The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 94 Article 2

2020

2019 Laskin Lecture Keynote Address: The U.S. Supreme Court's Challenge to Civil Society

Linda Greenhouse
Yale Law School

Part II

2019 Laskin Lecture

KEYNOTE ADDRESS

The U.S. Supreme Court's Challenge to Civil Society

Linda Greenhouse*

This keynote address was delivered at the Osgoode Hall Law School 2018 Constitutional Cases Conference by Linda Greenhouse, Pulitzer prize winner and Joseph Goldstein lecturer in Law and Knight Distinguished Journalist in Residence, Yale Law School on April 5, 2019.

I would like to begin by setting two texts side by side and inviting you to compare them.

The first is a paragraph from Justice Potter Stewart's opinion for the U.S. Supreme Court in *Abood v. Detroit Board of Education*,[1] a labor case decided in 1977 by a vote of 9-0. The question in the case was whether public employees who chose not to join a labor union could nonetheless be required to pay that portion of union dues that provided the union with the resources to fulfil its duty to represent and bargain on behalf of everyone in the bargaining unit — whether union members or not.

I suspect this question will be familiar to this audience, assuming your familiarity with an early *Charter* decision, *Lavigne v. Ontario Public Service Employees Union*,[2] decided in 1991. That case, like the American case, arose as a claim for constitutional protection for free expression and against compelled association — protections afforded by section 2 of the *Charter* and by the Free Speech Clause of the First Amendment to the U.S. Constitution. In U.S. labour law terms, at issue in *Abood* was the constitutionality of what was known as the "agency fee" system, under

---

* Joseph Goldstein lecturer in Law and Knight Distinguished Journalist in Residence, Yale Law School. An expanded version will appear in the 2020 issue of the [U.S.] Supreme Court Review, published by the University of Chicago.

1 431 U.S. 209 (1977).

2 [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 (S.C.C.).

which no one had to join the union but all had to pay their fair share for the benefits that all received; the objecting employees argued that the system subjected them to an unconstitutional degree of "ideological conformity".

Justice Stewart, writing for the Supreme Court, acknowledged that there could be many weighty reasons — political, ideological, even religious — why an employee might object to the union's activities or even to its existence. Just as in the Canadian case, the Supreme Court back in 1977 found the mandatory payments constitutional nonetheless. Justice Stewart observed:

> To be required to help finance the union collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But ... such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress.
>
> [and here Justice Stewart quoted from Justice William O. Douglas in an earlier labor case.]
>
> The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy….[3]

The furtherance of a common cause. Hold that thought, please, as I turn to my second text. First, a bit of context.

In January of this year, a federal district judge in Philadelphia granted an injunction barring enforcement of new rules issued by the Trump administration for the benefit of employers who have either religious objections or "sincerely held" moral objections to contraception. These employers were to be excused from the requirement in the *Affordable Care Act* that all employee health plans cover birth control along with other "preventive" services.[4] The judge, Wendy Beetlestone, noted the "remarkable" breadth of this exemption, which applies to for-profit as well as non-profit businesses. She noted that Congress had in fact

---

[3] *Abood v. Detroit Board of Education*, 431 U.S. 209 at 222-223 (citing *Machinists v. Street*, 367 U.S. 740, at 778, Douglas J. concurring).

[4] *Pennsylvania v. Trump*, 351 F. Supp. 3d 791, 816 (E.D. Pa. 2019). Following five Interim Final Rules, the Final Rule was issued on November 15, 2018. 83 Fed. Reg. 57,536.

considered and rejected a broad "conscience" opt-out from the birth control mandate. The new rule thus violated the "plain command" of the statutory text, she concluded, and she observed that if enforced, the rule would cause thousands of women who had the misfortune to work for opting-out employers to lose the insurance coverage to which they were legally entitled.

And now to my text: the response of the press secretary of the U.S. Department of Health and Human Services to Judge Beetlestone's ruling. "No American should be forced to violate his or her own conscience in order to abide by the laws and regulations governing our health care," said Caitlin Oakley.[5]

The story I have to tell inhabits the space between Justice Stewart's invocation of our "common cause" and Ms. Oakley's seeming obliviousness to the welfare of thousands of American women who happen to work for bosses who object to birth control. I argue that these two texts stand as goalposts at either end of a playing field known as civil society. If the two appear asymmetrical — one, a statement by the Supreme Court in a published opinion, the other, a remark by a federal bureaucrat in immediate response to breaking news — the asymmetry is likely to be only temporary. Judge Beetlestone's opinion, after an initial appeal,[6] is highly likely to reach the Supreme Court — a Court that only three years ago found itself unable, following the death of Justice Scalia, to decide the permissible scope of an accommodation to employers unwilling to abide by the birth control mandate.[7] The short-handed Court's stalemate in *Zubik v. Burwell* provided the gap that the Trump administration's broad exemptions now seek to fill. With the addition of the new justices, Neil Gorsuch and Brett Kavanaugh, there is reason to expect that today's Supreme Court will be willing and able, even eager, to decide the question in favour of the conscience opt-outs.

