemption* from doing what society thinks necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good?" (Italics ours.) *Id.* at 593. And again, ". . .

531559—44——44

flag salute controversy is whether such a ceremony so touching matters of opinion and political attitude may be imposed upon the individual by official authority under powers committed to any political organization under our Constitution. We examine rather than assume existence of this power and, against this broader definition of issues in this case, reëxamine specific grounds assigned for the *Gobitis* decision.

1. It was said that the flag-salute controversy confronted the Court with "the problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?' " and that the answer must be in favor of strength. *Minersville School District* v. *Gobitis*, *supra*, at 596.

We think these issues may be examined free of pressure or restraint growing out of such considerations.

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is

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whether school children, like the Gobitis children, must be *excused from conduct required of all the other children* in the promotion of national cohesion. . . ." (Italics ours.) *Id.* at 595.

doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

The subject now before us exemplifies this principle. Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction. If it is to impose any ideological discipline, however, each party or denomination must seek to control, or failing that, to weaken the influence of the educational system. Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise.

2. It was also considered in the *Gobitis* case that functions of educational officers in States, counties and school districts were such that to interfere with their authority "would in effect make us the school board for the country." *Id.* at 598.

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to ac-

count. The action of Congress in making flag observance voluntary [17] and respecting the conscience of the objector in a matter so vital as raising the Army [18] contrasts sharply with these local regulations in matters relatively trivial to the welfare of the nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution.

3. The *Gobitis* opinion reasoned that this is a field "where courts possess no marked and certainly no controlling competence," that it is committed to the legislatures as well as the courts to guard cherished liberties and that it is constitutionally appropriate to "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena," since all the "effective means of inducing political changes are left free." *Id.* at 597–598, 600.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

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[17] Section 7 of House Joint Resolution 359, approved December 22, 1942, 56 Stat. 1074, 36 U. S. C. (1942 Supp.) § 172, prescribes no penalties for nonconformity but provides:

"That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all,' be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress . . ."

[18] § 5 (a) of the Selective Training and Service Act of 1940, 50 U. S. C. (App.) § 307 (g).

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.

Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights occurs. True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century, is one to disturb self-confidence. These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervi-

sion over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

4. Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. *Id.* at 595. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity.

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism

and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[19]

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District* v. *Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is

Affirmed.

MR. JUSTICE ROBERTS and MR. JUSTICE REED adhere to the views expressed by the Court in *Minersville School*

[19] The Nation may raise armies and compel citizens to give military service. *Selective Draft Law Cases*, 245 U. S. 366. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life.

District v. *Gobitis,* 310 U. S. 586, and are of the opinion that the judgment below should be reversed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, concurring:

We are substantially in agreement with the opinion just read, but since we originally joined with the Court in the *Gobitis* case, it is appropriate that we make a brief statement of reasons for our change of view.

Reluctance to make the Federal Constitution a rigid bar against state regulation of conduct thought inimical to the public welfare was the controlling influence which moved us to consent to the *Gobitis* decision. Long reflection convinced us that although the principle is sound, its application in the particular case was wrong. *Jones* v. *Opelika,* 316 U. S. 584, 623. We believe that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments.

The statute requires the appellees to participate in a ceremony aimed at inculcating respect for the flag and for this country. The Jehovah's Witnesses, without any desire to show disrespect for either the flag or the country, interpret the Bible as commanding, at the risk of God's displeasure, that they not go through the form of a pledge of allegiance to any flag. The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment, rather than make the pledge.

No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave

and pressingly imminent dangers or which, without any general prohibition, merely regulate time, place or manner of religious activity. Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one, and in meeting it we cannot say that a failure, because of religious scruples, to assume a particular physical position and to repeat the words of a patriotic formula creates a grave danger to the nation. Such a statutory exaction is a form of test oath, and the test oath has always been abhorrent in the United States.

Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men.

Neither our domestic tranquillity in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think, their fears are groundless, time and reason are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution. As such, it is inconsistent with our Constitution's plan and purpose.

MR. JUSTICE MURPHY, concurring:

I agree with the opinion of the Court and join in it.

The complaint challenges an order of the State Board of Education which requires teachers and pupils to participate in the prescribed salute to the flag. For refusal to conform with the requirement, the State law prescribes ex-

pulsion. The offender is required by law to be treated as unlawfully absent from school and the parent or guardian is made liable to prosecution and punishment for such absence. Thus not only is the privilege of public education conditioned on compliance with the requirement, but noncompliance is virtually made unlawful. In effect compliance is compulsory and not optional. It is the claim of appellees that the regulation is invalid as a restriction on religious freedom and freedom of speech, secured to them against State infringement by the First and Fourteenth Amendments to the Constitution of the United States.

A reluctance to interfere with considered state action, the fact that the end sought is a desirable one, the emotion aroused by the flag as a symbol for which we have fought and are now fighting again,—all of these are understandable. But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except insofar as essential operations of government may require it for the preservation of an orderly society,—as in the case of compulsion to give evidence in court. Without wishing to disparage the purposes and intentions of those who hope to inculcate sentiments of loyalty and patriotism by requiring a declaration of allegiance as a feature of public education, or unduly belittle the benefits that may accrue therefrom, I am impelled to conclude that such a requirement is not essential to the maintenance of effective government and orderly society. To many it is deeply distasteful to join in a public chorus of affirmation of private belief. By some, in-

cluding the members of this sect, it is apparently regarded as incompatible with a primary religious obligation and therefore a restriction on religious freedom. Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the "severest contests in which I have ever been engaged." [1]

I am unable to agree that the benefits that may accrue to society from the compulsory flag salute are sufficiently definite and tangible to justify the invasion of freedom and privacy that is entailed or to compensate for a restraint on the freedom of the individual to be vocal or silent according to his conscience or personal inclination. The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: ". . . all attempts to influence [the mind] by temporal punishments, or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, . . ." Any spark of love for country which may be generated in a child or his associates by forcing him to make what is to him an empty gesture and recite words wrung from him contrary to his religious beliefs is overshadowed by the desirability of preserving freedom of conscience to the full. It is in that freedom and the example of persuasion, not in force and compulsion, that the real unity of America lies.

MR. JUSTICE FRANKFURTER, dissenting:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and

[1] See Jefferson, Autobiography, vol. 1, pp. 53–59.

action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government."

United States v. *Butler*, 297 U. S. 1, 79 (dissent). We have been told that generalities do not decide concrete cases. But the intensity with which a general principle is held may determine a particular issue, and whether we put first things first may decide a specific controversy.

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in *Hamilton* v. *Regents*, 293 U. S. 245. In neither situation is our function comparable to that of a legislature or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different rôles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be denied, that all the provisions of the first ten Amendments are "specific" prohibitions, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4. But each specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected, and the function of this

Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.

When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," *Missouri, K. & T. Ry. Co.* v. *May*, 194 U. S. 267, 270, he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and rôle of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

The framers of the federal Constitution might have chosen to assign an active share in the process of legislation to this Court. They had before them the well-known example of New York's Council of Revision, which had been functioning since 1777. After stating that "laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed," the state constitution made the judges of New York part of the legislative process by providing that "all bills which have passed the senate and assembly shall, before they become laws," be presented to a Council of which the judges constituted a majority, "for their revisal and consideration." Art. III, New York Constitution of 1777. Judges exercised this legislative function in New York

for nearly fifty years. See Art. I, § 12, New York Constitution of 1821. But the framers of the Constitution denied such legislative powers to the federal judiciary. They chose instead to insulate the judiciary from the legislative function. They did not grant to this Court supervision over legislation.

The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools.

We are not reviewing merely the action of a local school board. The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are in fact passing judgment on "the power of the State as a whole." *Rippey* v. *Texas,* 193 U. S. 504, 509; *Skiriotes* v. *Florida,* 313 U. S. 69, 79. Practically we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia. To suggest that we are here con-

cerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that law is void." It cannot modify or qualify, it cannot make exceptions to a general require-

531559—44——45

ment. And it strikes down not merely for a day. At least the finding of unconstitutionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"—something without which "a fair and enlightened system of justice would be impossible." *Palko* v. *Connecticut*, 302 U. S. 319, 325; *Hurtado* v. *California*, 110 U. S. 516, 530, 531. If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate. There have been many but unsuccessful proposals in the last sixty years to amend the Constitution to that end. See Sen. Doc. No. 91, 75th Cong., 1st Sess., pp. 248–51.

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.

What one can say with assurance is that the history out of which grew constitutional provisions for religious equal-

ity and the writings of the great exponents of religious freedom—Jefferson, Madison, John Adams, Benjamin Franklin—are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not in fact disguised assaults upon such dissident views. The great leaders of the American Revolution were determined to remove political support from every religious establishment. They put on an equality the different religious sects—Episcopalians, Presbyterians, Catholics, Baptists, Methodists, Quakers, Huguenots—which, as dissenters, had been under the heel of the various orthodoxies that prevailed in different colonies. So far as the state was concerned, there was to be neither orthodoxy nor heterodoxy. And so Jefferson and those who followed him wrote guaranties of religious freedom into our constitutions. Religious minorities as well as religious majorities were to be equal in the eyes of the political state. But Jefferson and the others also knew that minorities may disrupt society. It never would have occurred to them to write into the Constitution the subordination of the general civil authority of the state to sectarian scruples.

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Religious loyalties may be exercised without hindrance from the state, not the state may not exercise that which except by leave of religious loyalties is within the domain of temporal power. Otherwise each individual could set up his own censor against obedience to laws conscientiously deemed for the public good by those whose business it is to make laws.

The prohibition against any religious establishment by the government placed denominations on an equal foot-

ing—it assured freedom from support by the government to any mode of worship and the freedom of individuals to support any mode of worship. Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.

The essence of the religious freedom guaranteed by our Constitution is therefore this: no religion shall either receive the state's support or incur its hostility. Religion is outside the sphere of political government. This does not mean that all matters on which religious organizations or beliefs may pronounce are outside the sphere of government. Were this so, instead of the separation of church and state, there would be the subordination of the state on any matter deemed within the sovereignty of the religious conscience. Much that is the concern of temporal authority affects the spiritual interests of men. But it is not enough to strike down a non-discriminatory law that it may hurt or offend some dissident view. It would be too easy to cite numerous prohibitions and injunctions to which laws run counter if the variant interpretations of the Bible were made the tests of obedience to law. The validity of secular laws cannot be measured by their conformity to religious doctrines. It is only in a theocratic state that ecclesiastical doctrines measure legal right or wrong.

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many

claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, see *Jacobson* v. *Massachusetts*, 197 U. S. 11, food inspection regulations, see *Shapiro* v. *Lyle*, 30 F. 2d 971, the obligation to bear arms, see *Hamilton* v. *Regents*, 293 U. S. 245, 267, testimonial duties, see *Stansbury* v. *Marks*, 2 Dall. 213, compulsory medical treatment, see *People* v. *Vogelgesang*, 221 N. Y. 290, 116 N. E. 977—these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual con-

science may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may "exercise" it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.

In *Hamilton* v. *Regents*, 293 U. S. 245, this Court unanimously held that one attending a state-maintained university cannot refuse attendance on courses that offend his religious scruples. That decision is not overruled today, but is distinguished on the ground that attendance at the institution for higher education was voluntary and therefore a student could not refuse compliance with its conditions and yet take advantage of its opportunities. But West Virginia does not compel the attendance at its public schools of the children here concerned. West Virginia does not so compel, for it cannot. This Court denied the right of a state to require its children to attend public schools. *Pierce* v. *Society of Sisters*, 268 U. S. 510. As to its public schools, West Virginia imposes conditions which it deems necessary in the development of future citizens precisely as California deemed necessary the requirements that offended the student's conscience in the *Hamilton* case. The need for higher education and the duty of the state to provide it as part of a public educational system, are part of the democratic faith of most of our states. The right to secure such education in institutions not maintained by public funds is unquestioned.

But the practical opportunities for obtaining what is becoming in increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities. I find it impossible, so far as constitutional power is concerned, to differentiate what was sanctioned in the *Hamilton* case from what is nullified in this case. And for me it still remains to be explained why the grounds of Mr. Justice Cardozo's opinion in *Hamilton* v. *Regents, supra,* are not sufficient to sustain the flag salute requirement. Such a requirement, like the requirement in the *Hamilton* case, "is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war." 293 U. S. 245, 266. The religious worshiper, "if his liberties were to be thus extended, might refuse to contribute taxes . . . in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." *Id.,* at 268.

Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing but the state has no right to bring such schools "under a strict governmental control" or give "affirmative direction

concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks." *Farrington* v. *Tokushige*, 273 U. S. 284, 298. Why should not the state likewise have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?

When dealing with religious scruples we are dealing with an almost numberless variety of doctrines and beliefs entertained with equal sincerity by the particular groups for which they satisfy man's needs in his relation to the mysteries of the universe. There are in the United States more than 250 distinctive established religious denominations. In the State of Pennsylvania there are 120 of these, and in West Virginia as many as 65. But if religious scruples afford immunity from civic obedience to laws, they may be invoked by the religious beliefs of any individual even though he holds no membership in any sect or organized denomination. Certainly this Court cannot be called upon to determine what claims of conscience should be recognized and what should be rejected as satisfying the "religion" which the Constitution protects. That would indeed resurrect the very discriminatory treatment of religion which the Constitution sought forever to forbid. And so, when confronted with the task of considering the claims of immunity from obedience to a law dealing with civil affairs because of religious scruples, we cannot conceive religion more narrowly than in the terms in which Judge Augustus N. Hand recently characterized it:

"It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of rea-

son as a means of relating the individual to his fellowmen and to his universe. . . . [It] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse." *United States* v. *Kauten,* 133 F. 2d 703, 708.

Consider the controversial issue of compulsory Bible-reading in public schools. The educational policies of the states are in great conflict over this, and the state courts are divided in their decisions on the issue whether the requirement of Bible-reading offends constitutional provisions dealing with religious freedom. The requirement of Bible-reading has been justified by various state courts as an appropriate means of inculcating ethical precepts and familiarizing pupils with the most lasting expression of great English literature. Is this Court to overthrow such variant state educational policies by denying states the right to entertain such convictions in regard to their school systems, because of a belief that the King James version is in fact a sectarian text to which parents of the Catholic and Jewish faiths and of some Protestant persuasions may rightly object to having their children exposed? On the other hand the religious consciences of some parents may rebel at the absence of any Bible-reading in the schools. See *Washington ex rel. Clithero* v. *Showalter,* 284 U. S. 573. Or is this Court to enter the old controversy between science and religion by unduly defining the limits within which a state may experiment with its school curricula? The religious consciences of some parents may be offended by subjecting their children to the Biblical account of creation, while another state may offend parents by prohibiting a teaching of biology that contradicts such Biblical account. Compare *Scopes* v. *State,* 154 Tenn. 105, 289 S. W. 363. What of conscien-

tious objections to what is devoutly felt by parents to be the poisoning of impressionable minds of children by chauvinistic teaching of history? This is very far from a fanciful suggestion for in the belief of many thoughtful people nationalism is the seed-bed of war.

There are other issues in the offing which admonish us of the difficulties and complexities that confront states in the duty of administering their local school systems. All citizens are taxed for the support of public schools although this Court has denied the right of a state to compel all children to go to such schools and has recognized the right of parents to send children to privately maintained schools. Parents who are dissatisfied with the public schools thus carry a double educational burden. Children who go to public school enjoy in many states derivative advantages such as free textbooks, free lunch, and free transportation in going to and from school. What of the claims for equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools? What of the claim that if the right to send children to privately maintained schools is partly an exercise of religious conviction, to render effective this right it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?

These questions assume increasing importance in view of the steady growth of parochial schools both in number and in population. I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this

case with due regard for what went before and no less regard for what may come after. Is it really a fair construction of such a fundamental concept as the right freely to exercise one's religion that a state cannot choose to require all children who attend public school to make the same gesture of allegiance to the symbol of our national life because it may offend the conscience of some children, but that it may compel all children to attend public school to listen to the King James version although it may offend the consciences of their parents? And what of the larger issue of claiming immunity from obedience to a general civil regulation that has a reasonable relation to a public purpose within the general competence of the state? See *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535. Another member of the sect now before us insisted that in forbidding her two little girls, aged nine and twelve, to distribute pamphlets Oregon infringed her and their freedom of religion in that the children were engaged in "preaching the gospel of God's Kingdom." A procedural technicality led to the dismissal of the case, but the problem remains. *McSparran* v. *Portland,* 318 U. S. 768.

These questions are not lightly stirred. They touch the most delicate issues and their solution challenges the best wisdom of political and religious statesmen. But it presents awful possibilities to try to encase the solution of these problems within the rigid prohibitions of unconstitutionality.

We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any rea-

sonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

The right of West Virginia to utilize the flag salute as part of its educational process is denied because, so it is argued, it cannot be justified as a means of meeting a "clear and present danger" to national unity. In passing it deserves to be noted that the four cases which unani-

mously sustained the power of states to utilize such an educational measure arose and were all decided before the present World War. But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of "clear and present danger." To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about "clear and present danger" as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience, is to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted. Mr. Justice Holmes used the phrase "clear and present danger" in a case involving mere speech as a means by which alone to accomplish sedition in time of war. By that phrase he meant merely to indicate that, in view of the protection given to utterance by the First Amendment, in order that mere utterance may not be proscribed, "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States,* 249 U. S. 47, 52. The "substantive evils" about which he was speaking were inducement of insubordination in the military and naval forces of the United States and obstruction of enlistment while the country was at war. He was not enunciating a formal rule that there can be no restriction upon speech and, still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought "to our institutions or our government."

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs.

Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

I am fortified in my view of this case by the history of the flag salute controversy in this Court. Five times has the precise question now before us been adjudicated. Four times the Court unanimously found that the requirement of such a school exercise was not beyond the powers of the states. Indeed in the first three cases to come before the Court the constitutional claim now sustained was deemed so clearly unmeritorious that this Court dismissed the appeals for want of a substantial federal question. *Leoles* v. *Landers*, 302 U. S. 656; *Hering* v. *State Board of Education*, 303 U. S. 624; *Gabrielli* v. *Knickerbocker*, 306 U. S. 621. In the fourth case the judgment of the district court upholding the state law was summarily affirmed on the authority of the earlier cases. *Johnson* v. *Deerfield*, 306 U. S. 621. The fifth case, *Minersville District* v. *Gobitis*, 310 U. S. 586, was brought here because the decision of the Circuit Court of Appeals for the Third Circuit ran counter to our rulings. They were reaffirmed after full consideration, with one Justice dissenting.

What may be even more significant than this uniform recognition of state authority is the fact that every Jus-

tice—thirteen in all—who has hitherto participated in judging this matter has at one or more times found no constitutional infirmity in what is now condemned. Only the two Justices sitting for the first time on this matter have not heretofore found this legislation inoffensive to the "liberty" guaranteed by the Constitution. And among the Justices who sustained this measure were outstanding judicial leaders in the zealous enforcement of constitutional safeguards of civil liberties—men like Chief Justice Hughes, Mr. Justice Brandeis, and Mr. Justice Cardozo, to mention only those no longer on the Court.

One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before these Jehovah's Witnesses

cases (except for minor deviations subsequently retraced) has this Court overruled decisions so as to restrict the powers of democratic government. Always heretofore, it has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.

