Denying Systemic Equality: The Last Words of the Kennedy Court

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This Article examines the Supreme Court's voting, speech, and religion decisions in the 2017–18 Term, arguing that their unifying feature is the denial of systemic equality. In a series of end-of-Term constitutional rights decisions, the Court resolutely insisted on viewing equality in atomistic terms. In so doing, the Court ignored and even exacerbated systemic inequalities in each of these realms. In his last Term on the Court, Justice Kennedy was part of the majority in all of these decisions.

*The Court decided three important redistricting cases in the 2017–18 Term. Partisan gerrymandering is the classic systemic harm, yet the Court insisted on an individualized showing of injury in holding that Wisconsin plaintiffs had failed to demonstrate standing in their statewide challenge to a state districting plan (*Gill v. Whitford*). The Court also denied relief for an alleged gerrymander in Maryland (*Benisek v. Lamone*). In another redistricting case (*Abbott v. Perez*), the Court upheld Texas's congressional and state legislative districts, eliding the evidence of systemic injury to Latino voters. In two critical free speech decisions, the Court struck down a California law imposing certain notification requirements on pregnancy-related clinics (*National Institute of Family and Life Advocates v. Becerra*), and a state agency fee law for public sector labor unions (*Janus v. AFSCME*). Both decisions focus myopically on individual speakers, while ignoring the systemic viewpoint discrimination that arises from the Court's First Amendment decisions. The Court's disregard for systemic equality is also evident in two high-profile decisions involving claims of religious discrimination. The majority squinted hard to find evidence that the civil rights commissioners discriminated against a Christian baker who refused to make a cake for a same-sex wedding (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*), while upholding an entry ban on people from six Muslim-majority countries despite overwhelming evidence of discriminatory animus against Muslims (*Trump v. Hawaii*).*

This Article describes and criticizes the last-Term Kennedy Court's inattention to—and in some cases hostility toward—systemic equality. It argues that the Court's relentlessly atomistic approach to discrimination has obscured and intensified systemic inequalities in the public sphere.

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INTRODUCTION

Equality should be understood in systemic and not just atomistic terms.[1] This precept is commonly accepted in the context of employment discrimination, where institutional and structural racism are widely recognized by scholars, if less commonly remedied by courts.[2] The idea of systemic equality holds currency in other realms of law too. Voting rights law, for example, has long recognized the necessity of considering not just the effects that voting rules have on individuals, but also their differential impact on different groups defined by race, economic status, or political ideology.[3] Free speech law likewise focuses not just on individual speakers, but on how restraints on expression may distort the marketplace of ideas.[4] And the Religion Clauses of the First Amendment consider not only the impact on individuals' ability to practice their chosen religion, but the collective effect on adherents of minority religious groups.[5] Systemic equality is thus a core constitutional value in the realms of voting, speech, and religion.

This article examines the Supreme Court's voting, speech, and religion decisions in the 2017 Term, arguing that their unifying feature is the denial of systemic equality. In a series of end-of-Term decisions, the Court reso-

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[1] *See* Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2428 (2003) (defining and discussing the concepts of atomistic and systemic equality).

[2] *See* Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1333–35 (2015) (noting that systemic discrimination cases have been controversial and arguing that the EEOC is best positioned to litigate such cases); *see also* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 1 (2006) (expressing support for the "institutional" or "structural" approach to employment discrimination, while acknowledging the difficulties of pursuing such an approach under accepted law).

[3] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986) (formulating legal standard for racial vote dilution under Section 2 of the Voting Rights Act); Harper v. Virginia, 383 U.S. 663 (1966) (striking down poll tax because of its disproportionate impact on less affluent voters); Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681–89 (2001) (discussing vote dilution as an aggregate harm, measured by reference to its impact on a group of people).

[4] *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 356 (1976) (recognizing harm to "free functioning of the electoral process" resulting from patronage practices that burden the associational rights of minority political parties); Tokaji, *supra* note 1, at 2428–30 (contrasting atomistic and systemic conceptions of free speech).

[5] *See, e.g.*, McCreary County v. ACLU of Kentucky, 545 U.S. 844, 860–61 (2005) (articulating central aim of the Establishment Clause that the government not take sides by preferring one faith over another); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (considering "principal or primary effect" of advancing or inhibiting religion as one factor to consider under Establishment Clause); *see generally* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611 (1993) (developing a theory of the Religion Clauses founded in the proper role of religion in democratic politics).

lutely insisted on viewing equality exclusively in atomistic terms. In so doing, it ignored and in some cases exacerbated systemic inequalities in each of these areas. The Court wrongly viewed partisan gerrymandering in individualistic terms in one case, while disregarding evidence of systemic harm to Latino voters in another.[6] Its free speech and religion cases are even more disturbing. While focusing on the atomistic harms to the speech of pregnancy-care providers and public employees, the Court disregarded the systemic inequalities of expression that arise from its rulings.[7] The Court fixated on an individualized harm to a baker allegedly denied equal treatment because of his faith in one case, while disregarding the systemic harms to Muslims arising from the federal government's entry ban in another.[8] Ironically, some members of the Court ground their views in the venerable First Amendment doctrine of viewpoint discrimination. In reality, the Court's decisions worsen the very evil they claim to be combatting, privileging one faction—defined in terms of race, religion, party, or ideology—while disadvantaging others.

In his last Term on the Court, Justice Kennedy was part of the majority in all of these cases. Although it is customary to use the name of the Chief Justice in referring to the Court of a particular era, Justice Kennedy has been its most influential member for many years—especially since the retirement of Justice O'Connor, which made Justice Kennedy the swing Justice on many critical questions. It is therefore appropriate to speak of the Court from January 2006 to June 2018 as the Kennedy Court.[9] Progressives have hailed Justice Kennedy for his opinion in *Obergefell v. Hodges*[10] holding that same-sex couples have a constitutional right to marry.[11] He was sometimes seen as a champion of First Amendment rights, and some hoped that he would provide the long-sought fifth vote to strike down extreme partisan gerrymanders. Justice Kennedy's performance in the final weeks of his last Term was therefore especially disappointing for advocates of systemic equality.

Before proceeding further, some clarification of terminology may be helpful. This article uses the term *atomistic* to refer to a vision of equality that adopts a micro-level focus on how particular individuals are affected by a challenged practice. In the realm of employment discrimination, for example, an atomistic vision would focus on an individual claiming to have been denied employment based on her race or sex. The core idea is that like individuals should be treated alike—and conversely, that one should not be denied an opportunity based on a trait that is irrelevant to one's qualifications. By contrast, a *systemic* vision of equality takes a macro-level view, focusing

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[6] *See infra* Part I.
[7] *See infra* Part II.
[8] *See infra* Part III.
[9] *See* Adam Liptak, *In Influence if Not in Title, This Has Been the Kennedy Court*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-career.html [https://perma.cc/M8JW-675Q].
[10] 135 S. Ct. 2584 (2015).
[11] *Id.* at 2608.

on how laws or practices systematically disadvantage groups of people.[12] In the employment realm, the EEOC defines systemic discrimination as "a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area."[13] A case challenging an employer's policy of denying equal pay to women employees exemplifies such a practice.[14] Proponents of systemic equality thus tend to view the primary goal of law as prevention in anti-subordination rather than anti-differentiation terms.[15]

In the area of voting rights, an atomistic view focuses on how a challenged practice affects individual voters—for example, nuns in Indiana who lack legally required voter ID.[16] A systemic perspective, by contrast, considers how the law affects different groups of people. In a challenge to the same voter ID law, it would examine the differential effects that the law has on racial minorities, poor people, or nondominant parties.[17] A similar distinction exists with respect to First Amendment rights under the Speech and Religion Clauses. Obscenity law, for example, has sometimes focused on the liberty interest that people have in deciding what books they may read or films they may view.[18] A systemic perspective, by contrast, looks holistically on the impact that speech restrictions have on the marketplace of ideas, diminishing certain perspectives while magnifying others. One example is a law that requires public-sector employees to pay agency fees to support the union's expression on their behalf. Viewed from an atomistic perspective, that law might be seen as infringing on employee free speech by forcing dissenting employees to support a perspective they do not endorse. From a systemic perspective, by contrast, that law may advance equality by ensuring that the collective concerns of employees are given voice. In the realm of

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[12] For more discussion of systemic equality, see Bagenstos, *supra* note 2, at 4–19 (summarizing the literature on systemic discrimination in employment, in which scholars advocate "workplace structures that can facilitate or ameliorate bias"); Barbara Reskin, *The Race Discrimination System*, 38 ANN. REV. SOC. 17, 19 (2012) (defining a "discrimination system" as "a set of dynamically related subsystems (or domains) in which (a) disparities systematically favor certain groups, (b) disparities across subsystems are mutually reinforcing, and (c) one source of within-subsystem disparities is discrimination"); Kim, *supra* note 2, at 1133 (characterizing systemic discrimination claims as ones that challenge "workforce-wide policies and practices that systematically disadvantage racial minorities, women, and other protected groups").

[13] U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Systemic Discrimination*, https://www.eeoc.gov/eeoc/systemic/index.cfm [https://perma.cc/SV2Q-9GRF] (last visited Nov. 7, 2018).

[14] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[15] *See* Ruth Colker, *Anti-Subordination Above All Else: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986) (contrasting these two principles of equal protection law).

[16] *See* Greg Gordon, *With No Photo IDs, Nuns Denied Ballots in Indiana*, MCCLATCHY NEWSPAPERS (June 15, 2015, 4:16 PM) https://www.mcclatchydc.com/news/politics-government/article24482848.html [https://perma.cc/GNS8-4ASB].

[17] In the realm of election law, systemic approaches to voting issues are often called structural. *See, e.g.*, Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics,* 118 HARV. L. REV. 28, 41 (2004) (urging attention to "the systemic consequences that institutional structures and legal rules generate for political practices").

[18] *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("[A] State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.").

religion, an atomistic perspective would focus on the impact that a law has on an individual's ability to practice her religion, or differential treatment accorded her because of her religious views or expression. A systemic perspective, by contrast, would focus on the aggregate impact that a challenged law or practice—say, the display of a crèche—has on nondominant religious groups.

The last-Term Kennedy Court embraced an atomistic conception of equality while denying systemic equality in the domains of voting, speech, and religion. The Supreme Court denied relief in two cases challenging partisan gerrymandering, one involving an alleged Republican gerrymander in Wisconsin (*Gill v. Whitford*),[19] the other involving an alleged Democratic gerrymander in Maryland (*Benisek v. Lamone*).[20] The Maryland decision prudently denied interim relief, but the Wisconsin decision is more ominous. The Court held that plaintiffs must demonstrate an individualized and district-specific harm to have standing, refusing to recognize the systemic injury that plaintiffs had sustained due to the weakening of their political party in the state legislature.[21] In another redistricting case (*Abbott v. Perez*)[22], the Court upheld Texas's congressional and state legislative districts against constitutional challenge. In so doing, it sidestepped the three-judge district court's careful and measured assessment of the evidence, which led it to find that some (though not all) of the districts were drawn with the intent to weaken the political voice of Latinos.[23] By contrast, the Supreme Court's atomistic perspective on voting precluded it from seeing—or, perhaps more accurately, allowed it to ignore—the systemic diminution of the voting strength of a political minority.

The 2017–18 Court's speech decisions are even more disconcerting. It struck down a California law imposing certain notification requirements on pregnancy-related clinics, including clinics that discourage abortion (*National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*")).[24] Seeing the case from the perspective of anti-abortion providers, the Court viewed the state's notification requirements as content-based regulations on speech. While not unreasonable in itself, when viewed alongside the speech restrictions upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[25] *NIFLA* amounts to a systemic distortion of abortion-related discourse. While upholding state-mandated disclosures designed to discourage abortion, the Court rejected disclosures that would provide women with information about the availability of abortions. So too, in striking down Illinois's agency fee law for public sector labor unions (*Janus v. AFSCME*),[26] the

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[19] 138 S. Ct. 1916 (2018).
[20] 138 S. Ct. 1942 (2018).
[21] *See Whitford*, 138 S. Ct. at 1932–34.
[22] 138 S. Ct. 2305 (2018).
[23] *See* Perez v. Abbott, 274 F. Supp. 3d 624, 645–52 (W.D. Tex. 2017); 267 F. Supp. 3d 750, 758–69, 794–95 (W.D. Tex. 2017).
[24] *See* 138 S. Ct. 2361 (2018).
[25] 505 U.S. 833 (1992).
[26] *See* 138 S. Ct. 2448 (2018).