And what would be the harm of that? The United States, after all, has a proud tradition of protecting minorities who assert claims of conscience against mainstream norms that would overwhelm or even crush unconventional practices and belief systems. If the political system has often failed to extend such protections, the courts have done so. Such

---

[5] Associated Press, *The Latest: Official Decries Blocking of Birth Control Rules*, Jan. 13, 2019, online: <https://www.apnews.com/619b4cb94693436581ff39f8374f296e>.

[6] Affirmed as *Pennsylvania v. Trump*, 930 F.3d 543 (3d Cir. 2019).

[7] See *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), 1560.

Supreme Court decisions as *Sherbert v. Verner*,[8] which protected a Seventh-Day Adventist from having to work on his Sabbath; *West Virginia v. Barnette*,[9] holding that Jehovah's Witness children did not have to salute the American flag; and *Wisconsin v. Yoder*,[10] which exempted the Amish from having to send their children to high school, are well known to anyone with a passing familiarity with the history of the First Amendment's Free Exercise Clause. These decisions are celebrated as symbols of American society's commitment to freedom of conscience, of the protection of conscience as an essential aspect of civil society. The Civil Rights Act of 1964 protects religious claimants from employment discrimination and requires employers to accommodate the needs of religiously observant employees as long as the accommodation will not impose undue hardship on the conduct of the employer's business.[11]

The conservative writer Ryan Anderson, in an argument against same-sex marriage, observed that "religious liberty plays a crucial role in preserving civil society as something separate from government".[12] Few of us would argue with that statement as an expression of abstract principle. But given recent developments in our politics and our law, we needurgently to move from the abstract to the concrete. We need to question whether conscience claims, as they are being expressed and honored today, rather than embodying the best of civil society have become a threat to it — and indeed, to the legitimacy of the modern state, where laws of general applicability enacted through democratic politics are assumed to apply to all.[13]

---

[8] 374 U.S. 398 (1963).

[9] 319 U.S. 624 (1943).

[10] 406 U.S. 205 (1972).

[11] 42 U.S.C. 2000e(j), 2000e2(a)(1) Justice Samuel Alito, in a statement joined by three other justices, suggested recently that the statutory accommodation for religious employees, as construed by the Supreme Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), is insufficiently accommodationist. Assuming that Justice Alito is faithful to the practice described in the remainder of this lecture, we will shortly see cases that raise this long-settled issue making their way onto the Supreme Court's docket. (Statement of Alito J., respecting the denial of *certiorari*, *Joseph A. Kennedy v. Bremerton School District*, No. 18-12, 139 S. Ct. 634, Jan. 22, 2019.) On March 18, 2019, the Court requested the views of the Solicitor General on a petition for *certiorari* that explicitly asks the Court to overturn the 1977 precedent in favor of a broader accommodation requirement. *Patterson v. Walgreen Co*., petition for cert. pending, No. 18-349.

[12] Ryan T. Anderson, *The Continuing Threat to Religious Liberty,* Heritage Foundation, Aug. 4, 2017, online: <https://www.heritage.org/religious-liberty/commentary/the-continuing-threat-religious-liberty>.

[13] For a powerful explication of this idea, see Robert Post's concluding chapter in the multi-author book of essays, *The Conscience Wars* (Susanna Mancini & Michel Rosenfeld, eds.), 473-484 (2018).

With that introduction, I want to focus our attention on the Supreme Court, and to begin, on the most important decision of the Court's last term. That most important decision was not the failed challenge to the Trump Muslim travel ban.[14] It was not the case on the rights of the Colorado baker who wouldn't bake a cake for a same-sex couple's wedding celebration, although I will return to that case.[15]

It was a labor case, *Janus v. American Federation of State, County and Municipal Employees*.[16] The question in *Janus* was whether to overrule our old friend, *Abood v. Detroit Board of Education.* To the surprise of absolutely no one, that is what the Supreme Court did. For reasons I will describe, that outcome — and even the vote of 5 to 4 — had been expected for some years and was highly anticipated by the time the case was decided last June 27. It did not go unnoticed, so I don't purport to be rescuing this decision from obscurity. But few people fully comprehended just how radical *Janus* was, and how much it tells us about the current Supreme Court, the state of our constitutional law, and the emerging impact of the Court's constitutional vision on American society.

Janus is worth examining from several angles: First Amendment doctrine, judicial behavior, practical impact. I will discuss these in order to lay a foundation, so that we can see the case as a whole before I get to the most important point: what the decision suggests about the Supreme Court's role in the fraying fabric of civil society.