In view of this history it must be plain that what thirteen Justices found to be within the constitutional authority of a state, legislators can not be deemed unreasonable in enacting. Therefore, in denying to the states what heretofore has received such impressive judicial sanction, some other tests of unconstitutionality must surely be guiding the Court than the absence of a rational justification for the legislation. But I know of no other test which this Court is authorized to apply in nullifying legislation.

In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the "spirit of the Constitution." Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably

differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition. For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states. The attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. Moreover, it is to be borne in mind that in a question like this we are not passing on the proper distribution of political power as between the states and the central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government.

The whole Court is conscious that this case reaches ultimate questions of judicial power and its relation to our scheme of government. It is appropriate, therefore, to recall an utterance as wise as any that I know in analyzing what is really involved when the theory of this Court's function is put to the test of practice. The analysis is that of James Bradley Thayer:

". . . there has developed a vast and growing increase of judicial interference with legislation. This is a very differ-

ent state of things from what our fathers contemplated, a century and more ago, in framing the new system. Seldom, indeed, as they imagined, under our system, would this great, novel, tremendous power of the courts be exerted,—would this sacred ark of the covenant be taken from within the veil. Marshall himself expressed truly one aspect of the matter, when he said in one of the later years of his life: 'No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of legislative acts. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other grounds, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.' And again, a little earlier than this, he laid down the one true rule of duty for the courts. When he went to Philadelphia at the end of September, in 1831, on that painful errand of which I have spoken, in answering a cordial tribute from the bar of that city he remarked that if he might be permitted to claim for himself and his associates any part of the kind things they had said, it would be this, that they had 'never sought to enlarge the judicial power beyond its proper bounds, nor feared to carry it to the fullest extent that duty required.'

"That is the safe twofold rule; nor is the first part of it any whit less important than the second; nay, more; today it is the part which most requires to be emphasized. For just here comes in a consideration of very great weight. Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence,—the power of the judiciary to disregard unconstitutional legislation,—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. If the decision in Munn *v.* Illinois and the 'Granger Cases,' twenty-five years ago, and in the 'Legal Tender Cases,' nearly thirty years

ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill-advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration through every part of the population of sound ideas and sentiments, from the rousing into activity of opposite elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience that came out of it all,—that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

"The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

"What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them—the office merely of deciding litigated cases; how large, therefore, is the duty intrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature—the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coördinate department of the government,

charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

"To set aside the acts of such a body, representing in its own field, which is the very highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can ever be other than that. And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people, by undertaking a function not its own. On the other hand, by adhering rigidly to its own duty, the court will help, as nothing else can, to fix the spot where responsibility lies, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, today, in dealing with the acts of their coördinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it. For that course—the true course of judicial duty always—will powerfully help to bring the people and their representatives to a sense of their own responsibility. There will still remain to the judiciary an ample field for the determinations of this remarkable jurisdiction, of which our American law has so much reason to be proud; a jurisdiction which has had some of its chief illustrations and its greatest triumphs, as in Marshall's time, so in ours, while the courts were refusing to exercise it." J. B. Thayer, John Marshall, (1901) 104–10.

Of course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focussing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Re-

liance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

INTERSTATE COMMERCE COMMISSION ET AL. v. INLAND WATERWAYS CORP. ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 175. Argued January 11, 12, 1943.—Decided June 14, 1943.

Proportional rates on reshipments from Chicago to eastern destinations of grain coming from distant points Northwest on through shipment with transit privileges and arriving at Chicago by rail or by lake steamer, became applicable by reason of tariff wordings to grain coming from points close to Chicago arriving by barge over the Illinois Waterways route which was established after the tariffs were adopted. The railroads filed tariff amendments which would deny to the ex-barge grain the privilege of moving eastward on the proportional rates, and remit it to the higher local rates which grain entering Chicago by truck or from local origins by rail was obliged to pay. *Held:*

1. That an order by the Interstate Commerce Commission in a proceeding under § 15 (7) of the Interstate Commerce Act, which relieved the proposed tariff amendments from suspension, as not "unlawful," but which did not prevent future adjustments on specific complaint of the rates on the ex-barge traffic, was a determination within the administrative competency of the Commission with which the District Court should not have interfered. P. 685.

2. Proportional rates differing from each other according to the origin of the commodity may be fixed lower than local rates and may apply to outbound movements after stopover in transit. P. 684.

3. Since the Commission refused to approve or prescribe the rates here in controversy, they stand only as carrier-made rates and are subject to possible recovery of reparations. P. 686.

4. To perpetuate the existing rate structure by sustaining the District Court's injunction would favor the ex-barge grain over grain

Freedom of Association Cases

Syllabus

BOY SCOUTS OF AMERICA ET AL. *v.* DALE

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 99-699. Argued April 26, 2000—Decided June 28, 2000

Petitioners are the Boy Scouts of America and its Monmouth Council (collectively, Boy Scouts). The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people. It asserts that homosexual conduct is inconsistent with those values. Respondent Dale is an adult whose position as assistant scoutmaster of a New Jersey troop was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist. He filed suit in the New Jersey Superior Court, alleging, *inter alia*, that the Boy Scouts had violated the state statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation. That court's Chancery Division granted summary judgment for the Boy Scouts, but its Appellate Division reversed in pertinent part and remanded. The State Supreme Court affirmed, holding, *inter alia*, that the Boy Scouts violated the State's public accommodations law by revoking Dale's membership based on his avowed homosexuality. Among other rulings, the court held that application of that law did not violate the Boy Scouts' First Amendment right of expressive association because Dale's inclusion would not significantly affect members' ability to carry out their purposes; determined that New Jersey has a compelling interest in eliminating the destructive consequences of discrimination from society, and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose; and distinguished *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, on the ground that Dale's reinstatement did not compel the Boy Scouts to express any message.

Held: Applying New Jersey's public accommodations law to require the Boy Scouts to readmit Dale violates the Boy Scouts' First Amendment right of expressive association. Government actions that unconstitutionally burden that right may take many forms, one of which is intrusion into a group's internal affairs by forcing it to accept a member it does not desire. *Roberts* v. *United States Jaycees*, 468 U. S. 609, 623. Such forced membership is unconstitutional if the person's presence affects in a significant way the group's ability to advocate public or private viewpoints. *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 13. However, the freedom of expressive association is not absolute; it can be overridden by regulations adopted to serve compelling

state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms. *Roberts*, 468 U. S., at 623. To determine whether a group is protected, this Court must determine whether the group engages in "expressive association." The record clearly reveals that the Boy Scouts does so when its adult leaders inculcate its youth members with its value system. See *id.*, at 636. Thus, the Court must determine whether the forced inclusion of Dale would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. The Court first must inquire, to a limited extent, into the nature of the Boy Scouts' viewpoints. The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly those represented by the terms "morally straight" and "clean," and that the organization does not want to promote homosexual conduct as a legitimate form of behavior. The Court gives deference to the Boy Scouts' assertions regarding the nature of its expression, see *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 123–124. The Court then inquires whether Dale's presence as an assistant scoutmaster would significantly burden the expression of those viewpoints. Dale, by his own admission, is one of a group of gay Scouts who have become community leaders and are open and honest about their sexual orientation. His presence as an assistant scoutmaster would interfere with the Scouts' choice not to propound a point of view contrary to its beliefs. See *Hurley*, 515 U. S., at 576–577. This Court disagrees with the New Jersey Supreme Court's determination that the Boy Scouts' ability to disseminate its message would not be significantly affected by the forced inclusion of Dale. First, contrary to the state court's view, an association need not associate for the purpose of disseminating a certain message in order to be protected, but must merely engage in expressive activity that could be impaired. Second, even if the Boy Scouts discourages Scout leaders from disseminating views on sexual issues, its method of expression is protected. Third, the First Amendment does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." Given that the Boy Scouts' expression would be burdened, the Court must inquire whether the application of New Jersey's public accommodations law here runs afoul of the Scouts' freedom of expressive association, and concludes that it does. Such a law is within a State's power to enact when the legislature has reason to believe that a given group is the target of discrimination and the law does not violate the First Amendment. See, *e. g.*, *id.*, at 572. The Court rejects Dale's contention that the intermediate standard of review enunciated in *United States* v. *O'Brien*, 391 U. S. 367, should be applied here to evaluate the

Syllabus

competing interests of the Boy Scouts and the State. Rather, the Court applies an analysis similar to the traditional First Amendment analysis it applied in *Hurley*. A state requirement that the Boy Scouts retain Dale would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the freedom of expressive association. In so ruling, the Court is not guided by its view of whether the Boy Scouts' teachings with respect to homosexual conduct are right or wrong; public or judicial disapproval of an organization's expression does not justify the State's effort to compel the organization to accept members in derogation of the organization's expressive message. While the law may promote all sorts of conduct in place of harmful behavior, it may not interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may seem. *Hurley, supra*, at 579. Pp. 647–661.

160 N. J. 562, 734 A. 2d 1196, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 663. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 700.

George A. Davidson argued the cause for petitioners. With him on the briefs were *Carla A. Kerr*, *David K. Park*, *Michael W. McConnell*, and *Sanford D. Brown*.

Evan Wolfson argued the cause for respondent. With him on the brief were *Ruth E. Harlow*, *David Buckel*, *Jon W. Davidson*, *Beatrice Dohrn*, *Patricia M. Logue*, *Thomas J. Moloney*, *Allyson W. Haynes*, and *Lewis H. Robertson*.*

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*Briefs of *amici curiae* urging reversal were filed for Agudath Israel of America by *David Zwiebel;* for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Vincent McCarthy*, *John P. Tuskey*, and *Laura B. Hernandez;* for the American Civil Rights Union by *Peter J. Ferrara;* for the Becket Fund for Religious Liberty by *Kevin J. Hasson* and *Eric W. Treene;* for the California State Club Association et al. by *William I. Edlund;* for the Center for the Original Intent of the Constitution by *Michael P. Farris;* for the Christian Legal Society et al. by *Kimberlee Wood Colby* and *Carl H. Esbeck;* for the Claremont Institute Center

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners are the Boy Scouts of America and the Monmouth Council, a division of the Boy Scouts of America (col-

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for Constitutional Jurisprudence by *Edwin Meese III;* for the Eagle Forum Education & Legal Defense Fund et al. by *Erik S. Jaffe;* for the Family Defense Council et al. by *William E. Fay III;* for the Family Research Council by *Janet M. LaRue;* for Gays and Lesbians for Individual Liberty by *William H. Mellor, Clint Bolick,* and *Scott G. Bullock;* for the Individual Rights Foundation by *Paul A. Hoffman* and *Patrick J. Manshardt;* for the Institute for Public Affairs of the Union of Orthodox Jewish Congregations of America by *Nathan J. Diament;* for the Liberty Legal Institute by *Kelly Shackelford* and *George B. Flint;* for the National Catholic Committee on Scouting et al. by *Von G. Keetch;* for the National Legal Foundation by *Barry C. Hodge;* for the Pacific Legal Foundation by *John H. Findley;* for Public Advocate of the United States et al. by *William J. Olson* and *John S. Miles;* for the United States Catholic Conference et al. by *Mark E. Chopko* and *Jeffrey Hunter Moon;* and for John J. Hurley et al. by *Chester Darling, Michael Williams,* and *Dwight G. Duncan.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey by *John J. Farmer, Jr.,* Attorney General, *Jeffrey Burstein,* Senior Deputy Attorney General, and *Charles S. Cohen,* Deputy Attorney General; for the State of New York et al. by *Eliot Spitzer,* Attorney General of New York, *Preeta D. Bansal,* Solicitor General, and *Adam L. Aronson,* Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *Earl I. Anzai* of Hawaii, *J. Joseph Curran, Jr.,* of Maryland, *Thomas F. Reilly* of Massachusetts, *Philip T. McLaughlin* of New Hampshire, *W. A. Drew Edmondson* of Oklahoma; *Hardy Myers* of Oregon, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington; for the city of Atlanta et al. by *Peter T. Barbur, Sara M. Darehshori, James K. Hahn, David I. Schulman, Jeffrey L. Rogers, Madelyn F. Wessel, Thomas J. Berning, Lawrence E. Rosenthal, Benna Ruth Solomon, Michael D. Hess, Leonard J. Koerner, Florence A. Hutner,* and *Louise Renne;* for the American Association of School Administrators et al. by *Mitchell A. Karlan;* for the American Bar Association by *William G. Paul* and *Robert H. Murphy;* for the American Civil Liberties Union et al. by *Matthew A. Coles, Steven R. Shapiro, Sara L. Mandelbaum,* and *Lenora M. Lapidus;* for the American Jewish Congress by *Marc D. Stern;* for the American Psychological Association by *Paul M. Smith, Nory Miller, James L. McHugh,* and *Nathalie F. P. Gil-*

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

I

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

Dale applied for adult membership in the Boy Scouts in 1989. The Boy Scouts approved his application for the position of assistant scoutmaster of Troop 73. Around the same time, Dale left home to attend Rutgers University. After arriving at Rutgers, Dale first acknowledged to himself and

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foyle; for the American Public Health Association et al. by *Marvin E. Frankel, Jeffrey S. Trachtman,* and *Kerri Ann Law;* for Bay Area Lawyers for Individual Freedom et al. by *Edward W. Swanson* and *Paula A. Brantner;* for Deans of Divinity Schools and Rabbinical Institutions by *David A. Schulz;* for the National Association for the Advancement of Colored People by *Dennis C. Hayes* and *David T. Goldberg;* for Parents, Families, and Friends of Lesbians and Gays, Inc., et al. by *John H. Pickering, Daniel H. Squire,* and *Carol J. Banta;* for the Society of American Law Teachers by *Nan D. Hunter* and *David Cole;* and for Roland Pool et al. by *David M. Gische* and *Merril Hirsh.*

Michael D. Silverman filed a brief for the General Board of Church and Society of the United Methodist Church et al.

others that he is gay. He quickly became involved with, and eventually became the copresident of, the Rutgers University Lesbian/Gay Alliance. In 1990, Dale attended a seminar addressing the psychological and health needs of lesbian and gay teenagers. A newspaper covering the event interviewed Dale about his advocacy of homosexual teenagers' need for gay role models. In early July 1990, the newspaper published the interview and Dale's photograph over a caption identifying him as the copresident of the Lesbian/Gay Alliance.

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

In 1992, Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court. The complaint alleged that the Boy Scouts had violated New Jersey's public accommodations statute and its common law by revoking Dale's membership based solely on his sexual orientation. New Jersey's public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation. N. J. Stat. Ann. §§ 10:5–4 and 10:5–5 (West Supp. 2000); see Appendix, *infra*, at 661–663.

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

and held that the First Amendment freedom of expressive association prevented the government from forcing the Boy Scouts to accept Dale as an adult leader.

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

The New Jersey Supreme Court affirmed the judgment of the Appellate Division. It held that the Boy Scouts was a place of public accommodation subject to the public accommodations law, that the organization was not exempt from the law under any of its express exceptions, and that the Boy Scouts violated the law by revoking Dale's membership based on his avowed homosexuality. After considering the state-law issues, the court addressed the Boy Scouts' claims that application of the public accommodations law in this case violated its federal constitutional rights "'to enter into and maintain . . . intimate or private relationships . . . [and] to associate for the purpose of engaging in protected speech.'" 160 N. J. 562, 605, 734 A. 2d 1196, 1219 (1999) (quoting *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 544 (1987)). With respect to the right to intimate association, the court concluded that the Boy Scouts' "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that the organization is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." 160 N. J., at 608–609, 734 A. 2d, at 1221 (quoting *Duarte*, *supra*, at 546). With respect to the right of expressive association, the court "agree[d] that Boy Scouts expresses a belief in moral values and uses its activities to encourage the moral development

of its members." 160 N. J., at 613, 734 A. 2d, at 1223. But the court concluded that it was "not persuaded . . . that a shared goal of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." *Ibid.*, 734 A. 2d, at 1223–1224 (internal quotation marks omitted). Accordingly, the court held "that Dale's membership does not violate the Boy Scouts' right of expressive association because his inclusion would not 'affect in any significant way [the Boy Scouts'] existing members' ability to carry out their various purposes.'" *Id.*, at 615, 734 A. 2d, at 1225 (quoting *Duarte, supra,* at 548). The court also determined that New Jersey has a compelling interest in eliminating "the destructive consequences of discrimination from our society," and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose. 160 N. J., at 619–620, 734 A. 2d, at 1227–1228. Finally, the court addressed the Boy Scouts' reliance on *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995), in support of its claimed First Amendment right to exclude Dale. The court determined that *Hurley* did not require deciding the case in favor of the Boy Scouts because "the reinstatement of Dale does not compel Boy Scouts to express any message." 160 N. J., at 624, 734 A. 2d, at 1229.

We granted the Boy Scouts' petition for certiorari to determine whether the application of New Jersey's public accommodations law violated the First Amendment. 528 U. S. 1109 (2000).

II

In *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984), we observed that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would

rather express other, perhaps unpopular, ideas. See *ibid.* (stating that protection of the right to expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority"). Government actions that may unconstitutionally burden this freedom may take many forms, one of which is "intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." *Id.*, at 623. Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Ibid.*

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

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

Because this is a First Amendment case where the ultimate conclusions of law are virtually inseparable from findings of fact, we are obligated to independently review the

factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. See *Hurley*, *supra*, at 567–568. The record reveals the following. The Boy Scouts is a private, nonprofit organization. According to its mission statement:

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

Thus, the general mission of the Boy Scouts is clear: "[T]o instill values in young people." *Ibid.* The Boy Scouts seeks to instill these values by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing. During the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy

Scouts' values—both expressly and by example. It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity. See *Roberts, supra,* at 636 (O'CONNOR, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement").

Given that the Boy Scouts engages in expressive activity, we must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. This inquiry necessarily requires us first to explore, to a limited extent, the nature of the Boy Scouts' view of homosexuality.

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

Obviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation. See *supra,* at 649. And the terms "morally straight" and "clean" are by no means self-defining. Different people would attribute to those terms very different meanings. For example, some people may believe that engaging in homosexual conduct is not at odds with being "morally straight" and "clean." And others may believe that engaging in homosexual conduct is contrary to being "morally straight" and "clean." The Boy Scouts says it falls within the latter category.

The New Jersey Supreme Court analyzed the Boy Scouts' beliefs and found that the "exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy

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

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

A 1978 position statement to the Boy Scouts' Executive Committee, signed by Downing B. Jenks, the President of the Boy Scouts, and Harvey L. Price, the Chief Scout Executive, expresses the Boy Scouts' "official position" with regard to "homosexuality and Scouting":

> "Q. May an individual who openly declares himself to be a homosexual be a volunteer Scout leader?

> "A. No. The Boy Scouts of America is a private, membership organization and leadership therein is a privilege and not a right. We do not believe that homosexuality and leadership in Scouting are appropriate. We will continue to select only those who in our judgment meet our standards and qualifications for leadership." App. 453–454.

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

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

> "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." *Id.*, at 457.

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

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

The Boy Scouts publicly expressed its views with respect to homosexual conduct by its assertions in prior litigation. For example, throughout a California case with similar facts filed in the early 1980's, the Boy Scouts consistently asserted the same position with respect to homosexuality that it asserts today. See *Curran* v. *Mount Diablo Council of Boy*

Scouts of America, No. C–365529 (Cal. Super. Ct., July 25, 1991); 48 Cal. App. 4th 670, 29 Cal. Rptr. 2d 580 (1994); 17 Cal. 4th 670, 952 P. 2d 218 (1998). We cannot doubt that the Boy Scouts sincerely holds this view.