Court privileged the individual perspective while ignoring the systemic. It fixated on the individual who declines to join a union but is compelled to pay fees for the agency's work on her behalf, while ignoring the systemic weakening of the voice of working people arising from the Court's destabilization of long-settled precedent. When viewed alongside *Citizens United v. FEC*[27] and other decisions that systematically enhance the political voice of wealthy entities, *Janus*'s distortion of the marketplace of ideas is alarmingly evident. Evenhandedness in the regulation of speech has been an essential requirement of First Amendment law for nearly a century. Yet the Court's relentless focus on individual speakers disguises the unequal systemic effects of its decisions, in these cases, on people who favor the rights of workers and women seeking abortions.

The Kennedy Court's disregard for systemic equality is also apparent in two high-profile decisions involving claims of religious discrimination. The Court held that the Colorado Civil Rights Commission violated the Free Exercise Clause's requirement of religious neutrality in its treatment of a baker who refused to make a cake for a same-sex wedding (*Masterpiece Cakeshop v. Colorado Civil Rights Commission*).[28] Although the evidence of discrimination was thin, the Court squinted hard to find "hostility" to the baker's religious viewpoint.[29] Here too, the decision might be defensible in itself, but is much more troubling when placed alongside another case. Just three weeks later, the Court upheld President Trump's ban on people from six Muslim-majority countries entering the United States, despite evidence from his own mouth (and tweets) that the ban was intended to exclude Muslims (*Trump v. Hawaii*).[30] While the Court bent over backwards to find discrimination against a Christian baker, it ignored systemic discrimination against Muslims when the evidence was staring it right in the face.

This article describes and criticizes the Kennedy Court's inattention to—and in some cases hostility toward—systemic equality in its final Term. It focuses on how the Court's relentlessly atomistic approach to discrimination obscures and worsens systemic inequalities, including those which arise from its own decisions. Part I discusses the redistricting cases, Part II the free speech cases, and Part III the religion cases. The article concludes with recommendations on what advocates of systemic equality should do next.

I. Redistricting

The Supreme Court decided two highly anticipated cases in the 2017–18 Term raising claims of partisan gerrymandering and another case alleging racially discriminatory districting. Although the Court properly affirmed the denial of preliminary relief in a case out of Maryland (*Benisek v.*

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[27] 558 U.S. 310 (2010).
[28] 138 S. Ct. 1719 (2018).
[29] *See infra* Part III.A.
[30] 138 S. Ct. 2392, 2417 (2018).

Lamone),[31] the outcome of the other two was disappointing. In *Gill v. Whitford*, the Court concluded that plaintiffs challenging an alleged partisan gerrymander in Wisconsin lacked standing.[32] In *Abbott v. Perez*, the Court rejected claims that the Texas legislature had intentionally discriminated against Latinos in drawing U.S. House and state legislative districts.[33] More disturbing than the results of these two cases is the Court's insistence on an individualized conception of rights in this realm. The injury inflicted by unfair redistricting plans is inherently systemic, because it diminishes the collective political power of a group of people. Yet the Court mistakenly demanded an individualized injury in *Gill*,[34] while brushing aside compelling evidence of intentional discrimination against Latino voters in *Perez*.[35] In both these cases, the Court's atomistic conception of equality prevented it from grasping the systemic harms inflicted on groups of voters.

A. Gill v. Whitford

In *Gill v. Whitford*, the Court considered a state legislative redistricting plan drawn by the Republican-controlled Wisconsin legislature.[36] This plan allowed Republicans to win over sixty of the state's ninety-nine assembly seats with just 48.6% of the vote in 2012, and sixty-three of ninety-nine assembly seats with fifty-two percent of the vote in 2014.[37] Twelve Wisconsin voters, four of whom alleged that they live in assembly districts that were cracked or packed to dilute Democratic votes, challenged the plan as an unconstitutional partisan gerrymander.[38] Plaintiffs asserted that the plan violated the Fourteenth Amendment right to equal protection and the First Amendment right to expressive association.[39] They assembled an impressive record of evidence in support of their claims, including various quantitative metrics demonstrating the partisan effect of Wisconsin's legislative redistricting plan. The metric that has received the most public attention is the large "efficiency gap" in Wisconsin's plan—the fact that so many more Democratic votes than Republican votes were "wasted."[40] Yet this was just one indicator of the systemic injury to Democratic voters and candidates. Plaintiffs also presented evidence on the seats-to-vote curve (showing how

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[31] 138 S. Ct. 1942 (2018).
[32] 138 S. Ct. 1916, 1934 (2018).
[33] 138 S. Ct. 2305, 2330 (2018).
[34] *See Whitford*, 138 S. Ct. at 1929–30.
[35] *See infra* Part II.C.
[36] *See Whitford*, 138 S. Ct. at 1923.
[37] *See id.*
[38] *See id.* at 1923–24.
[39] *See id.* at 1924.
[40] *See* Whitford v. Gill, 218 F. Supp. 3d 837, 854–55, 859–61 (W.D. Wis. 2016). For media coverage, see, e.g., Darla Cameron, *Here's How the Supreme Court Could Decide Whether Your Vote Will Count*, WASH. POST (Oct. 4, 2017), https://www.washingtonpost.com/graphics/2017/politics/courts-law/gerrymander/ [https://perma.cc/LP66-4KJB].

the number of seats shifts as a party's share of the overall vote increases).[41] They showed that the plan was designed to favor Republicans, even in years when more people vote for Democratic candidates.[42] Based on a thick record showing both partisan intent and partisan effect, a majority of the three-judge district court concluded that Wisconsin's state legislative plan violated plaintiffs' rights under both the First and Fourteenth Amendments.[43]

The Supreme Court unanimously reversed on the ground that plaintiffs had failed to establish standing, though seven Justices (all but Justices Thomas and Gorsuch) agreed that the case should be remanded to allow plaintiffs another chance to demonstrate their standing.[44] Writing for all the Justices, Chief Justice Roberts wrote that the Court had "long recognized that a person's right to vote is 'individual and personal in nature.'"[45] Because the vote dilution claim in *Whitford* involves the majority political party "cracking" and "packing" voters of the other major party, the Court reasoned, their injury is "district specific."[46] Each individual voter votes for a single representative within a single district.[47] Thus, the Court reasoned, each plaintiff must show that his or her own district has been gerrymandered to demonstrate the injury that Article III requires.[48] According to the Court, the plaintiffs had only produced evidence of a "statewide injury," which by itself was insufficient for standing to assert a vote dilution claim.[49]

The upshot of *Whitford* is that plaintiffs making a vote dilution claim under the Equal Protection Clause must demonstrate an individualized injury arising from their being "cracked" or "packed" by particular districts. It is less clear whether such an injury is required for a right-of-association claim under the First Amendment, though it seems likely that a majority would have demanded an individualized and district-specific injury regardless of how framed.

The central problem with *Whitford* is its failure to grasp the core injury inflicted by partisan gerrymandering. As I have previously written, "the gravamen of a partisan gerrymandering claim is the systemic injury to a non-dominant major party and its adherents, which can only be judged by examining the entire plan."[50] In other words, the essence of the claim is that the plan *as a whole* denies an equal voice to people who support the non-domi-

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[41] *Whitford*, 218 F. Supp. 3d at 857–58. *See also* Wendy K. Tam Cho & Yan Y. Liu, *Toward a Talismanic Redistricting Tool: A Computational Method for Identifying Extreme Redistricting Plans*, 15 ELECTION L.J. 351, 360 (2016); Richard G. Niemi & Patrick Fett, *The Swing Ratio: An Explanation and an Assessment*, 11 LEGIS. STUD. Q. 75, 75–76 (1986).

[42] *See Whitford*, 218 F. Supp. 3d at 859–61.

[43] *See id.* at 864–83. *See also* Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2203–04 (2018) (describing district court opinion in *Whitford*).

[44] *See* 138 S. Ct. at 1929–34.

[45] *Id.* at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).

[46] *Id.* at 1930.

[47] *Id.*

[48] *See id.*

[49] *See id.* at 1931–33.

[50] Tokaji, *supra* note 43, at 2203.

nant party disadvantaged by a redistricting plan.[51] By insisting on an individualized injury arising from particular districts, the Court had cut the heart out of partisan gerrymandering claims—at least those based on the Equal Protection Clause.

The *Whitford* plaintiffs also made a right-of-association claim under the First Amendment, in addition to their vote dilution claim under the Equal Protection Clause of the Fourteenth Amendment.[52] The Court inartfully dodged the question whether standing on that claim might be shown without the individualized injury that the Court unanimously demanded for a vote dilution claim.[53] But Justice Kagan's concurring opinion (joined by Justices Ginsburg, Breyer, and Sotomayor) developed at some length the idea that a gerrymandered plan might impose a statewide injury to the associational rights of the non-dominant political party and its adherents.[54] The concurring Justices viewed the associational harm to the nondominant party and its supporters as distinct from the harm of vote dilution that the *Whitford* plaintiffs presented.[55] Harms other than the loss of representation might be used to demonstrate standing on an associational claim, such as "difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives)."[56] By demonstrating that partisan gerrymandering "weakens [a party's] capacity to perform all its functions,"[57] the concurring Justices suggested, plaintiffs might establish both standing and a First Amendment violation.

The type of harms to which Justice Kagan's concurrence points are systemic injuries to the nondominant party's ability to compete. This type of harm is much different from the atomistic harm on which the Court seems to insist to assert a Fourteenth Amendment vote dilution claim. And Justice Kagan is absolutely right to argue that the First Amendment right of association provides the most promising basis for challenging partisan gerrymanders. Existing doctrine affirms that voting is not just an individual right but also a collective activity, through which we join our voices with political parties, candidates, and like-minded voters.[58] An established body of First Amendment case law recognizes that systemic injuries to political parties and their adherents may violate the right to expressive association.[59] These include cases that look with disfavor on electoral rules that disadvantage

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[51] *See id.*

[52] *See* 138 S. Ct. at 1924.

[53] The Court suggests that the First Amendment claim was "not presented here," *see id.* at 1931, even though plaintiffs had in fact made this claim below and in their Supreme Court briefs.

[54] *See id.* at 1934–41 (Kagan, J., concurring).

[55] *See id.* at 1938.

[56] *Id.*

[57] *Id.*

[58] *See* Tokaji, *supra* note 43, at 2162.

[59] *See id.* at 2177–90; Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter-Participation Restrictions*, 13 ELECTION L.J. 288 (2014); David Schultz, *The Party's Over: Partisan Gerrymandering and the First Amendment*, 36 CAP. U.L. REV. 1

non-dominant parties, like ballot access rules[60] and limits on participation in party primaries.[61]

The Court's unanimous opinion in *Whitford* does not shut the door to systemic claims of injury arising from partisan gerrymandering's effect on associational rights. But there are reasons to doubt the likelihood of statewide claims prevailing, without more granular evidence of injury. In response to the concurrence, Chief Justice Roberts (still on behalf of a unanimous Court) wrote:

> We leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies . . . . The reasoning of this Court with respect to the disposition of this case is set forth in this opinion and none other.[62]

That is not exactly a rejection of the associational rights theory laid out in Justice Kagan's concurrence, but it is certainly not an endorsement. The Court proceeded to summarize its holding as follows: "[T]he sum of the standing principles articulated here, as applied to this case, is that the harm asserted by plaintiffs is best understood as arising from a burden on those plaintiffs' own votes."[63] Though speaking for all the Justices, this cryptic sentence may mask divisions on the Court between the four concurring Justices, who suggest that a statewide injury should be sufficient for standing on the First Amendment claim, and the five other Justices.