I'll begin briefly with the First Amendment. From today's perspective, the mediated view of the First Amendment the Court expressed 42 years ago in *Abood* — that the First Amendment provides a framework for balancing the collective interest of the state against the interests of private speakers — seems to come to us from a different era. It was an era when the First Amendment served to enable free and open public discourse. It was an era before, for example, the Supreme Court ruled in the 2011 case of *Sorrell v. IMS Health*[17] that Vermont violated the First Amendment rights of pharmaceutical companies when it barred pharmacies from selling to the companies doctors' prescription records — records that enabled pharmaceutical sales people to make targeted sales pitches to doctors for expensive new drugs for patients who were

---

[14] *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

[15] *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

[16] 138 S. Ct. 2448 (2018).

[17] 564 U.S. 552 (2011).

being treated with inexpensive old ones. It was an era before the D.C. Circuit ruled[18] that tobacco companies have a First Amendment right not to be required by federal regulators, implementing a 2009 Act of Congress,[19] to display on their packaging disturbing photographs of what happens to people who smoke — a ruling the Obama administration decided would be counter-productive to appeal to a Supreme Court that was highly likely to affirm it.

(And early this year, the U.S. Court of Appeals for the Ninth Circuit, relying on the Supreme Court's most recent First Amendment precedents, granted a preliminary injunction against enforcement of San Francisco's Sugar-Sweetened Beverage Warning Ordinance, which requires soda advertisements to contain a warning that "Drinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." The required warning also had to include the notice that: "This is a message from the City and County of San Francisco." There is little doubt that a few years ago, this public health measure requiring the inclusion of truthful information in a commercial advertisement would have been upheld. The Ninth Circuit's conclusion to the contrary was unanimous.)[20]

In other words, *Abood* was the product of an era before the First Amendment was turned into a potent tool of deregulation, before it was, in the words of Justice Elena Kagan's dissenting opinion in *Janus*, "weaponiz[ed]".[21] So when Justice Alito, writing for the majority in *Janus*, said that *Abood* had become "an anomaly in our First Amendment jurisprudence",[22] it was hard to argue with him.

The shorthand for what Justice Stewart offered as the rationale for *Abood* came to be known as the "free rider" problem — the notion that peace in the workplace would be threatened by the presence of fellow workers who were not paying their fair share. It is worth noting that a series of decisions following *Abood* made clear that the fair-share obligation extended only to the expenses of collective bargaining and representation. Employees could opt out of paying for expenses connected with a union's political advocacy; few questioned that distinction as a matter of law or policy. But the *Janus* majority found any

---

[18] *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F. 3d 1205 (D.C. Cir. 2012).

[19] Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31 Sec. 201, 123 Stat. 1776, 1845 (2009).

[20] *American Beveridge Assoc. v. City and County of San Francisco*, Ninth Cir., No. 16-16073 (Jan. 31, 2019).

[21] *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

[22] *Id.*, at 2483.

such distinction unworkable as a means of solving what it viewed as the central problem of coerced speech. As Justice Alito explained:

"Petitioner strenuously objects to this free-rider label. He argues that he is not a free rider on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage."[23]

The impact of *Janus* is considerable, extending well beyond the labor context. For example, the Court's analysis has invited a new round of litigation against mandatory bar dues and bar membership. The justices considered one such case this term, a challenge to mandatory bar membership in North Dakota.[24] That case was filed before *Janus*, clearly in expectation of *Janus*'s outcome. The justices took the case up in their private conference eight times during the fall, before finally vacating the Eighth Circuit decision below, which had upheld the compulsory bar membership, and remanding the case to the appeals court for reconsideration in light of *Janus.* While the Court's docket-setting function is notably opaque, it is clear from the many times the justices are listed as having discussed this petition at their weekly private conference that the disposition was controversial inside the Court. It is highly likely that some members of the Court were eager to take up the bar dues case immediately, without waiting for the lower courts to decide how to apply *Janus* to related challenges. There will be other such cases in the pipeline in short order.

And of course *Janus* will exact a substantial price from public employee unions, which under the legal duty of fair representation[25] will have to continue doing their work on behalf of non-members and members alike, even as their dues revenue shrinks. It is no coincidence that public employee unions have been a target of political and judicial conservatives. Even as union membership in the private sector shrinks almost to invisibility, standing now at 10 per cent, union membership is actually quite robust in the public sector, where more than one-third of employees are union members.[26] Further, public sector unions tend to skew progressive. They support Democrats.

In the wake of *Janus*, there are lawsuits seeking to claw back agency fees that have already been paid. One such case was recently dismissed

---

[23] *Id.*, at 2466.

[24] *Fleck v. Wetch*, 139 S. Ct. 590, No. 17-886, granted, vacated and remanded to the Eighth Circuit in light of *Janus*, Dec. 3, 2018.

[25] Grace Shaver Figg, *The Union Duty of Fair Representation: Fact or Fiction*, 60 Marquette L.R. 1116 (1977).

[26] See <https://www.bls.gov/news.release/union2.nr0.htm>.

in the federal district court in Seattle; the judge declared that the union was entitled to a "good faith" defense, since the dues were constitutional at the time the union collected them.[27] But other such cases are pending, and may find friendlier judicial audiences.