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

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

> "[A] contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals . . . . The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control." 515 U. S., at 574–575.

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

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

> "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views

> in respect of homosexuality." 160 N. J., at 612, 734 A. 2d, at 1223.

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

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

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

Third, the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be "expressive association." The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes. In this same vein, Dale makes much of the claim that the Boy Scouts does not revoke the membership of heterosexual Scout leaders that openly disagree with the Boy Scouts' policy on sexual orientation. But if this is true, it is irrelevant.[1] The presence of an avowed homosexual and gay

[1] The record evidence sheds doubt on Dale's assertion. For example, the National Director of the Boy Scouts certified that "*any* persons who advocate to Scouting youth that homosexual conduct is" consistent with Scouting values will not be registered as adult leaders. App. 746 (emphasis added). And the Monmouth Council Scout Executive testified that the

rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message but not the other. The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.

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

State public accommodations laws were originally enacted to prevent discrimination in traditional places of public accommodation—like inns and trains. See, *e. g.*, *Hurley*, *supra*, at 571–572 (explaining the history of Massachusetts' public accommodations law); *Romer* v. *Evans*, 517 U. S. 620, 627–629 (1996) (describing the evolution of public accommodations laws). Over time, the public accommodations laws have expanded to cover more places.[2] New Jersey's statu-

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advocacy of the morality of homosexuality to youth members by any adult member is grounds for revocation of the adult's membership. *Id.*, at 761.

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

tory definition of " '[a] place of public accommodation' " is extremely broad. The term is said to "include, but not be limited to," a list of over 50 types of places. N. J. Stat. Ann. § 10:5–5(*l*) (West Supp. 2000); see Appendix, *infra*, at 661–663. Many on the list are what one would expect to be places where the public is invited. For example, the statute includes as places of public accommodation taverns, restaurants, retail shops, and public libraries. But the statute also includes places that often may not carry with them open invitations to the public, like summer camps and roof gardens. In this case, the New Jersey Supreme Court went a step further and applied its public accommodations law to a private entity without even attempting to tie the term "place" to a physical location.[3] As the definition of "public accommodation" has expanded from clearly commercial entities, such as restaurants, bars, and hotels, to membership organizations such as the Boy Scouts, the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased.

We recognized in cases such as *Roberts* and *Duarte* that States have a compelling interest in eliminating discrimination against women in public accommodations. But in each of these cases we went on to conclude that the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express. In *Roberts*, we said "[i]ndeed, the Jaycees has failed to demonstrate . . .

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[3] Four State Supreme Courts and one United States Court of Appeals have ruled that the Boy Scouts is not a place of public accommodation. *Welsh* v. *Boy Scouts of America*, 993 F. 2d 1267 (CA7), cert. denied, 510 U. S. 1012 (1993); *Curran* v. *Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th 670, 952 P. 2d 218 (1998); *Seabourn* v. *Coronado Area Council, Boy Scouts of America*, 257 Kan. 178, 891 P. 2d 385 (1995); *Quinnipiac Council, Boy Scouts of America, Inc.* v. *Comm'n on Human Rights & Opportunities*, 204 Conn. 287, 528 A. 2d 352 (1987); *Schwenk* v. *Boy Scouts of America*, 275 Ore. 327, 551 P. 2d 465 (1976). No federal appellate court or state supreme court—except the New Jersey Supreme Court in this case—has reached a contrary result.

any serious burdens on the male members' freedom of expressive association." 468 U. S., at 626. In *Duarte*, we said:

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

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

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

been set on one side of the scale, and the State's interest on the other.

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

In *Hurley*, we applied traditional First Amendment analysis to hold that the application of the Massachusetts public accommodations law to a parade violated the First Amendment rights of the parade organizers. Although we did not explicitly deem the parade in *Hurley* an expressive association, the analysis we applied there is similar to the analysis we apply here. We have already concluded that a state requirement that the Boy Scouts retain Dale as an assistant scoutmaster would significantly burden the organization's right to oppose or disfavor homosexual conduct. The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association. That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.[4]

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[4] We anticipated this result in *Hurley* when we illustrated the reasons for our holding in that case by likening the parade to a private membership organization. 515 U. S., at 580. We stated: "Assuming the parade

JUSTICE STEVENS' dissent makes much of its observation that the public perception of homosexuality in this country has changed. See *post*, at 699–700. Indeed, it appears that homosexuality has gained greater societal acceptance. See *ibid.* But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of the popular variety or not. See, *e. g.*, *Texas* v. *Johnson*, 491 U. S. 397 (1989) (holding that Johnson's conviction for burning the American flag violates the First Amendment); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) *(per curiam)* (holding that a Ku Klux Klan leader's conviction for advocating unlawfulness as a means of political reform violates the First Amendment). And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.

JUSTICE STEVENS' extolling of Justice Brandeis' comments in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (dissenting opinion); see *post*, at 664, 700, confuses two entirely different principles. In *New State Ice*, the Court struck down an Oklahoma regulation prohibiting the manufacture, sale, and distribution of ice without a license. Justice Brandeis, a champion of state experimentation in the economic realm, dissented. But Justice Brandeis was never a champion of state experimentation in the suppression of free speech. To the contrary, his First Amendment commentary provides compelling support for the Court's opinion in this case. In speaking of the Founders of this Nation, Justice Brandeis emphasized that they "believed that free-

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to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members." *Id.*, at 580–581.

dom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth." *Whitney* v. *California*, 274 U. S. 357, 375 (1927) (concurring opinion). He continued:

> "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed." *Id.*, at 375–376.

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

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

It is so ordered.

APPENDIX TO OPINION OF THE COURT

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

"All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommoda-

tion, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

N. J. Stat. Ann. § 10:5–5 (West Supp. 2000). "Definitions

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

. . . . . .

"*l.* 'A place of public accommodation' shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.

Nothing herein contained shall be construed to include or to apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post secondary school from using in good faith criteria other than race, creed, color, national origin, ancestry or affectional or sexual orientation in the admission of students."

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

New Jersey "prides itself on judging each individual by his or her merits" and on being "in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society." *Peper* v. *Princeton Univ. Bd. of Trustees*, 77 N. J. 55, 80, 389 A. 2d 465, 478 (1978). Since 1945, it has had a law against discrimination. The law broadly protects the opportunity of all persons to obtain the advantages and privileges "of any place of public accommodation." N. J. Stat. Ann. § 10:5–4 (West Supp. 2000). The New Jersey Supreme Court's construction of the statutory definition of a "place of public accommodation" has given its statute a more expansive coverage than most similar state statutes. And as amended in 1991, the law prohibits discrimination on the basis of nine different traits including an individual's "sexual orientation."[1] The question in this case is whether that ex-

[1] In 1992, the statute was again amended to add "familial status" as a tenth protected class. It now provides:

"10:5–4 Obtaining employment, accommodations and privileges without discrimination; civil right

"All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any

pansive construction trenches on the federal constitutional rights of the Boy Scouts of America (BSA).

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

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

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

The majority holds that New Jersey's law violates BSA's right to associate and its right to free speech. But that law

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place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

does not "impos[e] any serious burdens" on BSA's "collective effort on behalf of [its] shared goals," *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622, 626–627 (1984), nor does it force BSA to communicate any message that it does not wish to endorse. New Jersey's law, therefore, abridges no constitutional right of BSA.

I

James Dale joined BSA as a Cub Scout in 1978, when he was eight years old. Three years later he became a Boy Scout, and he remained a member until his 18th birthday. Along the way, he earned 25 merit badges, was admitted into the prestigious Order of the Arrow, and was awarded the rank of Eagle Scout—an honor given to only three percent of all Scouts. In 1989, BSA approved his application to be an Assistant Scoutmaster.

On July 19, 1990, after more than 12 years of active and honored participation, the BSA sent Dale a letter advising him of the revocation of his membership. The letter stated that membership in BSA "is a privilege" that may be denied "whenever there is a concern that an individual may not meet the high standards of membership which the BSA seeks to provide for American youth." App. 135. Expressing surprise at his sudden expulsion, Dale sent a letter requesting an explanation of the decision. *Id.*, at 136. In response, BSA sent him a second letter stating that the grounds for the decision "are the standards for leadership established by the Boy Scouts of America, which specifically forbid membership to homosexuals." *Id.*, at 137. At that time, no such standard had been publicly expressed by BSA.

In this case, BSA contends that it teaches the young boys who are Scouts that homosexuality is immoral. Consequently, it argues, it would violate its right to associate to force it to admit homosexuals as members, as doing so would be at odds with its own shared goals and values. This contention, quite plainly, requires us to look at what, exactly, are the values that BSA actually teaches.

BSA's mission statement reads as follows: "It is the mission of the Boy Scouts of America to serve others by helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." *Id.*, at 184. Its federal charter declares its purpose is "to promote, through organization, and cooperation with other agencies, the ability of boys to do things for themselves and others, to train them in scoutcraft, and to teach them patriotism, courage, self-reliance, and kindred values, using the methods which were in common use by Boy Scouts on June 15, 1916." 36 U. S. C. §23; see also App. 315–316. BSA describes itself as having a "representative membership," which it defines as "boy membership [that] reflects proportionately the characteristics of the boy population of its service area." *Id.*, at 65. In particular, the group emphasizes that "[n]either the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy. . . . To meet these responsibilities we have made a commitment that our membership shall be representative of *all* the population in every community, district, and council." *Id.*, at 66–67 (emphasis in original).

To instill its shared values, BSA has adopted a "Scout Oath" and a "Scout Law" setting forth its central tenets. For example, the Scout Law requires a member to promise, among other things, that he will be "obedient." Accompanying definitions for the terms found in the Oath and Law are provided in the Boy Scout Handbook and the Scoutmaster Handbook. For instance, the Boy Scout Handbook defines "obedient" as follows:

> "A Scout is OBEDIENT. A Scout follows the rules of his family, school, and troop. He obeys the laws of his community and country. If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them." *Id.*, at 188 (emphasis deleted).

To bolster its claim that its shared goals include teaching that homosexuality is wrong, BSA directs our attention to two terms appearing in the Scout Oath and Law. The first is the phrase "morally straight," which appears in the Oath ("On my honor I will do my best . . . To keep myself . . . morally straight"); the second term is the word "clean," which appears in a list of 12 characteristics together constituting the Scout Law.

The Boy Scout Handbook defines "morally straight," as such:

> "To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values you follow as a Scout will help you become virtuous and self-reliant." *Id.*, at 218 (emphasis deleted).

The Scoutmaster Handbook emphasizes these points about being "morally straight":

> "In any consideration of moral fitness, a key word has to be 'courage.' A boy's courage to do what his head and his heart tell him is right. And the courage to refuse to do what his heart and his head say is wrong. Moral fitness, like emotional fitness, will clearly present opportunities for wise guidance by an alert Scoutmaster." *Id.*, at 239–240.

As for the term "clean," the Boy Scout Handbook offers the following:

> "A Scout is CLEAN. *A Scout keeps his body and mind fit and clean. He chooses the company of those who live by these same ideals. He helps keep his home and community clean.*
>
> "You never need to be ashamed of dirt that will wash off. If you play hard and work hard you can't help get-

> ting dirty. But when the game is over or the work is done, that kind of dirt disappears with soap and water.
>
> "There's another kind of dirt that won't come off by washing. It is the kind that shows up in foul language and harmful thoughts.
>
> "Swear words, profanity, and dirty stories are weapons that ridicule other people and hurt their feelings. The same is true of racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations. A Scout knows there is no kindness or honor in such mean-spirited behavior. He avoids it in his own words and deeds. He defends those who are targets of insults." *Id.*, at 225–226 (emphasis in original); see also *id.*, at 189.[2]

It is plain as the light of day that neither one of these principles—"morally straight" and "clean"—says the slightest thing about homosexuality. Indeed, neither term in the Boy

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[2] Scoutmasters are instructed to teach what it means to be "clean" using the following lesson:

"(Hold up two cooking pots, one shiny bright on the inside but sooty outside, the other shiny outside but dirty inside.) Scouts, which of these pots would you rather have your food cooked in? Did I hear somebody say, 'Neither one?'

"That's not a bad answer. We wouldn't have much confidence in a patrol cook who didn't have his pots shiny both inside and out.

"But if we had to make a choice, we would tell the cook to use the pot that's clean inside. The same idea applies to people.

"Most people keep themselves clean outside. But how about the inside? Do we try to keep our minds and our language clean? I think that's even more important than keeping the outside clean.

"A Scout, of course, should be clean inside and out. Water, soap, and a toothbrush tak[e] care of the outside. Only your determination will keep the inside clean. You can do it by following the Scout Law and the example of people you respect—your parents, your teachers, your clergyman, or a good buddy who is trying to do the same thing." App. 289–290.

Scouts' Law and Oath expresses any position whatsoever on sexual matters.

BSA's published guidance on that topic underscores this point. Scouts, for example, are directed to receive their sex education at home or in school, but not from the organization: "Your parents or guardian or a sex education teacher should give you the facts about sex that you must know." Boy Scout Handbook (1992) (reprinted in App. 211). To be sure, Scouts are not forbidden from asking their Scoutmaster about issues of a sexual nature, but Scoutmasters are, literally, the last person Scouts are encouraged to ask: "If you have questions about growing up, about relationships, sex, or making good decisions, ask. Talk with your parents, religious leaders, teachers, or Scoutmaster." *Ibid.* Moreover, Scoutmasters are specifically directed to steer curious adolescents to other sources of information:

> "If Scouts ask for information regarding . . . sexual activity, answer honestly and factually, but stay within your realm of expertise and comfort. If a Scout has serious concerns that you cannot answer, refer him to his family, religious leader, doctor, or other professional." Scoutmaster Handbook (1990) (reprinted in App. 264).

More specifically, BSA has set forth a number of rules for Scoutmasters when these types of issues come up:

> "You may have boys asking you for information or advice about sexual matters. . . .
>
> "How should you handle such matters?
>
> "Rule number 1: *You do not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life. The reasons are that it is not construed to be Scouting's proper area,* and that you are probably not well qualified to do this.
>
> "Rule number 2: If Scouts come to you to ask questions or to seek advice, you would give it within your compe-

> tence. A boy who appears to be asking about sexual intercourse, however, may really only be worried about his pimples, so it is well to find out just what information is needed.
>
> "Rule number 3: You should refer boys with sexual problems to persons better qualified than you [are] to handle them. If the boy has a spiritual leader or a doctor who can deal with them, he should go there. If such persons are not available, you may just have to do the best you can. But don't try to play a highly professional role. And at the other extreme, avoid passing the buck." Scoutmaster Handbook (1972) (reprinted in App. 546–547) (emphasis added).

In light of BSA's self-proclaimed ecumenism, furthermore, it is even more difficult to discern any shared goals or common moral stance on homosexuality. Insofar as religious matters are concerned, BSA's bylaws state that it is "absolutely nonsectarian in its attitude toward . . . religious training." *Id.*, at 362. "The BSA does not define what constitutes duty to God or the practice of religion. This is the responsibility of parents and religious leaders." *Id.*, at 76. In fact, many diverse religious organizations sponsor local Boy Scout troops. Brief for Petitioners 3. Because a number of religious groups do not view homosexuality as immoral or wrong and reject discrimination against homosexuals,[3] it is exceedingly difficult to believe that BSA none-

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[3] See, *e. g.*, Brief for Deans of Divinity Schools and Rabbinical Institutions as *Amicus Curiae* 8 ("The diverse religi[ous] traditions of this country present no coherent moral message that excludes gays and lesbians from participating as full and equal members of those institutions. Indeed, the movement among a number of the nation's major religious institutions for many decades has been toward public recognition of gays and lesbians as full members of moral communities, and acceptance of gays and lesbians as religious leaders, elders and clergy"); Brief for General Board of Church and Society of the United Methodist Church et al. as

theless adopts a single particular religious or moral philosophy when it comes to sexual orientation. This is especially so in light of the fact that Scouts are advised to seek guidance on sexual matters from their religious leaders (and Scoutmasters are told to refer Scouts to them);[4] BSA surely is aware that some religions do not teach that homosexuality is wrong.

II

The Court seeks to fill the void by pointing to a statement of "policies and procedures relating to homosexuality and Scouting," App. 453, signed by BSA's President and Chief Scout Executive in 1978 and addressed to the members of the Executive Committee of the national organization. *Ante*, at 651–652. The letter says that the BSA does "not believe that homosexuality and leadership in Scouting are appropriate." App. 454. But when the *entire* 1978 letter is read, BSA's position is far more equivocal:

> "4. Q. May an individual who openly declares himself to be a homosexual be employed by the Boy Scouts of America as a professional or non-professional?
>
> "A. Boy Scouts of America does not knowingly employ homosexuals as professionals or non-professionals. We are unaware of any present laws which would prohibit this policy.

Amicus Curiae 3 (describing views of the United Methodist Church, the Episcopal Church, the Religious Action Center of Reform Judaism, the United Church Board for Homeland Ministries, and the Unitarian Universalist Association, all of whom reject discrimination on the basis of sexual orientation).

[4] See *supra*, at 667 ("Be . . . faithful in your religious beliefs"); *supra*, at 668, n. 2 ("by following . . . the example of . . . your clergyman"); *supra*, at 669 ("If you have questions about . . . sex, . . . [t]alk with your . . . religious leade[r]"); *ibid.* ("If Scouts ask for information regarding . . . sexual activity . . . refer him to his . . . religious leader"); *supra*, at 670 ("You should refer boys with sexual problems to [their] spiritual leader").

> "5. Q. Should a professional or non-professional individual who openly declares himself to be a homosexual be terminated?
>
> "A. Yes, *in the absence of any law to the contrary.* At the present time we are unaware of any statute or ordinance in the United States which prohibits discrimination against individual's employment upon the basis of homosexuality. *In the event that such a law was applicable, it would be necessary for the Boy Scouts of America to obey it, in this case as in Paragraph 4 above.* It is our position, however, that homosexuality and professional or non-professional employment in Scouting are not appropriate." *Id.*, at 454–455 (emphasis added).

Four aspects of the 1978 policy statement are relevant to the proper disposition of this case. First, at most this letter simply adopts an exclusionary membership policy. But simply adopting such a policy has never been considered sufficient, by itself, to prevail on a right to associate claim. See *infra*, at 678–685.

Second, the 1978 policy was never publicly expressed—unlike, for example, the Scout's duty to be "obedient." It was an internal memorandum, never circulated beyond the few members of BSA's Executive Committee. It remained, in effect, a secret Boy Scouts policy. Far from claiming any intent to express an idea that would be burdened by the presence of homosexuals, BSA's *public* posture—to the world and to the Scouts themselves—remained what it had always been: one of tolerance, welcoming all classes of boys and young men. In this respect, BSA's claim is even weaker than those we have rejected in the past. See *ibid.*

Third, it is apparent that the draftsmen of the policy statement foresaw the possibility that laws against discrimination might one day be amended to protect homosexuals from employment discrimination. Their statement clearly provided that, in the event such a law conflicted with their policy, a Scout's duty to be "obedient" and "obe[y] the laws," even if "he thinks [the laws] are unfair," would prevail in such a

contingency. See *supra*, at 666. In 1978, however, BSA apparently did not consider it to be a serious possibility that a State might one day characterize the Scouts as a "place of public accommodation" with a duty to open its membership to all qualified individuals. The portions of the statement dealing with membership simply assume that membership in the Scouts is a "privilege" that BSA is free to grant or to withhold. The statement does not address the question whether the publicly proclaimed duty to obey the law should prevail over the private discriminatory policy if, and when, a conflict between the two should arise—as it now has in New Jersey. At the very least, then, the statement reflects no unequivocal view on homosexuality. Indeed, the statement suggests that an appropriate way for BSA to preserve its unpublished exclusionary policy would include an open and forthright attempt to seek an amendment of New Jersey's statute. ("If he thinks these rules and laws are unfair, he tries to have them changed in an orderly manner rather than disobey them.")