The last paragraph of the Court's standing analysis provides further reasons for concern. Addressing what it perceived to be "the fundamental problem with the plaintiffs' case as presented on this record,"[64] Chief Justice Roberts wrote: "It is a case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan preferences. The Court's constitutionally prescribed role is to vindicate the individual rights of the people appearing before it."[65] Technically, this sentence may concern the vote dilution claim that the plaintiffs presented, not the kind of associational rights claim that Justice Kagan's concurrence urges. But practically, it is hard to imagine a majority of the Court viewing systemic injuries to the right of association as sufficient to confer standing, much less prevail on an association claim under the First Amendment.

(2007); Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209 (2003)

[60] *See* Tokaji, *supra* note 43, at 2184–85 (discussing Anderson v. Celebrezze, 460 U.S. 780 (1983)).

[61] *See id.* at 2186–88 (discussing Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986)).

[62] *Whitford*, 138 S. Ct. at 1931 (2018).

[63] *Id.*

[64] *Id.* at 1933.

[65] *Id.*

The most disappointing aspect of *Whitford* was Justice Kennedy's failure to support the systemic association theory that Justice Kagan suggests, even though he had previously suggested such a theory. In *Vieth v. Jubelirer*,[66] a previous partisan gerrymandering case out of Pennsylvania, Justice Kennedy did not join the plurality opinion that would have held such claims to be nonjusticiable political questions.[67] While agreeing that plaintiffs' equal protection claim should be rejected, he wrote that "[t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering."[68] Justice Kennedy's *Vieth* concurrence proceeded to sketch out, albeit in vague terms, what such a claim might look like. He noted that such a claim might inquire into "whether political classifications were used to burden *a group's* representational rights."[69] This hints at a systemic claim very much like the one that Justice Kagan would later develop in her *Whitford* concurrence.

Though we do not know what happened behind closed doors, Justice Kagan's concurrence reads very much like an invitation declined. The concurring Justices' decision to join the majority opinion could be an attempt to stave off the much greater damage that would have arisen from a decision on other grounds. Had the Court held that partisan gerrymandering is a nonjusticiable political question, or ruled on the merits that the Constitution does not prohibit partisan gerrymandering, it would have foreclosed all future claims. Without such a ruling, the plaintiffs in *Whitford* and other partisan gerrymandering cases remain free to make the systemic association argument that Justice Kagan proposes.

B. Benisek v.Lamone

The Court's disposition of the other partisan gerrymandering case in the 2017 Term was more defensible. In *Benisek v. Lamone*, the Court unanimously affirmed the denial of a preliminary injunction against a Democratic-drawn congressional redistricting plan.[70] The *Benisek* plaintiffs focused on Republican voters in a particular district (Maryland's Sixth Congressional District), who were allegedly denied equal representation when the Democratic-dominated state legislature redrew its boundaries. Plaintiffs argued that this was a form of retaliation for the exercise of their First Amendment rights to expression and association.[71] On its face, this appears to be the type of individualized and district-specific harm that the *Whitford* case (issued the same day as *Benisek*) demands.[72] Yet the Court's unanimous *per curiam* opin-

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[66] 541 U.S. 267 (2004).

[67] *See id.* at 271–306 (plurality opinion), s*ee also id.* at 306–17 (Kennedy, J., concurring in the judgment).

[68] *Id.*at 314 (Kennedy, J., concurring in the judgment).

[69] *Id.* at 315 (emphasis added).

[70] *See* 138 S. Ct. 1942 (2018).

[71] *See* Shapiro v. McManus, 203 F. Supp. 3d 579, 595–96 (D. Md. 2016). *See also* Tokaji, *supra* note 43, at 2200–02 (discussing and criticizing district court opinion).

[72] *See supra* Part I.A.

ion in *Benisek* denied relief.[73] The Court avoided ruling on the merits, instead concluding that the balance of equities and public interest counseled against preliminary injunctive relief, even assuming that plaintiffs were likely to prevail on their First Amendment claim.[74]

The Court was right to uphold the denial of the preliminary injunction in *Benisek* based on the plaintiffs' failure to exercise reasonable diligence in presenting their retaliation theory and the potential harm to the public interest arising from the ensuing delay. Though not addressed by the Court, the Maryland plaintiffs' First Amendment claim was not as strong as it might have been, at least in the form in which it was presented. Plaintiffs attempted to couch the redrawing of Maryland's Sixth Congressional District as a form of *retaliation* for their political expression and association. They relied on cases like *Hartman v. Moore*,[75] in which plaintiff alleged that the government took negative action against him (in that case the filing of criminal charges) because of his speech.[76] But retaliation is an ill-fitting characterization of the harm arising from partisan gerrymandering. Taking negative action against someone in retaliation for disfavored speech or association effects a classically individualized harm. The harm arising from partisan gerrymandering is categorically different, because it disadvantages a group of people defined by political party preference.

Retaliation is also the wrong way to think about partisan gerrymandering because it suggests a backward-looking injury: individual speakers being punished for what they said or did in the past. By contrast, partisan gerrymandering inflicts a systemic and forward-looking injury. It weakens the collective voice of a group, prospectively diminishing voters' ability to join with like-minded others. To be sure, the Court has sometimes recognized that individual injuries can effect systemic harms. The leading example is *Elrod v. Burns*,[77] the seminal patronage decision in which the Court struck down party membership requirements for certain government jobs.[78] Justice Brennan's opinion for the *Elrod* plurality grounded its decision in *both* the harm to individual employees denied jobs because of their beliefs, and the systemic disadvantage that the non-dominant political party would suffer. As Justice Brennan explained, patronage allows the dominant political faction to "starve political opposition" and thus "tips the electoral process in favor of the incumbent party."[79] In this sense, patronage policies inflict a forward-looking, systemic injury. Ordinary retaliation claims, on the other hand, are

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[73] *See Benisek,* 138 S. Ct. at 1945.

[74] *See id.* at 1944–45.

[75] *See* 547 U.S. 250 (2006).

[76] *Id.* at 252. For other recent examples, see Lozman v. City of Riviera Beach, 138 S.Ct. 1945 (2018) (alleging arrest of activist in retaliation for speech), Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016) (alleging demotion of police officer in retaliation for political activities).

[77] 427 U.S. 347.

[78] *See id.* at 359–60 (1976) (plurality opinion).

[79] *Id.* at 356. For discussion of this passage from *Elrod*, see Tokaji, *supra* note 43, at 2181–2182; Schultz, *supra* note 59, at 45–46 (2007).

individualized and retrospective—and thus quite unlike partisan gerrymandering. Though the Court's decision in *Benisek* did not address the weakness of plaintiffs' First Amendment retaliation, its denial of relief was justified for this additional reason.

The big question after *Whitford* and *Benisek* is whether there is any hope for those seeking to challenge partisan gerrymandering under the U.S. Constitution. As this article goes to press, *Benisek* is back before the Court,[80] along with a partisan gerrymandering case out of North Carolina.[81] The most promising route is the First Amendment right of expressive association, but even that route is fraught with uncertainty. Although partisan gerrymandering inflicts a systemic injury on political parties and their adherents, the Court seems inclined to view only injuries framed in individualistic and district-specific terms as cognizable. How then should those challenging partisan gerrymanders proceed? One option is simply to abandon such claims, out of fear that they will meet with a bitter end. But even if the Court were to shut the door to partisan gerrymandering claims now, a future Court less hostile to systemic equality might be open to them in the future.

Rather than throwing in the towel, opponents of partisan gerrymandering should frame the systemic harm wrought by partisan gerrymanders in terms that reveal the injuries to individuals and groups whose voices are muffled. In this respect, we might look back to the one person, one vote cases, including Chief Justice Warren's opinion for the Court in *Reynolds v. Sims*.[82] The Court's rhetoric focused on how individual citizens were harmed by malapportionment, saying for example that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[83] So too, in *Gray v. Sanders*,[84] another early one person, one vote case, the Court asked:

> How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. . . . The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.[85]

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[80] Lamone v. Benisek, 2019 WL 98540 (Jan. 4, 2019).
[81] Rucho v. Common Cause, 2019 WL 98539 (Jan. 4, 2019).
[82] 377 U.S. 533 (1964). *See* Pildes, *supra* note 17, at 44 (arguing that the justification for judicial review of malapportionment is "the structural risk of political self-entrenchment").
[83] *Id.* at 555.
[84] 372 U.S. 368 (1963).
[85] *Id.* at 379–80 (1963).

The real harm done by malapportionment was undeniably systemic. Rural areas were overrepresented, while urban and suburban areas were underrepresented, thus diminishing their collective political power.[86] Yet the Court framed the injury in atomistic terms, talking about how individual voters had their votes diluted by the systemic denial of equal representation. Plaintiff in partisan gerrymandering cases would be well advised to try a similar approach.

If there is any chance of success in partisan gerrymandering claims, it will depend on telling the stories of the people harmed. While the ultimate injury is systemic, a more particularistic approach is most likely to persuade the Court.[87] In this regard, plaintiffs would do well to consider another partisan gerrymandering case, *League of United Latin American Citizens v. Perry* ("*LULAC*")[88]— not the Court's treatment of the partisan gerrymandering claim, on which there was no majority, but rather the racial vote dilution claim. Five Justices in *LULAC* voted to reject a partisan gerrymandering claim arising from Texas's 2003 redrawing of congressional districts without a majority opinion, but a five-Justice majority held that one of the districts violated Section 2 of the Voting Rights Act by diluting Latino votes.[89] The Court's resolution of the Section 2 claim suggests a path that partisan gerrymandering plaintiffs should consider following.

Writing for the majority, Justice Kennedy told a story of how Latino voters in Laredo, Texas were on the cusp of finally electing their preferred candidate, but had that opportunity snatched away from them when Texas's Twenty-Third Congressional District was redrawn. As the Court explained, the Latino share of that district had increased over the years, putting Republican incumbent Henry Bonilla at risk, given that he attracted the support of only eight percent of Latino voters.[90] That action deprived Latinos of their opportunity to exercise their growing political strength by unseating Representative Bonilla with a candidate more receptive to their interests. As Justice Kennedy explained:

> District 23's Latino voters were poised to elect their candidate of choice. They were becoming more politically active, with a marked and continuous rise in Spanish-surnamed voter registration. In successive elections Latinos were voting against Bonilla in greater numbers, and in 2002 they almost ousted him . . . . In response to the growing participation that threatened Bonilla's incumbency, the State divided the cohesive Latino community in Webb County, moving about 100,000 Latinos to District 28, which was already a Latino opportunity district, and leaving the rest in a dis-

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[86] *Id. See also* Tokaji, *supra* note 1, at 2484.

[87] *See* Edward B. Foley, *The Gerrymander and the Constitution: Two Avenues of Analysis and the Quest for a Durable Precedent*, 59 WM. & MARY L. REV. 1729 (2018) (urging a particularistic approach to partisan gerrymandering).

[88] 548 U.S. 399 (2006).

[89] *Id.* at 423–42.

[90] *See id.* at 423–24.

> trict where they now have little hope of electing their candidate of choice.
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> The changes to District 23 undermined the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive.[91]

If plaintiffs in future partisan gerrymandering cases are to succeed, they will have to tell a similarly compelling story. Doing so will not guarantee success, especially before a Court on which Chief Justice Roberts—who dissented from the Section 2 ruling in *LULAC*[92]—is likely to be the swing Justice. But telling this type of story is the only realistic chance of success that partisan gerrymandering plaintiffs have.[93]

C. Abbott v. Perez

Unfortunately, the Court's most recent redistricting decision out of Texas casts doubt on the majority's receptivity to claims of unfair treatment by a political outgroup.[94]

Redistricting cases tend to be complicated and this one is no exception, so some background is essential to understanding *Abbott v. Perez* and its import. Back in 2011, Texas adopted new congressional and state legislative redistricting plans to account for the 2010 Census.[95] The original maps were challenged in multiple courts and never implemented. In January 2012, the Supreme Court issued a *per curiam* decision in one of the Texas cases (*Perry v. Perez*),[96] providing guidance on the deference owed to legislatively drawn plans challenged under the Voting Rights Act. The next month, a three-judge district court in Texas followed this guidance to draw interim plans under unusually tight time constraints, with the 2012 primaries approaching.[97] The district court stressed the "interim" nature of these plans and the

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[91] *Id.* at 439–40 (citations omitted).