What does *Janus* tell us about the Roberts Court? I think we can conclude without exaggeration that it tells us that no precedent is safe. *Janus* provides a roadmap for how to hollow out a precedent so completely that a baby's breath can deliver the final blow. And I can't emphasize enough the extent to which overturning *Abood* was Samuel Alito's project. Here, in brief, is how he did it. The story is illuminating.

It began in 2012 with a case called *Knox v. Service Employees International Union*.[28] The question was a very narrow one: how the union should have treated a special dues assessment, and what accommodation it should have offered to objecting members of the bargaining unit. But Justice Alito, in a decision signed by five justices, went beyond the question presented to place *Abood* squarely in the Court's sights. "… our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate", he wrote. In any future case, he added, "The general rule — individuals should not be compelled to subsidize private groups or private speech — should prevail."

This was, of course, an invitation to bring the Court just such a "future case". One arrived two years later. *Harris v. Quinn*,[29] another 5 to 4 decision with a majority opinion by Justice Alito, held that *Abood* did not apply in the context of unionized home health workers, due to an employer-employee relationship that is very different from the relationship in a conventional workplace. Justice Alito went further than necessary to decide the question presented, his attack on *Abood* becoming more direct. *Abood* was questionable from the start, he wrote. The *Abood* court "failed to appreciate the conceptual difficulty" of the fact that in the public sector, "both collective bargaining and political advocacy and lobbying are directed at the government".[30]

Quinn had been brought to the court by the National Right to Work Legal Defense Fund, which in its briefing asked the Court directly to overrule *Abood.* That was not necessary, Justice Alito said — not necessary yet. Justice Kagan, in an opinion for the four dissenters, saw

---

27 *Danielson v. AFSCME*, 340 F. Supp. 3d 1083 (W.D. Wash. 2018).
28 567 U.S. 298 (2012).
29 134 S. Ct. 2618 (2014).
30 *Id.*, at 2632.

what lay ahead. There was no principled distinction between this case and *Abood*, she said, and therefore no need for the majority's extended discussion of *Abood*'s supposed deficiencies. "Today's opinion takes the tack of throwing everything against the wall in the hope that something might stick."[31] It would stick soon enough.

The following year, 2015, *Friedrichs v. California Teachers Association*[32] reached the Supreme Court. This was the first case since Justice Alito began his campaign that squarely presented the issue in a posture that gave the Court a clear choice between reaffirming *Abood* or overturning it. The litigation was financed by the conservative Lynde and Harry Bradley Foundation through its grantee, the Center for Individual Rights; Bradley also financed, at least in part, 11 of the organizations that filed *amicus* briefs on the plaintiffs' behalf at the Supreme Court.[33]

Friedrichs followed a very unusual path to the Court. In Federal District Court, the plaintiffs did not contest the union's motion for summary judgment.[34] Then, having lost in District Court according to plan, the plaintiffs asked the Ninth Circuit to affirm their defeat. Obliging, as settled law required, the appeals court affirmed in a one paragraph order calling the case "so insubstantial as not to require further argument".[35]

Despite the absence of a conflict in the circuits (the ordinary marker of an appeal deemed worthy of Supreme Court review[36]) the justices, not surprisingly, agreed to hear the case. Argument took place in January 2016. By the end of the argument, it was perfectly clear that *Abood* would be overturned by a vote of 5 to 4. Justice Alito, we can assume,[37] received the assignment from Chief Justice Robert. He no doubt turned quickly to the welcome task of drafting his majority opinion, his moment finally at hand.

---

[31] *Id.*, at 2648 (Kagan, J., dissenting).

[32] 136 S. Ct. 1083 (2016).

[33] Brian Mahoney, *Conservative Group Nears Big Payoff in Supreme Court Case*, Politico, Jan. 10, 2016, online: <https://www.politico.com/story/2016/01/friedrichs-california-teachers-union-supreme-court-217525>. See also Senators Sheldon Whitehouse and Richard Blumenthal's brief in support of respondents, *Janus v. AFSCME*, at pp. 16-17.

[34] 2013 WL 9825479 @ *1.

[35] Brief for Pets at *8-9, *Friedrichs v. California Teachers Ass'n*., 135 S. Ct. 2933, No. 14-915 (U.S. Sept. 4, 2015).

[36] Rules of the Supreme Court of the United States (2017), Rule 10(a).

[37] Justice Alito proved to be the only justice without a majority opinion from the January 2016 argument sitting.

Then, the next month, shockingly, Justice Scalia died. There would be no majority opinion, not this time. By a 4-4 vote, the justices affirmed the Ninth Circuit in a one-line order, without further discussion or explanation. (A tie vote at the Supreme Court automatically affirms the lower court opinion, without precedential weight; it is as if the case never reached the Court.) Justice Alito would have to wait just a bit longer, but not very long. Justice Gorsuch joined the Court in April 2017. The National Right to Work Legal Defense Fund filed its *cert* petition in *Janus* in June. The Court granted the petition on its opening day order list at the start of the 2017 term that Fall.