Fourth, the 1978 statement simply says that homosexuality is not "appropriate." It makes no effort to connect that statement to a shared goal or expressive activity of the Boy Scouts. Whatever values BSA seeks to instill in Scouts, the idea that homosexuality is not "appropriate" appears entirely unconnected to, and is mentioned nowhere in, the myriad of publicly declared values and creeds of the BSA. That idea does not appear to be among any of the principles actually taught to Scouts. Rather, the 1978 policy appears to be no more than a private statement of a few BSA executives that the organization wishes to exclude gays—and that wish has nothing to do with any expression BSA actually engages in.

The majority also relies on four other policy statements that were issued between 1991 and 1993.[5] All of them were

[5] The authorship and distribution of these statements remain obscure. Unlike the 1978 policy—which clearly identifies the authors as the President and the Chief Scout Executive of BSA—these later policies are unsigned. Two of them are initialed (one is labeled "JCK"; the other says

written and issued *after* BSA revoked Dale's membership. Accordingly, they have little, if any, relevance to the legal question before this Court.[6] In any event, they do not bolster BSA's claim.

In 1991, BSA issued two statements both stating: "We believe that homosexual conduct is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed, and that homosexuals do not provide a desirable role model for Scouts." App. 457–458. A third statement issued in 1992 was substantially the same. *Id.*, at 459. By 1993, however, the policy had changed:

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

Aside from the fact that these statements were all issued after Dale's membership was revoked, there are four important points relevant to them. First, while the 1991 and 1992

"js"), but BSA never tells us to whom these initials belong. Nor do we know how widely these statements were distributed. From the record evidence we have, it appears that they were not as readily available as the Boy Scout and Scoutmaster Handbooks; indeed, they appear to be quite difficult to get a hold of. See App. 662, 668–669.

[6] Dale's complaint requested three forms of relief: (1) a declaration that his rights under the New Jersey statute had been violated when his membership was revoked; (2) an order reinstating his membership; and (3) compensatory and punitive damages. *Id.*, at 27. Nothing that BSA could have done after the revocation of his membership could affect Dale's first request for relief, though perhaps some possible postrevocation action could have influenced the other two requests for relief.

statements tried to tie BSA's exclusionary policy to the meaning of the Scout Oath and Law, the 1993 statement abandoned that effort. Rather, BSA's 1993 homosexual exclusion policy was based on its view that including gays would be contrary to "the expectations that Scouting families have had for the organization." *Ibid.* Instead of linking its policy to its central tenets or shared goals—to teach certain definitions of what it means to be "morally straight" and "clean"—BSA chose instead to justify its policy on the "expectatio[n]" that its members preferred to exclude homosexuals. The 1993 policy statement, in other words, was *not* based on any expressive activity or on any moral view about homosexuality. It was simply an exclusionary membership policy, similar to those we have held insufficient in the past. See *infra,* at 678–685.

Second, even during the brief period in 1991 and 1992, when BSA tried to connect its exclusion of homosexuals to its definition of terms found in the Oath and Law, there is no evidence that Scouts were actually taught anything about homosexuality's alleged inconsistency with those principles. Beyond the single sentence in these policy statements, there is no indication of any shared goal of teaching that homosexuality is incompatible with being "morally straight" and "clean." Neither BSA's mission statement nor its official membership policy was altered; no Boy Scout or Scoutmaster Handbook was amended to reflect the policy statement; no lessons were imparted to Scouts; no change was made to BSA's policy on limiting discussion of sexual matters; and no effort was made to restrict acceptable religious affiliations to those that condemn homosexuality. In short, there is no evidence that this view was part of any collective effort to foster beliefs about homosexuality.[7]

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[7] Indeed, the record evidence is to the contrary. See, *e. g.,* App. 666–669 (affidavit of former Boy Scout whose young children were Scouts, and was himself an assistant scoutmaster and Merit Badge counselor) ("I never heard and am not aware of any discussion about homosexuality that oc-

Third, BSA never took any clear and unequivocal position on homosexuality. Though the 1991 and 1992 policies state one interpretation of "morally straight" and "clean," the group's published definitions appearing in the Boy Scout and Scoutmaster Handbooks take quite another view. And BSA's broad religious tolerance combined with its declaration that sexual matters are not its "proper area" render its views on the issue equivocal at best and incoherent at worst. We have never held, however, that a group can throw together any mixture of contradictory positions and then invoke the right to associate to defend any one of those views. At a minimum, a group seeking to prevail over an antidiscrimination law must adhere to a clear and unequivocal view.

Fourth, at most the 1991 and 1992 statements declare only that BSA believed "homosexual *conduct* is inconsistent with the requirement in the Scout Oath that a Scout be morally straight and in the Scout Law that a Scout be clean in word and deed." App. 457 (emphasis added). But New Jersey's law prohibits discrimination on the basis of sexual *orientation.* And when Dale was expelled from the Boy Scouts, BSA said it did so because of his sexual orientation, not because of his sexual conduct.[8]

It is clear, then, that nothing in these policy statements supports BSA's claim. The only policy written before the revocation of Dale's membership was an equivocal, undisclosed statement that evidences no connection between the group's discriminatory intentions and its expressive interests. The later policies demonstrate a brief—though ulti-

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curred during any Scouting meeting or function .... Prior to September 1991, I never heard any mention whatsoever of homosexuality during any Scouting function").

[8] At oral argument, BSA's counsel was asked: "[W]hat if someone is homosexual in the sense of having a sexual orientation in that direction but does not engage in any homosexual conduct?" Counsel answered: "[I]f that person also were to take the view that the reason they didn't engage in that conduct [was because] it would be morally wrong . . . that person would not be excluded." Tr. of Oral Arg. 8.

mately abandoned—attempt to tie BSA's exclusion to its expression, but other than a single sentence, BSA fails to show that it ever taught Scouts that homosexuality is not "morally straight" or "clean," or that such a view was part of the group's collective efforts to foster a belief. Furthermore, BSA's policy statements fail to establish any clear, consistent, and unequivocal position on homosexuality. Nor did BSA have any reason to think Dale's sexual *conduct,* as opposed to his orientation, was contrary to the group's values.

BSA's inability to make its position clear and its failure to connect its alleged policy to its expressive activities is highly significant. By the time Dale was expelled from the Boy Scouts in 1990, BSA had already been engaged in several suits under a variety of state antidiscrimination public accommodation laws challenging various aspects of its membership policy.[9] Indeed, BSA had filed *amicus* briefs before this Court in two earlier right to associate cases (*Roberts* v. *United States Jaycees,* 468 U. S. 609 (1984), and *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte,* 481 U. S. 537 (1987)) pointing to these very cases; it was clearly on notice by 1990 that it might well be subjected to state public accommodation antidiscrimination laws, and that a court might one day reject its claimed right to associate. Yet it took no steps prior to Dale's expulsion to clarify how its exclusivity was connected to its expression. It speaks volumes about the credibility of BSA's claim to a shared goal that homosexuality is incompatible with Scouting that since at least 1984 it had been aware of this issue—indeed, concerned enough to twice file *amicus* briefs before this

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[9] See, *e. g., Quinnipiac Council, Boy Scouts of America* v. *Commission on Human Rights and Opportunities,* 204 Conn. 287, 528 A. 2d 352 (1987) (challenge to BSA's exclusion of girls); *Curran* v. *Mount Diablo Council of the Boy Scouts of America,* 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983) (challenge to BSA's denial of membership to homosexuals; rejecting BSA's claimed right of association), overruled on other grounds, 17 Cal. 4th 670, 952 P. 2d 218 (1998).

Court—yet it did nothing in the intervening six years (or even in the years after Dale's explusion) to explain clearly and openly why the presence of homosexuals would affect its expressive activities, or to make the view of "morally straight" and "clean" taken in its 1991 and 1992 policies a part of the values actually instilled in Scouts through the Handbook, lessons, or otherwise.

III

BSA's claim finds no support in our cases. We have recognized "a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U. S., at 618. And we have acknowledged that "when the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association . . . may be implicated." *Ibid.* But "[t]he right to associate for expressive purposes is not . . . absolute"; rather, "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which . . . the constitutionally protected liberty is at stake in a given case." *Id.*, at 623, 618. Indeed, the right to associate does not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 13 (1988). For example, we have routinely and easily rejected assertions of this right by expressive organizations with discriminatory membership policies, such as private schools,[10] law

[10] *Runyon* v. *McCrary*, 427 U. S. 160, 175–176 (1976) ("[T]he Court has recognized a First Amendment right 'to engage in association for the advancement of beliefs and ideas . . . .' From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such insti-

firms,[11] and labor organizations.[12] In fact, until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State's antidiscrimination law. To the contrary, we have squarely held that a State's antidiscrimination law does not violate a group's right to associate simply because the law conflicts with that group's exclusionary membership policy.

In *Roberts* v. *United States Jaycees*, 468 U. S. 609 (1984), we addressed just such a conflict. The Jaycees was a nonprofit membership organization "'designed to inculcate in the individual membership . . . a spirit of genuine Americanism and civic interest, and . . . to provide . . . an avenue for intelligent participation by young men in the affairs of their community.'" *Id.*, at 612–613. The organization was divided into local chapters, described as "'young men's organization[s],'" in which regular membership was restricted to males between the ages of 18 and 35. *Id.*, at 613. But Minnesota's Human Rights Act, which applied to the Jaycees, made it unlawful to "'deny any person the full and equal

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tutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle" (citation omitted)).

[11] *Hishon* v. *King & Spalding*, 467 U. S. 69, 78 (1984) ("[R]espondent argues that application of Title VII in this case would infringe constitutional rights of . . . association. Although we have recognized that the activities of lawyers may make a 'distinctive contribution . . . to the ideas and beliefs of our society,' respondent has not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for partnership on her merits. Moreover, as we have held in another context, '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections'" (citations omitted)).

[12] *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 93–94 (1945) ("Appellant first contends that [the law prohibiting racial discrimination by labor organizations] interfere[s] with its right of selection to membership . . . . We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race").

enjoyment of . . . a place of public accommodation because of . . . sex.'" *Id.*, at 615. The Jaycees, however, claimed that applying the law to it violated its right to associate—in particular its right to maintain its selective membership policy.

We rejected that claim. Cautioning that the right to associate is not "absolute," we held that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*, at 623. We found the State's purpose of eliminating discrimination is a compelling state interest that is unrelated to the suppression of ideas. *Id.*, at 623–626. We also held that Minnesota's law is the least restrictive means of achieving that interest. The Jaycees had "failed to demonstrate that the Act imposes any serious burdens on the male members' freedom of expressive association." *Id.*, at 626. Though the Jaycees had "taken public positions on a number of diverse issues, [and] . . . regularly engage in a variety of . . . activities worthy of constitutional protection under the First Amendment," there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." *Id.*, at 626–627. "The Act," we held, "requires no change in the Jaycees' creed of promoting the interest of young men, and it imposes no restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." *Id.*, at 627.

We took a similar approach in *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537 (1987). Rotary International, a nonprofit corporation, was founded as "'an organization of business and professional men united worldwide who provide humanitarian service, encourage high ethical standards in all vocations, and help build good-

will and peace in the world.'" *Id.*, at 539. It admitted a cross section of worthy business and community leaders, *id.*, at 540, but refused membership to women. "[T]he exclusion of women," explained the group's General Secretary, "results in an 'aspect of fellowship . . . that is enjoyed by the present male membership.'" *Id.*, at 541. That policy also allowed the organization "to operate effectively in foreign countries with varied cultures and social mores." *Ibid.* Though California's Civil Rights Act, which applied to Rotary International, prohibited discrimination on the basis of sex, *id.*, at 541–542, n. 2, the organization claimed a right to associate, including the right to select its members.

As in *Jaycees*, we rejected the claim, holding that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes." 481 U. S., at 548. "To be sure," we continued, "Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment. But [California's Civil Rights Act] does not require the clubs to abandon or alter any of these activities. It does not require them to abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace. Nor does it require them to abandon their classification system or admit members who do not reflect a cross section of the community." *Ibid.* Finally, even if California's law worked a "slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women." *Id.*, at 549.[13]

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[13] BSA urged on brief that under the New Jersey Supreme Court's reading of the State's antidiscrimination law, "Boy Scout Troops would be forced to admit girls as members" and "Girl Scout Troops would be forced to admit boys." Brief for Petitioners 37. The New Jersey Supreme Court had no occasion to address that question, and no such issue is tendered for our decision. I note, however, the State of New Jersey's obser-

Several principles are made perfectly clear by *Jaycees* and *Rotary Club*. First, to prevail on a claim of expressive association in the face of a State's antidiscrimination law, it is not enough simply to engage in *some kind* of expressive activity. Both the Jaycees and the Rotary Club engaged in expressive activity protected by the First Amendment,[14] yet that fact was not dispositive. Second, it is not enough to adopt an openly avowed exclusionary membership policy. Both the Jaycees and the Rotary Club did that as well.[15] Third, it is not sufficient merely to articulate *some* connection between the group's expressive activities and its exclusionary policy. The Rotary Club, for example, justified its male-only membership policy by pointing to the "'aspect of fellowship . . . that is enjoyed by the [exclusively] male membership'" and by claiming that only with an exclusively male membership

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vation that BSA ignores the exemption contained in New Jersey's law for "'any place of public accommodation which is in its nature reasonably restricted exclusively to one sex,'" including, but not limited to, "'any summer camp, day camp, or resort camp, bathhouse, dressing room, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution which is restricted exclusively to individuals of one sex.'" See Brief for State of New Jersey as *Amicus Curiae* 12–13, n. 2 (citing N. J. Stat. Ann. § 10:5–12(f) (West 1993)).

[14] See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 626–627 (1984) ("[T]he organization [has] taken public positions on a number of diverse issues . . . worthy of constitutional protection under the First Amendment" (citations omitted)); *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U. S. 537, 548 (1987) ("To be sure, Rotary Clubs engage in a variety of commendable service activities that are protected by the First Amendment").

[15] The Jaycees openly stated that it was an organization designed to serve the interests of "young men"; its local chapters were described as "'young men's organization[s]'"; and its membership policy contained an express provision reserving regular membership to young men. *Jaycees*, 468 U. S., at 612–613. Likewise, Rotary International expressed its preference for male-only membership: It proclaimed that it was "'an organization of business and professional *men*'" and its membership policy expressly excluded women. *Rotary Club*, 481 U. S., at 539, 541 (emphasis added).

could it "operate effectively" in foreign countries. *Rotary Club*, 481 U. S., at 541.

Rather, in *Jaycees*, we asked whether Minnesota's Human Rights Law requiring the admission of women "impose[d] any *serious burdens*" on the group's "collective effort on behalf of [its] *shared goals*." 468 U. S., at 622, 626–627 (emphases added). Notwithstanding the group's obvious publicly stated exclusionary policy, we did not view the inclusion of women as a "serious burden" on the Jaycees' ability to engage in the protected speech of its choice. Similarly, in *Rotary Club*, we asked whether California's law would "affect in any *significant way* the existing members' ability" to engage in their protected speech, or whether the law would require the clubs "to abandon their *basic goals*." 481 U. S., at 548 (emphases added); see also *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 581 (1995) ("[A] private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members"); *New York State Club Assn.*, 487 U. S., at 13 (to prevail on a right to associate claim, the group must "be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion"); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 462–463 (1958) (asking whether law "entail[ed] the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association" and whether law is "likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs"). The relevant question is whether the mere inclusion of the person at issue would "impose any serious burden," "affect in any significant way," or be "a substantial restraint upon" the organization's "shared goals," "basic goals," or "collective effort to foster beliefs." Accordingly, it is necessary to examine what, exactly, are

BSA's shared goals and the degree to which its expressive activities would be burdened, affected, or restrained by including homosexuals.

The evidence before this Court makes it exceptionally clear that BSA has, at most, simply adopted an exclusionary membership policy and has no shared goal of disapproving of homosexuality. BSA's mission statement and federal charter say nothing on the matter; its official membership policy is silent; its Scout Oath and Law—and accompanying definitions—are devoid of any view on the topic; its guidance for Scouts and Scoutmasters on sexuality declare that such matters are "not construed to be Scouting's proper area," but are the province of a Scout's parents and pastor; and BSA's posture respecting religion tolerates a wide variety of views on the issue of homosexuality. Moreover, there is simply no evidence that BSA otherwise teaches anything in this area, or that it instructs Scouts on matters involving homosexuality in ways not conveyed in the Boy Scout or Scoutmaster Handbooks. In short, Boy Scouts of America is simply silent on homosexuality. There is no shared goal or collective effort to foster a belief about homosexuality at all—let alone one that is significantly burdened by admitting homosexuals.

As in *Jaycees*, there is "no basis in the record for concluding that admission of [homosexuals] will impede the [Boy Scouts'] ability to engage in [its] protected activities or to disseminate its preferred views" and New Jersey's law "requires no change in [BSA's] creed." 468 U. S., at 626–627. And like *Rotary Club*, New Jersey's law "does not require [BSA] to abandon or alter any of" its activities. 481 U. S., at 548. The evidence relied on by the Court is not to the contrary. The undisclosed 1978 policy certainly adds nothing to the actual views disseminated to the Scouts. It simply says that homosexuality is not "appropriate." There is no reason to give that policy statement more weight than Rotary International's assertion that all-male membership

fosters the group's "fellowship" and was the only way it could "operate effectively." As for BSA's postrevocation statements, at most they simply adopt a policy of discrimination, which is no more dispositive than the openly discriminatory policies held insufficient in *Jaycees* and *Rotary Club;* there is no evidence here that BSA's policy was necessary to—or even a part of—BSA's expressive activities or was ever taught to Scouts.

Equally important is BSA's failure to adopt any clear position on homosexuality. BSA's temporary, though ultimately abandoned, view that homosexuality is incompatible with being "morally straight" and "clean" is a far cry from the clear, unequivocal statement necessary to prevail on its claim. Despite the solitary sentences in the 1991 and 1992 policies, the group continued to disclaim any single religious or moral position as a general matter and actively eschewed teaching any lesson on sexuality. It also continued to define "morally straight" and "clean" in the Boy Scout and Scoutmaster Handbooks without any reference to homosexuality. As noted earlier, nothing in our cases suggests that a group can prevail on a right to expressive association if it, effectively, speaks out of both sides of its mouth. A State's antidiscrimination law does not impose a "serious burden" or a "substantial restraint" upon the group's "shared goals" if the group itself is unable to identify its own stance with any clarity.