[92] *Id.* at 492 (Roberts, C.J., concurring in part and dissenting in part).

[93] Plaintiffs in *Benisek* have now taken just such an approach. In their most recent merits brief, filed just before this article went to press, the *Benisek* plaintiffs back away from their retaliation theory and tell the story of how the Democratic majority systematically acted to diminish the political voice of plaintiffs and other Republican voters. Brief for Appellees, *Lamone v. Benisek*, No. 18-726 (filed Mar. 4, 2019), at 25, 36–42. *See also* Daniel P. Tokaji, *Plaintiffs' Merits Brief in Maryland Redistricting Case*, ELECTION LAW BLOG (Mar. 5, 2019), https://electionlawblog.org/?p=103933 [https://perma.cc/8EKU-Q8P6].

[94] The following discussion is adapted from Daniel P. Tokaji, *Abbott v. Perez: Bad Reading Invites Discriminatory Redistricting*, TAKE CARE (July 6, 2018), https://takecareblog.com/blog/abbott-v-perez-bad-reading-invites-discriminatory-redistricting [https://perma.cc/8EYF-T5TV].

[95] *See id.*

[96] *See* 565 U.S. 388 (2012).

[97] *See* Perez v. Texas, 891 F. Supp. 2d 808 (W.D. Tex. 2012).

"preliminary" character of its determination that they were permissible, noting that the legal issues surrounding them had not yet been fully vetted.[98]

These interim plans kept many features of the 2011 plans, including some of the same district lines that had been challenged as racially discriminatory. Texas's Republican legislature was happy enough with the interim plans that it adopted them in 2013 with just minor modifications. But Latino and African American voters alleged that the 2013 plans preserved the discriminatory features of the 2011 plans—and, in fact, that the Texas legislature intended to preserve the original plans' discriminatory effects. Plaintiffs challenged the plans under both the Fourteenth Amendment and Section 2 of the Voting Rights Act.

After years of litigation that included two trials, the three-judge district court in Texas agreed with some but not all of minority voters' claims.[99] Most significantly, the court concluded that some districts in the 2013 plans preserved—and were intended to preserve—racially discriminatory features of the original 2011 plans. In considering whether Texas intentionally discriminated against minority voters, the court applied a familiar equal protection standard drawn from *Village of Arlington Heights v. Metropolitan Housing Dev. Corp*.[100] That case calls for a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including the racial impact of official action, the historical background, the specific sequence of events preceding the challenged action, departures from normal procedures, and contemporary statements of decision makers.[101]

The three-judge district court did exactly what *Arlington Heights* and its progeny demand. In the most important part of its ruling, the court focused on portions of the 2011 plans that were unchanged by the 2013 plans. The court found that these aspects of the new plans "intentionally furthered and continued" discriminatory features of the prior plan.[102] It concluded that Texas's Republican legislature intended to dilute minority votes when it adopted the 2011 plans and to preserve these discriminatory effects in 2013. The district court engaged in the thorough review of record evidence that *Arlington Heights* prescribes. That record included the history of the 2011 plans, the expedited procedure used to push the 2013 bills through the legislature, and the absence of any meaningful deliberative process. That is not to say that the three-judge district court took an uncritical approach to plaintiffs' claims. To the contrary, it rejected their constitutional and statutory challenges to some of the districts, finding the evidence of discrimination against Latino and African Americans inadequate. In sum, the district court

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[98] *Id.* at 812, 838.

[99] *See* Perez v. Abbott, 267 F. Supp. 3d 750 (W.D. Tex. 2017) (challenging state legislative districts); Perez v. Abbott, 274 F. Supp. 3d 624 (W.D. Tex. 2017) (challenging congressional districts).

[100] *See* Perez v. Abbott, 274 F. Supp. 3d at 643 (quoting 429 U.S. 252 (1977)).

[101] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977).

[102] *Perez*, 274 F. Supp. 3d at 649.

engaged in precisely the sort of contextual, evidence-driven analysis that the Court had previously directed.

Unfortunately, the Supreme Court majority in *Abbott v. Perez* was much less attentive to the facts and law. Trial court factual findings are supposed to be reversed only for clear error. And in a racial gerrymandering case from the previous Term, the Court said that findings of fact should be affirmed if they are "'plausible' in light of the full record," not reversed simply because the Court would have decided the matter differently.[103] To get around the deferential standard of review, the *Abbott* majority manufactured an error of law. Justice Alito's opinion accused the district court of "disregard[ing] the presumption of legislative good faith and improperly revers[ing] the burden of proof."[104] A careful reading of the district court decision reveals that it did no such thing. Rather, the lower court found that the circumstantial evidence of an intent to weaken minority votes overcame this presumption. That includes the evidence that the Texas legislature chose to keep intentionally discriminatory features of the 2011 plan without any meaningful deliberative process.[105]

Instead of confronting the evidentiary record, the majority attacks a strawman. Justice Alito fixates on the lower court's use of the word "taint" to describe the discriminatory features of the 2011 that carried over into the 2013 plan.[106] But "tainted" is a wholly accurate characterization of Texas's process. When it adopted the 2013 plan, it did not address most of the discriminatory features of the prior plan and barely made any pretense of trying to do so. In accordance with longstanding precedent, the district court recognized that the plans' legislative history—especially the absence of a meaningful deliberative process in 2013—was not "necessarily dispositive" but was a "relevant consideration[ ]."[107] And a meaningful one at that, since it revealed the legislature's purpose of preserving the discriminatory features of the 2011 plans.

The majority owed deference to the district court's analysis of the evidence. Instead, Justice Alito engages in some creative appellate fact-finding. The five conservative Justices found no trace of discriminatory intent, but only the desire to bring the redistricting litigation to an expeditious end.[108] The majority arrives at this conclusion only by taking the few scraps of evidence it can use, confounding the remainder, and distorting what really happened in Texas[109]—a state with an indisputably lengthy and persistent history of race discrimination in voting.[110]

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[103] Cooper v. Harris, 137 S. Ct. 1455, 1465 (2017).
[104] Abbott v. Perez, 138 S. Ct. 2305, 2326–27 (2018).
[105] Perez v. Abbott, 274 F. Supp. 3d at 648–52.
[106] *See Abbott*, 138 S. Ct. at 2313, 2318, 2324, 2325–26.
[107] *See Perez*, 274 F. Supp. 3d at 648.
[108] *See Abbott*, 138 S. Ct. at 2327.
[109] *Cf.* Friedrich Nietzsche, Mixed Opinion and Maxims § 137 (1879) ("The worst readers are those who behave like plundering troops: they take away a few things they can use, dirty and confound the remainder, and revile the whole.")
[110] *See Perez*, 267 F. Supp. 3d at 779.

Justice Sotomayor and her fellow dissenters call out the majority on its sloppy rendering of the facts and law. As she notes, the majority's "cursory analysis of the record" conspicuously evades the deferential standard usually accorded to trial-court fact-finding and the evidentiary record before that court.[111] She also explains that the district court's supposed error of law—its asserted reversal of the burden of proof—is a figment of the majority's imagination.[112]

The majority's response to Justice Sotomayor is telling. Justice Alito accuses the dissent of "los[ing] track of its own argument,"[113] an assertion as insulting as it is untrue. Engaging in what he thinks to be a clever bit of "gotcha," Justice Alito quotes two different portions of the dissent, claiming they are inconsistent on whether Texas was required to engage in a deliberative process to cure the taint from its prior plans.[114] But here too, a careful reading belies the majority's assertion. Following the district court—which in turn followed *Arlington Heights*—the dissent properly views the absence of any meaningful deliberative process as evidence that the 2013 plans were intended to maintain the discriminatory effects of the 2011 plans.[115] That is different from flipping the burden of proof, a point the dissent repeatedly makes but the majority misses.

Ironically but thankfully, the result of the majority's bad reading is an opinion that makes less bad law than it might have. Careless as the majority's treatment of the facts is, *Abbott* makes almost no new law. The one possible exception is a handful of statements that might be understood to elevate the already-high threshold that plaintiffs must meet to show an equal protection violation. Since *Washington v. Davis*,[116] it has been well-established that plaintiffs must prove intentional discrimination.[117] That is difficult enough to prove, but there is language suggesting that even more may be required. At multiple points in the opinion, the Court uses the term "bad faith" in a manner that suggests that this is an additional requirement for plaintiffs claiming unconstitutional discrimination. In its discussion of the lower court opinion, for example, the majority states that the evidence before it was "plainly insufficient to prove that the 2013 Legislature acted in bad faith *and* engaged in intentional discrimination."[118] Perhaps this is a "single slip of the pen,"[119] to borrow Justice Alito's (mis)characterization of Justice Sotomayor's dissent. But the majority uses the term "bad faith" four more times in its equal protection discussion. This could be taken to imply an even more onerous standard than that which already exists under *Davis* and its progeny.

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[111] *Abbott*, 138 S. Ct. at 2349 (Sotomayor, J., dissenting).
[112] *See id.* at 2351.
[113] *Id.* at 2326 (majority opinion).
[114] *See id.*
[115] *See id.* at 2346–49 (Sotomayor, J., dissenting).
[116] 426 U.S. 229 (1976).
[117] *See id.* at 239–41 (1976).
[118] *Abbott*, 138 S. Ct. at 2327 (emphasis added).
[119] *Id.* at 2326.

In sum, the majority opinion in *Abbott v. Perez* demonstrates a willful blindness toward systemic racial equality in political representation. The fact-bound nature of the Court's ruling limits its precedential harm, but the decision should worry anyone who believes that redistricting—and the structuring of democratic politics more generally—should be free from discrimination against racial minorities. Brushing aside evidence of discrimination against Texas Latinos and African Americans, the Court invites other Republican legislatures to sublimate minority voting strength. Put in the context of other end-of-Term decisions, it bodes ill for those who take systemic equality seriously. The Court exhibits a willful blindness to the structural disadvantage imposed on Texas Latinos, even while displaying increasing solicitude for claims of discrimination made by those holding views to whom its conservative majority is sympathetic, a theme that Parts II and III examine with reference to its speech and religion decisions.

II. SPEECH

A central precept of First Amendment law is that the regulation of speech should be evenhanded. Justice Marshall said it best: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[120] To be sure, this is hyperbolic. There are multiple areas in which content-based limitations on speech are permitted, including threats, incitement, obscenity, commercial advertising, and campaign contributions. But the prohibition against discrimination based on *viewpoint* is almost sacrosanct. Free speech doctrine is largely driven by the "specter that government may effectively drive certain ideas or viewpoints from the marketplace."[121] In previous work, I have referred to this body of law as "First Amendment Equal Protection."[122] Free speech law frowns on laws and practices that may suppress viewpoints disfavored by the dominant political faction.[123] It also disfavors unclear and overly broad restrictions on speech, which may allow public officials to engage in under-the-table viewpoint discrimination.[124]

Systemic equality is thus a cornerstone of free speech law. The First Amendment's central precept is not simply that individual speakers be treated similarly irrespective of their point of view. It is rather that a robust marketplace of ideas, filled with diverse and sometimes competing ideas, will

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[120] Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

[121] Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

[122] Tokaji, *supra* note 1; *see also* Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

[123] *See* Tokaji, *supra* note 1, at 2426; s*ee also id.* at 2430–48 (summarizing formative cases and features of First Amendment Equal Protection).