Who is Mark Janus?

He didn't start out as the plaintiff in this case. The first plaintiff was the newly elected Illinois governor, Bruce Rauner, a Republican who had run for office on an anti-union platform, backed by millions of dollars in contributions from an Illinois businessman, Richard Uihlein, who also helps fund the Federalist Society, the National Right to Work Legal Defense Fund, and the Liberty Justice Center. With the state legislature controlled by Democrats, Governor Rauner could make no headway with legislation abolishing the agency shop. That is a step that is open to the states, and in fact more than half the states had either never instituted or had abolished the agency shop for their public employee unions. But that option was not politically available to Governor Rauner, so he turned to the courts. The Federal District Court threw a wrench into his plans, however, dismissing the governor's lawsuit for lack of standing.[38] The court then permitted Mark Janus, an Illinois state employee, to intervene as the new plaintiff — strange in itself because there was no longer an existing lawsuit in which to intervene. But no matter, the case — *Friedrichs redux* — was soon, after a brief stop at the U.S. Court of Appeals for the Seventh Circuit,[39] on its way to the Supreme Court.

The hurdle that Justice Alito and his five-member majority had to overcome was, of course, *stare decisis.* Here was a decision, more than four decades old, reaffirmed many times. What to do? Justice Alito did something quite remarkable — he cited himself to show that any reliance interest that attached to *Abood* had been erased — erased by his own *dicta*. Listen:

---

38 *Rauner v. AFSCME*, USDC N.D. Ill. No. 15-cv-01235.

39 851 F. 3d 746 (7th Cir. 2017) (affirming dismissal of the amended complaint).

> … public sector unions have been on notice for years regarding this Court's misgivings about *Abood.* In *Knox,* decided in 2012, we described *Abood* as a First Amendment "anomaly." Two years later, in *Harris,* we were asked to overrule *Abood*, and while we found it unnecessary to take that step, we cataloged *Abood*'s many weaknesses.[40]

He went on to describe the fate of the *Friedrichs* case, deriving from the tie vote the conclusion that the world should have discerned that the end of *Abood* was at hand: "During this period of time, any public sector union seeking an agency-fee provision in a collective-bargaining agreement must have understood that the constitutionality of such a provision was uncertain."[41]

In her dissenting opinion, Justice Kagan called Justice Alito out, referring to the Court's "six-year campaign to reverse *Abood*"[42] and observing that the majority had found "no exceptional or special reason" for doing so.[43] "It has overruled *Abood* because it wanted to."[44] That is a remarkably explicit statement for one justice to make about her colleagues. Justice Kagan continued: "… the majority has chosen the winners by turning the First Amendment into a sword and using it against workaday economic and regulatory policy . . . The First Amendment was meant for better things."[45]

I have delved at such length into the history of the *Janus* litigation to make clear the aggressive nature of the Court's attack on the status quo, a status quo anchored in democratic accountability. As I mentioned, states have been free from the beginning either to adopt the agency fee system for their public employee unions or to reject it. Governor Rauner lacked the political power to accomplish his goal by legislation, so he enlisted a friendly Supreme Court.

The disjunction between the Court's decision last June and the public mood is worth noting. A Gallup poll conducted in early August 2018, about a month after the Court's ruling, showed public support for labor unions at a 15-year high, at 62 percent.[46] Schoolteachers in red as well as blue states have staged successful strikes for higher pay and better working conditions.[47] To be sure, the fortunes of organized labor have

---

40 *Janus*, 138 S.Ct. 2484.

41 *Id.*, at 2485.

42 *Id.*, at 2487 (Kagan, J., dissenting).

43 *Id.*, at 2497 (Kagan, J., dissenting).

44 *Id.*, at 2501 (Kagan, J., dissenting).

45 *Id.*, at 2501-02 (Kagan, J., dissenting).

46 Online: <https://news.gallup.com/poll/241679/labor-union-approval-steady-year-high.aspx>.

47 Robert Gebeloff, *The Numbers That Explain Why Teachers Are in Revolt*, N.Y. Times, June 4, 2018.

ebbed and flowed throughout U.S. history, in the courts as well as in politics. Now we have entered an era when anti-union forces that can't prevail in politics will take refuge in the courts.

That is a problem for the legitimacy of the courts, to be sure. But my point here is an even deeper one. What we are seeing in the Supreme Court's recent behavior is a threat to the foundations of civil society.

Earlier in this talk I asked you to keep in mind Justice Douglas's phrase as quoted by Justice Stewart, "the furtherance of a common cause". Stepping back from what *Janus* tells us about labor law or the First Amendment, I think its primary injury is to further constitutionalize the notion that we as a society are not in fact united in a common cause, that we can help ourselves to an opt-out of our choice, that we are not all in this together.