IV

The majority pretermits this entire analysis. It finds that BSA in fact "'teach[es] that homosexual conduct is not morally straight.'" *Ante,* at 651. This conclusion, remarkably, rests entirely on statements in BSA's briefs. See *ibid.* (citing Brief for Petitioners 39; Reply Brief for Petitioners 5). Moreover, the majority insists that we must "give deference to an association's assertions regarding the nature of its expression" and "we must also give deference to an association's view of what would impair its expression." *Ante,* at

653. So long as the record "contains written evidence" to support a group's bare assertion, "[w]e need not inquire further." *Ante*, at 651. Once the organization "asserts" that it engages in particular expression, *ibid.*, "[w]e cannot doubt" the truth of that assertion, *ante*, at 653.

This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further. It is even more astonishing in the First Amendment area, because, as the majority itself acknowledges, "we are obligated to independently review the factual record." *Ante*, at 648–649. It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims. But the majority insists that our inquiry must be "limited," *ante*, at 650, because "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent," *ante*, at 651. See also Brief for Petitioners 25 ("[T]he Constitution protects [BSA's] ability to control its own message").

But nothing in our cases calls for this Court to do any such thing. An organization can adopt the message of its choice, and it is not this Court's place to disagree with it. But we must inquire whether the group is, in fact, expressing a message (whatever it may be) and whether that message (if one is expressed) is significantly affected by a State's antidiscrimination law. More critically, that inquiry requires our *independent* analysis, rather than deference to a group's litigating posture. Reflection on the subject dictates that such an inquiry is required.

Surely there are instances in which an organization that truly aims to foster a belief at odds with the purposes of a State's antidiscrimination laws will have a First Amendment right to association that precludes forced compliance with those laws. But that right is not a freedom to discriminate at will, nor is it a right to maintain an exclusionary member-

ship policy simply out of fear of what the public reaction would be if the group's membership were opened up. It is an implicit right designed to protect the enumerated rights of the First Amendment, not a license to act on any discriminatory impulse. To prevail in asserting a right of expressive association as a defense to a charge of violating an anti-discrimination law, the organization must at least show it has adopted and advocated an unequivocal position inconsistent with a position advocated or epitomized by the person whom the organization seeks to exclude. If this Court were to defer to whatever position an organization is prepared to assert in its briefs, there would be no way to mark the proper boundary between genuine exercises of the right to associate, on the one hand, and sham claims that are simply attempts to insulate nonexpressive private discrimination, on the other hand. Shielding a litigant's claim from judicial scrutiny would, in turn, render civil rights legislation a nullity, and turn this important constitutional right into a farce. Accordingly, the Court's prescription of total deference will not do. In this respect, Justice Frankfurter's words seem particularly apt:

> "Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of nondiscrimination beyond that which the Constitution itself exacts." *Railway*

Mail Assn. v. *Corsi*, 326 U. S. 88, 98 (1945) (concurring opinion).

There is, of course, a valid concern that a court's independent review may run the risk of paying too little heed to an organization's sincerely held views. But unless one is prepared to turn the right to associate into a free pass out of antidiscrimination laws, an independent inquiry is a necessity. Though the group must show that its expressive activities will be substantially burdened by the State's law, if that law truly has a significant effect on a group's speech, even the subtle speaker will be able to identify that impact.

In this case, no such concern is warranted. It is entirely clear that BSA in fact expresses no clear, unequivocal message burdened by New Jersey's law.

V

Even if BSA's right to associate argument fails, it nonetheless might have a First Amendment right to refrain from including debate and dialogue about homosexuality as part of its mission to instill values in Scouts. It can, for example, advise Scouts who are entering adulthood and have questions about sex to talk "with your parents, religious leaders, teachers, or Scoutmaster," and, in turn, it can direct Scoutmasters who are asked such questions "not undertake to instruct Scouts, in any formalized manner, in the subject of sex and family life" because "it is not construed to be Scouting's proper area." See *supra*, at 669–670. Dale's right to advocate certain beliefs in a public forum or in a private debate does not include a right to advocate these ideas when he is working as a Scoutmaster. And BSA cannot be compelled to include a message about homosexuality among the values it actually chooses to teach its Scouts, if it would prefer to remain silent on that subject.

In *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), we recognized that the government may not "requir[e] affirmation of a belief and an attitude of mind," nor

"force an American citizen publicly to profess any statement of belief," even if doing so does not require the person to "forego any contrary convictions of their own." *Id.*, at 633–634. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley*, 515 U. S., at 573. Though the majority mistakenly treats this statement as going to the right to associate, it actually refers to a free speech claim. See *id.*, at 564–565, 580–581 (noting distinction between free speech and right to associate claims). As with the right to associate claim, though, the court is obligated to engage in an independent inquiry into whether the mere inclusion of homosexuals would actually force BSA to proclaim a message it does not want to send. *Id.*, at 567.

In its briefs, BSA implies, even if it does not directly argue, that Dale would use his Scoutmaster position as a "bully pulpit" to convey immoral messages to his troop, and therefore his inclusion in the group would compel BSA to include a message it does not want to impart. Brief for Petitioners 21–22. Even though the majority does not endorse that argument, I think it is important to explain why it lacks merit, before considering the argument the majority does accept.

BSA has not contended, nor does the record support, that Dale had ever advocated a view on homosexuality to his troop before his membership was revoked. Accordingly, BSA's revocation could only have been based on an assumption that he would do so in the future. But the only information BSA had at the time it revoked Dale's membership was a newspaper article describing a seminar at Rutgers University on the topic of homosexual teenagers that Dale attended. The relevant passage reads:

> "James Dale, 19, co-president of the Rutgers University Lesbian Gay Alliance with Sharice Richardson, also 19, said he lived a double life while in high school, pretending to be straight while attending a military academy.

> "He remembers dating girls and even laughing at homophobic jokes while at school, only admitting his homosexuality during his second year at Rutgers.
>
> "'I was looking for a role model, someone who was gay and accepting of me,' Dale said, adding he wasn't just seeking sexual experiences, but a community that would take him in and provide him with a support network and friends." App. 517.

Nothing in that article, however, even remotely suggests that Dale would advocate any views on homosexuality to his troop. The Scoutmaster Handbook instructs Dale, like all Scoutmasters, that sexual issues are not their "proper area," and there is no evidence that Dale had any intention of violating this rule. Indeed, from all accounts Dale was a model Boy Scout and Assistant Scoutmaster up until the day his membership was revoked, and there is no reason to believe that he would suddenly disobey the directives of BSA because of anything he said in the newspaper article.

To be sure, the article did say that Dale was co-president of the Lesbian/Gay Alliance at Rutgers University, and that group presumably engages in advocacy regarding homosexual issues. But surely many members of BSA engage in expressive activities outside of their troop, and surely BSA does not want all of that expression to be carried on inside the troop. For example, a Scoutmaster may be a member of a religious group that encourages its followers to convert others to its faith. Or a Scoutmaster may belong to a political party that encourages its members to advance its views among family and friends.[16] Yet BSA does not think it is appropriate for Scoutmasters to proselytize a particular faith to unwilling Scouts or to attempt to convert them from one

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[16] Scoutmaster Handbook (1990) (reprinted in App. 273) ("Scouts and Scouters are encouraged to take active part in political matters *as individuals*" (emphasis added)).

religion to another.[17] Nor does BSA think it appropriate for Scouts or Scoutmasters to bring politics into the troop.[18] From all accounts, then, BSA does not discourage or forbid outside expressive activity, but relies on compliance with its policies and trusts Scouts and Scoutmasters alike not to bring unwanted views into the organization. Of course, a disobedient member who flouts BSA's policy may be expelled. But there is no basis for BSA to presume that a homosexual will be unable to comply with BSA's policy not to discuss sexual matters any more than it would presume that politically or religiously active members could not resist the urge to proselytize or politicize during troop meetings.[19] As BSA itself puts it, its rights are "not implicated *unless* a prospective leader *presents himself* as a role model incon-

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[17] Bylaws of the Boy Scouts of America, Art. IX, § 1, cl. 3 (reprinted in App. 363) ("In no case where a unit is connected with a church or other distinctively religious organization shall members of other denominations or faith be required, because of their membership in the unit, to take part in or observe a religious ceremony distinctly unique to that organization or church").

[18] Rules and Regulations of the Boy Scouts of America, Art. IX, § 2, cl. 6 (reprinted in App. 407) ("The Boy Scouts of America shall not, through its governing body or through any of its officers, its chartered councils, or members, involve the Scouting movement in any question of a political character").

[19] Consider, in this regard, that a heterosexual, as well as a homosexual, could advocate to the Scouts the view that homosexuality is not immoral. BSA acknowledges as much by stating that a heterosexual who advocates that view to Scouts would be expelled as well. *Id.*, at 746 ("*[A]ny* persons who advocate to Scouting youth that homosexual conduct is 'morally straight' under the Scout Oath, or 'clean' under the Scout Law will not be registered as adult leaders" (emphasis added)) (certification of BSA's National Director of Program). But BSA does not expel heterosexual members who take that view *outside* of their participation in Scouting, as long as they do not advocate that position to the Scouts. Tr. of Oral Arg. 6. And if there is no reason to presume that such a heterosexual will openly violate BSA's desire to express no view on the subject, what reason—other than blatant stereotyping—could justify a contrary presumption for homosexuals?

sistent with Boy Scouting's understanding of the Scout Oath and Law." Brief for Petitioners 6 (emphases added).[20]

The majority, though, does not rest its conclusion on the claim that Dale will use his position as a bully pulpit. Rather, it contends that Dale's mere presence among the Boy Scouts will itself force the group to convey a message about homosexuality—even if Dale has no intention of doing so. The majority holds that "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinc[t] . . . message," and, accordingly, BSA is entitled to exclude that message. *Ante*, at 655–656. In particular, "Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of be-

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[20] BSA cites three media interviews and Dale's affidavit to argue that he will openly advance a pro-gay agenda while being a Scoutmaster. None of those statements even remotely supports that conclusion. And *all* of them were made *after* Dale's membership was revoked and *after* this litigation commenced; therefore, they could not have affected BSA's revocation decision.

In a New York Times interview, Dale said "'I owe it *to the organization* to point out *to them* how bad and wrong this policy is.'" App. 513 (emphases added). This statement merely demonstrates that Dale wants to use *this litigation*—not his Assistant Scoutmaster position—to make a point, and that he wants to make the point to the BSA organization, not to the boys in his troop. At oral argument, BSA conceded that would not be grounds for membership revocation. Tr. of Oral Arg. 13. In a Seattle Times interview, Dale said Scouting is "'about giving adolescent boys a role model.'" App. 549. He did not say it was about giving them a role model who advocated a position on homosexuality. In a television interview, Dale also said "I am gay, and I'm very proud of who I am . . . . I stand up for what I believe in . . . . I'm not hiding anything." *Id.*, at 470. Nothing in that statement says anything about an intention to stand up for homosexual rights in any context other than in this litigation. Lastly, Dale said in his affidavit that he is "open and honest about [his] sexual orientation." *Id.*, at 133. Once again, like someone who is open and honest about his political affiliation, there is no evidence in that statement that Dale will not comply with BSA's policy when acting as a Scoutmaster.

havior." *Ante,* at 653; see also Brief for Petitioners 24 ("By donning the uniform of an adult leader in Scouting, he would 'celebrate [his] identity' as an openly gay Scout leader").

The majority's argument relies exclusively on *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995). In that case, petitioners John Hurley and the South Boston Allied War Veterans Council ran a privately operated St. Patrick's Day parade. Respondent, an organization known as "GLIB," represented a contingent of gays, lesbians, and bisexuals who sought to march in the petitioners' parade "as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." *Id.*, at 561. When the parade organizers refused GLIB's admission, GLIB brought suit under Massachusetts' antidiscrimination law. That statute, like New Jersey's law, prohibited discrimination on account of sexual orientation in any place of public accommodation, which the state courts interpreted to include the parade. Petitioners argued that forcing them to include GLIB in their parade would violate their free speech rights.

We agreed. We first pointed out that the St. Patrick's Day parade—like most every parade—is an inherently expressive undertaking. *Id.*, at 568–570. Next, we reaffirmed that the government may not compel anyone to proclaim a belief with which he or she disagrees. *Id.*, at 573–574. We then found that GLIB's marching in the parade would be an expressive act suggesting the view "that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals." *Id.*, at 574. Finally, we held that GLIB's participation in the parade "would likely be perceived" as the parade organizers' own speech—or at least as a view which they approved—because of a parade organizer's customary control over who marches in the parade. *Id.*, at 575. Though *Hurley* has a superficial similarity to the present case, a close inspection reveals a wide gulf between that case and the one before us today.

First, it was critical to our analysis that GLIB was actually conveying a message by participating in the parade—otherwise, the parade organizers could hardly claim that they were being forced to include any unwanted message at all. Our conclusion that GLIB was conveying a message was inextricably tied to the fact that GLIB wanted to march in a parade, as well as the manner in which it intended to march. We noted the "inherent expressiveness of marching [in a parade] to make a point," *id.*, at 568, and in particular that GLIB was formed for the purpose of making a particular point about gay pride, *id.*, at 561, 570. More specifically, GLIB "distributed a fact sheet describing the members' intentions" and, in a previous parade, had "marched behind a shamrock-strewn banner with the simple inscription 'Irish American Gay, Lesbian and Bisexual Group of Boston.'" *Id.*, at 570. "[A] contingent marching behind the organization's banner," we said, would clearly convey a message. *Id.*, at 574. Indeed, we expressly distinguished between the members of GLIB, who marched as a unit to express their views about their own sexual orientation, on the one hand, and homosexuals who might participate as individuals in the parade without intending to express anything about their sexuality by doing so. *Id.*, at 572–573.

Second, we found it relevant that GLIB's message "would likely be perceived" as the parade organizers' own speech. *Id.*, at 575. That was so because "[p]arades and demonstrations . . . are not understood to be so neutrally presented or selectively viewed" as, say, a broadcast by a cable operator, who is usually considered to be "merely 'a conduit' for the speech" produced by others. *Id.*, at 575–576. Rather, parade organizers are usually understood to make the "customary determination about a unit admitted to the parade." *Id.*, at 575.

Dale's inclusion in the Boy Scouts is nothing like the case in *Hurley*. His participation sends no cognizable message to the Scouts or to the world. Unlike GLIB, Dale did not

carry a banner or a sign; he did not distribute any factsheet; and he expressed no intent to send any message. If there is any kind of message being sent, then, it is by the mere act of joining the Boy Scouts. Such an act does not constitute an instance of symbolic speech under the First Amendment.[21]

It is true, of course, that some acts are so imbued with symbolic meaning that they qualify as "speech" under the First Amendment. See *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968). At the same time, however, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Ibid.* Though participating in the Scouts could itself conceivably send a message on some level, it is not the kind of act that we have recognized as speech. See *Dallas* v. *Stanglin*, 490 U. S. 19, 24–25 (1989).[22] Indeed, if merely joining a group did constitute symbolic speech; and such speech were attributable to the group being joined; and that group has the right to exclude that speech (and hence, the right to exclude that person from joining), then the right of free speech effectively becomes a limitless right to exclude for every organization, whether or not it engages in *any* expressive activities. That cannot be, and never has been, the law.

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[21] The majority might have argued (but it did not) that Dale had become so publicly and pervasively identified with a position advocating the moral legitimacy of homosexuality (as opposed to just being an individual who openly stated he is gay) that his leadership position in BSA would necessarily amount to using the organization as a conduit for publicizing his position. But as already noted, when BSA expelled Dale, it had nothing to go on beyond the one newspaper article quoted above, and one newspaper article does not convert Dale into a public symbol for a message. BSA simply has not provided a record that establishes the factual premise for this argument.

[22] This is not to say that Scouts do not engage in expressive activity. It is only to say that the simple act of joining the Scouts—unlike joining a parade—is not inherently expressive.

The only apparent explanation for the majority's holding, then, is that homosexuals are simply so different from the rest of society that their presence alone—unlike any other individual's—should be singled out for special First Amendment treatment. Under the majority's reasoning, an openly gay male is irreversibly affixed with the label "homosexual." That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.[23] As counsel for BSA remarked, Dale "put a banner around his neck when he . . . got himself into the newspaper. . . . He created a reputation. . . . He can't take that banner off. He put it on himself and, indeed, he has continued to put it on himself." See Tr. of Oral Arg. 25.

Another difference between this case and *Hurley* lies in the fact that *Hurley* involved the parade organizers' claim to determine the content of the message they wish to give at a particular time and place. The standards governing such a claim are simply different from the standards that govern BSA's claim of a right of expressive association. Generally, a private person or a private organization has a right to refuse to broadcast a message with which it disagrees, and a right to refuse to contradict or garble its own specific statement at any given place or time by including the messages of others. An expressive association claim, however, normally involves the avowal and advocacy of a consistent position on some issue over time. This is why a different kind of scrutiny must be given to an expressive association claim, lest the right of expressive association simply turn into a right to discriminate whenever some group can think of an expressive object that would seem to be inconsistent with the ad-

[23] See Yoshino, Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays, 96 Colum. L. Rev. 1753, 1781–1783 (1996).

mission of some person as a member or at odds with the appointment of a person to a leadership position in the group.

Furthermore, it is not likely that BSA would be understood to send any message, either to Scouts or to the world, simply by admitting someone as a member. Over the years, BSA has generously welcomed over 87 million young Americans into its ranks. In 1992 over one million adults were active BSA members. 160 N. J. 562, 571, 734 A. 2d 1196, 1200 (1999). The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those adults may express in a non-Scouting context is simply mind boggling. Indeed, in this case there is no evidence that the young Scouts in Dale's troop, or members of their families, were even aware of his sexual orientation, either before or after his public statements at Rutgers University.[24] It is equally farfetched to assert that Dale's open declaration of his homosexuality, reported in a local newspaper, will effectively force BSA to send a message to anyone simply because it allows Dale to be an Assistant Scoutmaster. For an Olympic gold medal winner or a Wimbledon tennis champion, being "openly gay" perhaps communicates a message—for example, that openness about one's sexual orientation is more virtuous than concealment; that a homosexual person can be a capable and virtuous person who should be judged like anyone else; and that homosexuality is not immoral—but it certainly does not follow that they necessarily send a message on behalf of the organizations that sponsor the activities in which they excel. The fact that such persons participate in these organizations is not usually construed to convey a message on behalf of those organizations any more than does the inclusion of women, African-Americans, reli-

[24] For John Doe to make a public statement of his sexual orientation to the newspapers may, of course, be a matter of great importance to John Doe. Richard Roe, however, may be much more interested in the weekend weather forecast. Before Dale made his statement at Rutgers, the Scoutmaster of his troop did not know that he was gay. App. 465.

gious minorities, or any other discrete group.[25] Surely the organizations are not forced by antidiscrimination laws to take any position on the legitimacy of any individual's private beliefs or private conduct.

The State of New Jersey has decided that people who are open and frank about their sexual orientation are entitled to equal access to employment as schoolteachers, police officers, librarians, athletic coaches, and a host of other jobs filled by citizens who serve as role models for children and adults alike. Dozens of Scout units throughout the State are sponsored by public agencies, such as schools and fire departments, that employ such role models. BSA's affiliation with numerous public agencies that comply with New Jersey's law against discrimination cannot be understood to convey any particular message endorsing or condoning the activities of all these people.[26]

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[25] The majority simply announces, without analysis, that Dale's participation alone would "force the organization to send a message." *Ante*, at 653. "But . . . these are merely conclusory words, barren of analysis. . . . For First Amendment principles to be implicated, the State must place the citizen in the position of either apparently or actually 'asserting as true' the message." *Wooley* v. *Maynard*, 430 U. S. 705, 721 (1977) (REHNQUIST, J., dissenting).