[124] See *id.* at 2441–44.

help promote a well-functioning democracy.[125] Although there are limits to the marketplace metaphor,[126] it captures the idea that free speech should be understood in systemic and not just atomistic terms, that it is essential to a robust public debate.[127] That does not necessarily mean that an unregulated marketplace is best. But it does mean that the permissibility—or even necessity—of speech regulations should be judged by whether they promote a vibrant and healthy democratic discourse.[128]

From the standpoint of systemic equality, the Court's free speech decisions from the last month of the Kennedy Court are disastrous. Despite Justice Kennedy's long-stated commitment to viewpoint neutrality,[129] the Court issued two important decisions on consecutive days that embed viewpoint discrimination into First Amendment doctrine. In *NIFLA v. Becerra*, the Court struck down a law requiring crisis pregnancy centers to provide truthful information to their clients.[130] When viewed alongside existing precedent, the net effect is to favor speech that discourages abortion over speech that informs people of the availability of abortions. In *Janus v. AFSCME,* the Court struck down a state law authorizing "agency fees" for public-sector labor unions,[131] a decision that is likely to hamstring unions as a political force—the result of a multi-year litigation strategy designed to achieve just

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[125] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 73 (1960); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) (discussing canonization of First Amendment ideal that freedom of speech promotes a robust marketplace of ideas). The "marketplace of ideas" metaphor derives from Justice Holmes's dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1919), although Justice Brennan is actually the one who coined this turn of phrase. *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–24, 824 n.3 (2008) (discussing derivation of the term and defending the idea of a marketplace of ideas); Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 230–31 (2004) (discussing development and proliferation of the marketplace of ideas metaphor).

[126] Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845 (2018) (arguing that false facts should be treated differently from ideas); Thomas W. Joo, *The Worst Test of Truth: The "Marketplace of Ideas" as Faulty Metaphor*, 89 TUL. L. REV. 383 (2014) (arguing that the marketplace of ideas metaphor is inconsistent with experience); Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 519–20 (2001) (discussing the view that market failures are inevitable and government intervention sometimes warranted); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (calling the idea of a self-operating marketplace of ideas a "romantic conception" at odds with reality).

[127] New York Times v. Sullivan, 376 U.S. 254, 270 (1964); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407, 1410–13, 1421 (discussing and developing the idea of an "uninhibited, robust, and wide-open" public debate).

[128] OWEN M. FISS, THE IRONY OF FREE SPEECH 1–4 (1996).

[129] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 828–29 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.")

[130] *See* 138 S. Ct. 2361 (2018).

[131] *See* Janus v. AFSCME, 138 S. Ct. 2448, 2486 (2018).

that result.[132] *Janus* is especially troubling when viewed along cases like *Citizens United*,[133] which enhance the political voice of corporations and wealthy individuals. Rather than ensuring evenhanded regulation of the marketplace of ideas, *NIFLA* and *Janus* constitutionalize systemic inequality in the realm of ideas, thus detracting from a vibrant and healthy democratic discourse.

Before discussing these cases, however, I begin with another decision from the 2017 Term that better embodies the core First Amendment value of systemic equality—a small bright spot in an otherwise bleak Term.[134]

A. Minnesota Voters Alliance v. Mansky

Many states have laws limiting campaign activities in or near the polling place on election day.[135] Authority for the constitutionality of such restrictions may be found in *Burson v. Freeman*,[136] which upheld one such law.[137] Tennessee's law prohibited campaign-related speech within one hundred feet of polling place entrances, providing that no "campaign posters, signs, or other campaign materials" could be displayed within that zone.[138] The Court rejected a challenge to this law without a majority opinion. Justice Blackmun's opinion for a four-Justice plurality subjected the law to strict scrutiny, but found that it was narrowly tailored to the state's compelling interests in preventing voter intimidation and election fraud.[139] Justice Scalia concurred in the judgment, believing that restrictions on speech in and around polling places should be upheld if reasonable and viewpoint-neutral, given their venerable tradition.[140]

The state law challenged in *Minnesota Voters Alliance v. Mansky*[141] presented a variation on the problem of campaign speech inside the polling place. Rather than banning "campaign" speech like the law upheld in *Burson*, Minnesota's statute included a provision that prohibited people from wear-

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[132] *See* Daniel P. Tokaji, *Following the New Soft Money*, HARV. L. REV. BLOG (Nov. 5, 2018), https://blog.harvardlawreview.org/following-the-new-soft-money/ [https://perma.cc/4BRT-YHDT]; Mary Bottari, *Behind Janus: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), http://inthesetimes.com/features/janus_supreme_court_unions_investigation.html [https://perma.cc/DJ82-3KCR].

[133] 558 U.S. 310 (2010).

[134] The discussion below omits one other free speech case from the 2017 Term, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018), the unusual circumstances of which limit its precedential significance. The case involved an outspoken critic of local government who was allegedly arrested as part of the city's plan to retaliate against him for his speech. The question before the Court was whether the existence of probable cause to arrest him sufficed to defeat his retaliation claim. An eight-Justice majority (all but Justice Thomas) concluded that plaintiff's claim could proceed even if there was probable cause for his arrest, because he had alleged that the arrest was made pursuant to an official policy of the city. *Id.*at 1953–55.

[135] *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1883 (2018).

[136] 504 U.S. 191 (1992).

[137] *See id.* at 211 (plurality opinion).

[138] *Id.* at 193–94.

[139] *See id.* at 198–211.

[140] *See id.* at 214 (Scalia, J., concurring in the judgment).

[141] 138 S. Ct. 1876 (2018).

ing a "political badge, political button, or other political insignia."[142] Writing for a seven-Justice majority, Chief Justice Roberts held the law unconstitutional.[143] The Court first determined that the polling place was a nonpublic forum.[144] Though speech in such places is subject to less protection than speech in public fora like streets, sidewalks, and public parks, regulations on speech in nonpublic fora must still be viewpoint neutral.[145]

Despite the greater tolerance for speech regulation in a nonpublic forum like the polling place, the Court believed that Minnesota's law presented too great a risk of systemic inequality. The problem was the absence of specificity as to the meaning of "political," which gave too much discretion to officials to determine what speech was allowed.[146] Minnesota acknowledged that the law encompassed *campaign-related* speech, but was not limited to such speech.[147] Some applications were sufficiently clear, such as its inclusion of items displaying the names of political parties or candidates, and those demonstrating support or opposition to ballot measures.[148] Beyond that, however, the statute's reach was murky. The state had promulgated a policy statement in 2010 stating that it prohibited badges reading "Please I.D. Me," even though no ballot measure regarding that contentious topic appeared on the ballot that year.[149] The majority noted the lack of clarity over whether messages like "#MeToo" or "Support Our Troops" were covered.[150] And so on.

The central problem with Minnesota's law, then, was the uncertainty of its reach—and the corresponding risk that certain ideas would be targeted for disfavored treatment. While recognizing that perfect clarity is not required, even of laws regulating speech, the Court held that the scope of Minnesota's ban on political speech near polling places was simply too indeterminate.[151] This holding follows a long line of Supreme Court precedent that looks skeptically at laws that vest too much discretion in public officials to determine who may speak.[152] The *Minnesota Voters Alliance* opinion nicely explains why such discretion is problematic:

> It is "self-evident" that an indeterminate prohibition carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." Election judges "have the authority to decide what is political" when screening individuals at the entrance to the polls. We do not doubt that the vast majority

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[142] *Id.* at 1888.
[143] *See id.* at 1892.
[144] *See id.* at 1885–86.
[145] *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 505 U.S. 666, 683 (1992); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 806 (1985).
[146] *See Minnesota Voters Alliance,* 138 S. Ct. at 1888.
[147] *See id.* at 1889.
[148] *See id.*
[149] *See id.* at 1889 n.4.
[150] *See id.* at 1890.
[151] *See id.* at 1891.
[152] *See* Tokaji, *supra* note 1, at 2441–44 (summarizing cases).

> of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as "political." And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.[153]

This passage encapsulates why vaguely worded speech regulations jeopardize systemic equality. The concern is not simply that individuals will be denied equal treatment because of their perspective; it is that certain ideas will be denied an equal hearing, to the detriment of the political system as a whole. When government officials are called upon to determine what speech is "political," without clear guidance, they may exercise their authority in a manner that disfavors certain viewpoints.[154] Open-ended speech laws like Minnesota's thus open the door to systematic bias toward ideas and messages toward which public officials are more sympathetic. The necessity of evenhanded enforcement, and the risk that a vague law would be applied in a less-than-evenhanded manner, was sufficient to hold the law facially unconstitutional.[155]

Unfortunately, *Minnesota Voters Alliance* stands alone in Justice Kennedy's last Term as a worthy example of the Court's longstanding commitment to evenhandedness in the regulation of speech. Two other decisions from the Term constitutionalize systemic inequality in the realm of expression.

B. National Institute of Family and Life Advocates v. Becerra

It is one thing to deny a remedy for systemic equality, as the Court did in *Gill v. Whitford* and *Abbott v. Perez*.[156] It is quite another to instantiate systemic inequality in constitutional doctrine. Yet that is precisely what the Court did in both *NIFLA* and *Janus*.

To understand how *NIFLA* constitutionalizes systemic inequality, one must first understand *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[157] That decision is best known as a critical reproductive rights case, which reaffirmed *Roe v. Wade*[158] and established the "undue burden" standard. But *Casey* is also an important free speech case. The Pennsylvania law at issue in *Casey* required that, at least twenty-four hours before the procedure, women be provided with information on the nature of the procedure,

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[153] *See Minnesota Voters*, 138 S. Ct. at 1891 (citations omitted).
[154] *See id.*
[155] *See id.* at 1891.
[156] 138 S. Ct. 2305 (2018).
[157] 505 U.S. 833 (1992).
[158] 410 U.S. 113 (1973).

the health risks of the abortion and childbirth, and the "probable gestational age of the unborn child," as well as the availability of printed state materials "describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."[159] An abortion could only be performed if a woman certified in writing that she had been informed of the availability of the materials and provided with them if she chose.[160] Plaintiffs challenged the law as both an unconstitutional restriction on abortion and an impermissible restriction on physicians' speech.[161]

The controlling opinion in *Casey*—co-authored by Justices O'Connor, Kennedy, and Souter—upheld Pennsylvania's required disclosures to women seeking abortions.[162] The Court relied on precedent that it characterized as "requir[ing] a woman to give her written informed consent to an abortion."[163] Although the disclosures that Pennsylvania mandated went beyond typical informed consent requirements, the majority deemed it permissible for the state to require physicians to provide truthful and non-misleading information that would allow a woman to "apprehend the full consequences of her decision" whether to have an abortion.[164] In so holding, the Court partially overruled prior cases invalidating compelled disclosure laws designed to discourage women from having abortions.[165] The *Casey* majority saw no problem with requiring the disclosure of information that had no direct relation to the woman's health, rejecting the suggestion that such requirements placed a "straitjacket" on doctors.[166] And it summarily disposed of physicians' argument that the state law compelled speech of physicians. It acknowledged that physicians' First Amendment rights were affected, but only "as part of the practice of medicine, subject to *reasonable licensing and regulation* by the State."[167]

The upshot of *Casey* was that states were no longer required to be neutral toward a woman's decision whether to have an abortion. States could require information that had the effect of directing—and that was designed to direct—women toward the pathway of childbirth instead of abortion. Such regulations were (and still are) presumptively constitutional so long as they were reasonable. In the intervening years, the Court has upheld compelled disclosure requirements in various contexts, including campaign finance. The Supreme Court upheld disclosure requirements for

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[159] *See* Casey, 505 U.S. at 881 (citing 18 PA. CONS. STAT. § 3205 (1990)).
[160] *See id.*
[161] *See id.* at 881–87.
[162] *See id.* at 881–85.
[163] *Id.* at 881 (citing Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67 (1976)).
[164] *Id.* at 882.
[165] *See id.* at 881–82 (discussing Akron v. Akron Ctr. for Reproductive Health, 462 U.S. 416 (1983) and Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986)).
[166] *Id.* at 883 (quoting *Thornburgh*, 476 U.S. at 762).
[167] *Id.* at 884 (emphasis added).

