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The Voracious First Amendment: Alvarez and Knox in the context of 2012 and Beyond

Vikram David Amar

Alan Brownstein

THE VORACIOUS FIRST AMENDMENT: *ALVAREZ* AND *KNOX* IN THE CONTEXT OF 2012 AND BEYOND

*Vikram David Amar & Alan Brownstein**

Supreme Court jurisprudence often privileges certain constitutional provisions to the detriment of others. Following World War II, the Court's elevation of the equal protection doctrine drove decisions that limited the rights of states and individuals. Over the last twenty years, however, the First Amendment—particularly the Free Speech Clause—has knocked equal protection from its perch.

This Article analyzes United States v. Alvarez *and* Knox v. Service Employees International Union *by critiquing the Court's opinions, comparing these opinions to other contemporaneously decided cases, and situating the cases within the larger doctrinal field of the First Amendment. In doing so, this Article illustrates the Court's systematic advancement of the First Amendment's Free Speech Clause. The Article highlights the occasionally inconsistent rationales behind the ascendance of the Free Speech Clause and emphasizes the cost of that ascendance to other societal and constitutional values, including labor rights, military interests, and even other clauses within the First Amendment. The Article concludes by underscoring the modern jurisprudential driving force of the First Amendment.*

* Vikram David Amar is Professor of Law and Associate Dean for Academic Affairs, Univ. of California at UC Davis School of Law. Alan Brownstein is Professor of Law and holds the Boochever and Bird Chair for the Study and Teaching of Freedom and Equality, UC Davis School of Law.

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I. INTRODUCTION

Supreme Court cases can be analyzed and understood in many different ways. Often it is helpful to examine a case on its own terms, within its own four corners, to see whether the assumptions are sound, the reasoning is solid, and the result is tenable. At other times, it is interesting to look at a case in relation to seemingly unrelated yet roughly contemporaneous cases to compare methodological similarities and possible inconsistencies. In yet other situations, to make useful sense of a case (or a group of related cases), one must pull back the lens and ask what the cases can tell us about the larger doctrinal field—its ascendancy or its marginalization—of which they are a part.

In our Article for this Supreme Court issue, we examine two First Amendment speech cases from the 2011–2012 Term from each of these perspectives. In particular, we take up *United States v. Alvarez*[1] and *Knox v. Service Employees International Union*.[2] After describing and dissecting each of the two rulings and the various positions the Justices asserted in them, we compare the opinions in these cases to some of the other landmark rulings of the last few years whose reasoning seems connected to *Knox* and *Alvarez*, even though these other cases fall outside the First Amendment. We then situate *Knox* and *Alvarez* in the larger pattern of ascendancy of First Amendment doctrine and values over the last few decades; specifically, we analyze the ways in which expressive autonomy now seems regularly to trump competing constitutional and societal values that have traditionally been given great weight—somewhat in the same way that equal protection reasoning seemed to dominate constitutional analysis and balancing in the previous generation.

A. Alvarez

Let us begin with *United States v. Alvarez*, the First Amendment case from last Term that seemed to garner the most headlines. *Alvarez* involved a constitutional challenge to a federal conviction

1. 132 S. Ct. 2537 (2012).
2. 132 S. Ct. 2277 (2012).

under the Stolen Valor Act of 2005 (SVA or "Act").[3] The SVA makes it a crime for a person to "falsely represent[] himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."[4] The Act authorizes an enhanced criminal penalty "if a decoration or medal involved in an offense . . . is a Congressional Medal of Honor."[5] Xavier Alvarez, a board member of a local water district in Southern California, began his remarks at a public meeting by saying: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded a Congressional Medal of Honor. I got wounded many times by the same guy."[6] These factual assertions were false.[7] Alvarez had not received any military decoration, much less the Medal of Honor. He had never even served in the Marines.[8]

Alvarez was indicted and challenged his indictment on the ground that the Act violated the First Amendment.[9] The federal district court rejected his challenge, after which he pleaded guilty to one count, reserving his right to reassert his First Amendment argument on appeal. The United States Court of Appeals for the Ninth Circuit reversed, finding the Act unconstitutional. Over the dissenting votes of seven judges, the Ninth Circuit denied en banc review, and the Supreme Court then granted certiorari.[10]

The High Court affirmed the Ninth Circuit's invalidation of Alvarez's conviction but could not generate a majority opinion or rationale for doing so; Justice Kennedy wrote a plurality opinion joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor. Justice Breyer penned a concurring opinion joined by Justice Kagan, and Justice Alito wrote a dissent joined by Justices Scalia and Thomas. The Court thus broke down 4–2–3, with six Justices siding with Mr. Alvarez.[11]

3. 18 U.S.C. § 704 (2006), *invalidated by Alvarez*, 132 S. Ct. 2537.
4. *Alvarez*, 132 S. Ct. at 2543 (plurality opinion).
5. *Id.*
6. *Id.* at 2542.
7. *Id.*
8. United States v. Alvarez, 617 F.3d 1198, 1200–01 (9th Cir. 2010), *aff'd*, 132 S. Ct. 2537 (2012).
9. *Alvarez*, 132 S. Ct. at 2542 (plurality opinion).
10. *Id.*
11. *Id.* at 2541.

Justice Kennedy's plurality opinion began by pointing out that the SVA is a "content-based" law, insofar as its prohibitions turn on the specific content (i.e., lies about military decorations) of a person's communications, and that content-based laws are usually subject to "exacting" judicial scrutiny.[12] Justice Kennedy acknowledged that various categories of unprotected or lesser-protected speech, such as threats, fighting words, or incitement, are defined by their content but may nonetheless be regulated by legislatures under a more lenient level of judicial review. He insisted, however, that there is no general category of "false statements" of fact that receives less than full First Amendment protection.[13] Indeed, the plurality reaffirmed that aside from the aforementioned list of limited exceptions, all content-based regulations are "presumed invalid" and reminded that the "Court has [in the past] rejected as 'startling and dangerous' a 'free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.'"[14]

Justice Kennedy conceded that some prior cases used language suggesting that false factual statements may fall outside the scope of the First Amendment.[15] But Justice Kennedy reasoned that these prior opinions had really involved a narrower set of circumstances: when false speech caused or was likely to cause cognizable harm to persons other than the speaker—as in the context of defamation or fraud—the Court might treat falsity as a factor weighing in favor of government latitude to regulate such speech.[16] But such "legally cognizable harm" to other persons (and, thus, such latitude) was not present here; Mr. Alvarez's knowingly false statements were not made "to secure employment or financial benefits or admission to privileges reserved for those who had earned military decorations."[17] Even federal statutes punishing false statements made to government officials, laws punishing perjury, and prohibitions against false representations that one is speaking on behalf of the government, Justice Kennedy said, involve discrete and identifiable harms—such

12. *Id.* at 2543–44.
13. *Id.* at 2544.
14. *Id.* (quoting United States v. Stevens, 130 S. Ct. 1577, 1585 (2010) (alterations in original)).
15. *Id.* at 2545.
16. *Id.*
17. *Id.* at 2542.

as damaging the integrity of judicial, investigatory, and other governmental processes; increasing the risk of mistaken court judgments; and undermining the "general good repute and dignity of . . . government . . . service itself."[18] However, the existence of these laws could not support the blanket proposition that "false speech should be in a general category that is presumptively unprotected."[19]

Indeed, Justice Kennedy pointed out, if government could regulate false statements free of constitutional constraint simply because they are false, then government could prohibit a wide range of communications—"whether shouted from the rooftops or made in a barely audible whisper"—on a broad list of topics.[20] "That governmental power," he asserted, "has no clear limiting principle."[21]

Applying strict scrutiny to the content-based Act, Justice Kennedy concluded that the statute was unnecessary to protect the integrity of federally conferred medals (even if that goal is an overriding or compelling governmental objective) because the constitutionally preferred remedy for bad, false speech is good, true speech.[22] In the case of the SVA, for example, private people and the government alike can, with their own speech, expose those who lie about earning military medals as the scoundrels they are.[23] Importantly, as Justice Kennedy explained, a "Government-created [and presumably publicly accessible] database could list" Medal of Honor recipients.[24] To the extent that such counterspeech would be ineffective because "some military records have been lost," the plurality reasoned, criminal prosecution would also be ineffective, since prosecution without "verifiable records . . . would be more difficult . . . . So, in cases where public refutation will not serve the Government's interest, the Act will not either."[25] Since there are less restrictive means than criminally prosecuting liars to accomplish the

18. *Id.* at 2546 (quoting United States v. Lepowitch, 318 U.S. 702, 704 (1943) (alteration in original)).
19. *Id.* at 2546–47.
20. *Id.* at 2547.
21. *Id.*
22. *Id.* at 2550–51.
23. *Id.* at 2549–50.
24. *Id.* at 2551.
25. *Id.* at 2550.

government's interest of preserving the integrity of military honors, the SVA failed strict scrutiny.[26]

Justice Breyer's concurrence was far less conventional than Justice Kennedy's opinion. Justice Breyer never mentioned, let alone emphasized, that the Act was content-based. Instead, his opinion was written as if there were no formal free speech doctrine currently in use that constrains judges' assessments of free speech claims. Without recognizing any doctrinal categories, he observed that courts in free speech cases generally consider the interests of the speaker in freely communicating a message, the justifications that the government advances for impairing freedom of speech, and the alternatives available to the government to accomplish its goals.[27] Sometimes, after considering all of these factors, judicial review requires either a near-automatic invalidation of a law (under strict scrutiny), a near-automatic upholding of the law (under minimum rationality/"rational basis review"), or some form of proportionality analysis or intermediate level scrutiny.[28]

According to Justice Breyer and his free-form balancing approach, the SVA should receive intermediate scrutiny because (1) the harm to speakers here (i.e., the extent to which the Act creates a "chilling effect" inhibiting valuable speech) is limited insofar as the veracity of the speech in question—the factual assertion that the speaker has received a military decoration—is easily verifiable and does not involve contested matters of philosophy, religion, history, politics, or the like; (2) false assertions of fact contribute less to the marketplace of ideas than do true assertions of fact; and (3) government often has a good reason to prohibit false assertions of fact.[29]

Although intermediate scrutiny is not "strict," neither is it toothless, and Justice Breyer concluded that the Act could not survive this standard of review.[30] In reaching this conclusion, Justice Breyer expressed concern about the statute's breadth and recommended the enactment of a more finely tailored statute,

26. *Id.*
27. *See id.* at 2551 (Breyer, J., concurring).
28. *Id.* at 2551–52.
29. *Id.* at 2552.
30. *Id.* at 2556.

perhaps one that required specific proof of harm to others or at least a particular likelihood of harm.[31]

Justice Alito's dissent began, naturally enough, from doctrinal pole directly opposite from that of the plurality.[32] The dissent (like the concurrence) barely mentioned that the Act is content discriminatory; instead, what was essential to Justice Alito was that the statute was limited to knowingly false statements of facts, lies about facts that are directly within the speaker's personal knowledge.[33] Such lies, the dissent argued, have no value and are thus not protected by the First Amendment.[34] Therefore, the Act, in Justice Alito's view, should easily be upheld as constitutional.[35]

What about other possible statutes that might regulate other kinds of lies in ways, and to an extent, that would have more problematic consequences? Justice Alito recognized that government prohibitions of some lies might also "chill" and suppress protected speech that is not false.[36] In such cases, he said the Court should review the prohibition rigorously, even though lies have no First Amendment value themselves, for prophylactic reasons—that is, because of the law's impact on protected speech.[37]

Finally, the dissent responded to the "slippery slope" concern that if lies are treated as unprotected speech, the government might prohibit lying on an endless list of subjects—such as lying about college records, achievement or prowess in the arts or athletics, etc.[38] The dissent argued that such legislative abuses would be unlikely to occur and in any case would be corrected by the political process: "The safeguard against such laws is democracy, not the First Amendment. Not every foolish law is unconstitutional."[39]

One overriding problem with all three of the opinions that were issued in *Alvarez* is that they do not really provide a clear answer to the key question that the case presented: How should the First Amendment treat factual lies?[40] Certainly, if we look at the Justices'

31. *Id.* at 2553–56.
32. *See id.* at 2556–57 (Alito, J., dissenting).
33. *Id.*
34. *Id.* at 2557.
35. *Id.*
36. *Id.* at 2563–64.
37. *See id.*
38. *Id.* at 2565.
39. *Id.*
40. *See id.* at 2539 (plurality opinion).

writings collectively, we have no clear resolution of that question, in part because there was no majority opinion. But more troubling still, even if the nine Justices were to rally around one of the three approaches offered in their various opinions, there would still be no coherent resolution of the status the First Amendment affords false factual assertions. Why? Because none of the three frameworks really identifies a workable approach to dealing with false assertions as a general matter.