[26] BSA also argues that New Jersey's law violates its right to "intimate association." Brief for Petitioners 39–47. Our cases recognize a substantive due process right "to enter into and carry on certain intimate or private relationships." *Rotary Club*, 481 U. S., at 545. As with the First Amendment right to associate, the State may not interfere with the selection of individuals in such relationships. *Jaycees*, 468 U. S., at 618. Though the precise scope of the right to intimate association is unclear, "we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship" to determine whether a group is sufficiently personal to warrant this type of constitutional protection. *Rotary Club*, 481 U. S., at 546. Considering BSA's size, see *supra*, at 697, its broad purposes, and its nonselectivity, see *supra*, at 666, it is impossible to conclude that being a member of the Boy Scouts ranks among those intimate relationships falling within this right, such as marriage, bearing children, rearing children, and cohabitation with relatives. *Rotary Club*, 481 U. S., at 545.

VI

Unfavorable opinions about homosexuals "have ancient roots." *Bowers* v. *Hardwick*, 478 U. S. 186, 192 (1986). Like equally atavistic opinions about certain racial groups, those roots have been nourished by sectarian doctrine. *Id.*, at 196–197 (Burger, C. J., concurring); *Loving* v. *Virginia*, 388 U. S. 1, 3 (1967).[27] See also *Mathews* v. *Lucas*, 427 U. S. 495, 520 (1976) (STEVENS, J., dissenting) ("Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white"). Over the years, however, interaction with real people, rather than mere adherence to traditional ways of thinking about members of unfamiliar classes, have modified those opinions. A few examples: The American Psychiatric Association's and the American Psychological Association's removal of "homosexuality" from their lists of mental disorders;[28] a move toward greater understanding within some religious communities;[29] Justice Blackmun's classic opinion in *Bowers*;[30]

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[27] In *Loving*, the trial judge gave this explanation of the rationale for Virginia's antimiscegenation statute: "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'" 388 U. S., at 3.

[28] Brief for American Psychological Association as *Amicus Curiae* 8.

[29] See n. 3, *supra*.

[30] The significance of that opinion is magnified by comparing it with Justice Blackmun's vote 10 years earlier in *Doe* v. *Commonwealth's Attorney for City of Richmond*, 425 U. S. 901 (1976). In that case, six Justices—including Justice Blackmun—voted to summarily affirm the District Court's rejection of the same due process argument that was later rejected in *Bowers*. Two years later, furthermore, Justice Blackmun joined in a dissent in *University of Missouri* v. *Gay Lib*, 434 U. S. 1080 (1978). In that case, the university had denied recognition to a student gay rights organization. The student group argued that in doing so, the university had violated its free speech and free association rights. The Court of

Georgia's invalidation of the statute upheld in *Bowers;*[31] and New Jersey's enactment of the provision at issue in this case. Indeed, the past month alone has witnessed some remarkable changes in attitudes about homosexuals.[32]

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

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

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

I join JUSTICE STEVENS's dissent but add this further word on the significance of Part VI of his opinion. There, JUSTICE STEVENS describes the changing attitudes toward gay people and notes a parallel with the decline of stereotypical thinking about race and gender. The legitimacy of New

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Appeals agreed with that argument. A dissent from denial of certiorari, citing the university's argument, suggested that the proper analysis might well be as follows:

"[T]he question is more akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measle sufferers be quarantined." *Id.*, at 1084 (REHNQUIST, J., dissenting).

[31] *Powell* v. *State*, 270 Ga. 327, 510 S. E. 2d 18 (1998).

[32] See, *e. g.*, Bradsher, Big Carmakers Extend Benefits to Gay Couples, New York Times, June 9, 2000, p. C1; Marquis, Gay Pride Day is Observed by About 60 C. I. A. Workers, New York Times, June 9, 2000, p. A26; Zernike, Gay Couples are Accepted as Role Models at Exeter, New York Times, June 12, 2000, p. A18.

Jersey's interest in forbidding discrimination on all these bases by those furnishing public accommodations is, as JUSTICE STEVENS indicates, acknowledged by many to be beyond question. The fact that we are cognizant of this laudable decline in stereotypical thinking on homosexuality should not, however, be taken to control the resolution of this case.

Boy Scouts of America (BSA) is entitled, consistently with its own tenets and the open doors of American courts, to raise a federal constitutional basis for resisting the application of New Jersey's law. BSA has done that and has chosen to defend against enforcement of the state public accommodations law on the ground that the First Amendment protects expressive association: individuals have a right to join together to advocate opinions free from government interference. See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 622 (1984). BSA has disclaimed any argument that Dale's past or future actions, as distinct from his unapologetic declaration of sexual orientation, would justify his exclusion from BSA. See Tr. of Oral Arg. 12–13.

The right of expressive association does not, of course, turn on the popularity of the views advanced by a group that claims protection. Whether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group's rights. I conclude that BSA has not made out an expressive association claim, therefore, not because of what BSA may espouse, but because of its failure to make sexual orientation the subject of any unequivocal advocacy, using the channels it customarily employs to state its message. As JUSTICE STEVENS explains, no group can claim a right of expressive association without identifying a clear position to be advocated over time in an unequivocal way. To require less, and to allow exemption from a public accommodations statute based on any individual's difference from an alleged group ideal, however expressed and however inconsistently claimed, would convert the right of expres-

sive association into an easy trump of any antidiscrimination law.*

If, on the other hand, an expressive association claim has met the conditions JUSTICE STEVENS describes as necessary, there may well be circumstances in which the antidiscrimination law must yield, as he says. It is certainly possible for an individual to become so identified with a position as to epitomize it publicly. When that position is at odds with a group's advocated position, applying an antidiscrimination statute to require the group's acceptance of the individual in a position of group leadership could so modify or muddle or frustrate the group's advocacy as to violate the expressive associational right. While it is not our business here to rule on any such hypothetical, it is at least clear that our estimate of the progressive character of the group's position will be irrelevant to the First Amendment analysis if such a case comes to us for decision.

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*An expressive association claim is in this respect unlike a basic free speech claim, as JUSTICE STEVENS points out; the latter claim, *i. e.*, the right to convey an individual's or group's position, if bona fide, may be taken at face value in applying the First Amendment. This case is thus unlike *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995).

Syllabus

HURLEY ET AL. *v.* IRISH-AMERICAN GAY, LESBIAN AND BISEXUAL GROUP OF BOSTON, INC., ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 94–749. Argued April 25, 1995—Decided June 19, 1995

Petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various veterans groups, was authorized by the city of Boston to organize and conduct the St. Patrick's Day-Evacuation Day Parade. The Council refused a place in the 1993 event to respondent GLIB, an organization formed for the purpose of marching in the parade in order to express its members' pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York St. Patrick's Day parade. GLIB and some of its members filed this suit in state court, alleging that the denial of their application to march violated, *inter alia,* a state law prohibiting discrimination on account of sexual orientation in places of public accommodation. In finding such a violation and ordering the Council to include GLIB in the parade, the trial court, among other things, concluded that the parade had no common theme other than the involvement of the participants, and that, given the Council's lack of selectivity in choosing parade participants and its failure to circumscribe the marchers' messages, the parade lacked any expressive purpose, such that GLIB's inclusion therein would not violate the Council's First Amendment rights. The Supreme Judicial Court of Massachusetts affirmed.

Held: The state courts' application of the Massachusetts public accommodations law to require private citizens who organize a parade to include among the marchers a group imparting a message that the organizers do not wish to convey violates the First Amendment. Pp. 566–581.

(a) Confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the realm of nonexpressive conduct, this Court has a constitutional duty to conduct an independent examination of the record as a whole, without deference to those courts, to assure that their judgment does not constitute a forbidden intrusion on the field of free expression. See, *e. g., New York Times Co.* v. *Sullivan,* 376 U. S. 254, 285. Pp. 566–568.

(b) The selection of contingents to make a parade is entitled to First Amendment protection. Parades such as petitioners' are a form of protected expression because they include marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Cf., *e. g.*, *Gregory* v. *Chicago*, 394 U. S. 111, 112. Moreover, such protection is not limited to a parade's banners and songs, but extends to symbolic acts. See, *e. g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632, 642. Although the Council has been rather lenient in admitting participants to its parade, a private speaker does not forfeit constitutional protection simply by combining multifarious voices, by failing to edit their themes to isolate a specific message as the exclusive subject matter of the speech, or by failing to generate, as an original matter, each item featured in the communication. Thus, petitioners are entitled to protection under the First Amendment. GLIB's participation as a unit in the parade was equally expressive, since the organization was formed to celebrate its members' sexual identities and for related purposes. Pp. 568–570.

(c) The Massachusetts law does not, as a general matter, violate the First or Fourteenth Amendments. Its provisions are well within a legislature's power to enact when it has reason to believe that a given group is being discriminated against. And the statute does not, on its face, target speech or discriminate on the basis of its content. Pp. 571–572.

(d) The state court's application, however, had the effect of declaring the sponsors' speech itself to be the public accommodation. Since every participating parade unit affects the message conveyed by the private organizers, the state courts' peculiar application of the Massachusetts law essentially forced the Council to alter the parade's expressive content and thereby violated the fundamental First Amendment rule that a speaker has the autonomy to choose the content of his own message and, conversely, to decide what not to say. Petitioners' claim to the benefit of this principle is sound, since the Council selects the expressive units of the parade from potential participants and clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another, free from state interference. The constitutional violation is not saved by *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622. The Council is a speaker in its own right; a parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience; and there is no assertion here that some speakers will be destroyed in the absence of

the Massachusetts law. Nor has any other legitimate interest been identified in support of applying that law in the way done by the state courts to expressive activity like the parade. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 87, and *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 13, distinguished. Pp. 572–581.

418 Mass. 238, 636 N. E. 2d 1293, reversed and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

Chester Darling argued the cause for petitioners. With him on the briefs were *Dwight G. Duncan* and *William M. Connolly.*

John Ward argued the cause for respondents. With him on the brief were *David Duncan, Gretchen Van Ness, Gary Buseck, Mary Bonauto, Larry W. Yackle,* and *Charles S. Sims.**

JUSTICE SOUTER delivered the opinion of the Court.

The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment.

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*Briefs of *amici curiae* urging reversal were filed for the Boy Scouts of America by *George A. Davidson, Carla A. Kerr,* and *David K. Park;* for the Catholic War Veterans of the United States of America, Inc., by *John P. Hale;* for the Center for Individual Rights et al. by *Gary B. Born, Ernest L. Mathews, Jr., Maura R. Cahill,* and *Michael P. McDonald;* and for the Christian Legal Society et al. by *Steven T. McFarland, Samuel B. Casey,* and *Gregory S. Baylor.*

Briefs of *amici curiae* urging affirmance were filed for the Anti-Defamation League et al. by *Walter A. Smith, Jr., Thomas N. Bulleit, Jr., Steven M. Freeman, Arlene B. Mayerson, Antonia Hernandez, Alice E. Zaft, Judith L. Lichtman,* and *Donna R. Lenhoff;* and for the Irish Lesbian and Gay Organization et al. by *R. Paul Wickes* and *Michael E. Deutsch.*

Burt Neuborne, Steven R. Shapiro, and *Marjorie Heins* filed a brief for the American Civil Liberties Union as *amicus curiae.*

I

March 17 is set aside for two celebrations in South Boston. As early as 1737, some people in Boston observed the feast of the apostle to Ireland, and since 1776 the day has marked the evacuation of royal troops and Loyalists from the city, prompted by the guns captured at Ticonderoga and set up on Dorchester Heights under General Washington's command. Washington himself reportedly drew on the earlier tradition in choosing "St. Patrick" as the response to "Boston," the password used in the colonial lines on evacuation day. See J. Crimmins, St. Patrick's Day: Its Celebration in New York and other American Places, 1737–1845, pp. 15, 19 (1902); see generally 1 H. Commager & R. Morris, The Spirit of 'Seventy Six, pp. 138–183 (1958); The American Book of Days 262–265 (J. Hatch ed., 3d ed. 1978). Although the General Court of Massachusetts did not officially designate March 17 as Evacuation Day until 1938, see Mass. Gen. Laws § 6:12K (1992), the City Council of Boston had previously sponsored public celebrations of Evacuation Day, including notable commemorations on the centennial in 1876, and on the 125th anniversary in 1901, with its parade, salute, concert, and fireworks display. See Celebration of the Centennial Anniversary of the Evacuation of Boston by the British Army (G. Ellis ed. 1876); *Irish-American Gay, Lesbian and Bisexual Group of Boston* v. *City of Boston et al.*, Civ. Action No. 92–1518A (Super. Ct., Mass., Dec. 15, 1993), reprinted in App. to Pet. for Cert. B1, B8–B9.

The tradition of formal sponsorship by the city came to an end in 1947, however, when Mayor James Michael Curley himself granted authority to organize and conduct the St. Patrick's Day-Evacuation Day Parade to the petitioner South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various South Boston veterans groups. Every year since that time, the Council has applied for and received a permit for the parade, which at times has included as many as 20,000 marchers and drawn

up to 1 million watchers. No other applicant has ever applied for that permit. *Id.*, at B9. Through 1992, the city allowed the Council to use the city's official seal, and provided printing services as well as direct funding.

In 1992, a number of gay, lesbian, and bisexual descendants of the Irish immigrants joined together with other supporters to form the respondent organization, GLIB, to march in the parade as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York's St. Patrick's Day Parade. *Id.*, at B3; App. 51. Although the Council denied GLIB's application to take part in the 1992 parade, GLIB obtained a state-court order to include its contingent, which marched "uneventfully" among that year's 10,000 participants and 750,000 spectators. App. to Pet. for Cert. B3, and n. 4.

In 1993, after the Council had again refused to admit GLIB to the upcoming parade, the organization and some of its members filed this suit against the Council, the individual petitioner John J. "Wacko" Hurley, and the city of Boston, alleging violations of the State and Federal Constitutions and of the state public accommodations law, which prohibits "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws §272:98 (1992). After finding that "[f]or at least the past 47 years, the Parade has traveled the same basic route along the public streets of South Boston, providing entertainment, amusement, and recreation to participants and spectators alike," App. to Pet. for Cert. B5–B6, the state trial court ruled that the parade fell within the statutory definition of a public accommodation, which includes "any place . . . which is open to and accepts or solicits the patronage of the general public

and, without limiting the generality of this definition, whether or not it be . . . (6) a boardwalk or other public highway [or] . . . (8) a place of public amusement, recreation, sport, exercise or entertainment," Mass. Gen. Laws § 272:92A (1992). The court found that the Council had no written criteria and employed no particular procedures for admission, voted on new applications in batches, had occasionally admitted groups who simply showed up at the parade without having submitted an application, and did "not generally inquire into the specific messages or views of each applicant." App. to Pet. for Cert. B8–B9. The court consequently rejected the Council's contention that the parade was "private" (in the sense of being exclusive), holding instead that "the lack of genuine selectivity in choosing participants and sponsors demonstrates that the Parade is a public event." *Id.*, at B6. It found the parade to be "eclectic," containing a wide variety of "patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes," as well as conflicting messages. *Id.*, at B24. While noting that the Council had indeed excluded the Ku Klux Klan and ROAR (an antibusing group), *id.*, at B7, it attributed little significance to these facts, concluding ultimately that "[t]he only common theme among the participants and sponsors is their public involvement in the Parade," *id.*, at B24.

The court rejected the Council's assertion that the exclusion of "groups with sexual themes merely formalized [the fact] that the Parade expresses traditional religious and social values," *id.*, at B3, and found the Council's "final position [to be] that GLIB would be excluded because of its values and its message, *i. e.*, its members' sexual orientation," *id.*, at B4, n. 5, citing Tr. of Closing Arg. 43, 51–52 (Nov. 23, 1993). This position, in the court's view, was not only violative of the public accommodations law but "paradoxical" as well, since "a proper celebration of St. Patrick's and Evacuation Day requires diversity and inclusiveness." App. to Pet. for

Cert. B24. The court rejected the notion that GLIB's admission would trample on the Council's First Amendment rights since the court understood that constitutional protection of any interest in expressive association would "requir[e] focus on a specific message, theme, or group" absent from the parade. *Ibid.* "Given the [Council's] lack of selectivity in choosing participants and failure to circumscribe the marchers' message," the court found it "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment." *Id.*, at B25. It concluded that the parade is "not an exercise of [the Council's] constitutionally protected right of expressive association," but instead "an open recreational event that is subject to the public accommodations law." *Id.*, at B27.

The court held that because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council's right to expressive association was only "incidental" and "no greater than necessary to accomplish the statute's legitimate purpose" of eradicating discrimination. *Id.*, at B25, citing *Roberts* v. *United States Jaycees*, 468 U. S. 609, 628–629 (1984). Accordingly, it ruled that "GLIB is entitled to participate in the Parade on the same terms and conditions as other participants." App. to Pet. for Cert. B27.[1]

The Supreme Judicial Court of Massachusetts affirmed, seeing nothing clearly erroneous in the trial judge's findings

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[1] The court dismissed the public accommodations law claim against the city because it found that the city's actions did not amount to inciting or assisting in the Council's violations of §272:98. App. to Pet. for Cert. B12–B13. It also dismissed respondents' First and Fourteenth Amendment challenge against the Council for want of state action triggering the proscriptions of those Amendments. *Id.*, at B14–B22. Finally, the court did not reach the state constitutional questions, since respondents had apparently assumed in their arguments that those claims, too, depended for their success upon a finding of state action and because of the court's holding that the public accommodation statutes apply to the parade. *Id.*, at B22.

that GLIB was excluded from the parade based on the sexual orientation of its members, that it was impossible to detect an expressive purpose in the parade, that there was no state action, and that the parade was a public accommodation within the meaning of § 272:92A. *Irish-American Gay, Lesbian and Bisexual Group of Boston* v. *Boston*, 418 Mass. 238, 242–248, 636 N. E. 2d 1293, 1295–1298 (1994).[2] Turning to petitioners' First Amendment claim that application of the public accommodations law to the parade violated their freedom of speech (as distinguished from their right to expressive association, raised in the trial court), the court's majority held that it need not decide on the particular First Amendment theory involved "because, as the [trial] judge found, it is 'impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment.'" *Id.*, at 249, 636 N. E. 2d, at 1299 (footnote omitted). The defendants had thus failed at the trial level "to demonstrate that the parade truly was an exercise of . . . First Amendment rights," *id.*, at 250, 636 N. E. 2d, at 1299, citing *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 293, n. 5 (1984), and on appeal nothing indicated to the majority of the Supreme Judicial Court that the trial judge's assessment of the evidence on this point was clearly erroneous, 418 Mass., at 250, 636 N. E. 2d, at 1299. The court rejected petitioners' further challenge to the law as overbroad, holding that it does not, on its face, regulate speech, does not let public officials examine the content of speech, and would not be interpreted as reaching speech. *Id.*, at 251–252, 636 N. E. 2d, at 1300. Finally, the court rejected the challenge that the public accommodations law was unconstitutionally vague, holding that this case did not present an issue of speech and that the law gave persons of

[2] Since respondents did not cross-appeal the dismissal of their claims against the city, the Supreme Judicial Court declined to reach those claims. 418 Mass., at 245, n. 12, 636 N. E. 2d, at 1297.

ordinary intelligence a reasonable opportunity to know what was prohibited. *Id.*, at 252, 636 N. E. 2d, at 1300–1301.