"electioneering communications" in *McConnell v. FEC*.[168] And even as it partly overruled *McConnell* to strike down longstanding federal law banning corporate expenditures on electioneering, *Citizens United* again upheld the disclosure requirements applicable to such spending.[169] The Court also upheld a state law compelling disclosure of referendum signatories against a facial challenge.[170] Support for compelled disclosure in *Doe v. Reed* was lopsided, with eight Justices voting to uphold the challenged laws and only Justice Thomas dissenting.[171] The Court has also upheld reasonable disclosure requirements for attorneys and other licensed professionals.[172]

It was against this backdrop that the Court considered *NIFLA*, a First Amendment challenge to California's compelled disclosure law applicable to "crisis pregnancy centers."[173] A stated aim of these facilities is "to discourage and prevent women from seeking abortions."[174] They are commonly run by groups that oppose abortion like the National Institute of Family and Life Advocates.[175] California's law imposed distinct requirements on two categories of facilities: those licensed to provide certain services to pregnant women, and unlicensed facilities.[176] Licensed facilities covered by California's law were required to provide a state-drafted notice informing people of "public programs that provide immediate free or low-cost access to comprehensive family planning services . . . , prenatal care, and abortion for eligible women."[177] The purpose of this requirement was to ensure that people making reproductive health decisions know their rights and the services available to them.[178] Unlicensed facilities providing pregnancy-related services were required to provide a different state-drafted notice, stating that the facility was not licensed by the state and "has no licensed medical provider who provides or directly supervises the provision of services."[179] The purpose of this requirement was to inform pregnant women of when they are receiving care from licensed professionals.[180]

The Court struck down California's compelled disclosure requirements 5–4, with Justice Thomas writing for the majority.[181] The majority viewed

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[168] *See* 540 U.S. 93, 106 (2003).
[169] 558 U.S. 310, 366–71 (2010).
[170] Doe v. Reed, 561 U.S. 186 (2010).
[171] *Id.* at 228.
[172] *See, e.g.*, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 252–53 (2010); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).
[173] *NIFLA*, 138 S. Ct. at 2368.
[174] *Id.*
[175] *Id. See also* Amy G. Bryant, *Why Crisis Pregnancy Centers Are Legal But Unethical*, 20 AMA J. ETHICS 269 (2018), https://journalofethics.ama-assn.org/article/why-crisis-pregnancy-centers-are-legal-unethical/2018-03 [https://perma.cc/NJ8R-6UUQ].
[176] *See NIFLA*, 138 S. Ct. at 2368–70.
[177] *Id.* at 2369 (quoting CAL. HEALTH & SAFETY CODE § 123472(a)(1) (West, Westlaw through Ch. 1016 of 2018 Reg. Sess. and all propositions on 2018 ballot) (2016)).
[178] *Id.*
[179] *Id.* at 2370 (quoting CAL. HEALTH & SAFETY CODE §123472(b)(1) (West, Westlaw through Ch. 1016 of 2018 Reg. Sess. and all propositions on 2018 ballot) (2016)).
[180] *See id.*
[181] *Id.* at 2368.

the licensed facility requirements as content-based restrictions on speech which are subject to heightened scrutiny due to their tendency to impede the "uninhibited marketplace of ideas in which truth will ultimately prevail."[182] Insofar as California's licensed facility requirement was designed to educate women about the services provided, the Court found the required disclosure "wildly underinclusive" because it only applied to clinics with the primary purpose of providing pregnancy services.[183] The requirement was not sufficiently tailored, in the Court's view, because the state could serve its informational goals through other means less restrictive of speech, such as a public information campaign.[184] While acknowledging that health and safety warnings had long been considered permissible, the Court suggested that the "uncontroversial" nature of these compelled disclosures distinguished them from the licensed facility requirements.[185] As for the unlicensed facility requirements, the Court avoided ruling on the level of scrutiny, holding that they were impermissible even under a deferential standard.[186] Dismissing the state's informational interest, the Court concluded that it had utterly failed to demonstrate anything more than a "hypothetical" justification for requiring unlicensed facilities to disclose their status as such.[187]

That Justice Thomas—a longtime skeptic of compelled disclosure[188]—would write such an opinion is unsurprising. More disconcerting is that the other four conservative Justices, including Justice Kennedy, joined him. As noted above, all the other members of the Court have been much more receptive to disclosure requirements, based primarily on the interest in helping people make informed decisions in a variety of contexts.[189]

The Court's atomistic focus on the providers subjected to disclosure requirements obscures an even more serious free speech problem. The most disturbing aspect of *NIFLA* is that it constitutionalizes systemic inequality in the speech of those on opposite sides of the abortion debate. *NIFLA* not only abandons but reverses the Supreme Court's longstanding commitment to evenhanded regulation of the marketplace of ideas.[190] Whereas *Casey* upheld a compelled disclosure law designed to discourage abortions, *NIFLA* strikes down a compelled disclosure law designed to inform women of their availability. If making an "informed choice" about whether to have an abortion is an appropriate goal in one context, it is certainly so in the other.[191] As Justice Breyer puts it, "what is sauce for the goose is normally sauce for the

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[182] *Id.* at 2374 (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014)).

[183] *Id.* at 2375 (quoting Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 802 (2011).

[184] *See id.* at 2376.

[185] *Id.*

[186] *See id.* at 2377–78.

[187] *Id.*

[188] *See, e.g.*, Doe v. Reed, 561 U.S. at 228–29 (Thomas, J., dissenting) (arguing that compelled disclosure of signed initiative and referendum petitions "chills citizen participation").

[189] *See supra* notes 168–72 and accompanying text.

[190] *See NIFLA*, 138 S. Ct. at 2385 (Breyer, J., dissenting).

[191] *See* Erin Bernstein, *The Upside of Abortion Disclosure Laws*, 24 STAN. L. & POL'Y REV. 171, 207 (2013) ("If the *Casey* disclosure test is to be more than a one-way ratchet, the disclo-

gander."[192] The majority's myopic focus on the content discrimination in this particular case obscures the larger systemic effect of its decisions, which privilege one perspective while allowing suppression of its rival.

NIFLA thus constitutionalizes systemic inequality in the realm of ideas with respect to a topic of supercharged political debate. By doing so, the Court has not merely tolerated but has constitutionalized systemic viewpoint discrimination. It would have been consistent for the Court to uphold compelled disclosure in both *Casey* and *NIFLA*, or to strike down compelled disclosure in both contexts. The problem is that the Court offers speech protection to one side of a contentious issue, after having denied protection to the other. By narrowly focusing on the content discrimination in this particular law, the majority elides the systemic viewpoint discrimination arising from the combined effect of its own decisions.

C. Janus v. AFSCME

Janus is probably the most consequential decision of the 2017–18 Term. The Court overturned forty-one-year-old precedent upholding "agency fees" for public-sector labor unions.[193] In so doing, the Court focuses single-mindedly on the individual employee whose funds are used to support speech he or she does not wish to support. This focus obscures the systemic denial of an equal political voice to working people, especially when *Janus* is juxtaposed to the Kennedy Court's campaign finance decisions, including but not limited to *Citizens United*.

Since *Abood v. Detroit Board of Education*,[194] it had been settled that public employees may be required to provide financial support for the union's collective bargaining activities, even if they chose not to become members or to support the union's political activities.[195] The 5–4 decision in *Janus* was the result of a multiyear "crusade" (as Justice Kagan's dissent aptly put it)[196] to end agency fees. It can be expected to have devastating long-term effects on public-sector labor unions. And *Janus* is most disturbing when juxtaposed with decisions from the Court over the past decade that have allowed more and more private wealth to pour into election campaigns.[197] With one hand, the Court has used the First Amendment to amplify the political voice of corporations and wealthy individuals, while using it to suppress the voice of working people with the other. Like *NIFLA*, decided one

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sure requirements must apply to all doctors—including those who disagree with the disclosures for religious reasons.").

[192] *NIFLA*, 138 S. Ct. at 2385 (Breyer, J., dissenting) (quoting Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016)).

[193] Janus v. AFSCME, 138 S. Ct. 2448, 2486 (2018).

[194] 431 U.S. 209 (1977).

[195] *See id.* at 235–36.

[196] *See Janus*, 138 S. Ct. at 2500 (Kagan, J., dissenting).

[197] *See, e.g.*, McCutcheon v. FEC, 572 U.S. 185 (2014); Citizens United v. FEC, 558 U.S. 310 (2010).

day earlier, *Janus* demonstrates a willful blindness to the interest in systemic equality.

To understand the significance of *Janus*, it must be viewed in context of First Amendment precedent on both agency fees and campaign finance. *Abood* upheld the constitutionality of an agency shop agreement requiring public employees to subsidize a union's collective bargaining services, but struck down compelled support for the union's political activities.[198] The decision was not an unqualified win for public-sector unions or their members. Rather, it struck a balance between public-sector employees' expressive and associational interests on the one hand, and the interest in effective representation of workers on the other. *Abood* arose from an agency shop arrangement, under which a public-sector union was designated as the exclusive representative of all workers within the bargaining unit.[199] As part of this arrangement, workers were required to pay a fee that was used for both the union's collective bargaining and for political activities.[200]

Abood drew a sharp First Amendment line between these two types of activities. According to the Court, being made to support collective bargaining activities had some effect on public employees' First Amendment interests, insofar as they might disagree with some of the union's speech made on their behalf.[201] But compelled subsidization of collective bargaining and related activities was justified by the interest in ensuring that the union could advocate effectively on behalf of all employees, as required by federal labor law.[202] If employees were able to opt out of paying for this representation, it would create the risk of "free riders"—employees hoping to derive the benefits of the union's collective bargaining without paying for it.[203]

While upholding agency fees for collective bargaining, *Abood* concluded that there was no justification for making public-sector employees support unrelated political activities by the union.[204] The Court relied on the holding of *Buckley v. Valeo*,[205] decided the previous year, that campaign contributions were protected by First Amendment.[206] *Buckley* viewed the First Amendment interest in making contributions as weaker than the interest in making expenditures, with the former sounding more in the right to associate than freedom of speech.[207] Still, *Abood* held that compelled contributions to a union for political activities were prohibited. Making public employees con-

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[198] *See Abood*, 431 U.S. at 235–36.
[199] *See id.* at 211.
[200] *See id.* at 221–22.
[201] *See id.* at 222.
[202] *See id.* at 221–23. *See also* J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944) (explaining the duty of fair representation that comes with exclusive representation).
[203] *See Abood*, 431 U.S. at 221–22.
[204] *See id.* at 232–37.
[205] 424 U.S. 1 (1976).
[206] *See Abood*, 431 U.S. at 234 (quoting *Buckley*, 424 U.S. at 22).
[207] *See* Courtlyn Roser-Jones, The Imperfect Union Between Agency Fees and the First Amendment 29 (Sept. 2018) (draft of unpublished manuscript).

tribute to support those activities was "no less an infringement of their constitutional rights" than a prohibition on campaign contributions.[208]

That premise is dubious. Being required to pay money is not the same thing as being forced to speak. It is one thing for an employee to have to pay a fee to an organization that will use some of it for expression of which the employee disagrees. But that is hardly the same thing as being required to salute a flag, recite an oath, or join an advocacy group to which one objects. As Professors Eugene Volokh and Will Baude wrote in their amicus brief: "The First Amendment rights to freedom of speech and association simply do not guarantee that one's hard-earned dollars will never be spent on speech one disapproves of."[209] Moreover, the "free rider" problem exists for political activities just as for collective bargaining. Public employees who refuse to subsidize political activities—as was their right after *Abood*—might still benefit from them, to the extent that they result in policies that serve their interests.

Abood thus exaggerated the atomistic free speech interests of employees who wished not to contribute.[210] But it also struck a balance between the individual employee's interest in not subsidizing speech they disagree with, and the systemic interest in ensuring that the collective interests of workers are given voice. *Abood* limited the resources available for public-sector unions' political advocacy, but did not entirely starve public-sector unions of resources to advocate for workers.

Janus unsettles this balance. While mouthing respect for the First Amendment's essential role in "our democratic form of government,"[211] *Janus* utterly disregards the interest in systemic equality that is at the heart of the self-government rationale for freedom of speech.[212] Instead, Justice Alito's opinion for the five-Justice majority exaggerates the speech interests of the individual employee compelled to support the union's collective bargaining activities, who is "a person shanghaied for an unwanted voyage" in the majority's eyes.[213] If one scrapes away the rhetoric, there is little left in the opinion to explain why being required to pay a subsidy to support collective bargaining is so invasive. Although Justice Alito attempts to paint *Abood* as at odds with modern First Amendment precedent, the reality is that the Court's intolerance for agency fees is out of step with precedent. The Court has long applied a balancing test to restrictions on public employees' speech.[214] The nuanced approach of *Abood* is more consistent with this line of cases than the rigid approach adopted in *Janus*.