In other words, the lack of clarity in *Alvarez* results not just from the Court's fragmentation, but also from the fuzzy and incomplete quality of the analysis in each of the opinions. Justice Kennedy's opinion differentiated between harm-causing lies and non-harm-causing lies as a basis for holding that strict scrutiny governs the review of the SVA.[41] But this is a very ambiguous distinction—who knows what type or magnitude of harm would suffice to remove a statute from strict scrutiny under the plurality's approach? Why, precisely, is the possible devaluation of military medals—the concern that motivated Congress to enact the SVA—not a cognizable or serious enough harm?

Relatedly, Justice Kennedy conceded that whether the regulated speech is a lie may often be relevant to the First Amendment analysis, but he does not say how it is relevant.[42] Indeed, he does not seem even to formally take the falsity of the prohibited speech into account in his application of strict scrutiny to the Act.[43] Finally, Justice Kennedy does not clarify how the regulation of lies that do (in his judgment) cause harm should be evaluated.[44] Do laws regulating lies ever warrant strict scrutiny? If they warrant some lower level of scrutiny, what level of review should courts apply? For example, state law regimes for regulating defamation do not seem to map onto the strict/intermediate/rational basis scrutiny grid very well, and yet Justice Kennedy never tries to harmonize his approach in the SVA case with the First Amendment's general treatment of lies in the defamation context.

The primary problem with Justice Breyer's invocation of intermediate scrutiny to review the SVA's prohibition of false

41. *See id.* at 2542–51.
42. *Id.*
43. *Id.*
44. *Id.*

statements of fact is that the trigger for invoking that scrutiny seems so nebulous. The big knock on intermediate scrutiny generally is that it is too malleable and indeterminate in its application. If the very basis for invoking it is also a malleable and indeterminate amalgam of factors (Justice Breyer's opinion offers only vague intuitions about the value of particular speech and the generally good reasons government might have to regulate it as the basis for applying intermediate level scrutiny to the SVA), then the problem of subjectivity and unpredictability is exacerbated.

To be clear, we do not necessarily oppose subjecting laws restricting false statements of fact to intermediate scrutiny. If that approach is to be adopted, however, such scrutiny should apply to the entire category of such laws, not just laws directed at those false statements that strike Justice Breyer as being of particularly low value, or not just laws that Justice Breyer thinks further important government interests. In other words, categories and categorical analysis have served free speech values well, and abandoning categories in favor of an unstructured, ad hoc assessment of the kind that Justice Breyer undertakes is problematic (even if Justice Breyer would end up upholding and striking down most of the same laws we would under a more structured approach).

The dissent's position has problems of its own. It asserts that all lies are unprotected speech and do not really implicate the First Amendment unless their prohibition does in fact chill protected speech. But what happens if regulation of lies does chill protected speech? Should strict scrutiny apply? Courts do not generally perform a strict scrutiny analysis in the context of defamation, where the primary free speech concern is about chilling effects. Thus, like the other opinions, the dissent does not adequately locate this dispute about false facts in the larger setting of cases—including defamation cases—in which the Court has grappled with false assertions of fact. Also, the dissent provides no limiting principle for the review of regulations of lies that do not chill protected speech.[45] The only check on such laws would then be political accountability, but that is not an adequate response for many folks when freedom of speech is at issue.

45. *Id.* at 2556–65 (Alito, J., dissenting).

B. Knox

The First Amendment claim in *Knox* is quite different from that involved in *Alvarez*. In *Knox*, nonunion state employees invoked the First Amendment to challenge the way California structures its relationship with public-sector employee unions.[46] In California, as in many other states, a public-sector bargaining unit may, by majority vote, elect to create an "agency shop" in which the union is the collective bargaining agent on behalf of all the employees. Employees in the unit, whether or not they choose to become full-fledged union members (and they have a choice not to), must pay an "annual fee to cover the cost of union services related to collective bargaining (so-called chargeable services)."[47] Such chargeable services do not, and cannot, however, include expenses incurred to fund the union's political or ideological projects.[48] In *Abood v. Detroit Board of Education*,[49] and then again in *Chicago Teachers Union v. Hudson*,[50] the Court held that the First Amendment prohibits states from forcing public-sector employees to pay for a union's ideological or political activities (as distinguished from the union's collective bargaining activities), because some employees may disagree with the union's politics.[51]

Knox focuses on the procedure by which employees who do not want to pay for a union's ideological activities can prevent their contributions to the union from being used for political purposes.[52] The actual legal dispute in *Knox* arose out of an unusual scenario in which the union not only assessed employees for its regular annual fee but levied an additional, midyear fee on employees as well.[53] In June 2005, the affected public-sector union sent its annual fee notice to all employees within the unit.[54] Consistent with procedures set forth in *Hudson*, the union estimated that 56 percent of its projected outlays during the coming year would involve so-called "chargeable" expenses—that is, expenses related to collective bargaining and other

46. *See* Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277, 2284 (2012).
47. *Id.*
48. *Id.*
49. 431 U.S. 209 (1977).
50. 475 U.S. 292 (1986).
51. *Knox*, 132 S. Ct. at 2284–85.
52. *Id.*
53. *Id.* at 2301 (Breyer, J., dissenting).
54. *Id.* at 2285 (majority opinion).

nonpolitical core union activities for which even nonmember employees could be required to contribute.[55] This 56 percent estimate was based on the actual experience during the previous year. To the extent that a particular year's (call it "Year One's") estimate of chargeable expenses is higher than actual expenses end up being, the following year's ("Year Two's") estimate will be lower because it will be based on the actual expenditures incurred in Year One, determined by an audit at the end of Year One. Although this system involves some imprecision, insofar as employees are (in hindsight) sometimes billed too much and at other times billed too little for a particular year, the Court has permitted this rough-and-ready approach because predicting actual expenditures and allocations with complete accuracy is impossible.[56]

Pursuant to the notice required under *Hudson* (called a "*Hudson* notice") that went out in June, employees who wished not to pay the 44 percent of the total fee amount attributable to expected political expenses had thirty days to object, and if they met this deadline, they would have to pay only 56 percent of the total union fees. The fee notice said that fees were subject to increase without further notice.[57]

After the thirty-day objection period had lapsed, the union sent out another fee notice, proposing a temporary (that is, one-year) 25 percent increase in employee dues, which the union titled an "Emergency Temporary Assessment to Build a Political Fight-Back Fund."[58] The proposal stated that union needed the money to "help achieve the union's political objectives in the special election and the upcoming November 2006 election."[59] The proposal specifically stated that the monies raised by the "temporary" 25 percent increase

55. *Id.*

56. *Id.* at 2301 (Breyer, J., dissenting).

57. *Id.*

58. *Id.*

59. *Id.* The special election involved, in particular, two contentious ballot measures: Propositions 75 and 76. *Id.* at 2285 (majority opinion). Ironically, "Proposition 75 would have required unions to obtain employees' affirmative consent before charging them fees to be used for political purposes." *Id.* "Proposition 76 would have limited state spending and would have given the Governor the ability under some circumstances to reduce state appropriations for public-employee compensation." *Id.* The union vigorously opposed both propositions. *Id.* Governor Arnold Schwarzenegger had called for the special election within which Propositions 75 and 76 were ballot initiatives. *Id.* Accordingly, with respect to the upcoming November 2006 gubernatorial election, the union's goal was "to elect a governor and a legislature who support public employees and the services [they] provide." *Id.* at 2286 (alteration in original).

in dues would be used "for a broad range of political expenses"[60] and not to fund "regular costs of the union."[61] Less than thirty days after the proposed one-year increase, the union's general counsel implemented it.[62]

Employees who were not members of the union ("nonmember employees") were not given the choice of whether to pay the 25 percent increase in dues,[63] although the union subsequently permitted nonmember employees who had filed timely objections in response to the June 2005 *Hudson* notice to pay only 56 percent of the one-year "emergency" assessment. Nonmember employees who opposed having to pay this assessment to support the union's "Political Fight-Back Fund" formed a class and sued.[64] Those nonmember employees who had filed objections to the June 2005 notice argued they should not have to pay even 56 percent of the temporary assessment because the entirety of the new assessment was intended to be used for political, and thus nonchargeable, expenses.[65] Those employees who had not filed objections to, and thus paid the entirety of, the annual dues levied in June 2005 argued that they should have been given a separate chance to object to the political expenditures contemplated by the new assessment. Their argument was based in part on the notion that their failure to opt out of paying the nonchargeable part of the regular annual assessment did not necessarily indicate agreement with the union's plans concerning the political use to which the special fund levy was going to be put.[66] The district court ruled in the plaintiffs' favor, the Ninth Circuit reversed, and the plaintiffs sought and obtained Supreme Court review.[67]

After the Supreme Court granted certiorari, the union offered to provide refunds to all members of the plaintiff class.[68] As a result, the first question the Court had to resolve was whether the dispute had been rendered moot by virtue of the union's offer.[69] The Court rejected the notion that the dispute was moot, observing that

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 2286.
65. *Id.*
66. *Id.*
67. *Id.* at 2286–87.
68. *Id.* at 2287.
69. *Id.*

"postcertiorari maneuvers designed to insulate a decision from review in this Court must be viewed with a critical eye."[70] The Court also reasoned that the case remained live because the union's refund notice was allegedly chock-full of "conditions, caveats and confusions . . . aimed at reducing the number of class members who claim a refund."[71] Because "the nature of the notice may affect how many employees who object to the union's special assessment would be able to get their money back," and because "[t]he union was not entitled to dictate unilaterally the manner in which it [was legally obligated to] advertise[] the availability of the refund,"[72] the controversy had not died.

Turning to the merits, seven Justices concluded that the plaintiffs should prevail on their two primary arguments. First, the Court concluded that employees who had objected in June 2005 should not have had to pay any of the special assessment because the entire special assessment was being used for nonchargeable matters. Second, the Court concluded that employees who had not objected in June 2005 should have been given a separate opportunity to object the special assessment because the anticipated political expenditures connected with the special fund might generate disagreement among at least some of the employees who initially did not opt out of full payment of the regular annual dues.[73] In summary, the Court concluded that "when a [public] union levies a special assessment or dues increase to fund political activities [only], the union may not collect funds from nonmembers who earlier had objected to the payment of nonchargeable expenses, and may not collect funds from other nonmembers without providing a new *Hudson* notice and opportunity to opt out."[74]

Two members of the Court, Justices Sotomayor and Ginsburg, would have limited the holding to the above conclusion.[75] Yet five other Justices who agreed with the Court's judgment—Chief Justice Roberts and Justices Alito, Kennedy, Scalia, and Thomas—went further in holding that "when a public-sector union imposes a special assessment or dues increase, [it] may not exact any funds from

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 2293.
74. *Id.* at 2297 (Sotomayor, J., concurring).
75. *Id.* at 2296.

nonmembers without their affirmative consent."[76] In other words, in addition to providing notice, the union must receive a nonmember's affirmative consent to opt in before the union can compel special assessments; the union may not simply rely on the nonmember's silence or failure to opt out as a basis for collecting the special assessment.