There's been much talk about the rise of tribalism in the United States and elsewhere. We retreat to our living rooms where alternate visions of reality greet us from across the airwaves, cable connections, and the Internet. It is increasingly hard to sustain the structures of civil society under these conditions. The Supreme Court once had an insight, as embodied by *Abood* and the cases that followed it until very recent years, that while we may disagree with one another, we are all playing by the same rules of democratic accountability. Somehow American society managed to navigate, through law, what Jeffrey Alexander calls "the seemingly oxymoronic commitment to individuality and collectivity that defines the sphere of civil life".[48]

When did we begin to lose navigational ability, that commitment to the collectivity? It'ss not possible to pinpoint a moment, but it was certainly well before the 2016 election. The story of the *Religious Freedom Restoration Act* ("RFRA")[49] is instructive. Congress passed RFRA to reject the Supreme Court's 1990 decision, *Employment Division v. Smith*.[50] In *Smith* the Court, by a vote of 5 to 4 and with a majority opinion by Justice Scalia, rejected the argument that the Free Exercise Clause mandates religious exemptions from a law of general applicability.

The case arose when the state of Oregon refused unemployment benefits to two members of the Native American Church who had been fired for using peyote in their religious ritual. Oregon law held that people who become unemployed through violating a criminal statute were not entitled to benefits. The plaintiffs claimed a right to the benefits under the First Amendment's Free Exercise Clause.

---

[48] Jeffrey C. Alexander, *The Civil Sphere* (2006), 153.

[49] 42 U.S.C. 2000bb.

[50] 494 U.S. 872 (1990).

Writing for the majority, Justice Scalia acknowledged that the men's claim was a sympathetic one that Oregon might well have chosen to accommodate as, he noted, other states did in similar circumstances. However, he concluded:

> But to say that a nondiscriminatory religious practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[51]

The decision alarmed religious communities across the spectrum from the most liberal to the most orthodox. The result was the *Religious Freedom Restoration Act* (1993). Liberals were fully on board with this project of congressional triumphalism, as shown by the identities of its chief legislative sponsors. The chief sponsor in the House of Representatives, where it passed unanimously, was Rep. Chuck Schumer. In the Senate, where it passed by a vote of 97-3, the chief sponsor was Senator Ted Kennedy. President Bill Clinton signed the bill into law to great acclaim from all religious communities.

RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that the policy or practice serves a "compelling governmental interest" by the "least restrictive means".

What amounts to a substantial burden, and by what test? How are courts to evaluate whether a challenged policy imposes the least possible burden on religious adherents? Is every religious claim equally weighty? What does the Establishment Clause have to say about this hyper vigilant protection of free exercise? These questions went unanswered; in fact, they were scarcely raised.[52]

---

[51] *Id.*, at 890.

[52] The Court never subjected RFRA to analysis under the Establishment Clause. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that RFRA's application to the states exceeded Congress's enforcement authority under s. 5 of the 14th Amendment, leaving the law applicable only to federal action. Many states then enacted their own versions of RFRA. In 2000, Congress supplemented RFRA with the *Religious Land Use and Institutionalized Persons Act*, 42 U.S.C. 2000cc. The Court unanimously upheld the constitutionality of this statute as applied both to the federal government and the states. See *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

But Justice Scalia's warning came to pass. The political context in which RFRA was deployed was transformed during the following decades of what Michel Rosenfeld calls the "dramatic repoliticization of religion".[53] What its sponsors intended as a shield to protect minority religions became, instead, a sword in the hands of powerful forces representing the religious Right and the Catholic Church. What we have now is, indeed, a statute that permits — one might say encourages — "every conscience to be a law unto itself".

The Supreme Court's *Hobby Lobby* decision from 2014 is the case in point.[54] The owner of a national chain of craft stores with thousands of employees claimed entitlement under RFRA to an exemption from the *Affordable Care Act*'s requirement to include contraception coverage in the employee health insurance plan. He raised a religious objection to certain forms of birth control that he deemed, incorrectly, to be "abortifacients". In an opinion by Justice Alito, the Court held by a vote of 5 to 4 that the owner of this for-profit business was entitled to the same accommodation the Obama administration was already offering to religiously affiliated non-profits. (Churches themselves were completely exempt from the contraception mandate.) The administration was giving these religiously identified organizations the option of simply informing the federal government of their objection to contraception coverage, at which point the government would notify the organizations' third-party insurers to pick up the cost directly. Hands-off, in other words. In *Hobby Lobby*, the Court held that the existence of this voluntary accommodation by the administration demonstrated that there was a less restrictive means, within the meaning of RFRA, to address a for-profit employer's religious concerns while still assuring coverage for those employees who did not share his objections.