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[208] 431 U.S. at 234.

[209] Brief of Professors Eugene Volokh and William Baude as Amici Curiae in Support of Respondents, Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018) (No. 16-1466), at 4–5.

[210] *See* Catherine L. Fisk & Margaux Poueymirou, *Harris v. Quinn and the Contradictions of Compelled Speech,* 48 LOY. L. REV. 439, 472, 482–85 (2014).

[211] 138 S. Ct. at 2464.

[212] *See supra* notes 125–28 and accompanying text.

[213] *Janus*, 138 S. Ct. at 2466.

[214] *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 599–600 (2008); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

The Court's myopic focus on the individual employee obscures the systemic effects on unions' ability to advocate for the collective interests of workers. Public employees may now benefit from the union's collective bargaining activities without having to support them, incentivizing them to become free riders. The majority devotes short shift to the systemic risks that the free-rider problem creates for the collective voice of workers represented by public-sector unions. It answers these concerns with a wave of the hand, quoting its own recent statement that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections."[215] As Justice Kagan notes in her dissent, this dramatically understates the likely effect of eliminating agency fees: "Employees . . . realize that they can get the same benefits even if they let their memberships expire. And as more and more stop paying dues, those left must take up the financial slack (and anyway, begin to feel like suckers)—so they too quit the union."[216] So *Janus* can be expected to accelerate the decline of organized labor and, with it, the ability of labor unions to serve as an effective voice for working people. This loss of support will likely weaken the voices of working people, not just at the bargaining table but also in the realm of democratic politics.

While *Janus* fixates on the individualized harm to employees who object to subsidizing speech they disagree with, it disregards the systemic diminution of workers' speech that is likely to arise from its decision. The systemic inequality likely to flow from *Janus* becomes painfully clear when viewed in the context of the Kennedy Court's campaign finance oeuvre. Since *Buckley*, the Court has rejected equality as an interest that can justify limits on campaign spending.[217] While equality has not been considered a permissible rationale for limiting contributions or expenditures since there, the Court for a time broadened its understanding of corruption to include the disparate access and influence enjoyed by big donors and spenders.[218] But that ended with the replacement of Justice O'Connor with Justice Alito.[219] Although a swing Justice in many cases, Justice Kennedy was a relentless skeptic of legal restrictions on the flow of money into election campaigns. His opinion for the Court in *Citizens United* gets the lion's share of attention, but that is just one in a series of decisions that have increased the flow of political money from corporations and wealthy individuals.[220] Among the campaign finance laws that the Kennedy Court struck down were: a state limit on individual contributions deemed too low; an increase in the federal contribution limit

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[215] *Janus*, 138 S. Ct. at 2457 (quoting Knox v. Serv. Emp., 567 U.S. 298, 311 (2012)).

[216] *Id.* at 2491 (Kagan, J., dissenting) (citing Casey Ichniowski & Jeffrey S. Zax, *Right-to-Work Laws, Free Riders, and Unionization in the Local Public Sector*, 9 J. LAB. ECON. 255, 257 (1991)).

[217] *See* Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

[218] *See* Daniel P. Tokaji, *The Obliteration of Equality: A Trans-Border Comparison*, 5 J. PARLIAMENTARY & POL. L. 381, 385–91.

[219] *See id.* at 391.

[220] *See* RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 19–36 (2016).

tied to spending by a wealthy, self-financed opponent; the longstanding ban on corporate spending on electioneering communications in federal elections; a state public financing law that tied the amount of funding to contributions and expenditures on the other side; and the decades-long ban on aggregate contributions to all candidates, parties, and other political committees.[221]

The collective impact of the Kennedy Court's campaign finance decisions is a dramatic escalation of "independent" spending by outside groups.[222] And that spending tilts in favor of one side of our polarized electoral politics. Outside spending for conservative candidates has outpaced spending in support of liberal candidates in recent election cycles, sometimes by a considerable margin.[223] As the political influence of corporations and wealthy individuals has increased,[224] the relative influence of labor unions has declined.[225] As Professor Greg Magarian has put it, the Court's decisions have marginalized unions while "help[ing] corporations, the beneficiaries of *Citizens United*, in their political struggle against unions' advocacy of positions favorable to workers."[226] Not surprisingly, the overwhelming majority of labor union contributions go to support Democrats and liberal groups.[227]

The Court's micro-level focus on the dissenting employee obscures the macro-level effects that *Janus* is likely to have on the marketplace of ideas. With one hand (through its campaign finance decisions) the Court has amplified the voices of corporations and wealthy individuals; with the other (through *Janus*) it has weakened the collective voice of working people. Although the magnitude of the effect remains to be seen, there can be no doubt of its direction. The decision will further erode the political influence of labor unions, including financial support for Democrats and worker-friendly policies, even as the flow of money from big business and wealthy

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[221] *See* Renata E.B. Strause & Daniel P. Tokaji, *How Sausage Is Made: A Research Agenda for Campaign Finance and Lobbying*, 164 U. PA. L. REV. ONLINE 223, 226 (2016) (listing cases).

[222] This term is used to refer to "independent" spending on express advocacy and electioneering communications by groups that are not formally affiliated with the political parties. *See id.* at 224; DANIEL P. TOKAJI & RENATA E.B. STRAUSE, THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 4 (2014), https://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf [https://perma.cc/A79V-Z75K]; CTR. FOR RESPONSIVE POL., TOTAL OUTSIDE SPENDING BY ELECTION CYCLE, EXCLUDING PARTY COMMITTEES, https://www.opensecrets.org/outsidespending/cycle_tots.php [https://perma.cc/7BUF-YQWD].

[223] *See* CTR. FOR RESPONSIVE POL., *supra* note 222.

[224] ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *Citizens United* 292 (2014).

[225] *See* MONICA VENDITUOLI, CTR. FOR RESPONSIVE POL., LABOR: BACKGROUND (Oct. 2013), https://www.opensecrets.org/industries/background.php?cycle=2018&ind=p [https://perma.cc/5ZVG-PZDW] ("The labor sector has experienced decreasing political power in recent years. The past generation has been marked by a changing economy, a pattern of deregulation, and decreasing union membership.").

[226] GREGORY MAGARIAN, MANAGED SPEECH 219 (2017).

[227] *See Labor: Summary*, CTR. FOR RESPONSIVE POL (Oct. 26, 2018), https://www.opensecrets.org/industries/indus.php?cycle=2018&ind=P [https://perma.cc/EY8S-URHN] (showing top recipients of campaign donations from organized labor).

donors continues to increase. Of course, even before *Janus*, public-sector unions were prohibited from obtaining fees from public employees for political activities without their consent. But membership in and financial support for unions is almost sure to decline even further, now that public employees are free to avoid paying for their collective bargaining activities. The ability of unions to advocate on behalf of public-sector employees will surely decrease, and their political influence can be expected to correspondingly wane.[228] The end result is to constitutionalize systemic inequality in the marketplace of ideas. While the *Citizens United* line of decisions protects corporate-friendly speech, *Janus* weakens the collective voice of workers.

Janus thus puts the Court's heavy foot on the scales of justice. It demonstrates extraordinary concern for the individual employee who objects to her dollar being used to support speech of which she disapproves. But it entirely disregards the systemic inequality that is sure to arise from its tightening the screws on labor unions, while simultaneously loosening the flow of money from corporations and wealthy individuals. Justice Kagan's *Janus* dissent properly accuses the majority of "weaponizing" the First Amendment,[229] but she only scratches the surface of why this is so. As with *NIFLA*, one side of the public debate is privileged, while the other is diminished.

III. Religion

To recap Parts I and II, the last-term Kennedy Court's redistricting decisions reveal a Court mistakenly viewing systemic problems in atomistic terms. The Court wrongly insists on an individualized and district-specific injury in *Whitford*, while disregarding the evidence of systematic racial discrimination in *Abbott*. If these cases look the other way in the face of viewpoint discrimination against non-dominant groups, the Kennedy Court's final free speech cases are even worse. The Court engages in a form of viewpoint discrimination, taking sides in the politically charged battles over abortion, unions, and attendant electoral politics. In both *NIFLA* and *Janus*, the Court microscopically focuses on the interests of individual pregnancy clinics compelled to make disclosures they dislike and the individual employees compelled to support collective bargaining activities of which they disapprove. But they ignore the big picture—in particular, how their decisions work in tandem with other precedents to distort the marketplace of ideas.

A similar dynamic is evident in two high profile, end-of-Term decisions involving claims of religious discrimination. In *Masterpiece Cakeshop*,[230] the Court fixated on a claim of atomistic inequality, bending over backwards to find evidence that a baker was targeted on the basis of his religion after he refused to create a wedding cake for a same-sex couple. By contrast, in

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[228] *See* Magarian, *supra* note 226, at 219.
[229] *See* Janus v. AFSCME, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting).
[230] 138 S. Ct. 1719 (2018).

Trump v. Hawaii,[231] the Court overlooked evidence of systemic discrimination against Muslims seeking to enter the country—much of which evidence emerged from the twittering fingers of none other than the President himself. Standing alone, each of these decisions is problematic. Viewed together, they are alarming. The last-Term Kennedy Court's opinions expose a majority willing to scour the record for evidence of discrimination against some people, while exhibiting an utter blindness to the systemic exclusion of Muslims from the country.

A. Masterpiece Cakeshop v. Colorado Civil Rights Commission

Jack Phillips refused to bake a cake. Charlie Craig and Dave Mullins, a same-sex couple, came into Phillips's shop and told him they wanted to order a cake for their planned wedding. Phillips refused, saying: "I just don't make cakes for same sex weddings."[232] A devout Christian, Phillips later explained to Craig's mother that he thought same-sex marriage went against the teachings of the Bible.[233] Craig and Mullins filed a discrimination complaint with the state agency, citing the state's anti-discrimination law which prohibits places of public accommodation from discriminating on the basis of sexual orientation.[234] After investigating, the Division found that Phillips had turned away multiple customers on the basis of their sexual orientation, refusing to make wedding cakes for them.[235] A state administrative law judge then found that Phillips had violated state anti-discrimination law and rejected his free speech and free exercise of religion defenses.[236] The Colorado Civil Rights Commission affirmed the ALJ's decision, ordering him to stop discriminating against same-sex couples, and Colorado state courts affirmed.[237] Phillips then sought review in the U.S. Supreme Court, claiming that his rights to free speech and free exercise had been violated.

If there is anything to be thankful for in the Kennedy Court's last Term, it is that the Court's opinion in *Masterpiece Cakeshop* avoids deciding the question whether Colorado's anti-discrimination law—and by implication, other states' protections from discrimination based on sexual orientation—may violate the First Amendment in some circumstances. *Masterpiece Cakeshop* properly recognizes that the First Amendment prohibits the government from acting with hostility toward people because of their religion or religious beliefs.[238] What is striking is the Court's willingness to discard its usual skepticism for claims of intentional discrimination, evident in cases like

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[231] 138 S. Ct. 2392 (2018).
[232] Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1724 (2018).
[233] *See id.*
[234] *See id.* at 1724–25.
[235] *See id.* at 1726.
[236] *See id.*
[237] *See id.*
[238] *See id.* at 1731 (citing Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993)).

Abbott v. Perez,[239] when the majority finds an individual plaintiff with whom it is sympathetic.