The majority's rationale, if accepted, could call into question the union's use of an opt-out, rather than an opt-in, approach as applied to annual, nonchargeable dues as well; nothing in the majority opinion explained why an opt-in procedure is constitutionally required for special assessments but would not be required for annual assessments. The majority did say that the union's position would have required the Court to "go farther" than past cases[77]—which had authorized use of an opt-out procedure for annual dues—but it also said that these past cases "approach, if they do not cross, the limit of what the First Amendment can tolerate."[78]

More ambitiously still, the majority seemed to raise some questions about whether a public union could compel nonmembers to pay even chargeable expenses related to collective bargaining.[79] The majority stated that forcing nonmembers to pay anything at all "represent[s] an 'impingement' on [their] First Amendment rights."[80] The Court went on to state that the "primary purpose"[81] of allowing unions to collect fees from nonmembers—the desire "to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred"—is one that is "generally insufficient to overcome First Amendment concerns"[82] and that cases upholding the requirement that nonmembers pay for chargeable expenses "represents something of an anomaly."[83] Nonetheless, the majority said it was not going to "revisit today whether the Court's

76. *Id.* (majority opinion).
77. *Id.* at 2291.
78. *Id.*
79. *Id.* at 2293.
80. *Id.* at 2284.
81. *Id.* at 2289.
82. *Id.*
83. *Id.* at 2290.

former cases have given adequate recognition to the critical First Amendment rights at stake."[84]

In his dissent, Justice Breyer, joined by Justice Kagan, indicated that he would have upheld the union's actions in this case.[85] Like the two concurring Justices, he chided the majority for reaching out and speaking on the important opt-out versus opt-in question for special assessments (and perhaps also for annual dues) given that that issue had not been fully argued.[86] He also concluded that the objecting nonmembers had no legitimate gripe at all in this case (even though they had not been permitted to opt out of nonchargeable expenses associated with the special assessment), largely because of the union's need to operate efficiently.[87] True, the union's mode of collecting monies from members and nonmembers and allowing nonmembers to opt out of nonchargeable expenses just once a year may result in some objectors having their monies used temporarily for political purposes with which they disagree. Such imperfections, however, are offset by the system's "administrative virtue"[88] and efficiency for the union and for workers. By basing each year's assessment on the previous year's allocation track record, even though the previous year may be an imperfect predictor of the present year, and by limiting the time window during which individuals can opt out , the system in place gives "workers reliable information [and] advance notice of next year's payable charge."[89] It also "gives nonmembers a 'reasonably prompt' opportunity to object"[90] and frees the union from having to predict with great accuracy what the next year's outlays will look like.

84. *Id.* at 2289.

85. *Id.* at 2299 (Breyer, J., dissenting).

86. *Id.* at 2306.

87. *See id.* at 2301.

88. *Id.* ("Normally, what the objecting nonmembers lose on the swings they will gain on the roundabouts.").

89. *Id*.

90. *Id.* at 2301–02.

II. *ALVAREZ* AND *KNOX* IN RELATION TO OTHER MAJOR RULINGS OF RECENT YEARS IN DIFFERENT DOCTRINAL AREAS

A. A "Slippery" Summer Day

The *Alvarez* opinion was handed down on June 28, 2012 the very same day as the opinion in the year's most-watched case: *National Federation of Independent Business v. Sebelius*,[91] which addressed the challenges to Obamacare.[92] *Sebelius* cast large shadows over everything else in the Term that it dominated. Indeed, it is not an exaggeration to say that the Affordable Care Act (ACA) dispute was—in terms of the number of people affected, the amount of money involved, and the symbolic, political, and institutional stakes on the line—bigger than all the other seventy-some cases the Court decided this year put together.[93]

The Court issued many holdings in *Sebelius*, one of which was that the Commerce Clause could not be a valid basis for Obamacare's so-called "individual mandate" provision because Congress was requiring participation in, rather than "regulating," commercial activity.[94] No one seemed to doubt that the healthcare and healthcare insurance markets involved true interstate commercial problems.[95] After all, insurance and healthcare providers are usually national, or at least regional, operations. Quite regularly, folks who cross state lines get sick and must be cared for away from home, and people are often unable to relocate to another state for fear of losing their employer-based coverage. Nor did anyone really dispute that the individual mandate was sincerely motivated by, and closely related to, the regulation of these interstate markets and interstate

91. 132 S. Ct. 2566 (2012).

92. *Id.* This Supreme Court issue contains two articles that discuss *Sebelius* in depth. Brietta Clark, *Safeguarding Federalism by Saving Health Reform: Implications of* National Federation of Independent Business v. Sebelius, 46 LOY. L.A. L. REV. 541 (2013); Jonathan D. Varat, *Supreme Court Foreword, October Term 2011: Federalism Points and the Sometime Recognition of Essential Federal Power*, 46 LOY. L.A. L. REV. 411 (2013).

93. Vikram David Amar & Akhil Reed Amar, *Chief Justice Roberts Reaches for Greatness*, L.A. TIMES (July 1, 2012), http://articles.latimes.com/2012/jul/01/opinion/la-oe-amar-roberts-supreme-court-20120701.

94. *Sebelius*, 132 S. Ct. at 2591 (Opinion of Roberts, C.J.); *id.* at 2643–48 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

95. *See id.* at 2572–77 (Opinion of Roberts, C.J.).

spillover effects.[96] Those two conclusions would ordinarily be sufficient to justify the exercise of congressional power under the Commerce Clause of the Constitution.[97]

But the problem, suggested by Chief Justice Roberts and the four Justices (Justices Kennedy, Scalia, Thomas, and Alito) in the joint dissent, was the slippery slope they saw in a congressional mandate requiring individuals to buy something.[98] It raised red flags that Congress was not just regulating existing commercial transactions, but rather compelling previously inactive individuals to engage in commercial activity.[99] If the federal government can require each person to buy health insurance, what can't it force people to purchase? Both at oral argument and in their opinions, these Justices seemed worried: Would Congress also be able to force people to buy cell phones, broccoli, or burial services?[100] If the Court were to permit Congress to compel people to purchase goods or services, the resulting freefall would have only one conceivable endpoint—a world in which there are no limits to the federal government's Commerce Clause power to regulate the lives of all Americans.[101]

This slippery slope concern did not originate at oral argument. As one prominent challenger to the ACA, Randy Barnett, had put the point in an earlier essay:

> Congress can mandate individuals do virtually anything at all on the grounds that the failure to engage in economic activity substantially affects interstate commerce. Therefore, [a theory that permits the healthcare law] would effectively obliterate, once and for all, the enumerated

96. Vikram David Amar, *Obamacare and the Misguided Criticism of "Liberal Law Professors" Who Defend It*, JUSTIA (June 7, 2012), http://verdict.justia.com/2012/06/07/obamacare-and-the-misguided-criticism-of-liberal-law-professors-who-defend-it.

97. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).

98. *Sebelius*, 132 S. Ct. at 2587 (Opinion of Roberts, C.J.); *id.* at 2643–44 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

99. *Id.* at 2587 (Opinion of Roberts, C.J.); *id.* at 2643–44 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

100. *Id.* at 2591 (Opinion of Roberts, C.J.).

101. *See, e.g.*, *id.* at 2623 (Ginsburg, J., concurring in part and dissenting in part) (internal citation omitted) ("Underlying the Chief Justice's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. The joint dissenters express a similar apprehension.").

> powers scheme that even the New Deal Court did not abandon.[102]

We understand the need for courts to have adequate doctrinal tools available to keep Congress within some constitutional bounds in exercising its Commerce Clause power or other national powers recognized by the Constitution. But while we think courts should not abdicate a robust role in policing the boundaries of federalism, we also think that judges should use tools that are of the right shape and size for the job. And as we have written before,[103] we are struck by the fact that in the dispute over the mandate, none of the Justices in the majority even acknowledged, let alone dealt with, the fact that constitutional doctrine is already poised on equally treacherous slopes in interpreting the Commerce Clause, and that the Court has demonstrated that it has plenty of pitons available to arrest any slide into the abyss of limitless federal power. The slippery slope danger has been present in Commerce Clause doctrine for the past fifty years,[104] and the mandate does not create additional slopes that are any more dangerous than those the Court has already been dealing with for decades. In other words, there is no persuasive basis for thinking that the individual mandate will create a steeper or more slippery slope—one that is less susceptible to judicial or political handholds and footholds—than those hazards we live with that exist under current doctrine.

To understand this point, it is useful to remember that the Court has already determined that Congress has the authority to prohibit people from possessing things under the Commerce Clause.[105] Just seven years ago in *Gonzales v. Raich*,[106] the Court held that the federal government can ban the possession of marijuana.[107] It did not matter in *Raich* how a person obtained the marijuana, how much he

102. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581, 607 (2010).

103. *See, e.g.*, Vikram Amar & Alan Brownstein, *Not-So-Slippery Slope*, L.A. TIMES, Apr. 3, 2012, at A19; Vikram David Amar, *The High Court Needn't Worry About Sliding Downhill*, JUSTIA (Apr. 11, 2012), http://verdict.justia.com/2012/04/11/the-high-court-neednt-worry-about-sliding-downhill.

104. *See Sebelius*, 132 S. Ct. at 2616–17, 2619 (Ginsburg, J., concurring in part and dissenting in part) (describing the scope of federal power under the Commerce Clause and its ability to regulate current conduct based on anticipated future activity).

105. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).

106. 545 U.S. 1 (2005).

107. *Id.* at 9.

or she possessed, or whether he or she planned to consume it rather than sell it. Possession itself was punishable.[108]

As we observed before the *Sebelius* ruling came down (and as Justice Ginsburg noted in her dissenting opinion in *Sebelius*),[109] the holding in *Raich* would seem to put us on hazardous ground. Does *Raich* mean that Congress can also ban the possession of cars, televisions, clothes, the tomatoes you grow in your garden, or the broccoli in your refrigerator? If the federal government can ban the possession of all goods, hasn't it become all powerful?

The Court has provided some answers to that question already, by denying the premise. Even though the federal government might ban possession of some things at some times, the government's power in this regard is not unlimited.[110] As Justice Scalia observed in his concurring opinion in *Raich*, the possession of marijuana in particular can be punished because such penalties are necessary to carry out a comprehensive regulatory scheme—the Controlled Substances Act—that governs a robust and interstate market in drugs.[111] Without that comprehensive regulatory scheme as an anchor and a clear tie-line connecting the ban on possession to the regulation of the market in illicit drugs, the ban on marijuana possession would exceed Congress's Commerce Clause power.[112]

Of course, such an argument cuts in favor of, not against, the individual mandate in the healthcare reform law. The ACA *is* a comprehensive regulatory scheme governing interstate commerce, and the individual mandate plays an important role in furthering that regulatory framework. In other words, upholding the mandate in the ACA does not mean upholding any and every random, hypothetical mandate a crazy Congress might enact, even assuming that such a rogue Congress could survive in office.