Justice Nolan dissented. In his view, the Council "does not need a narrow or distinct theme or message in its parade for it to be protected under the First Amendment." *Id.*, at 256, 636 N. E. 2d, at 1303. First, he wrote, even if the parade had no message at all, GLIB's particular message could not be forced upon it. *Id.*, at 257, 636 N. E. 2d, at 1303, citing *Wooley* v. *Maynard*, 430 U. S. 705, 717 (1977) (state requirement to display "Live Free or Die" on license plates violates First Amendment). Second, according to Justice Nolan, the trial judge clearly erred in finding the parade devoid of expressive purpose. 418 Mass., at 257, 636 N. E. 2d, at 1303. He would have held that the Council, like any expressive association, cannot be barred from excluding applicants who do not share the views the Council wishes to advance. *Id.*, at 257–259, 636 N. E. 2d, at 1303–1304, citing *Roberts*, *supra*. Under either a pure speech or associational theory, the State's purpose of eliminating discrimination on the basis of sexual orientation, according to the dissent, could be achieved by more narrowly drawn means, such as ordering admission of individuals regardless of sexual preference, without taking the further step of prohibiting the Council from editing the views expressed in their parade. 418 Mass., at 256, 258, 636 N. E. 2d, at 1302, 1304. In Justice Nolan's opinion, because GLIB's message was separable from the status of its members, such a narrower order would accommodate the State's interest without the likelihood of infringing on the Council's First Amendment rights. Finally, he found clear error in the trial judge's equation of exclusion on the basis of GLIB's message with exclusion on the basis of its members' sexual orientation. To the dissent this appeared false in the light of "overwhelming evidence" that the Council objected to GLIB on account of its message and a dearth of testimony or documentation indicating that sexual orientation was the bar to admission. *Id.*, at 260, 636

N. E. 2d, at 1304. The dissent accordingly concluded that the Council had not even violated the State's public accommodations law.

We granted certiorari to determine whether the requirement to admit a parade contingent expressing a message not of the private organizers' own choosing violates the First Amendment. 513 U. S. 1071 (1995). We hold that it does and reverse.

II

Given the scope of the issues as originally joined in this case, it is worth noting some that have fallen aside in the course of the litigation, before reaching us. Although the Council presents us with a First Amendment claim, respondents do not. Neither do they press a claim that the Council's action has denied them equal protection of the laws in violation of the Fourteenth Amendment. While the guarantees of free speech and equal protection guard only against encroachment by the government and "erec[t] no shield against merely private conduct," *Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948); see *Hudgens* v. *NLRB*, 424 U. S. 507, 513 (1976), respondents originally argued that the Council's conduct was not purely private, but had the character of state action. The trial court's review of the city's involvement led it to find otherwise, however, and although the Supreme Judicial Court did not squarely address the issue, it appears to have affirmed the trial court's decision on that point as well as the others. In any event, respondents have not brought that question up either in a cross-petition for certiorari or in their briefs filed in this Court. When asked at oral argument whether they challenged the conclusion by the Massachusetts' courts that no state action is involved in the parade, respondents' counsel answered that they "do not press that issue here." Tr. of Oral Arg. 22. In this Court, then, their claim for inclusion in the parade rests solely on the Massachusetts public accommodations law.

There is no corresponding concession from the other side, however, and certainly not to the state courts' characterization of the parade as lacking the element of expression for purposes of the First Amendment. Accordingly, our review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 499 (1984). The "requirement of independent appellate review . . . is a rule of federal constitutional law," *id.*, at 510, which does not limit our deference to a trial court on matters of witness credibility, *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 688 (1989), but which generally requires us to "review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts," *Fiske* v. *Kansas*, 274 U. S. 380, 385–386 (1927). See also *Niemotko* v. *Maryland*, 340 U. S. 268, 271 (1951); *Jacobellis* v. *Ohio*, 378 U. S. 184, 189 (1964) (opinion of Brennan, J.). This obligation rests upon us simply because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection. See *Bose Corp.*, *supra*, at 503. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that "[f]indings of fact . . . shall not be set aside unless clearly erroneous," we are obliged to make a fresh examination of crucial facts. Hence, in this case, though we are confronted with the state courts' conclusion that the factual characteristics of petitioners' activity place it within the vast realm of nonexpressive conduct, our obligation is to " 'make an independent examina-

tion of the whole record,' . . . so as to assure ourselves that th[is] judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285 (1964) (footnote omitted), quoting *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963).

III

A

If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." S. Davis, Parades and Power: Street Theatre in Nineteenth-Century Philadelphia 6 (1986). Hence, we use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened." *Id.*, at 171. Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches. In *Gregory* v. *Chicago*, 394 U. S. 111, 112 (1969), for example, petitioners had taken part in a procession to express their grievances to the city government, and we held that such a "march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment." Similarly, in *Edwards* v. *South Carolina*, *supra*, at 235, where petitioners had joined in a march of protest and pride, carrying placards and singing The Star Spangled Banner, we held that the activities "reflect an exercise of these basic constitutional

rights in their most pristine and classic form." Accord, *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 152 (1969).

The protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression. Noting that "[s]ymbolism is a primitive but effective way of communicating ideas," *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 632 (1943), our cases have recognized that the First Amendment shields such acts as saluting a flag (and refusing to do so), *id.*, at 632, 642, wearing an armband to protest a war, *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 505–506 (1969), displaying a red flag, *Stromberg* v. *California*, 283 U. S. 359, 369 (1931), and even "[m]arching, walking or parading" in uniforms displaying the swastika, *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977). As some of these examples show, a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a "particularized message," cf. *Spence* v. *Washington*, 418 U. S. 405, 411 (1974) *(per curiam)*, would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.

Not many marches, then, are beyond the realm of expressive parades, and the South Boston celebration is not one of them. Spectators line the streets; people march in costumes and uniforms, carrying flags and banners with all sorts of messages (*e. g.*, "England get out of Ireland," "Say no to drugs"); marching bands and pipers play; floats are pulled along; and the whole show is broadcast over Boston television. See Record, Exh. 84 (video). To be sure, we agree with the state courts that in spite of excluding some applicants, the Council is rather lenient in admitting participants. But a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive

subject matter of the speech. Nor, under our precedent, does First Amendment protection require a speaker to generate, as an original matter, each item featured in the communication. Cable operators, for example, are engaged in protected speech activities even when they only select programming originally produced by others. *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 636 (1994) ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment"). For that matter, the presentation of an edited compilation of speech generated by other persons is a staple of most newspapers' opinion pages, which, of course, fall squarely within the core of First Amendment security, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 258 (1974), as does even the simple selection of a paid noncommercial advertisement for inclusion in a daily paper, see *New York Times*, 376 U. S., at 265–266. The selection of contingents to make a parade is entitled to similar protection.

Respondents' participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. App. to Pet. for Cert. B3. The organization distributed a fact sheet describing the members' intentions, App. A51, and the record otherwise corroborates the expressive nature of GLIB's participation, see Record, Exh. 84 (video); App. A67 (photograph). In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription "Irish American Gay, Lesbian and Bisexual Group of Boston." GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.

B

The Massachusetts public accommodations law under which respondents brought suit has a venerable history. At common law, innkeepers, smiths, and others who "made profession of a public employment," were prohibited from refusing, without good reason, to serve a customer. *Lane* v. *Cotton*, 12 Mod. 472, 484–485, 88 Eng. Rep. 1458, 1464–1465 (K. B. 1701) (Holt, C. J.); see *Bell* v. *Maryland*, 378 U. S. 226, 298, n. 17 (1964) (Goldberg, J., concurring); *Lombard* v. *Louisiana*, 373 U. S. 267, 277 (1963) (Douglas, J., concurring). As one of the 19th-century English judges put it, the rule was that "[t]he innkeeper is not to select his guests[;] [h]e has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants." *Rex* v. *Ivens*, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N. P. 1835); M. Konvitz & T. Leskes, A Century of Civil Rights 160 (1961).

After the Civil War, the Commonwealth of Massachusetts was the first State to codify this principle to ensure access to public accommodations regardless of race. See Act Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts, ch. 277 (May 16, 1865); Konvitz & Leskes, *supra*, at 155–156; Lerman & Sanderson, Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws, 7 N. Y. U. Rev. L. & Soc. Change 215, 238 (1978); Fox, Discrimination and Antidiscrimination in Massachusetts Law, 44 B. U. L. Rev. 30, 58 (1964). In prohibiting discrimination "in any licensed inn, in any public place of amusement, public conveyance or public meeting," 1865 Mass. Acts, ch. 277, § 1, the original statute already expanded upon the common law, which had not conferred any right of access to places of public amusement, Lerman & Sanderson, *supra*, at 248. As with many public accommodations statutes across the Nation, the legislature continued to

broaden the scope of legislation, to the point that the law today prohibits discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation . . . , deafness, blindness or any physical or mental disability or ancestry" in "the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Mass. Gen. Laws §272:98 (1992). Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments. See, *e. g.*, *New York State Club Assn., Inc.* v. *City of New York*, 487 U. S. 1, 11–16 (1988); *Roberts* v. *United States Jaycees*, 468 U. S., at 624–626; *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258–262 (1964). Nor is this statute unusual in any obvious way, since it does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds.

C

In the case before us, however, the Massachusetts law has been applied in a peculiar way. Its enforcement does not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade. Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march. Instead, the disagreement goes to the admission of GLIB as its own parade unit carrying its own banner. See App. to Pet. for Cert. B26–B27, and n. 28. Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content

of their parade. Although the state courts spoke of the parade as a place of public accommodation, see, *e. g.*, 418 Mass., at 247–248, 636 N. E. 2d, at 1297–1298, once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation. Under this approach any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all those protected by the law who wished to join in with some expressive demonstration of their own. But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.

"Since *all* speech inherently involves choices of what to say and what to leave unsaid," *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of Cal.*, 475 U. S. 1, 11 (1986) (plurality opinion) (emphasis in original), one important manifestation of the principle of free speech is that one who chooses to speak may also decide "what not to say," *id.*, at 16. Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985); see *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 386–387 (1973), outside that context it may not compel affirmance of a belief with which the speaker disagrees, see *Barnette*, 319 U. S., at 642. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, *McIntyre* v. *Ohio Elections Comm'n*, 514 U. S. 334, 341–342 (1995); *Riley* v. *National Federation of Blind of N. C., Inc.*,

487 U. S. 781, 797–798 (1988), subject, perhaps, to the permissive law of defamation, *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 347–349 (1974); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46 (1988). Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. See *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969); *Terminiello* v. *Chicago*, 337 U. S. 1 (1949).

Petitioners' claim to the benefit of this principle of autonomy to control one's own speech is as sound as the South Boston parade is expressive. Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day. Even if this view gives the Council credit for a more considered judgment than it actively made, the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another. The message it disfavored is not difficult to identify. Although GLIB's point (like the Council's) is not wholly articulate, a contingent marching behind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals and indeed as members of parade units organized around other identifying characteristics. The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified

social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.

Respondents argue that any tension between this rule and the Massachusetts law falls short of unconstitutionality, citing the most recent of our cases on the general subject of compelled access for expressive purposes, *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622 (1994). There we reviewed regulations requiring cable operators to set aside channels for designated broadcast signals, and applied only intermediate scrutiny. *Id.*, at 662. Respondents contend on this authority that admission of GLIB to the parade would not threaten the core principle of speaker's autonomy because the Council, like a cable operator, is merely "a conduit" for the speech of participants in the parade "rather than itself a speaker." Brief for Respondents 21. But this metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well. A newspaper, similarly, "is more than a passive receptacle or conduit for news, comment, and advertising," and we have held that "[t]he choice of material . . . and the decisions made as to limitations on the size and content . . . and treatment of public issues . . .—whether fair or unfair—constitute the exercise of editorial control and judgment" upon which the State can not intrude. *Tornillo*, 418 U. S., at 258. Indeed, in *Pacific Gas & Electric*, we invalidated coerced access to the envelope of a private utility's bill and newsletter because the utility "may be forced either to appear to agree with [the intruding leaflet] or to respond." 475 U. S., at 15 (plurality opinion) (citation omitted). The plurality made the further point that if "the government

[were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next." *Id.*, at 16. Thus, when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised.

In *Turner Broadcasting*, we found this problem absent in the cable context, because "[g]iven cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." 512 U. S., at 655. We stressed that the viewer is frequently apprised of the identity of the broadcaster whose signal is being received via cable and that it is "common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility." *Ibid.* (citation omitted); see *id.*, at 684 (O'CONNOR, J., concurring in part and dissenting in part) (noting that Congress "might . . . conceivably obligate cable operators to act as common carriers for some of their channels").

Parades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed. Unlike the programming offered on various channels by a cable network, the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience. Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving

parade. Cf. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 87 (1980) (owner of shopping mall "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand"). Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole.

An additional distinction between *Turner Broadcasting* and this case points to the fundamental weakness of any attempt to justify the state-court order's limitation on the Council's autonomy as a speaker. A cable is not only a conduit for speech produced by others and selected by cable operators for transmission, but a franchised channel giving monopolistic opportunity to shut out some speakers. This power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed. The Government's interest in *Turner Broadcasting* was not the alteration of speech, but the survival of speakers. In thus identifying an interest going beyond abridgment of speech itself, the defenders of the law at issue in *Turner Broadcasting* addressed the threshold requirement of any review under the Speech Clause, whatever the ultimate level of scrutiny, that a challenged restriction on speech serve a compelling, or at least important, governmental object, see, *e. g.*, *Pacific Gas & Electric*, *supra*, at 19; *Turner Broadcasting*, *supra*, at 662; *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968).

In this case, of course, there is no assertion comparable to the *Turner Broadcasting* claim that some speakers will be destroyed in the absence of the challenged law. True, the size and success of petitioners' parade makes it an enviable vehicle for the dissemination of GLIB's views, but that fact,

without more, would fall far short of supporting a claim that petitioners enjoy an abiding monopoly of access to spectators. See App. to Pet. for Cert. B9; Brief for Respondents 10 (citing trial court's finding that no other applicant has applied for the permit). Considering that GLIB presumably would have had a fair shot (under neutral criteria developed by the city) at obtaining a parade permit of its own, respondents have not shown that petitioners enjoy the capacity to "silence the voice of competing speakers," as cable operators do with respect to program providers who wish to reach subscribers, *Turner Broadcasting*, *supra*, at 656. Nor has any other legitimate interest been identified in support of applying the Massachusetts statute in this way to expressive activity like the parade.

The statute, Mass. Gen. Laws § 272:98 (1992), is a piece of protective legislation that announces no purpose beyond the object both expressed and apparent in its provisions, which is to prevent any denial of access to (or discriminatory treatment in) public accommodations on proscribed grounds, including sexual orientation. On its face, the object of the law is to ensure by statute for gays and lesbians desiring to make use of public accommodations what the old common law promised to any member of the public wanting a meal at the inn, that accepting the usual terms of service, they will not be turned away merely on the proprietor's exercise of personal preference. When the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But in the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids.

It might, of course, have been argued that a broader objective is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a

speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective. Having availed itself of the public thoroughfares "for purposes of assembly [and] communicating thoughts between citizens," the Council is engaged in a use of the streets that has "from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.). Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says. See, *e. g.*, *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972); cf. H. Kalven, A Worthy Tradition 6–19 (1988); Fiss, Free Speech and Social Structure, 71 Iowa L. Rev. 1405, 1408–1409 (1986). The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis. See, *e. g.*, *Barnette*, 319 U. S., at 642; *Pacific Gas & Electric*, 475 U. S., at 20. While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

Far from supporting GLIB, then, *Turner Broadcasting* points to the reasons why the present application of the Massachusetts law can not be sustained. So do the two other principal authorities GLIB has cited. In *Prune-Yard Shopping Center* v. *Robins*, *supra*, to be sure, we

sustained a state law requiring the proprietors of shopping malls to allow visitors to solicit signatures on political petitions without a showing that the shopping mall owners would otherwise prevent the beneficiaries of the law from reaching an audience. But we found in that case that the proprietors were running "a business establishment that is open to the public to come and go as they please," that the solicitations would "not likely be identified with those of the owner," and that the proprietors could "expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand." 447 U. S., at 87. Also, in *Pacific Gas & Electric, supra,* at 12, we noted that *PruneYard* did not involve "any concern that access to this area might affect the shopping center owner's exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets . . . ." The principle of speaker's autonomy was simply not threatened in that case.

New York State Club Assn. is also instructive by the contrast it provides. There, we turned back a facial challenge to a state antidiscrimination statute on the assumption that the expressive associational character of a dining club with over 400 members could be sufficiently attenuated to permit application of the law even to such a private organization, but we also recognized that the State did not prohibit exclusion of those whose views were at odds with positions espoused by the general club memberships. 487 U. S., at 13; see also *Roberts,* 468 U. S., at 627. In other words, although the association provided public benefits to which a State could ensure equal access, it was also engaged in expressive activity; compelled access to the benefit, which was upheld, did not trespass on the organization's message itself. If we were to analyze this case strictly along those lines, GLIB would lose. Assuming the parade to be large enough and a source of benefits (apart from its expression) that would generally justify a mandated access provision, GLIB could

nonetheless be refused admission as an expressive contingent with its own message just as readily as a private club could exclude an applicant whose manifest views were at odds with a position taken by the club's existing members.

IV

Our holding today rests not on any particular view about the Council's message but on the Nation's commitment to protect freedom of speech. Disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others. Accordingly, the judgment of the Supreme Judicial Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* ALABAMA EX REL. PATTERSON, ATTORNEY GENERAL.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 91. Argued January 15–16, 1958.—Decided June 30, 1958.

Petitioner is a nonprofit membership corporation organized under the laws of New York for the purpose of advancing the welfare of Negroes. It operates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner. It had local affiliates in Alabama and opened an office of its own there without complying with an Alabama statute which, with some exceptions, requires a foreign corporation to qualify before doing business in the State by filing its corporate charter and designating a place of business and an agent to receive service of process. Alleging that petitioner's activities were causing irreparable injury to the citizens of the State for which criminal prosecution and civil actions at law afforded no adequate relief, the State brought an equity suit in a state court to enjoin petitioner from conducting further activities in, and to oust it from, the State. The court issued an *ex parte* order restraining petitioner, *pendente lite*, from engaging in further activities in the State and from taking any steps to qualify to do business there. Petitioner moved to dissolve the restraining order, and the court, on the State's motion, ordered the production of many of petitioner's records, including its membership lists. After some delay, petitioner produced substantially all the data called for except its membership lists. It was adjudged in contempt and fined $100,000 for failure to produce the lists. The State Supreme Court denied certiorari to review the contempt judgment, and this Court granted certiorari. *Held:*

1. Denial of relief by the State Supreme Court did not rest on an adequate state ground, and this Court has jurisdiction to entertain petitioner's federal claims. Pp. 454–458.

2. Petitioner has a right to assert on behalf of its members a claim that they are entitled under the Federal Constitution to be protected from being compelled by the State to disclose their affiliation with the Association. Pp. 458–460.