It is important to underscore exactly what the claim was, both here and in the cases that followed. Obviously, no one was forcing the Hobby Lobby owner — or, in subsequent litigation, the Little Sisters of the Poor, an order of nuns whose chain of nursing homes both employs and serves non-adherents[55] — to buy or use birth control for themselves. Rather, the claim was one of complicity in the sin of third parties — what Douglas NeJaime and Reva Siegel call a complicity-based conscience claim.[56]

---

[53] Susanna Mancini & Michel Rosenfeld, eds., *The Conscience Wars* (2018), 58.

[54] *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014).

[55] *See Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

[56] Douglas NeJaime and Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516 (2015).

There are two points to note about the nature and consequences of this type of conscience claim as it has evolved. One is the increasingly attenuated nature of these claims. Consider Kim Davis, the Kentucky county clerk, who acted under what she called "God's authority" when she refused to perform her duty to issue marriage licenses to anyone legally entitled to marry, including same-sex couples.[57] That was a straightforward complicity claim: my signature would enable your marriage.

The claims put forward in the months and years following *Hobby Lobby*, however, have been much more attenuated: some employers asserted that even submitting the opt-out form to the government made them complicit,[58] while others objected to a proposed work-around by which the government would act to assure contraception coverage even without any formal notice at all.[59] On this logic, it is difficult to say where the chain of complicity would end. It is hard to see why an employer could not claim complicity in sin when issuing a paycheck that a female employee of child-bearing age might predictably use to buy birth control products.

The second point to note is the scant regard that the conscience claimants and the Court pay to the harms suffered by third parties from recognition of the complicity claims. While in the *Hobby Lobby* opinion, Justice Alito offered the view that the decision's effect on female employees seeking contraception coverage "would be precisely zero"[60] under the accommodation the Court identified, that has proven not to be the case as claimants have rejected one accommodation after another, each more generous. As Professors NeJaime and Siegel point out, accommodation of such claims "does not entail costs borne by society as a whole; instead, accommodation has consequences for the third parties whose conduct is at issue".[61]

---

[57] See online: <https://www.chicagotribune.com/news/nationworld/politics/ct-kim-davis-kentucky-20181107-story.html>. Davis, who became a heroine to the religious Right, was found in contempt of court when she continued to refuse an order to issue the licenses.

[58] *Wheaton College v. Burwell*, 573 U.S. 958 (2014).

[59] Brief for petitioners, *East Texas Baptist University v. Burwell*, No. 14-1418 and consolidated cases, Jan. 4, 2016. ("Notwithstanding the various euphemistic labels the government has attached to that regulatory mechanism, there is no escaping the reality that it is a mechanism for petitioners to *comply with*, not avoid, the mandate to which they object ... because by taking the acts that it requires, an employer would enable the use of its own plan infrastructure to provide 'seamless' coverage to which it holds sincere religious objections." Brief at 42 (emphasis in original).

[60] 134 S. Ct., at 2760.

[61] Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics,* 124 Yale L.J. 2516 (2015), at 2542. For an extended treatment of the problem of third-party harm, see Micah Schwartzman, Nelson Tebbe & Richard Schragger, *The Costs of Conscience*, 106 Ky. L. J. 881 (2017-2018).

This became clear in the *Masterpiece Cakeshop* case, in which a same-sex couple left a bakeshop empty-handed after the owner informed them that his religious objection to same-sex marriage makes him unable to bake a cake to be used in a celebration of their marriage.[62] In other words, the owner of a public accommodation, legally bound under Colorado law not to discriminate on the basis of sexual orientation, claimed the conscience-driven right to be able to pick and choose his customers, on the ground that *his* cake would make him complicit in *their* sin. The Court decided the case in a way that sidestepped the main issue. But other cases are in the pipeline, and will multiply in recognition that the Supreme Court's door is open to such claims.

The Trump administration is now testing the boundaries of complicity-based conscience claims with a newly promulgated rule that permits employers to refuse to cover contraception on the basis not only of religious objections but "sincerely held moral convictions" as well. Judge Wendy Beetlestone, granting a preliminary injunction in the contraception litigation, marveled at the new rule's "remarkable breadth" and asked: "Who determines whether the expressed moral reason is sincere or not or, for that matter, whether it falls within the bounds of morality or is merely a preference choice?" The administration, she observed, "has conjured up a world where a government entity is empowered to impose its own version of morality on each one of us. . . . That cannot be right."[63]

And that cannot be civil society as we have understood it. That case, too, will predictably come to the Supreme Court.

It may seem a stretch to draw a line from *Janus* to wedding cakes to birth control. But I think all the cases I've mentioned present a similar challenge to the Supreme Court, and to us. Will the Roberts Court further accelerate the tribalizing of America or will this fractured court somehow find a way to invoke constitutional principles that help to hold us together, all passengers on the same boat in stormy seas?

"A democratic society cannot flourish if its citizens merely pursue their own narrow interests," the political philosopher Robert Audi wrote 20 years ago.[64] And yet the atomistic First Amendment that the Court appears committed to delivering is enshrining pursuit of narrow personal interests as a constitutional right. Recall that Illinois, through its elected

---

62 *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018).