Consider another example: No one doubts that under current doctrine the government can often regulate ongoing economic activity—the sale and purchase of goods and services. Once people enter commerce as producers, sellers, or buyers, the government can

108. *Id.* at 22.

109. *Sebelius*, 132 S. Ct. at 2625 (Ginsburg, J., concurring in part and dissenting in part) (observing that "[w]hen contemplated in its extreme, almost any power looks dangerous").

110. *See, e.g.*, *Raich*, 545 U.S. at 35–36 (Scalia, J., concurring).

111. *Id.* at 39–40.

112. *Id.*

regulate their economic transactions and activities. This authority is widely accepted. But think about the slippery slopes it creates.

Let us return to broccoli, the commodity of choice during the oral arguments. Congress might, instead of requiring the purchase and consumption of broccoli, try to prohibit grocery stores from selling any vegetable—or even any food—other than broccoli. Or it might require people to purchase broccoli as a condition of purchasing other food, or other goods or services. Can Congress pull us down this cliff? If so, then who cares whether Congress can compel specific purchases to be made directly? It can *effectively* compel people to buy designated goods by regulating or prohibiting consumer decisions to purchase other things.

Happily, we do not think the American people have cause for serious concern here either. Some commercial regulations would lack the constitutionally required minimal rationality. In the extremely unlikely event that Congress conditioned the purchase of, say, cars on the purchase of broccoli, the law would fail even a deferential rational basis review by courts. Moreover, some connections between a particular piece of a law and the larger comprehensive scheme regulating commerce that justifies congressional attention in the first place are simply too attenuated to be upheld as constitutional.

The key point here is that these slippery slopes already exist. We have been standing on them for years under long-accepted interpretations of the Commerce Clause, and we have held our position without tumbling into the crevasse of unlimited federal regulatory authority.[113]

113. None of this is to say that attenuation is the only device the Court has—or should have—to keep Congress in check. Not all congressional mandates are constitutionally permissible simply because they advance some otherwise legitimate federal goal in a direct and non-attenuated way. The Constitution itself, in some of its provisions and doctrines, prevents Congress from coercing certain kinds of action. The Third Amendment prohibits the quartering of troops in private homes during peacetime, the Fifth Amendment prevents government from mandating self-incrimination and the surrender of property without just compensation, and the First Amendment prohibits government from mandating that individuals be vessels for government speech. U.S. CONST. amend. I, III. The Supreme Court has held in the so-called anticommandeering cases, *New York v. United States*, 505 U.S. 144, 145 (1992), and *Printz v. United States*, 521 U.S. 898, 900 (1997), that federalism principles prohibit Congress from mandating that state governments exercise their regulatory power on behalf of federal goals. On the other hand, the federal government can mandate taxes and jury and military service, among other things, even if the individuals so mandated are not doing anything that serves as the predicate for being subject to such mandates. *See* Vikram Amar, *Assessing the Reasoning of the*

Given that they failed to address, let alone refute, the strong arguments *against* an asserted slippery slope problem in *Sebelius*, the five Justices in the Commerce Clause majority might be expected to be very open to embracing meaningful slippery slope arguments in other cases. And yet in *Alvarez*, Justices Alito, Scalia, and Thomas (60 percent of the Obamacare Commerce Clause majority) have virtually nothing to say to the other Justices who (plausibly) wonder where Congress's power to proscribe false statements would end if, as the dissent insisted, all lies are unprotected speech. The dissent in *Alvarez* merely states:

> This concern is likely unfounded. With very good reason, military honors have traditionally been regarded as quite different from civilian awards . . . . In any event, if the plurality's concern is not entirely fanciful, it falls outside the purview of the First Amendment . . . . The safeguard against such laws is democracy, not the First Amendment. Not every foolish law is unconstitutional.[114]

Now we ask: Is a law proscribing additional categories of false statements (if false statements are held to be outside the Constitution's protection) more or less likely to be enacted than a law requiring the purchase of broccoli or many other goods and services (if the federal government's power were to be upheld in the Obamacare cases under the Commerce Clause)? Justice Alito's dissent in *Alvarez* states that legislatures have traditionally regarded military awards as special.[115] But recent federal and state history suggest that legislatures also view the way the healthcare and health

Eleventh Circuit Opinion Striking Down Obamacare, JUSTIA VERDICT (Aug. 19, 2011), http://verdict.justia.com/2011/08/19. The question then becomes, when is a mandate that would in fact promote a legitimate end nonetheless be constitutionally problematic? Although no simple line can be drawn to connect all the dots, it is noteworthy that with respect to those mandates that are acknowledged to be constitutionally impermissible, generally speaking, the individual or entity being mandated is not contributing to the problem Congress is trying to solve in any distinctive way, or in a way that explains the extent of the mandate. For example, in the anti-commandeering cases, the states that were commandeered were themselves not in any way standing as an obstacle to Congress's ability to otherwise implement its regulatory objectives. *See Amar*, *supra* note 113. They were, simply put, not part of the problem Congress was trying to fix, but instead had simply declined to be the solution that Congress wanted them to be. The free riders to whom the Obamacare mandate was directed are not outside bystanders to the problem that the government seeks to solve. They are part of the problem.

114. United States v. Alvarez, 132 S. Ct. 2537, 2565 (2012) (Alito, J., dissenting).

115. *Id.* at 2557–58.

insurance markets operate as special. (Indeed, the Court so held in the Medicaid portions of the ruling.)[116]

If legislatures do begin to go down the slippery slope in either context, which slide would be harder to stop? As noted above, in the Commerce Clause setting, the Court has already developed tools—like the requirement of comprehensive regulation of a true interstate market to which the law in question is proximately related—to arrest inevitable freefall. Where are the similar ropes and cables in First Amendment doctrine once heightened scrutiny of any rigor is rejected (as the dissent would have it)? The dissenters in *Alvarez* point to political checks against government abuse, but is there reason to think that additional punishments of false speech are likely to generate more intense and broad-based political blowback than would congressional requirements mandating more purchases by consumers?

An obsession with complete consistency may be the hobgoblin of little minds, but flagrantly inconsistent methodology in major cases decided the same day cannot be the answer either.

B. Of Free Riding, Manipulative Mootness, and Union Clout

Knox preceded *Alvarez* and *Sebelius* by a week, but it too shared deep methodological connections with the healthcare ruling. We focus here on the part of the majority opinion in *Knox* suggesting that nonmember employees may very well have a winning First Amendment argument against forced payment of even so-called chargeable expenses—those relating to the collective-bargaining activities by the union that presumably improve wages, benefits, and working conditions for all employees. The same concern about deterring free riders lay at the heart of the so-called mandate provision in the ACA; individuals who knew that insurance companies could not reject their applications for policies after the onset of sickness or injury, because of the ACA's ban on so-called preexisting condition discrimination, would have every incentive to

116. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606 (2012) ("We have no need to fix a line. . . . It is enough for today that wherever that line may be, this statute is surely beyond it."); *see also id.* at 2661 (Kennedy, J., dissenting) ("The question whether a law enacted under the spending power is coercive in fact will sometimes be difficult, but where Congress has plainly 'crossed the line distinguishing encouragement from coercion,' . . . a federal program that coopts the States' political processes must be declared unconstitutional.").

wait until they had serious health problems before obtaining coverage and paying premiums.[117]

It is important to recognize that in both these cases, the Court's concerns with the government's attempts to resolve these problems are limited to those situations in which the government acts through private agents and businesses to further public goals. There is no Commerce Clause issue when government extends Medicare or creates some other public healthcare system and taxes the general public to support it. Nor does the First Amendment prohibit government from exacting fees or taxes from employees—even if those funds are eventually used by government to subsidize unions' collective bargaining efforts.[118]

As Professor Mike Dorf has explained crisply, there is a similarity between the reasoning in *Knox* and *Sebelius*, but one that is troubling:

> The five Justices in the *Knox* majority were the same five who voted that the Affordable Care Act's so-called individual mandate could not be sustained under the Commerce Clause because Congress supposedly lacks the authority to mandate purchases of insurance in the private sector . . . .
>
> . . . In *Knox*, the majority hinted that in the future, it may invoke the First Amendment to deny government the ability to authorize agency shops in which unions charge non-members for free-riding on their bargaining activities. In the health care case, the same five conservative Justices (including Chief Justice Roberts, on this point), said that the Commerce Clause forbade Congress from mandating health-insurance purchases as a means of preventing currently healthy people from free-riding on the premiums that are being paid by others who now have insurance.

117. *See* 42 U.S.C. § 18001 (2012); *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1501, 124 Stat. 119 (2011).

118. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 562 (2005) ("Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech."); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 258 n.13 (1977) (Powell, J., concurring). Justice Powell in *Abood* explained that in First Amendment cases dealing with compelled dues from nonunion employees, "[s]upport of a private association is fundamentally different from compelled support of government . . . . [T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union." *Abood*, 431 U.S. at 258 n.13.

> Yet the consistency that was exhibited by the Court's conservatives in *Knox* and the health care case only deepens the mystery, because it suggests that these Justices are deeply committed to a principle that is not only difficult to justify, but upon scrutiny, not at all conservative: The principle that it is better (so far as the Constitution is concerned) for government to achieve its aims through government programs [like broadly based taxation and the direct provision of public services, all of which are constitutionally permissible] than to achieve them through the private sector and private organizations.[119]

Moving beyond *Sebelius*, we see important connections between *Knox* and other major contemporaneous cases at the Court. Consider the mootness holding in *Knox* regarding the imperfect offer of a refund made by the union. Here the *Knox* majority concluded that "postcertiorari maneuvers designed to insulate a decision from review in this Court must be viewed with a critical eye."[120] This observation very well might have been calculated to send a message to litigants in the case that loomed over the 2012–2013 Term, the challenge to race-based affirmative action in *Fisher v. University of Texas*.[121] The white plaintiff in *Fisher* (who was originally one of two plaintiffs but was the only one left by the time Supreme Court review was sought) unsuccessfully applied to the University of Texas at Austin (UT) for admission as a freshman.[122] She then filed suit in federal court challenging UT's race-based admissions criteria, but at the same time enrolled in another college.[123] In her complaint, she asked for a declaratory judgment that UT's race-based admissions policies violate the U.S. Constitution; an injunction directing UT to consider admitting her without regard to race (on the premise that she would transfer to UT if admitted); and money damages "in the form of" (rather than "including, but not limited to" or something similar to that formulation) a refund of her admissions application

119. Michael C. Dorf, *How a Recent Supreme Court Case About Labor Unions Foreshadowed the Obamacare Ruling*, JUSTIA (July 16, 2012), http://verdict.justia.com/2012/07/16/how-a-recent-supreme-court-case-about-labor-unions-foreshadowed-the-obamacare-ruling.

120. Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277, 2287 (2012) (citing City News & Novelty, Inc. v. Waukesha, 531 U.S. 278, 283–84 (2001)).

121. 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012).

122. *Id.* at 217 n.3.