Justice Kennedy's opinion for a seven-Justice majority (all but Justices Ginsburg and Sotomayor) scours the record for any trace of intentional discrimination against Phillips based on his Christian beliefs. The evidence it finds is meager. The majority points to one commissioner's statement at Phillips's hearing that he was free to believe "what he wants to believe," but could not act on those beliefs if he wished to do business in the state.[240] A few moments later, the commissioner said if Phillips thought the law "impact[s] his personal belief system," Phillips would have to "compromise" if he wished to do business in the state.[241] As the Court acknowledges, these statements can be understood as saying that businesses cannot act in violation of state anti-discrimination laws if they wish to keep doing business.[242] The scrap of evidence the Court believes to be most damning is a single statement by another commissioner made at a meeting two months later:

> I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[243]

Justice Kennedy takes exception to this statement, particularly the commissioner's use of the word "despicable," finding irrefutable evidence of intentional religious discrimination. A more charitable reading is that it states an incontrovertible truth: that religious beliefs sometimes have been used to justify discrimination that we now recognize as noxious. In *Loving v. Virginia*, for example, the trial judge who received the Lovings' guilty plea for violating the state's anti-miscegenation law offered a religious basis for its race discrimination: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."[244] The commissioner's characterization of using religion to justify discrimination as "despicable"—however sincere those religious beliefs might be—does not prove hostility to religion in general or Phillips's faith in particular. Even if one were to put a more sinister gloss on his words, they do not prove the intentional discrimination that is required to show a First Amendment violation. And even if the above quotation were viewed as de-

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[239] 138 S. Ct. at 2325–30. Also see *supra* Part I.C.
[240] *Masterpiece Cakeshop*, 138 S. Ct. at 1729.
[241] *Id.*
[242] *See id.*
[243] *Id.*
[244] 388 U.S. 1, 3 (1967).

finitively establishing such intent, it is hard to see how the outcome of Phillips's case would have been any different. For there is no doubt that he refused to create a wedding cake for Craig and Mullins because of their sexual orientation.

Masterpiece Cakeshop was not the most significant case to come out of the Kennedy Court in its last Term. The opinion found intentional discrimination in the face of scant evidence, but this fact-bound ruling breaks little or no new legal ground. Government bodies enforcing anti-discrimination laws are now on notice that they should avoid saying that religion has been used to justify invidious discrimination—truthful though that is. And the Court's resolution of *Masterpiece Cakeshop* is much less harmful than a decision invalidating Colorado's anti-discrimination law would have been. What is most disconcerting about *Masterpiece Cakeshop* is the markedly different treatment it gives to Phillips's claim of discrimination, compared to others that came before the Kennedy Court in its last Term, most notably *Abbott v. Perez* and *Trump v. Hawaii*, the last case discussed here.

B. Trump v. Hawaii

While the *Masterpiece Cakeshop* Court squinted hard to find religious discrimination against an individual, *Trump v. Hawaii* ignored abundant evidence of systemic religious discrimination staring it right in the face. In September 2017, President Trump issued Proclamation 9645, generally banning entry into the United States by nationals of eight foreign states. That proclamation followed two previous executive orders, which had also restricted entry to the United States by people from certain foreign states—all of them majority Muslim—but had been enjoined by lower federal courts.[245] The stated basis for this proclamation was to allow the Department of Homeland Security (DHS) to determine where the greatest security threats lay, and the State Department to then encourage identified countries to improve their practices.[246] At the end of this process, DHS concluded that deficiencies remained in eight countries.[247] The Acting Secretary of DHS concluded that special circumstances warranted adding Somalia to the list and subtracting Iraq from it.[248] Following this advice, Proclamation 9645 restricted entry to foreign nationals from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen.[249] Six of those eight countries (all but North Korea and Venezuela) are majority Muslim.[250]

Both before and after becoming President, Donald Trump has been remarkably explicit about his desire to exclude Muslims from the United States. As the five-Justice majority acknowledges, he published a "Statement

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[245] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2403–04 (2018).
[246] *See id.* at 2404–05.
[247] *See id.* at 2405.
[248] *See id.*
[249] *See id.*
[250] *See id.* at 2438 (Sotomayor, J., dissenting).

on Preventing Muslim Immigration" as a candidate for President, calling for a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."[251] Even before that statement, Trump had called for a Muslim ban, citing as historical precedent the internment of Japanese Americans during World War II.[252] As a candidate, he said that "Islam hates us," and that the United States was "having problems with Muslims coming into the country."[253] Though some of his remarks after winning the Republican nomination were more muted or ambiguous, when asked whether he was pulling back from his proposed Muslim ban, candidate Trump said: "I actually don't think it's a rollback. In fact, you could say it's an expansion."[254] A month after the 2016 election, when asked whether he would rethink his position, President-elect Trump replied: "You know my plans. All along, I've proven to be right."[255] After becoming President, one of his campaign advisers revealed that the President had called for a "Muslim ban" and asked to be shown "the right way to do it legally."[256] When signing the first version of the entry restrictions, President Trump explained that Christians would be given priority as refugees.[257] During the litigation over the second version, President Trump made repeated statements indicating his desire to keep Muslims out of the country. For example, he tweeted:

> People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN![258]

> That's right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won't help us protect our people![259]

A month before Proclamation 9645, President Trump referenced a story about a massacre of Muslims in the Philippines, saying that afterwards: "There was no more Radical Islamic Terror for 35 years!"[260] And even after the issuance of Proclamation 9645, the President retweeted links to anti-Muslim propaganda videos.[261] When asked about these retweets, the President's deputy press secretary replied that the President has "been talking about these security issues for years now, from the campaign trail to the

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[251] *Id.* at 2417 (majority opinion).
[252] *See id.* at 2435 (Sotomayor, J., dissenting).
[253] *Id.* at 2417 (majority opinion).
[254] *Id.* at 2436 (Sotomayor, J., dissenting).
[255] *Id.*
[256] *Id.* at 2417 (majority opinion).
[257] *See id.* at 2436 (Sotomayor, J., dissenting).
[258] *Id.* at 2437.
[259] *Id.*
[260] *Id.* at 2438.
[261] *See id.* at 2417 (majority opinion).

White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation."[262]

No reasonable observer could fairly examine this evidence and honestly deny the President's animus toward Muslims or his persistent intention to exclude Muslims from entering the United States. The evidence comes from President Trump's own words, and those of people close to him. Yet the five-Justice majority in *Trump v. Hawaii* denies that Proclamation 9645 unconstitutionally discriminated against Muslims.[263]

It is settled law that government action intended to disfavor a particular religious group violates the First Amendment.[264] It is sometimes difficult to determine whether government action was motivated by discriminatory intent or some legitimate purpose. But *Trump v. Hawaii* was not a difficult case. As candidate, President-elect, and then President, Trump was crystal clear on the motivation underlying the various versions of his entry ban. He has been equally clear—albeit with a wink and nod—in conveying that his more recent reluctance to call his policy a Muslim ban is due not to any change of heart, but a desire to avoid it being overturned in Court. But Chief Justice Roberts's opinion for the majority still manages to look the other way. Although the Court has long applied heightened scrutiny to religious discrimination[265] as well as racial discrimination,[266] it applied only rational basis review to Proclamation 9645.[267] The majority offered little explanation and no relevant precedent for its decision to apply this deferential standard. Instead, it cited cases establishing the unremarkable proposition that the political branches have broad authority over the admission and exclusion of foreign nationals.[268] The majority relied most heavily on *Kleindienst v. Mandel*,[269] in which the Court had upheld the visa denial of a self-described "revolutionary Marxist" where the Executive Branch had provided a "facially legitimate and bona fide reason" for denying the visa.[270] That is a far cry from *Trump v. Hawaii*, in which the President's repeated statements of intent to exclude Muslims from entering the United States belie the suggestion that Proclamation 9645's stated purpose was anything but a pretext for religious discrimination.[271] It appears that the Court can tell no difference between a genuine factual dispute over whether an individual was excluded because of her political views, and a broad-based policy that was unambiguously intended to keep Muslims out of the United States.

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[262] *Id.*
[263] *See id.* at 2423.
[264] There is precedent for this proposition under both the Free Exercise Clause and the Establishment Clause. *See, e.g.*, McCreary County v. ACLU, 545 U.S. 844, 860 (2005); Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 532 (1993); Lynch v. Donnelly, 465 U.S. 668, 673 (1984).
[265] *See, e.g.*, *Church of Lukumi Babalu Aye*, 508 U.S. at 546.
[266] *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).
[267] *See Trump*, 138 S. Ct. at 2420.
[268] *See id.* at 2418–20.
[269] 408 U.S. 753 (1972).
[270] *Id.* at 770.
[271] *See Trump*, 138 S. Ct. at 2435–38 (Sotomayor, J., dissenting).

The Court's disregard for the overwhelming evidence of President Trump's animus toward Muslims is painful enough. But placing this decision alongside the others from the Term makes it look even worse. The Court summarily dismisses the systemic exclusion of certain groups and perspectives: Democratic voters in *Whitford*,[272] Latinos in *Abbott v. Perez*,[273] abortion-rights supporters in *NIFLA*,[274] public-sector unions and members in *Janus*,[275] and Muslims in *Trump v. Hawaii*.[276] At the same time, it demonstrates overweening solicitude for individuals to whom the Court is more sympathetic, who come to it claiming a denial of equal treatment: the Christian baker in *Masterpiece Cakeshop*,[277] the anti-abortion provider in *NIFLA*,[278] and the objecting employee in *Janus*.[279] The Kennedy Court had its favored children and left no doubt of who they were. By so doing, the Court abdicated its constitutional obligation to ensure even-handedness in the realms of electoral politics, speech, and religion.

Conclusion

In its final Term, the Kennedy Court demonstrated a disregard and sometimes even disdain for systemic equality. Viewing its redistricting, speech, and religion cases together reveals an even more disturbing picture than may be seen from each area alone. The Court was extraordinarily attentive to individual claims of unequal treatment from anti-abortion providers, public employees objecting to union fees, and Christian business owners opposed to same-sex marriage. But the Court refused to act in response to compelling claims of systemic discrimination against nondominant groups, defined by race, religion, and party affiliation. Worse still, some of its decisions constitutionalize systemic viewpoint discrimination, protecting one side in contentious public issues like abortion, workers' rights, and same-sex marriage while giving the other side a cold shoulder.

We do not know whether Justice Brett Kavanaugh will be more sympathetic to claims of systemic inequality than Justice Kennedy. If he is not, then advocates of systemic equality will have to consider other venues for making such claims. State legislatures or ballot initiatives may provide a more realistic option, at least in some parts of the country. Several states have already adopted reforms to the redistricting process that are likely to reduce the risk and magnitude of partisan gerrymandering. Another viable option, at least in some states, is to pursue systemic reforms through state

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[272] *See* 138 S. Ct. 1916 (2018).
[273] *See* 138 S. Ct. 2305 (2018).
[274] *See* 138 S. Ct. 2361 (2018).
[275] *See* 138 S. Ct. 2448 (2018).
[276] *See* 138 S. Ct. 2392 (2018).
[277] *See* 138 S. Ct. 1719 (2018).
[278] *See* 138 S. Ct. 2361 (2018).
[279] *See* 138 S. Ct. 2448 (2018).

constitutional litigation.[280] Statutory claims may be available in some states as well, like the Colorado anti-discrimination statute at issue in *Masterpiece Cakeshop*.

Even these channels, however, are fraught with peril. An even more conservative Supreme Court may well use its power to invalidate state laws designed to promote systemic equality. Just a few years ago, the Court was one vote away from striking down an Arizona state constitutional provision—adopted through the initiative process—that gave an independent commission authority to draw lines.[281] Had the view offered in Chief Justice Roberts's dissent prevailed, the Court's constitutional law would have hamstrung state efforts at redistricting and other electoral reforms. So too, the Court's atomistic understanding of the First Amendment may impair efforts to achieve systemic equality. Laws prohibiting discrimination on the basis of sexual orientation are just one example. State-law measures designed to inform women of their right to choose an abortion and laws designed to ensure that labor unions can effectively represent workers' interests may come under increasing scrutiny.

I have long believed that the federal courts can guide the way toward a more inclusive democracy. At their best, the Courts can stop laws and practices that exclude people based on race, sex, sexual orientation, political party, religion, and socioeconomic status. They can also ensure an even-handed public debate, in which a diversity of viewpoints may be aired. Sadly, this was not the vision that the Kennedy Court articulated in its final Term. If that does not change, then the best route to systemic equality will have to be one that avoids the federal courts.

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[280] *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

[281] *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015).