63 *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 577 (E.D. Pa. 2017).

64 Robert Audi, *A Liberal Theory of Civic Virtue*, 15 *Social Philosophy and Policy* 149 (1998).

representatives, was perfectly free to abolish the agency fee system for its public sector unions, but the will of the people was otherwise. It was only in that realization that the governor turned to the courts to do his work for him.

Civil society by definition exists outside the formal structures of government. Judith Shklar defines citizenship in part as having "a sense of obligation to the social environment . . . an internalized part of a democratic order that relies on the self-direction and responsibility of its citizens rather than on their mere obedience."[65]

But neither does civil society exist apart from government, which has the power, through law, to regulate the structures that sustain it. The Supreme Court, in its role as "republican schoolmaster", in Robert Dahl's classic phrase,[66] is an indispensable partner in the ongoing project of translating into operative law the values that vie for dominance at a given cultural moment. When the Court moves from understanding the First Amendment as furthering a "common cause" to enlisting it as a tool that individuals can invoke to free themselves from the bonds of joint enterprise, we are entering a kind of twilight of democratic legitimacy.

I will conclude with a brief discussion of recent Supreme Court decisions that deal directly with citizenship and that are disturbing in a different but related way: decisions dealing with voting rights. These cases can be said to represent the other side of the same coin: not the individual right to opt out of the bonds of citizenship, but rather a claim to inclusion, to a right that ought to be taken for granted at this stage in the history of our democracy but that is under sustained attack. The right to vote has an important — indeed, an all-embracing symbolic as well as practical dimension.

This is not the occasion to explore in depth the controversy over Republican-driven efforts to raise the barriers to access to the polls through, for example, requiring precise forms of voter identification that elderly people, poor people, and members of ethnic minorities are less likely to have or to obtain easily. The Supreme Court dealt in an unfortunately superficial manner with the voter-ID question more than a decade ago, when it rejected a facial challenge to one of the earliest such efforts in a case from Indiana.[67] The later 5 to 4 decision in *Shelby*

---

[65] Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (1991), 7.

[66] Robert Dahl, *Decision Making in a Democracy: The Supreme Court as National Policy Maker*, 6 J. of Public Law 279 (1957).

[67] *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008).

County v. Holder,[68] disabling the protective apparatus of section 5 of the *Voting Rights Act of 1965*, invites a deeper exploration than I can give it here. Suffice to say that this was an act of extreme judicial aggression, given that section 5 had recently been reauthorized by large bipartisan majorities of both houses of Congress.

In 2013, the Republican-led North Carolina legislature enacted one of the most comprehensive of the newly popular vote-suppression statutes. The Fourth Circuit declared it unconstitutional, with Judge Diana Motz writing for the court that the law had been passed with discriminatory intent and reflected an effort to "target African-Americans with almost surgical precision".[69] The Supreme Court denied the state's petition for *certiorari*.[70] In a separate "statement respecting the denial of certiorari", Chief Justice Roberts spoke with evident regret about why the Court had deemed itself unable to grant the state's petition. Shortly after the state filed its petition, a new governor and attorney general, both Democrats, took office. The attorney general moved to dismiss the petition. The General Assembly, still Republican-controlled, objected and moved to intervene in order to defend the law and appeal the Fourth Circuit decision. The question of who had authority to speak for the state was looming, without a readily apparent answer. This is what the Chief Justice concluded after describing the ongoing confusion:

"Given the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that 'the denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'"[71]

The Chief Justice's statement was both gratuitous and revealing. He was saying, unmistakably: *I wish we could have gotten our hands on this case, but the political mess in the state makes that impossible. By no means, however, should anyone suppose that we approve of the Fourth Circuit's invalidation of this law.*

At the beginning of the year, Democrats in the House of Representatives introduced a bill they call the For the People Act of 2019, designed to increase the country's notoriously low voter participation by, among other measures, permitting same-day registration and making Election Day a federal holiday. Senator Mitch McConnell,

---

[68] 570 U.S. 529 (2013).

[69] *North Carolina State Conference of the NAACP v. North Carolina*, 831 F. 3d 204, __ (2016).

[70] *North Carolina v. North Carolina State Conference of the NAACP*, 137 S. Ct. 1399, No. 16-833, cert. den. May 15, 2017.

[71] *Id.*, at 2.

Republican of Kentucky and the Senate majority leader, took to the Senate floor to denounce the bill. He called it a "power grab".[72]

Making it easier to vote is a power grab? That is the point to which the culture wars have brought us. Will the Supreme Court permit itself to be enlisted as a combatant in the cause of protecting voting rights, or of enabling voter suppression? In the answer to that question and to the other questions I have raised here lies the future not only of civil society, but of democracy itself.

[72] Matthew Haag, *Mitch McConnell Calls Push to Make Election Day a Holiday a Democratic 'Power Grab*', N.Y. Times, Jan. 31, 2019.