123. *Id.*

fee, on the theory that her application had not been processed fairly and therefore she was entitled to get her money back.[124] But there was a big wrinkle. Because it took almost two years for Fisher's case to be resolved by the U.S. Court of Appeals for the Fifth Circuit (which ruled in UT's favor on the merits) and given that she was a senior at Louisiana State University at the time certiorari was granted, she was no longer interested in transferring to UT. Therefore, her claims for declaratory and injunctive relief were no longer live; in legal parlance, they were moot. But what about her small monetary refund claim (for a sum total of roughly $100)? In opposing Supreme Court review, UT asserted that if the Justices were to grant review, UT could simply offer to refund the $100, thereby mooting the damages claim as well.[125] So, argued UT, it would be a waste of time for the Court to grant review, only to have to dismiss the case before deciding it.[126]

The Court nonetheless granted review, and UT apparently never followed through on its threat to tender a refund. The university may have been waiting until *Knox* came down in the summer of 2012. In light of what the Court held in *Knox*, UT might have thought better of even trying to tender money in light of the Court's reluctance to allow late-stage procedural maneuvering by one party to "insulate" alleged unconstitutional conduct from judicial review.[127]

Finally, consider *Knox* alongside another blockbuster case of recent years—*Citizens United v. Federal Election Commission*.[128] Recall that in *Citizens United*, the Court freed not just corporations but also labor unions from regulations that limited their ability to spend money on national political campaigns.[129] Some observers

124. Second Amended Complaint for Declaratory, Injunctive, and Other Relief at 2, *Fisher*, 645 F. Supp. 2d 587 (No. 1:08-cv-00263-SS), 2008 WL 7318510, at ¶ 101.

125. *See* Brief in Opposition at 21, *Fisher*, 132 S. Ct. 1536 (No. 11-345), 2011 WL 6146835, at *21.

126. *Id.* at *22.

127. For more analysis of this mootness issue and the ways the Court could deal with this kind of situation, see Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* Fisher v. University of Texas *Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77 (2012).

128. 130 S. Ct. 876 (2010).

129. Although the Court in *Citizens United* focused on the question of whether it violates the First Amendment for the government to ban independent election expenditures by corporations, the majority's opinion clearly applies with equal force to labor unions. The Court described at length and with approval earlier cases casting doubt on laws restricting the political expenditures of unions. *See id.* at 900–03. More important, the Court insisted that it was returning to the

may have expected that union money and corporate money would tend to counteract each other. But to the extent that *Knox* weakens public-sector unions (which make up a large percentage of all unions) by requiring opt-in versus opt-out procedures for nonchargeable expenses, and by conferring rights to would-be free riders to avoid paying even for chargeable offenses (if the Court should take those two steps it intimated), then the real-world meaning and effect of *Citizens United* could be altered in nontrivial ways.

III. *ALVAREZ* AND *KNOX* IN A LARGER FIRST AMENDMENT PERSPECTIVE

In both *Knox* and *Alvarez*, the First Amendment claimant won; the real question the Court grappled with in each case was how wide, doctrinally speaking, the victory should be.[130] In *Knox*, the real division among the Justices is over how far beyond the narrow First Amendment win the Court should go in foreshadowing further victories for nonmembers who feel their expressive autonomy rights are being impinged by having their monetary contributions used in ways or by institutions with which they may disagree.[131] And in *Alvarez*, the big question left unresolved is whether bans on even untruthful speech will be subject to (nearly always fatal) strict scrutiny on a categorical basis (as the plurality suggests), or instead whether particular regulations of certain kinds of untruthful speech will be subject to a more ad hoc—but nonetheless toothy—intermediate scrutiny standard, as favored by the concurring Justices.[132]

In this crucial, bottom-line "First Amendment-claimants-have-a-good-chance-of-winning" way, 2011-2012 is far from an exceptional Term. For over two decades, expressive autonomy and the First Amendment's Speech Clause have been the darlings of the Court. Numbers can help tell this remarkable story. Since 1992, the Supreme Court has invoked the Speech Clause to invalidate federal, state, or local laws and regulations in more than fifty cases,

reasoning of *Buckley v. Valeo*, 424 U.S. 1 (1972), which rejected the argument for expenditure limits for both unions and corporations. *See Citizens United*, 130 S. Ct. at 909–12.

130. *See* United States v. Alvarez, 132 S. Ct. 2537 (2012) (plurality opinion); Knox v. Serv. Emps. Int'l Union, 132 S. Ct. 2277 (2012).

131. *See Knox*, 132 S. Ct. 2277.

132. *See Alvarez*, 132 S. Ct. 2537 (plurality opinion).

averaging close to three cases each year, a substantial number given the Court's small yearly docket of between seventy and eighty cases for most of that period. But a quantitative inquiry tells only part of the story.[133] We find it particularly noteworthy that First Amendment claims grounded in expressive autonomy rights are not simply winning but that they are prevailing over—and requiring significant sacrifices of—other values that traditionally have enjoyed high esteem in our legal, social, and constitutional traditions. *Knox*, for instance, thrusts aside the efficient functioning of labor unions—important institutions in the nation's economic and political development throughout the twentieth century—in favor of each individual nonmember's maximal opportunity to avoid subsidizing potentially disagreeable political activity.[134] As Justice Breyer's dissent observes, the choice of opt-in over opt-out in the context of nonchargeable expenses (and the requirement of additional *Hudson* notices when any supplemental fees are imposed during a year) has significant implications for the level of resources public-sector unions will enjoy to pursue all of their activities.[135] The Court was willing to sacrifice the interests on the union side of the balance without even seeking briefing on the practical effects of additional notice and the codification of opt-in procedures on union activities.[136] More ominous still, for those who believe that unions perform valuable functions in our markets and our politics, is the Court's intimation that nonmembers may be constitutionally entitled to avoid paying even chargeable fees.[137] As noted earlier, such a regime would create a substantial free-rider problem, and produce potentially devastating damage to union finances.[138]

133. The exact number of Speech Clause invalidations depends upon whether one counts cases in which other constitutional provisions might also be invoked by the Court, among other factors, but the average of around three cases per Term, based on the authors' review of all the cases handed down during the past two decades, is workable for these purposes. The *Loyola of Los Angeles Law Review* keeps a list of these cases on file.

134. *Knox*, 132 S. Ct. at 2288–99.

135. *Id.* at 2306 (Breyer, J., dissenting).

136. *Id.* at 2299 (Sotomayor, J., concurring).

137. *See Knox*, 132 S. Ct. at 2288–99 (plurality opinion).

138. *See* Dorf, *supra* note 119 ("[S]uppose that the Supreme Court were eventually to rule that unions may not even charge non-members for collective bargaining activities. Any individual worker might then decide that it is not in his interest to join the union, because he will still benefit from whatever favorable terms the union negotiates. Let somebody else pay for it, the free rider says. . . . Free riding is not simply a fairness problem. Once enough people decide to free ride, the

In *Alvarez*, the U.S. military—another institution even more deeply embedded in American history than unions—loses in a case where the First Amendment challenger concedes that punishing him would not chill anyone else's worthwhile speech.[139] As Justice Alito's dissent points out, the majority's suggestion (both the plurality and the concurrence make this suggestion) that government counterspeech is the best way to deal with scoundrels like Mr. Alvarez and the damage he and those like him may do to military honor does not work in many instances, because the government may not have the information it needs to affirmatively compile and publicize lists of all recipients of military awards.[140] And the plurality's rejoinder that in such instances prosecution under the SVA would not help in any event[141]—because without verifiable information, prosecution is impossible—is logically flawed; there may be plenty of instances in which the government could prove that a person is lying about receipt of a military honor (say, by proving that the liar was in another line of work or in another country during the time he allegedly earned the honor), even if the government does not have enough information to proactively produce and post lists of all medal recipients during that time period. To the extent that criminal prosecution (or its threat) would decrease the incidence of individuals being able to "get away" with their lies, and thus reduce the dignitary harm caused to legitimate medal winners, the nontrivial costs to the military and the government of not having that tool available should be assigned some meaningful weight.

To see the extent to which modern expressive autonomy has eclipsed these and other important values, we must look not just to this past year but also to recent years preceding it. Staying in the military context, *Snyder v. Phelps*,[142] decided a year before *Alvarez*, illustrates another loss of military interests to free speech values. Indeed, the plurality in *Alvarez* began its analysis by observing that "[t]his is the second case in two Terms requiring the Court to consider speech that can disparage, or attempt to steal, honor that

people who would otherwise be inclined to pay their fair share begin to feel like suckers; they too may refuse to pay; and the underlying collective good goes away.").

139. United States v. Alvarez, 132 S. Ct. 2537, 2563–64 (2012) (Alito, J., dissenting).

140. *Id.* at 2559–60.

141. *Id.* at 2550 (plurality opinion) ("[I]n cases where public refutation will not serve the Government's interest, the Act will not either.").

142. 131 S. Ct. 1207 (2011).

belongs to those who fought for this Nation in battle."[143] What the plurality did not mention here was that both times military interests were trumped by expressive autonomy.[144]

We are not arguing that *Snyder* reached the wrong result; indeed we believe the case was correctly decided. But we do think that the Court did not discuss the competing values at stake in a way that will help it make good decisions in future cases when well-conceived efforts to protect military and other funeral mourners—the setting of *Snyder*—clash with the interests of protestors.

In *Snyder*, the father of a marine killed in Iraq obtained a multi-million dollar intentional infliction of emotional distress (IIED) jury verdict based on picketing—in three public locations not far from his son's funeral—by members of the Westboro Baptist Church.[145] The church members held up signs expressing messages such as "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."[146] The Court, by an 8–1 vote (with Justice Alito dissenting), overturned the tort liability judgment in favor of the grieving father in an opinion by Chief Justice Roberts that provided free speech protection to the picketing in a "narrow" holding "limited by the particular facts before us."[147] These controlling facts included the following:

> The church had notified the authorities in advance of its intent to picket at the time of the funeral, and the picketers complied with police instructions in staging their demonstration. The picketing took place within a 10–by 25–foot plot of public land adjacent to a public street, behind a temporary fence . . . . That plot was approximately 1,000 feet from the church where the funeral was held. Several buildings separated the picket site from the church . . . . The Westboro picketers displayed their signs for about 30 minutes before the funeral began and sang hymns and recited Bible verses. None of the picketers

143. *Alvarez*, 132 S. Ct. at 2542 (plurality opinion).
144. *See id.*; *Snyder*, 131 S. Ct. at 1207.
145. *Snyder*, 131 S. Ct. at 1214.
146. *Id.* at 1213.
147. *Id.* at 1220.

> entered church property or went to the cemetery. They did not yell or use profanity, and there was no violence associated with the picketing . . . .
>
> The funeral procession passed within 200 to 300 feet of the picket site. Although Snyder [the father bringing suit] testified that he could see the tops of the picket signs as he drove to the funeral, he did not see what was written on the signs until later that night, while watching a news broadcast covering the event.[148]

Under these circumstances, the Court rejected liability, observing that

> [w]hether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case . . . .
>
> . . . The "content" of Westboro's signs plainly relates to broad issues of interest to society at large, rather than matters of "purely private concern." . . . While [the] messages [on the placards] may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.[149]

We think the Court was wrong to focus on the question of whether the content of the picketers' speech constituted a matter of public or private concern.[150] Other factors should have been the focus of the Court's explanation of its result. These factors include the location of the protests about one thousand feet from the funeral service.[151] Relatedly, the protestors' messages were not visible to the mourners when they entered or left the church where the service was held.[152] The protestors complied with police directions as to where they could stand and hold their signs.[153] The

148. *Id.* at 1213–14.
149. *Id.* at 1215–17.
150. *See id.* at 1215–19.
151. *Id.* at 1213.
152. *See id.* at 1213–14.
153. *Id.* at 1213.

protest was directed to the public at large.[154] This was public discourse—it was not speech exclusively, or even primarily, directed at a target audience.

Since all of these conditions concerning the protest were present, it is not clear that the question of whether their speech related to a matter of public or private concern should be relevant in this kind of a case. Assume a speaker strongly dislikes one of his colleagues at work. The speaker stands on a soapbox in a public park and states that his colleague is a horrible person who should be sent to hell when he dies. This is mean-spirited private speech, but as long as it is not defamatory we would think it is constitutionally protected—at least if it is addressed to a public audience and expressed in a location some distance away from the place where the maligned colleague lives and works.

Now assume that Westboro Baptist Church members placed telephone calls to the home of parents of a soldier killed in the line of duty immediately before and after the funeral service for their son or daughter. Assume further that the church members expressed exactly the same messages that were depicted on the protestors' signs at issue in the *Snyder* case—messages that the Supreme Court characterized as addressing matters of public concern. As we maintained in an earlier article, there is a strong argument that such phone calls could and should be sanctioned as telephone harassment.[155] Similarly, the antiabortion messages communicated by residential picketers in *Frisby v. Schultz*[156] were also considered speech on a matter of public concern.[157] Yet the picketers' expressive activity there could lawfully be restricted because it "inherently and offensively intrude[d] on residential privacy" and had a "devastating effect . . . on the quiet enjoyment of the home."[158] Thus, in particular cases, when, where, and how speech is communicated may be more

154. *See id.* at 1218 n.4 ("The fact that Westboro conducted its picketing adjacent to a public street does not insulate the speech from liability, but instead heightens concerns that what is at issue is an effort to communicate to the public the church's views on matters of public concern. That is why our precedents so clearly recognize the special significance of this traditional public forum.").

155. *See* Alan Brownstein & Vikram David Amar, *Death, Grief, and Freedom of Speech: Does the First Amendment Permit Protection Against the Harassment and Commandeering of Funeral Mourners?*, 2010 CARDOZO L. REV. DE NOVO 368, 380 (2010).

156. 487 U.S. 474 (1988).

157. *Id.* at 479.

158. *Id.* at 486.

important in determining whether the speech can be restricted or subject to penalty than is the determination that the speech is a matter of public or private concern. By emphasizing the military/public policy content of the speech, however, in explaining First Amendment protection in *Snyder*, the Court may have sent the wrong message to legislatures interested in pursuing reasonable time, place, and manner limits on funeral protestors; may have made lower courts less likely to see that such laws, even if they are applied to speech on matters of public concern, are permissible; and thus may have made it harder to vindicate the interests of the military and the mourners at funerals.[159]

Military and mourner protections are far from the only recent victims of the expressive autonomy juggernaut. Antidiscrimination laws and norms have also fallen in the First Amendment's path. The 5–4 ruling in *Boy Scouts of America v. Dale*[160] is a prominent example. There, the Court upheld the expressive autonomy entitlement of the Boy Scouts to be exempt from a state law prohibiting public accommodation entities from discriminating on the basis of sexual orientation.[161] Another important constitutional value—free and fair elections—has also come under pressure from the First Amendment.[162] We speak here, of course, of the famous *Citizens United* ruling three years ago that we mentioned earlier, in which the Court vindicated the First Amendment rights of corporations (and labor unions, whose victory in *Citizens United* may be undermined by their loss in *Knox*)[163] to expend unlimited amounts of money in support of candidates or causes in federal and state elections notwithstanding plausible concerns about corruption, the appearance of corruption, and the unfairness of the electoral playing

159. *See Snyder*, 131 S. Ct. at 1218. The *Snyder* Court did observe that the protestors' "choice of where and when to conduct [their] picketing is not beyond the Government's regulatory reach—it is 'subject to reasonable time, place, or manner restrictions' that are consistent with the standards announced in this Court's precedents." *Id.* But the Court went on to say that it had "no occasion to consider how [such a law] might apply to facts such as those before us," suggesting that perhaps content-neutral time, place, and manner laws could proscribe the very conduct at issue in *Snyder*. *Id.* Both the wrong-headed suggestion and the related misplaced emphasis on the nature of the protestors' message discourage sensible evolution of the First Amendment doctrine going forward.

160. 530 U.S. 640 (2000).

161. *Id.* at 640.

162. *See* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010).

163. *See* Knox v. Serv. Employees Int'l Union, 132 S. Ct. 2277 (2012).

field.[164] Nor is *Citizens United* the only recent case we have in mind when we say that electoral reform has often been a casualty brought down by First Amendment warriors. Consider *Arizona Free Enterprise Club's PAC v. Bennett*,[165] where the Court by a 5–4 vote (with Chief Justice Roberts writing a majority opinion for himself, Justices Kennedy, Scalia, Thomas, and Alito) invalidated an Arizona campaign finance law that increased the subsidy available to a publicly financed candidate based on the amount his self-financed opponent spent on her own behalf or the amount independent organizations spent supporting her.[166] In some respects, increased use of publicly financed elections may be the remedy for what some people think are flaws in the regime *Citizens United* created. Placing hurdles in the path of public finance schemes may undermine the utility of this check on the excesses of privately funded political power permitted by *Citizens United*.

Under the Arizona law at issue in *Bennett*, "candidates for state office who accept public financing could receive additional money from the state in direct response to the campaign activities of privately financed candidates and independent expenditure groups."[167] Once a candidate exceeded a set spending limit, a publicly financed candidate received roughly one dollar for every dollar spent by an opposing privately financed candidate, up to a predetermined ceiling.[168] The publicly financed candidate also received, again up to a specified ceiling, roughly one dollar for every dollar spent by independent expenditure groups to support the privately financed candidate or to oppose the publicly financed candidate.[169] The Court held that this funding scheme substantially burdened protected political speech by self-financed candidates and independent expenditure groups without serving a compelling state interest and therefore violated the First Amendment.[170]

Although the speech of the self-financed candidates and independent expenditure groups was not directly capped or limited by Arizona's matching funds provision, those parties contended that

164. *See Citizens United*, 130 S. Ct. at 881–82.
165. 131 S. Ct. 2806 (2011).
166. *Id.* at 2829.
167. *Id.* at 2831.
168. *Id.* at 2813.
169. *Id.*
170. *Id.*

the law substantially burdened their political speech in the same way that speech was unconstitutionally burdened in *Davis v. Federal Election Commission*.[171] In *Davis*, the Court struck down "a new, asymmetrical regulatory scheme" enacted by Congress providing that if a candidate for the United States House of Representatives spent more than $350,000 of personal funds on his or her electoral campaign, the candidate's opponent would then be permitted to collect individual contributions up to $6,900 per contributor—three times the normal contribution limit of $2,300.[172] The Court held that this scheme "burden[ed] [the self-funded candidate's] exercise of his First Amendment right to make unlimited expenditures of his personal funds because" doing so had "the effect of enabling his opponent to raise more money and to use that money to finance speech that counteract[ed] and thus diminishe[d] the effectiveness of [the self-funded candidate's] own speech."[173]

The *Bennett* Court held that "the logic of *Davis* largely control[led]" the current case before it.[174] Indeed, to the Court, the differences between Arizona's regime and that regime struck down in *Davis* made the Arizona law worse. First, in *Davis*, unlike in *Bennett*, the opponent of the self-funded candidate was not guaranteed more money based on what the self-funded candidate spent—he merely had the opportunity to raise more money.[175] Moreover, under the Arizona law in *Bennett*, additional monies for an opponent were triggered by expenditures of third parties rather than just by the self-funded candidate himself, further increasing the burden on the self-funded candidate.[176] The Court then rejected the two government rationales that were advanced as sufficiently compelling interests to justify any burden on expression—the leveling of the playing field among candidates and the desire to avoid corruption or its appearance.[177] As to the former, the Court reiterated its position that equalizing the resources among candidates is not a permissible objective of campaign finance laws under the

171. *Id.* at 2817 (citing Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008)).
172. *Davis*, 554 U.S. at 729.
173. *Id.* at 736.
174. *Bennett*, 131 S. Ct. at 2818.
175. *Davis*, 554 U.S. at 736, 738.
176. *Bennett*, 131 S. Ct. at 2818–21.
177. *Id.* at 2807.

First Amendment.[178] And as to the latter, the Court noted that self-expenditures and independent expenditures, unlike campaign contributions, do not raise the specter of corruption.

Justice Kagan wrote a passionate dissent, joined by Justices Ginsburg, Breyer, and Sotomayor, in which she distinguished *Davis* from *Bennett* on the ground that it involved limits on the self-funded candidate's ability to raise money himself, rather than increases in subsidies for the opponent.[179] The full meaning of *Bennett* and *Davis* will, of course, depend on how the Court ultimately interprets them. One possible way to read the majority's opinion in *Bennett* is that explicit, near dollar-for-dollar "matching" subsidies triggered by one candidate's funding of political speech is hard to understand as anything other than an attempt to "level the playing field," which has been held to be an impermissible goal under the First Amendment ever since *Buckley v. Valeo*.[180] Under this reading, more nuanced public finance schemes that avoid the appearance of equalization and instead simply give publicly funded candidates an amount of money adequate to get their messages out, regardless of what others spend, will remain permissible. A second reading of *Bennett* is more ominous for advocates of public financing. Under this reading, the very essence of public financing schemes is attempted equalization. As such, all these schemes will increasingly be looked at by the Court with skepticism.

Consider too another case from the last decade (outside the context of campaign finance) in which electoral regulation—and the power of states to experiment in our system of federalism—fell prey to an arguably overzealous application of free speech principles.[181] In *Republican Party of Minnesota v. White*, five Justices used the First Amendment to strike down a Minnesota law that prohibited candidates for judicial office from speaking out on issues of the day.[182]

The Minnesota law at issue in *White* prohibited a candidate for judicial office, whether an incumbent judge or a non-judge challenger, from "announc[ing] his or her views on disputed legal or

178. *Id.* at 2825–26.

179. *Id.* at 2839–41 (Kagan, J., dissenting).

180. 424 U.S. 1 (1976) (holding that equalizing the financial resources of the parties is not an acceptable justification for capping campaign expenditures).

181. Republican Party of Minn. v. White, 536 U.S. 765 (2002).

182. *Id.* at 788.

political issues."[183] The prohibition went beyond candidate "promises" and forbade, for example, a candidate from criticizing a past court decision and indicating a willingness to consider a different result in similar cases down the road.[184] Strong sanctions accompanied Minnesota's prohibition.[185] Judicial candidates who were sitting judges who violated the Minnesota ban were "subject to discipline, including removal, censure, civil penalties, and suspension without pay."[186] Lawyers who ran for judicial office and violated the rule were subject to, among other things, "disbarment, suspension, and probation" from the practice of law.[187]

Minnesota argued that it needed to regulate candidate speech to ensure that the public believes that judges are sufficiently open minded about important matters that might come before them.[188] According to the Court, however, whatever gain in public confidence the Minnesota law achieved was inadequate to overcome the free speech interests of the candidates because it is "imperative that [candidates] be allowed to freely express themselves on matters of current public importance."[189] Justice Kennedy, whose concurrence took a similar route, added that an individual's First Amendment rights are not surrendered simply because he has thrown his hat into the election ring.[190]

The dissenting Justices' approach was quite different. For them, this case was not so much about the First Amendment as it was about states' rights—in particular, the freedom of states to structure their judicial selection procedures to promote judiciousness.[191] Justice Stevens and the other dissenting Justices argued that judicial elections are not like other "political" elections, because "there is a critical difference between the work of the judge and the work of other public officials."[192] Judges must be, and must be perceived to be, impartial and free from politics in a way that legislative and executive officials are not. Because of this, states must not be put in

183. *Id.* at 768.
184. *Id.* at 772.
185. *Id.* at 768.
186. *Id.*
187. *Id.*
188. *Id.* at 778–79.
189. *See id.* at 781–82 (quoting Wood v. Georgia, 370 U.S. 375, 395 (1962)).
190. *Id.* at 793.
191. *Id.* at 818.
192. *Id.* at 798.

"an all or nothing choice of abandoning judicial elections or having elections in which anything goes."[193]

The majority and the dissent end up in very different places. If one embraces the majority's reasoning, states are going to have a hard time discouraging judicial candidates from speaking their minds, however irresponsibly. Yet if one heeds the dissent, states will have a pretty free hand to deter people who want to criticize existing judicial rulings and doctrines—no matter the First Amendment costs this might entail. From where we sit, neither of these destinations seems very attractive.

But there is another place to go—a place where both free speech and judicial impartiality can be protected, a place where the First and Tenth Amendments can peacefully coexist, and a place where both the centrality of anti-incumbent speech in an election and the right of a state to fill its judiciary with judicious people can be acknowledged. This middle path is based on two key thoughts. First, speakers should not be punished for core political and anti-incumbent speech. Second, there is no First Amendment right to be a judge, and it is not unconstitutional punishment to be kept off the bench for injudicious speech.

In a nutshell, the First Amendment protects one's right to speak about the bench, but not to sit on it, and the Tenth Amendment gives states broad powers to structure state officeholding—especially judicial officeholding—but it does not give states free rein to censor and punish free-spirited critics and candidates.

Begin with the second point: It is simply not a punishment that violates the First Amendment for a state to deny a person high public office because of the views he or she has expressed. This happens all the time in the executive branch under the (perfectly constitutional) system of patronage used to reward party loyalists with plum government posts.[194] There is, in short, a First Amendment right to be a Democrat, but there is not a First Amendment right to be a Democrat in a Republican president's cabinet. Consider also the selection of judges at the federal level, where the President and the Senate certainly, and permissibly, may refuse to make someone a judge because of what that person has said, even though such

193. *Id.* at 799–800.

194. Elrod v. Burns, 427 U.S. 347 (1976).

refusals are undeniably "content-based" and indeed "viewpoint-based," and thus might, in other contexts, run afoul of basic First Amendment principles. A President is perfectly within his rights to withdraw a judicial nomination if the nominee says injudicious things. Thus, there is a right to say foolish things, but there is not a right to both say them and be nominated or confirmed despite them.

If it is not a violation of the First Amendment (and it is surely not) for the Senate to pass an internal Senate rule saying it will not confirm to the federal bench anyone who has expressed racist views in public, then neither is it a violation of the First Amendment for the Senate to announce that it will not confirm any person who speaks out "injudiciously" about the current Supreme Court or any other issues of the day during the confirmation process. We are not saying the Senate can refuse to consider someone for a judgeship on any ground at all. The fact that a nominee is African American, for example, cannot be a disqualifying characteristic because of constitutional principles rooted in the Fourteenth and Fifteenth Amendments, among other places. But the content and timing of the nominee's expressed views surely can be taken into account without violating the First Amendment.

A counterargument to our position might run as follows: In Minnesota, judges are selected not by the governor and state senate, but by the *people* in an *election*. Once Minnesota has turned over the process of picking judges from government institutions to the people themselves, the counterargument goes, then surely the state must allow the people to have access to all relevant information about the candidates. Perhaps—although pinning down the precise source and scope of this constitutional intuition is no easy matter. One possible elaboration might run like this: When a state decides to hold a true "election" to determine a contest, the voters in that election should not be constrained in doing their job, lest people be confused or deceived about what powers they are being given or denied.

Avoiding voter confusion is a laudable objective, and, at some level, a constitutionally grounded one. But suppose Minnesota tweaked its process ever so slightly so as to avoid any possible deception or voter confusion. Suppose, for example, that the state made crystal clear that the vote of the people was not the final word but rather only, formally speaking, a strong opinion poll (a "beauty contest," in election lingo) that a governmental agency—perhaps a

special committee of the state senate—should take into account in making the final decision about whom to appoint to the bench. Consistent with the Constitution, any state could cut the people out of the loop altogether and give judicial selection powers entirely to a governor and a senate who are free to take into account the views and statements of judicial applicants. Indeed, there is strong Supreme Court precedent suggesting such state choices are central to the Tenth Amendment and American federalism.[195] Given that this is so, why should a state not be able to decide to involve the people, but with less finality?

So long as the final decision is made on grounds (judiciousness) plainly relevant to the nature of the office (the judiciary), how is the Constitution violated by this popular "beauty contest" system? Note that there is no federal constitutional rule that the top vote-getter in a state judicial election must get the bench seat, the way there is, for example, a constitutional rule in the Seventeenth Amendment that the candidate who wins a majority of the statewide vote gets to be the U.S. Senator.[196]

Popular-vote "beauty contests" may be unusual nowadays, but they are certainly not unheard of in American history. Before the Seventeenth Amendment, which provides for direct popular election of U.S. Senators,[197] many states held "beauty contest" popular elections that were then used by the state legislatures in their decisions about whom to elect to the Senate.[198] Similarly, in presidential "elections," states in the early Republic were free to use popular-vote "beauty contests" to give the state legislatures information that legislators could then use to decide whom to send to the electoral college. And even today, a state could, without violating the First Amendment, prospectively legislate that it will award its electoral college votes to the winner of the popular vote in that state only if that "winner" has, say, participated in state-sponsored debates or refrained from endorsing racial segregation.[199] This is so even though the First Amendment would forbid truly *punishing* someone

195. *E.g.*, Coyle v. Smith, 221 U.S. 559 (1911).

196. U.S. CONST. amend. XVII.

197. *Id.*

198. *See* Vikram Amar, *The Case for Reforming Presidential Elections by Subconstitutional Means: The Electoral College, the National Popular Vote Compact, and Congressional Power*, 100 GEO. L. J. 237, 237–38 (2011).

199. *See* Bush v. Gore, 531 U.S. 98, 111 (2000) (Rehnquist, J., concurring).

for boycotting a debate or for spewing racist rhetoric at an open political rally. In short, there is no ultrastrong First Amendment right to be a president. Or a judge. The right to speak does not encompass the right to hold either of these jobs.

But isn't there a presumptive right to ply one's lawful private legal practice free from penalty for one's anti-incumbent political expressions? And didn't the Minnesota regime go too far when it threatened *disbarment* (and not just ineligibility for the bench) for any non-incumbent judicial candidate who speaks out too politically during the campaign? Surely it did, and this was the aspect of the Minnesota law that should have been stressed by the majority and was altogether missed by the dissent. When Minnesota not only denied high government jobs to intemperate speakers, but also threatened to take away their private livelihoods without clear evidence that they were unfit to hold those occupations, then the state's actions became punitive in a way that the First Amendment prohibits.

Allowing Minnesota to disbar lawyer critics of incumbent judges and existing judicial rulings would severely dampen core political discourse, whether we call the bench-filling process an "election," a "selection," or a "beauty contest." Punishing private citizens for speaking out against existing laws and judges is precisely what the First Amendment is, at its core, designed to prevent. All of this suggests that if Minnesota passed legislation changing its election to a "beauty contest" and limiting the consequences of intemperate speech to judicial ineligibility, then the legislation should survive First Amendment attack. That much narrower approach should have been the one the Court took in *White*—and should, indeed, have commanded unanimity, as it satisfies the concerns of all nine Justices. Such an approach also would have provided a map for other states as they considered revising their own judicial selection procedures.

Let us now turn to two other historically important values that have given way to expressive autonomy challenges in the last few years: (1) parental control over the upbringing of their children and (2) consumer protections. Regarding parental control, consider *Brown v. Entertainment Merchants Ass'n*,[200] where a somewhat

200. 131 S. Ct. 2729 (2011).

divided Court[201] invalidated a California statute that prohibited the sale or rental of "violent video games" to minors unless accompanied by a parent purchaser and required the packaging of "violent video games" to be labeled "18."[202] The California statute covered games

> "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors."[203]

Observing that video games qualify for First Amendment protection, and drawing no meaningful distinction between speech for adults and speech for children outside the realm of sexual speech, Justice Scalia's opinion for the Court recognized "that it is difficult to distinguish politics from entertainment, and dangerous to try."[204] Scalia went on to remind us that

> "as a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." There are of course exceptions. "From 1791 to the present," . . . the First Amendment has "permitted restrictions upon the content of speech in a few limited areas," and has never "include[d] a freedom to disregard these traditional limitations."[205]

Justice Scalia then continued by noting that "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the 'judgment [of] the American people,' embodied in the First Amendment, 'that the benefits of its restrictions on the

201. Five Justices joined the majority opinion and seven concurred in the ruling.
202. *Brown*, 131 S. Ct. at 2732.
203. *Id.* at 2732–33 (quoting CAL. CIV. CODE § 1746(d)(1) (West 2006)).
204. *Id.* at 2733.
205. *Id.* (quoting United States v. Stevens, 130 S. Ct. 1577, 1585 (2009) (alterations in original)).

Government outweigh the costs.'"[206] This principle, Justice Scalia argued, controlled the case at hand.[207]

To our way of thinking, the Court in *Brown*, as in *Snyder*, may have reached a defensible result in the case at hand, but in doing so seemed to have fashioned some bad doctrinal principles. As we explained when we offered written analysis to California legislative staff while the video game bill was under consideration, California's law reached too far. It is hard to argue, for First Amendment purposes or otherwise, that the state can (or should try to) prohibit a seventeen-year-old person planning to join the Marines when he turns eighteen from buying a violent video game unless his mother accompanies him to the store to purchase the game for him. The statute's age cut-off was simply too high.

The Court could have made that point succinctly and noted that a more carefully tailored law restricting access to violent video games to children under the age of thirteen or fourteen would have raised a very different case.[208] Unfortunately, the Court did not go that route. Instead, it insisted that, with the exception of sexually graphic materials, children have pretty much the same free speech rights as adults.[209] Thus, if adults may access depraved and viciously violent video games in which women and racial and religious minorities are slaughtered like animals,[210] minors under the age of eighteen have the same freedom to obtain these materials.

But this constitutional equivalence between adults and children is very much open to question. Children do not have the same rights as adults when it comes to voting, having abortions, marrying, or keeping and bearing arms.[211] The reason children do not enjoy the full panoply of rights guaranteed to adults is that children lack the experience, maturity, and knowledge to decide how to responsibly exercise those freedoms.[212] Why should the right to free speech be any different, particularly if legislation is properly directed at protecting young children?

206. *Id.* at 2734 (quoting *Stevens*, 130 S. Ct. at 1585).
207. *Id.*
208. Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2736 (2011).
209. *Id.* at 2760–61.
210. *Id.* at 2749–50.
211. *Id.* at 2760.
212. *Id.* at 2767.

The *Brown* Court did not adequately answer this question. Instead, the Court cited language from one case, *Erznoznik v. Jacksonville*,[213] to support the argument that children and adults have equivalent First Amendment rights.[214] Yet, *Erznoznik* was distinguishable from *Brown* because it did not concern the narrow issue in *Brown* of marketing expressive materials to children. Rather, *Erznoznik* invalidated a law prohibiting drive-in movie theaters from showing movies containing nude scenes in order to prevent children from catching fleeting glimpses of nude images on the screen from afar.[215] We agree with the holding in *Erznoznik* to the extent that it correctly recognized that the State cannot childproof the marketplace of ideas and cannot restrict free speech among adults simply because the speech might be overheard (or seen) by children. In contrast, California's statute in *Brown* narrowly restricted the direct marketing of video games to children[216] and did not impose limits on adults' rights to purchase the violent video games for themselves or their children.

We are not suggesting that determining the free speech rights of children and the rights of adults who target child audiences is a simple issue for the courts to resolve. Age matters, and there is a continuum of rights that grows along with a child's maturity and experience. Courts will confront difficult questions about what falls within the scope of legislative discretion. While we may avoid those hard questions by providing children the same free speech rights as adults, avoiding these problems creates others in their place. Does the fact that Nazis can hold rallies on public streets mean they can patrol sidewalks in front of elementary schools and recruit children to attend their meetings? Justice Scalia points out in *Brown* that a seventeen-year-old can attend the church of his choice and that church groups have a free speech right to proselytize our youth.[217] Does that mean that any group that identifies itself as religious in nature can proselytize eight-year-olds and invite them to attend church meetings without their parents' permission?

213. 422 U.S. 205 (1975).

214. *See Brown*, 131 S. Ct. at 2735–36 (citing Erznoznik v. Jacksonville, 422 U.S. 205 (1975)).

215. *Erznoznik*, 422 U.S. at 223.

216. CAL. CIV. CODE § 1746.1 (West 2006).

217. *Brown*, 131 S. Ct. at 2736 n.3.

As for consumer protection, consider the Court's most important commercial speech case in recent years, *Sorrell v. IMS Health, Inc*.[218] There, the Court (6–3, with Justices Breyer, Ginsburg, and Kagan, dissenting) struck down a Vermont law restricting the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors.[219] Subject to certain exceptions, the Vermont statute prohibited such information from being sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufacturers.[220] Vermont argued that its prohibitions safeguarded medical privacy and diminished the likelihood that marketing would lead to prescription decisions that are adverse to the best interests of patients and the state.[221] The Court assumed these interests were significant, but it held that Vermont's statute must be subjected to heightened judicial scrutiny because speech in aid of pharmaceutical marketing is a form of expression protected by the Free Speech Clause of the First Amendment.[222] The Court concluded the law did not satisfy that standard because of the imprecise fit between its means and asserted ends.[223]

Free speech doctrine has been so ravenous in recent years that it is substantially cannibalizing other clauses in the First Amendment, particularly the Free Exercise Clause and the Establishment Clause. In a series of cases beginning with *Widmar v. Vincent*[224] in 1981 and extending through *Lamb's Chapel v. Center Moriches Union Free School District*,[225] *Rosenberger v. Rector & Visitors of the University of Virginia*,[226] and *Good News Club v. Milford Central School*,[227] the Court used the Free Speech Clause to protect religious gatherings and activities from discrimination. *Widmar* characterized discrimination against expressive religious activities as content discrimination.[228] In *Lamb's Chapel*, *Rosenberger*, and *Good News Club*, however, the Court more aggressively construed

218. 131 S. Ct. 2653 (2011).
219. *Id.* at 2658–59, 2672.
220. *Id.* at 2659.
221. *Id.*
222. *Id.*
223. *Id.* at 2668.
224. 454 U.S. 263 (1981).
225. 508 U.S. 384 (1993).
226. 515 U.S. 819 (1995).
227. 533 U.S. 98 (2001).
228. *Widmar*, 454 U.S. at 270.

discrimination against these activities as viewpoint discrimination.[229] In perhaps the most forceful assertion of Free Speech Clause dominance, in *Christian Legal Society v. Martinez*[230] four dissenting Justices asserted that a university policy prohibiting both religious and secular student groups from discriminating on the basis of religion in admitting members, while permitting discrimination on the basis of political belief or affiliation, amounted to unconstitutional viewpoint discrimination *against* religion.[231]

This line of authority displaces the Free Exercise Clause as the primary constitutional vehicle for protecting religious liberty and simultaneously undermines Establishment Clause constraints on government promotion of religion. *Lamb's Chapel* and *Good News Club*, for example, involved discriminatory policies restricting religious groups' access to public property for religiously expressive activities.[232] Although *Employment Division v. Smith*,[233] the seminal free exercise case decided in 1990, sharply limited the scope of free exercise rights against neutral laws of general applicability, it reaffirmed the viability of free exercise rights against laws targeting religion.[234] Thus, the discriminatory policies at issue in *Lamb's Chapel* and *Good News Club* were vulnerable to rigorous review and invalidation under free exercise doctrine, and the plaintiffs in both cases raised such claims in their lawsuits.[235] Yet, in both *Lamb's Chapel* and *Good News*, the Court ignored the constitutional guarantees focusing directly on the protection of religious liberty and

229. *Good News Club*, 533 U.S. at 106–07; *Rosenberger*, 515 U.S. at 831; *Lamb's Chapel*, 508 U.S. at 394.

230. 130 S. Ct. 2971 (2010).

231. *Id.* at 3009–10 (Alito, J., dissenting).

232. In *Lamb's Chapel*, the Court described the issue as follows:

> [W]hether, against this background of state law, it violates the Free Speech Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today.

Lamb's Chapel, 508 U.S. at 387. In *Good News Club*, a private Christian youth organization named the Good News Club was entitled to use public school facilities so long as the club received approval from the school. *Good News Club*, 533 U.S. at 103. The club's sponsors requested permission to hold the club's weekly meeting in the school's cafeteria. *Id.* School policy prohibited use of the facilities "by any individual or organization for religious purposes," and the superintendent denied the club's request on the basis that the activity was equivalent to religious worship. *Id.*

233. 494 U.S. 872 (1990).

234. *Id.*

235. *Lamb's Chapel*, 508 U.S. at 389; *Good News Club*, 533 U.S. at 104.

elected to resolve both cases on free speech grounds.[236] Given the range of religious practice and activity with an expressive dimension (such as sermons, prayers, and proselytizing), substituting free speech for the free exercise of religion dramatically limits the scope of the latter provision.

In contrast to *Lamb's Chapel* and *Good News Club*, the *Rosenberger* case did not involve restrictions on access to public property.[237] At issue in *Rosenberger* was a university program that provided financial subsidies to student groups for various expressive activities.[238] Here again, the university excluded funding for religiously expressive activities,[239] and the Court concluded that the university's policies were discriminatory on the basis of viewpoint and were therefore unconstitutional.[240] This step—from discrimination against religion regarding access to public property to discrimination in eligibility for government subsidies—was arguably a substantial one, however. The Court does not typically apply rigorous review to government decisions to fund some speakers but not others.[241] More importantly, the Establishment Clause imposes serious constraints on government funding of religious institutions and activities.[242] If the Free Speech Clause were interpreted to prohibit such discrimination with respect to government funding, it would fundamentally undercut the key Establishment Clause goal of prohibiting the government from promoting religion.

236. *Lamb's Chapel*, 508 U.S. at 387; *Good News Club*, 533 U.S. at 111.

237. Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 843 (1995).

238. *Id.* at 824.

239. *Id.* at 824–27.

240. *Id.* at 835–37.

241. As the Court noted in a free speech subsidy case, *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983), it is hardly a "novel principle[]" to recognize that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right . . . ." The applicability of this principle to freedom of speech was reaffirmed in *Rust v. Sullivan*, 500 U.S. 173 (1991). Here, the Court provided an explicit example to support its reasoning. "When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism or Fascism." *Id.* at 193; *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 595–98 (1998) (Scalia, J., concurring) (arguing that by denying some speakers subsidies provided to others, the government neither abridges nor suppresses freedom of speech).

242. *See, e.g.*, Locke v. Davey, 540 U.S. 712, 721 (2004) ("[T]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions.").

The Court's use of the Free Speech Clause to bulldoze over and through the religion clauses may have serious costs, and it is unclear whether the Justices orchestrating this line of authority realize the doctrinal risks involved. The Free Speech Clause requires the same rigorous level of review of government regulations whether they favor or disfavor a particular viewpoint.[243] Both forms of viewpoint discrimination are unconstitutional unless they can pass the Court's strict scrutiny test.[244] Accordingly, if laws discriminating against religiously expressive activities are subject to rigorous review, then laws discriminating in favor of religiously expressive activities must receive the same rigorous level of review. Such rigorous review would, however, undermine the constitutionality of numerous laws accommodating religious beliefs and activities, as well as those exempting religious individuals and institutions from general regulations that their secular counterparts are required to obey.

The ramifications of the arguments offered by the dissenting Justices in the *Martinez* case are even more disturbing.[245] If we are going to view religion through a free speech prism, rather than an equal protection framework, many conventional civil rights laws protecting religious individuals against discrimination may be vulnerable to constitutional challenge. From an equal protection perspective, religion is conceptualized as a person's status or identity.[246] Pursuant to this understanding, it is no more problematic to prohibit discrimination on the basis of religion, but allow it on the basis of political belief or affiliation, than it is to prohibit discrimination on the basis of race but allow it on the basis of political belief and affiliation.

The analysis changes dramatically, however, if we conceptualize religion as a viewpoint of speech under free speech doctrine. Now civil rights laws that prohibit discrimination on the basis of religion but not discrimination on the basis of political belief or affiliation seem to be viewpoint discriminatory on their face. Individuals who hold and espouse religious beliefs are protected against

243. Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 66 (1983) ("[N]o case has applied any but the most exacting scrutiny to a content or speaker restriction that substantially tended to favor the advocacy of one point of view on a given issue." (quoting Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1296 (7th Cir. 1981)).

244. *Id.*

245. Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3000 (2010) (Alito, J., dissenting).

246. *Id.* at 2989–90.

discrimination while individuals who hold and espouse nonreligious beliefs receive no comparable protection.[247] Let us be clear that we are not arguing here that all such civil rights laws are unconstitutional under the Free Speech Clause. We do suggest that there is a price to pay when free speech doctrine is expanded into domains that may be more appropriately reserved for analysis under doctrinal frameworks interpreting other constitutional provisions.

To list some of the many important areas into which First Amendment doctrine has been extended and the many important societal and constitutional values over which free speech claims have prevailed is not to say the Supreme Court has decided all or any of these difficult disputes incorrectly. Nor is it to say this is the first time when one provision/theory in the Constitution seems to have ramified to influence and dominate over other provisions/theories. Indeed, we see in the modern free speech jurisprudence a development similar to that which could be said to characterize the extensive spread and reach of equal protection/antidiscrimination doctrine and theory during the decades following World War II.[248] In that era, antidiscrimination norms and values derived from an equal protection foundation did more than simply govern racial discrimination cases; these norms and values deeply affected regulation of the electoral process,[249] dictated the result in cases involving federal power to regulate the economy and protect consumers,[250] drove state action doctrine,[251] undergirded the right to travel,[252] overrode associational interests,[253] infiltrated establishment clause thinking,[254] and indeed strongly influenced much of the doctrine developed under the Free Speech Clause,[255] the provision

247. *Id.* at 2991.

248. *See* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 146 (1986) (describing the Court's commitment to equal protection principles as "doctrinal imperialism" because "the equal protection mode of analysis has come to dominate the interpretation of many other Clauses of the Constitution" (internal quotation marks omitted)).

249. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).

250. *E.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

251. *E.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 717 (1961); Shelly v. Kraemer, 334 U.S. 1, 15–16 (1948).

252. *E.g.*, United States v. Guest, 383 U.S. 745, 757–58 (1966).

253. *E.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 605 (1983).

254. *E.g.*, Lynch v. Donnelly, 465 U.S. 668, 673–74 (1984).

255. *E.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 96 (1972) ("Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not

that in recent decades seems to have become the dominant constitutional paradigm.

In terms of constitutional centrality and salience, the First Amendment in some ways is the new equal protection.

grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."). It is also interesting to note that the idea and label of "intermediate scrutiny" in content-neutral free speech regulation cases seems to have been borrowed from equal protection gender classification review.