3. Immunity from state scrutiny of petitioner's membership lists is here so related to the right of petitioner's members to pursue their lawful private interests privately and to associate freely with others in doing so as to come within the protection of the Fourteenth Amendment. The State has failed to show a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of petitioner's membership lists is likely to have. Accordingly, the judgment of civil contempt and the fine which resulted from petitioner's refusal to produce its membership lists must fall. Pp. 460–466.

(a) Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment. Pp. 460–461.

(b) In the circumstances of this case, compelled disclosure of petitioner's membership lists is likely to constitute an effective restraint on its members' freedom of association. Pp. 461–463.

(c) Whatever interest the State may have in obtaining the names of petitioner's ordinary members, it has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order. Pp. 463–466.

4. The question whether the state court's temporary restraining order preventing petitioner from soliciting support in the State violates the Fourteenth Amendment is not properly before this Court, since the merits of the controversy have not been passed upon by the state courts. Pp. 466–467.

265 Ala. 349, 91 So. 2d 214, reversed and cause remanded.

Robert L. Carter argued the cause for petitioner. With him on the brief were *Thurgood Marshall, Arthur D. Shores, William T. Coleman, Jr., George E. C. Hayes, William R. Ming, Jr., James M. Nabrit, Jr., Louis H. Pollak* and *Frank D. Reeves.*

Edmon L. Rinehart, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief were *John Patterson,* Attorney General, and *MacDonald Gallion* and *James W. Webb,* Assistant Attorneys General.

MR. JUSTICE HARLAN delivered the opinion of the Court.

We review from the standpoint of its validity under the Federal Constitution a judgment of civil contempt entered against petitioner, the National Association for the Advancement of Colored People, in the courts of Alabama. The question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association. The judgment of contempt was based upon petitioner's refusal to comply fully with a court order requiring in part the production of membership lists. Petitioner's claim is that the order, in the circumstances shown by this record, violated rights assured to petitioner and its members under the Constitution.

Alabama has a statute similar to those of many other States which requires a foreign corporation, except as exempted, to qualify before doing business by filing its corporate charter with the Secretary of State and designating a place of business and an agent to receive service of process. The statute imposes a fine on a corporation transacting intrastate business before qualifying and provides for criminal prosecution of officers of such a corporation. Ala. Code, 1940, Tit. 10, §§ 192–198. The National Association for the Advancement of Colored People is a nonprofit membership corporation organized under the laws of New York. Its purposes, fostered on a nationwide basis, are those indicated by its name,* and it oper-

*The Certificate of Incorporation of the Association provides that its ". . . principal objects . . . are voluntarily to promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interest of colored citizens; to

ates through chartered affiliates which are independent unincorporated associations, with membership therein equivalent to membership in petitioner. The first Alabama affiliates were chartered in 1918. Since that time the aims of the Association have been advanced through activities of its affiliates, and in 1951 the Association itself opened a regional office in Alabama, at which it employed two supervisory persons and one clerical worker. The Association has never complied with the qualification statute, from which it considered itself exempt.

In 1956 the Attorney General of Alabama brought an equity suit in the State Circuit Court, Montgomery County, to enjoin the Association from conducting further activities within, and to oust it from, the State. Among other things the bill in equity alleged that the Association had opened a regional office and had organized various affiliates in Alabama; had recruited members and solicited contributions within the State; had given financial support and furnished legal assistance to Negro students seeking admission to the state university; and had supported a Negro boycott of the bus lines in Montgomery to compel the seating of passengers without regard to race. The bill recited that the Association, by continuing to do business in Alabama without complying with the qualification statute, was ". . . causing irreparable injury to the property and civil rights of the residents and citizens of the State of Alabama for which criminal prosecution and civil actions at law afford no adequate relief . . . ." On the day the complaint was filed, the Circuit Court issued *ex parte* an order restraining the Association, *pendente lite,* from engaging in

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secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law."

further activities within the State and forbidding it to take any steps to qualify itself to do business therein.

Petitioner demurred to the allegations of the bill and moved to dissolve the restraining order. It contended that its activities did not subject it to the qualification requirements of the statute and that in any event what the State sought to accomplish by its suit would violate rights to freedom of speech and assembly guaranteed under the Fourteenth Amendment to the Constitution of the United States. Before the date set for a hearing on this motion, the State moved for the production of a large number of the Association's records and papers, including bank statements, leases, deeds, and records containing the names and addresses of all Alabama "members" and "agents" of the Association. It alleged that all such documents were necessary for adequate preparation for the hearing, in view of petitioner's denial of the conduct of intrastate business within the meaning of the qualification statute. Over petitioner's objections, the court ordered the production of a substantial part of the requested records, including the membership lists, and postponed the hearing on the restraining order to a date later than the time ordered for production.

Thereafter petitioner filed its answer to the bill in equity. It admitted its Alabama activities substantially as alleged in the complaint and that it had not qualified to do business in the State. Although still disclaiming the statute's application to it, petitioner offered to qualify if the bar from qualification made part of the restraining order were lifted, and it submitted with the answer an executed set of the forms required by the statute. However petitioner did not comply with the production order, and for this failure was adjudged in civil contempt and fined $10,000. The contempt judgment provided that the fine would be subject to reduction or remission if compliance

were forthcoming within five days but otherwise would be increased to $100,000.

At the end of the five-day period petitioner produced substantially all the data called for by the production order except its membership lists, as to which it contended that Alabama could not constitutionally compel disclosure, and moved to modify or vacate the contempt judgment, or stay its execution pending appellate review. This motion was denied. While a similar stay application, which was later denied, was pending before the Supreme Court of Alabama, the Circuit Court made a further order adjudging petitioner in continuing contempt and increasing the fine already imposed to $100,000. Under Alabama law, see *Jacoby* v. *Goetter, Weil & Co.*, 74 Ala. 427, the effect of the contempt adjudication was to foreclose petitioner from obtaining a hearing on the merits of the underlying ouster action, or from taking any steps to dissolve the temporary restraining order which had been issued *ex parte*, until it purged itself of contempt. But cf. *Harrison* v. *St. Louis & S. F. R. Co.*, 232 U. S. 318; *Hovey* v. *Elliott*, 167 U. S. 409.

The State Supreme Court thereafter twice dismissed petitions for certiorari to review this final contempt judgment, the first time, 91 So. 2d 221, for insufficiency of the petition's allegations and the second time on procedural grounds. 265 Ala. 349, 91 So. 2d 214. We granted certiorari because of the importance of the constitutional questions presented. 353 U. S. 972.

I.

We address ourselves first to respondent's contention that we lack jurisdiction because the denial of certiorari by the Supreme Court of Alabama rests on an independent nonfederal ground, namely, that petitioner in applying for certiorari had pursued the wrong appellate

remedy under state law. Respondent recognizes that our jurisdiction is not defeated if the nonfederal ground relied on by the state court is "without any fair or substantial support," *Ward* v. *Board of County Commissioners,* 253 U. S. 17, 22. It thus becomes our duty to ascertain, ". . . in order that constitutional guaranties may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank* v. *Bryan,* 282 U. S. 765, 773.

The Alabama Supreme Court held that it could not consider the constitutional issues underlying the contempt judgment which related to the power of the State to order production of membership lists because review by certiorari was limited to instances ". . . where the court lacked jurisdiction of the proceeding, or where on the face of it the order disobeyed was void, or where procedural requirements with respect to citation for contempt and the like were not observed, or where the fact of contempt is not sustained . . . ." 265 Ala., at 353, 91 So. 2d, at 217. The proper means for petitioner to obtain review of the judgment in light of its constitutional claims, said the court, was by way of mandamus to quash the discovery order prior to the contempt adjudication. Because of petitioner's failure to pur ue this remedy, its challenge to the contempt order was restricted to the above grounds. Apparently not deeming the constitutional objections to draw into question whether "on the face of it the order disobeyed was void," the court found no infirmity in the contempt judgment under this limited scope of review. At the same time it did go on to consider petitioner's constitutional challenge to the order to produce membership lists but found it untenable since membership lists were not privileged against disclosure pursuant to reasonable state demands and since the privilege against self-incrimination was not available to corporations.

We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment. As early as 1909 that court said in such a case, *Ex parte Dickens,* 162 Ala. 272, at 276, 279–280, 50 So. 218, at 220, 221:

> "Originally, on certiorari, only the question of jurisdiction was inquired into; but this limit has been removed, and now the court 'examines the law questions involved in the case which may affect its merits.' . . .
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> ". . . [T]he judgment of this court is that the proper way to review the action of the court in cases of this kind is by certiorari, and not by appeal.
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> "We think that certiorari is a better remedy than mandamus, because the office of a 'mandamus' is to require the lower court or judge to act, and not 'to correct error or to reverse judicial action,' . . . whereas, in a proceeding by certiorari, errors of law in the judicial action of the lower court may be inquired into and corrected."

This statement was in full accord with the earlier case of *Ex parte Boscowitz,* 84 Ala. 463, 4 So. 279, and the practice in the later Alabama cases, until we reach the present one, appears to have been entirely consistent with this rule. See *Ex parte Wheeler,* 231 Ala. 356, 358, 165 So. 74, 75–76; *Ex parte Blakey,* 240 Ala. 517, 199 So. 857; *Ex parte Sellers,* 250 Ala. 87, 88, 33 So. 2d 349, 350. For example, in *Ex parte Morris,* 252 Ala. 551, 42 So. 2d 17, decided as late as 1949, the petitioner had been held in contempt for his refusal to obey a court order to produce names of members of the Ku Klux Klan. On writ of certiorari, constitutional grounds were urged in part for

reversal of the contempt conviction. In denying the writ of certiorari, the Supreme Court concluded that petitioner had been accorded due process, and in explaining its denial the court considered and rejected various constitutional claims relating to the validity of the order. There was no intimation that the petitioner had selected an inappropriate form of appellate review to obtain consideration of all questions of law raised by a contempt judgment.

The Alabama cases do indicate, as was said in the opinion below, that an order requiring production of evidence ". . . *may* be reviewed on petition for mandamus." 265 Ala., at 353, 91 So. 2d, at 217. (Italics added.) See *Ex parte Hart,* 240 Ala. 642, 200 So. 783; cf. *Ex parte Driver,* 255 Ala. 118, 50 So. 2d 413. But we can discover nothing in the prior state cases which suggests that mandamus is the *exclusive* remedy for reviewing court orders after disobedience of them has led to contempt judgments. Nor, so far as we can find, do any of these prior decisions indicate that the validity of such orders can be drawn in question by way of certiorari only in instances where a defendant had no opportunity to apply for mandamus. Although the opinion below suggests no such distinction, the State now argues that this was in fact the situation in all of the earlier certiorari cases, because there the contempt adjudications, unlike here, had followed almost immediately the disobedience to the court orders. Even if that is indeed the rationale of the Alabama Supreme Court's present decision, such a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitu-

tional rights. Cf. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673.

That there was justified reliance here is further indicated by what the Alabama Supreme Court said in disposing of petitioner's motion for a stay of the first contempt judgment in this case. This motion, which was filed prior to the final contempt judgment and which stressed constitutional issues, recited that "[t]he only way in which the [Association] can seek a review of the validity of the order upon which the adjudication of contempt is based [is] by filing a petition for Writ of Certiorari in this Court." In denying the motion, 265 Ala. 356, 357, 91 So. 2d 220, 221, the Supreme Court stated:

> "It is the established rule of this Court that the proper method of reviewing a judgment for civil contempt of the kind here involved is by a petition for common law writ of certiorari . . . .
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> "But the petitioner here has not applied for writ of certiorari, and we do not feel that the petition [for a stay] presently before us warrants our interference with the judgment of the Circuit Court of Montgomery County here sought to be stayed."

We hold that this Court has jurisdiction to entertain petitioner's federal claims.

II.

The Association both urges that it is constitutionally entitled to resist official inquiry into its membership lists, and that it may assert, on behalf of its members, a right personal to them to be protected from compelled disclosure by the State of their affiliation with the Association as revealed by the membership lists. We think that petitioner argues more appropriately the rights of its members, and that its nexus with them is sufficient to permit that it act as their representative before this

Court. In so concluding, we reject respondent's argument that the Association lacks standing to assert here constitutional rights pertaining to the members, who are not of course parties to the litigation.

To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. *Tileston* v. *Ullman,* 318 U. S. 44; Robertson and Kirkham, Jurisdiction of the Supreme Court (1951 ed.), § 298. This rule is related to the broader doctrine that constitutional adjudication should where possible be avoided. See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 346–348 (concurring opinion). The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court. See *Barrows* v. *Jackson,* 346 U. S. 249, 255–259; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 183–187 (concurring opinion).

If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies . . ." may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views. The reasonable likelihood that the Association itself through diminished financial support and membership may be adversely

affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members. Cf. *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–536.

III.

We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment. Petitioner argues that in view of the facts and circumstances shown in the record, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs. It contends that governmental action which, although not directly suppressing association, nevertheless carries this consequence, can be justified only upon some overriding valid interest of the State.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. *De Jonge* v. *Oregon,* 299 U. S. 353, 364; *Thomas* v. *Collins,* 323 U. S. 516, 530. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See *Gitlow* v. *New York,* 268 U. S. 652, 666; *Palko* v. *Connecticut,* 302 U. S. 319, 324; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Staub* v. *City of Baxley,* 355 U. S. 313, 321. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the

effect of curtailing the freedom to associate is subject to the closest scrutiny.

The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action, cf. *De Jonge* v. *Oregon, supra; Near* v. *Minnesota,* 283 U. S. 697, to restrict the right of petitioner's members to associate freely, does not end inquiry into the effect of the production order. See *American Communications Assn.* v. *Douds,* 339 U. S. 382, 402. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action. Thus in *Douds,* the Court stressed that the legislation there challenged, which on its face sought to regulate labor unions and to secure stability in interstate commerce, would have the practical effect "of discouraging" the exercise of constitutionally protected political rights, 339 U. S., at 393, and it upheld the statute only after concluding that the reasons advanced for its enactment were constitutionally sufficient to justify its possible deterrent effect upon such freedoms. Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. *United States* v. *Rumely,* 345 U. S. 41, 46–47; *United States* v. *Harriss,* 347 U. S. 612, 625–626. The governmental action challenged may appear to be totally unrelated to protected liberties. Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. *Grosjean* v. *American*

Press Co., 297 U. S. 233; *Murdock* v. *Pennsylvania*, 319 U. S. 105.

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Assn.* v. *Douds, supra,* at 402: "A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. Cf. *United States* v. *Rumely, supra,* at 56–58 (concurring opinion).

We think that the production order, in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association. Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and

its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by Alabama citizens in petitioner's activities follows not from *state* action but from *private* community pressures. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.

We turn to the final question whether Alabama has demonstrated an interest in obtaining the disclosures it seeks from petitioner which is sufficient to justify the deterrent effect which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association. See *American Communications Assn.* v. *Douds, supra,* at 400; *Schneider* v. *State,* 308 U. S. 147, 161. Such a ". . . subordinating interest of the State must be compelling," *Sweezy* v. *New Hampshire,* 354 U. S. 234, 265 (concurring opinion). It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize.

It is important to bear in mind that petitioner asserts no right to absolute immunity from state investigation, and no right to disregard Alabama's laws. As shown by its substantial compliance with the production order, petitioner does not deny Alabama's right to obtain from it such information as the State desires concerning the pur-

poses of the Association and its activities within the State. Petitioner has not objected to divulging the identity of its members who are employed by or hold official positions with it. It has urged the rights solely of its ordinary rank-and-file members. This is therefore not analogous to a case involving the interest of a State in protecting its citizens in their dealings with paid solicitors or agents of foreign corporations by requiring identification. See *Cantwell* v. *Connecticut, supra,* at 306; *Thomas* v. *Collins, supra,* at 538.

Whether there was "justification" in this instance turns solely on the substantiality of Alabama's interest in obtaining the membership lists. During the course of a hearing before the Alabama Circuit Court on a motion of petitioner to set aside the production order, the State Attorney General presented at length, under examination by petitioner, the State's reason for requesting the membership lists. The exclusive purpose was to determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute, and the membership lists were expected to help resolve this question. The issues in the litigation commenced by Alabama by its bill in equity were whether the character of petitioner and its activities in Alabama had been such as to make petitioner subject to the registration statute, and whether the extent of petitioner's activities without qualifying suggested its permanent ouster from the State. Without intimating the slightest view upon the merits of these issues, we are unable to perceive that the disclosure of the names of petitioner's rank-and-file members has a substantial bearing on either of them. As matters stand in the state court, petitioner (1) has admitted its presence and conduct of activities in Alabama since 1918; (2) has offered to comply in all respects with the state qualification statute, although pre-

serving its contention that the statute does not apply to it; and (3) has apparently complied satisfactorily with the production order, except for the membership lists, by furnishing the Attorney General with varied business records, its charter and statement of purposes, the names of all of its directors and officers, and with the total number of its Alabama members and the amount of their dues. These last items would not on this record appear subject to constitutional challenge and have been furnished, but whatever interest the State may have in obtaining names of ordinary members has not been shown to be sufficient to overcome petitioner's constitutional objections to the production order.

From what has already been said, we think it apparent that *Bryant* v. *Zimmerman,* 278 U. S. 63, cannot be relied on in support of the State's position, for that case involved markedly different considerations in terms of the interest of the State in obtaining disclosure. There, this Court upheld, as applied to a member of a local chapter of the Ku Klux Klan, a New York statute requiring any unincorporated association which demanded an oath as a condition to membership to file with state officials copies of its ". . . constitution, by-laws, rules, regulations and oath of membership, together with a roster of its membership and a list of its officers for the current year." N. Y. Laws 1923, c. 664, §§ 53, 56. In its opinion, the Court took care to emphasize the nature of the organization which New York sought to regulate. The decision was based on the particular character of the Klan's activities, involving acts of unlawful intimidation and violence, which the Court assumed was before the state legislature when it enacted the statute, and of which the Court itself took judicial notice. Furthermore, the situation before us is significantly different from that in *Bryant,* because the organization there had made no effort to comply with

any of the requirements of New York's statute but rather had refused to furnish the State with *any* information as to its local activities.

We hold that the immunity from state scrutiny of membership lists which the Association claims on behalf of its members is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment. And we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have. Accordingly, the judgment of civil contempt and the $100,000 fine which resulted from petitioner's refusal to comply with the production order in this respect must fall.

IV.

Petitioner joins with its attack upon the production order a challenge to the constitutionality of the State's *ex parte* temporary restraining order preventing it from soliciting support in Alabama, and it asserts that the Fourteenth Amendment precludes such state action. But as noted above, petitioner has never received a hearing on the merits of the ouster suit, and we do not consider these questions properly here. The Supreme Court of Alabama noted in its denial of the petition for certiorari that such petition raised solely a question pertinent to the contempt adjudication. "The ultimate aim and purpose of the litigation is to determine the right of the state to enjoin petitioners from doing business in Alabama. That question, however, is not before us in this proceeding." 265 Ala., at 352, 91 So. 2d, at 216. The proper method for raising questions in the state appellate courts pertinent to the underlying suit for an injunction appears

to be by appeal, after a hearing on the merits and final judgment by the lower state court. Only from the disposition of such an appeal can review be sought here.

For the reasons stated, the judgment of the Supreme Court of Alabama must be reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed.