2021

Blue Brief 2020-2021

University of San Diego School of Law

USD School of Law
2020-21 U.S. Supreme Court Decisions

Blue Brief

Faculty Review of 2020-21 Supreme Court Term

University of San Diego
SCHOOL OF LAW

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I. Introduction

Robert Schapiro

The University of San Diego School of Law is pleased to announce the inaugural **Blue Brief**, a faculty review of selected rulings from the most recent Term of the United States Supreme Court. Even before I joined the School of Law in January of this year, I was deeply impressed with the scholarly expertise of our outstanding faculty. I believe you will enjoy reading their assessments and reviews of cases ranging across a variety of significant topics, including antitrust, church and state, copyright, criminal law, elections, healthcare, and student speech.

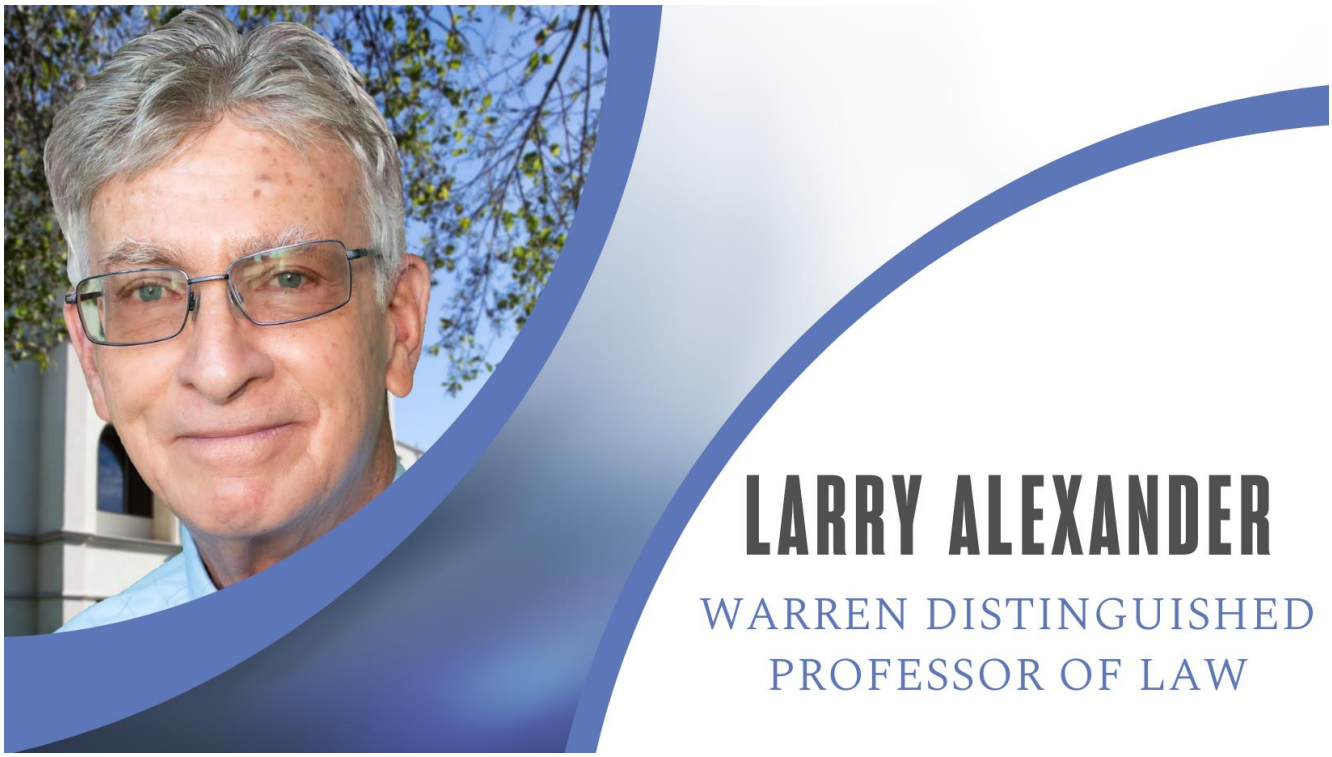
Some cases represent the Court's grappling with the constitutional doctrines that you studied in law school, including free speech and personal jurisdiction. Others feature return engagements for important federal statutes, such as the Voting Rights Act, and the Affordable Care Act. In some ways, this past term of the Court was unique. Like the rest of the world, the Court had to embrace a wide range of innovative ways to

operate during the pandemic. The biggest technological change was the shift to livestream audio technology. This Term also witnessed the influence of the Court's newest member, Justice Amy Coney Barrett.

We are very happy to share the insights of our eminent faculty. We are eagerly awaiting the opening of the Court's new Term on October 4, and we look forward to reporting back to you next summer with the latest developments.

Warm Regards,

Robert A. Schapiro
Dean and C. Hugh Friedman Professor of Law



II. Eight Cheers for Student Speech: *Mahanoy Area School District v. B.L.*

Larry Alexander

May a high school discipline a student for what she expresses while not in school? In *Mahanoy Area School District v. B.L.*, the U.S. Supreme Court gave its answer to this question: a resounding "maybe."

At the end of her freshman year at Mahanoy Area High School, Brandi Levy tried out for the varsity cheerleading team. She did not make it but was offered a spot on the junior varsity cheerleading team. Angered by not making the varsity team, particularly because an incoming freshman did, Brandi, while not at school, took to Snapchat and posted a picture of her raised middle finger and an F-bomb-filled denunciation of various school activities, including cheerleading. Although that post was up only 24 hours, during this time, one of the students in Brandi's Snapchat audience took a screenshot of Brandi's post and showed it to the student's mother, a cheerleading coach. That ultimately lead to a decision by the coaches, the school administrators, and the school

board to suspend Brandi from the junior varsity cheerleading team for one year. The basis for that decision was that Brandi had violated team and school rules regarding foul language and sportsmanship.

Through her parents, Brandi sued the school district in federal court. The district court, affirmed on appeal by the circuit court, ordered that Brandi be reinstated on the junior varsity team. The district court judge argued that the post did not cause any substantial disruption of school activities and therefore was a constitutionally protected expression. This was the standard the Supreme Court had announced for on-campus expression in 1969, in *Tinker v. Des Moines Independent Community School District*, in which students wore black armbands at school to protest the Vietnam War. The court of appeals, however, in upholding the district court's decision, went beyond that court's holding and held that *Tinker* only applied to expression on campus and that schools could not discipline students for expression off-campus.

The Supreme Court, in an 8-1 decision, upheld the lower courts' rulings in Brandi's favor. But it refused to go as far as the circuit court and deny schools' ability to discipline students for off-campus expression. The Court gave some examples of off-campus expression that schools might be able to regulate: cases of serious bullying or harassing other students; threats aimed at teachers or students; failure to follow rules about lessons, writing papers, the use of computers, and online school activities; and breaches of school security devices. The Court refused to opine on these possible exceptions to the circuit court's blanket restriction on schools' regulating off-campus speech. It said, "We are uncertain as to the length or content of any such list of appropriate exceptions or carveouts to the [circuit court's] rule…. Neither do we know how such a list might vary, depending upon a student's age, the nature of the school's off-campus activity, or the impact upon the school itself. Thus, we do not now set forth a broad, highly general First Amendment rule…." The Court did, however, note that

schools do not stand in the place of parents with respect to off-campus speech, that students must have some room to speak free from school regulation, and that schools themselves have an interest in protecting unpopular expression.

When the Court turned to consider Brandi's speech, it upheld her right not to be sanctioned on essentially the same basis as had the district court—namely, that the speech posed little danger of substantially disrupting either classes or cheerleading. Eight of the Court's nine justices joined the Court's opinion and its holding in favor of Brandi's reinstatement. Justice Thomas, however, dissented. He believed that Brandi's post degraded the cheerleading program and staff in front of other students and thus had a tendency to subvert the cheerleading coach's authority. For that, Thomas argued, Brandi's discipline was appropriate.

Although the Court's decision settled Brandi's case, it settled almost nothing else. Unless a school attempts to discipline a student in circumstances almost identical to Brandi's, it is anyone's guess how such a case will be decided.

III. In *Brnovich v. DNC*, the Court Weakens Protections for Democracy

Laurence Claus

In 2016, Arizona changed its state election law to narrow the range of people who can collect and submit votes on behalf of Arizona voters. The Democratic National Committee (DNC) sued state officials, alleging that the state was violating Section 2 of the Voting Rights Act of 1965 (VRA) both through the new restriction on ballot collecting and through a longer-standing regulation that invalidates election-day votes cast outside voters' designated precincts. In *Brnovich v. DNC*, the Supreme Court upheld the Arizona laws by vote of 6-3.

Section 2 of the VRA (as amended) prohibits any state voting regulation that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color…." The section elaborates that it is violated if, based on "the totality of circumstances," the political process is not "equally open to participation" by racial minorities in that they "have less opportunity than other members of the electorate to

participate in the political process and to elect representatives of their choice." The DNC alleged that both state regulations "adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens," and that the ballot-collection restriction was also "enacted with discriminatory intent." The district court rejected these allegations, finding that the plaintiffs had not proven disparate impacts large enough to deprive racial minorities of equal access to the political process. The district court also rejected the allegation of discriminatory intent, while acknowledging that "some individual legislators and proponents were motivated in part by partisan interests." A Ninth Circuit panel affirmed, but the judgment was reversed en banc.

In the Supreme Court, Justice Kagan's dissent noted that Arizona had tried to restrict ballot collection in 2011, but retreated during preclearance review by the United States Department of Justice under Section 5 of the VRA. After the Supreme Court in *Shelby County v. Holder* freed the state from the constraints of Section 5, Arizona tried again. The Court in *Shelby County* had emphasized that Section 2's constraint on state voting restrictions remained in full force. But what was the shape of that constraint? Absent proof of intentional race discrimination, did Section 2 nonetheless provide a remedy for racial disparate impacts any time a state could not show that its rules were strictly necessary to serve strong state interests?

Justice Alito's majority opinion said no. Disparate impacts are relevant to whether state voting rules comply with Section 2, the Court reasoned, but so are many other factors, including how burdensome the rules are, how much they depart from the status quo when Section 2's current language was enacted, how large the racial disparities in the rules' impact are, what other opportunities for voting are available, and the strength of state interests served by the challenged rules. "[I]n determining 'based on the totality of circumstances' whether a rule goes too far, it is important to consider the reason for the rule," Justice Alito wrote. "Rules that are supported by strong state interests are less

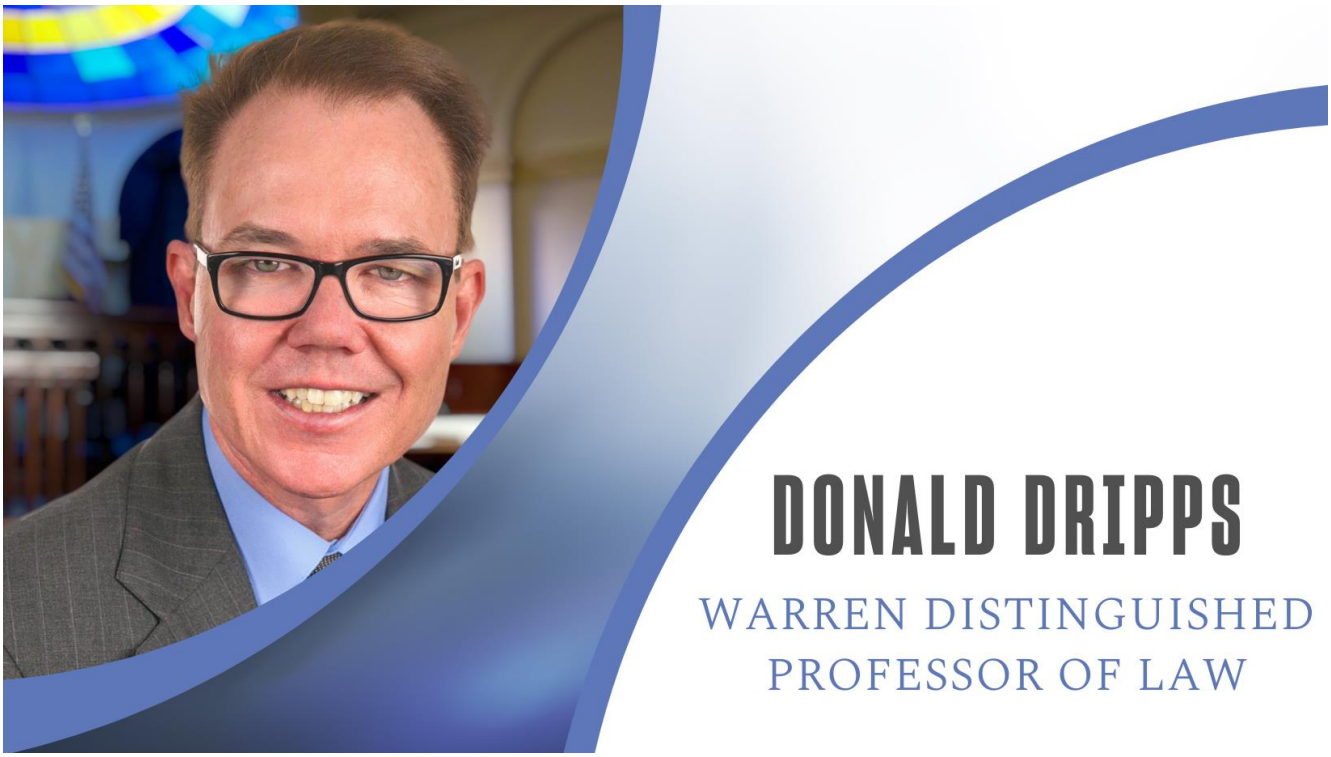
likely to violate § 2." Rules that have a racial disparate impact but serve strong state interests might be valid even if the state could have chosen other rules with less disparate impact to protect those interests. Under the majority's multi-factor analysis, Arizona's rules did not violate the VRA.

What were the strong state interests that Arizona's restrictions reasonably served? For the ballot-collecting rule, the majority identified preventing fraud, intimidation, and undue influence. The dissenters judged these interests sufficiently served by others means, notably the criminal law. In emphasizing the countervailing interest supporting ballot collection, they cited evidence that "[o]nly 18% of Native voters in rural counties receive home mail delivery, compared to 86% of white voters living in those counties," and that "Native Americans in rural Arizona 'often must travel 45 minutes to 2 hours just to get to a mailbox.'"

What strong interests were served by the rule against voting out of precinct? The interests cited by the majority were about serving the interests of the *voters*: distributing voters evenly in districts to reduce wait times, providing polling places closer to home, and supplying voters with ballots that list only the candidates and questions on which they can vote. The Ninth Circuit had concluded these were not sufficient reasons for discarding out-of-precinct votes. It's one thing to have a rule, but it's quite another to attach a consequence to violating the rule that is at odds with the interests of the rule's intended beneficiaries. Justice Alito observed that counting out-of-precinct votes would complicate vote counting and encourage voters who don't care about voting for local officeholders and issues, to vote wherever they pleased. But do those concerns really reflect strong state interests? If voters are content to deprive themselves of opportunity to vote for local officeholders and issues, how is that a reason to void their choices for statewide and national offices and issues? This seems especially bothersome when there is appreciable risk that a state's cited reasons for a rule are pretextual. Requiring votes

to be cast in precinct might be a way to force voters to face long lines in under-resourced neighborhoods rather than drive to other places where wait times are shorter. That might deter them from voting. And though not currently true in Arizona, one could imagine prohibitions of out-of-precinct voting complementing restrictions on mail-in voting to buttress partisan gerrymandering. To the extent voters mail in their secret ballots, or vote out of precinct, partisan mapmakers may be deprived of data they need to rig boundaries with precision. Precinct voting helps take the guesswork out of gerrymandering.

The challenge posed by *Brnovich* for those who seek to challenge the current wave of state legislative changes to voting rules and procedures derives from the fact that the concerns of the litigants are imperfectly aligned with the concerns of the VRA. The act focuses on race discrimination. The litigants are primarily focused on partisan discrimination. Race discrimination may loom large behind some instances of partisan discrimination, but not all. Consider, for example, the state voting rule struck down by the Supreme Court of New Hampshire the day after *Brnovich* was decided. That rule made it hard for college students to establish domicile in New Hampshire for the purpose of voting there. The state court in that case could point to a state constitutional promise of voting rights without needing to establish a racial dimension to the state law's injustice. *Brnovich* makes it less likely that suing over racial disparate impacts will help protect democracy for all of us.



IV. The End of the Watershed: *Edwards v. Vannoy* and Federal Habeas Review

Donald Dripps

In *Edwards v. Vannoy*, the Court held that *Ramos v. Louisiana* did not apply retroactively to convictions no longer subject to direct review when the Court decided *Ramos*. *Apodaca v. Oregon* held that the federal constitution permits felony convictions in state courts by nonunanimous jury verdicts of ten to two. *Ramos* overruled *Apodaca* based on the original understanding of the Sixth Amendment.

A Louisiana jury convicted the petitioner, Edwards, of robbery, rape, and kidnapping by a vote of eleven to one, a dozen years before *Ramos*. Edwards sought to vacate his conviction by a petition for federal habeas corpus.

The plurality opinion in *Teague v. Lane* sets out the template for assessing retroactivity issues raised when state prisoners seek the benefit of Supreme Court decisions rendered after their convictions have become final. *Teague* decreed a distinction between

procedural and substantive constitutional rules. Procedural rules apply retroactively to all defendants who still have the right to seek a writ of certiorari from SCOTUS. These defendants stand in the same time zone as the named defendant in the new decision itself. When the defendant's conviction has been affirmed by the state's highest appellate court, however, and his or her petition for certiorari is either filed and denied or not filed and time-barred, the case is different. Here the state courts have committed no error and retrials figure to be both difficult and costly. The stakes are higher because the prisoners serving the longest sentences, most likely to benefit from full retroactivity, generally have been convicted of the most serious crimes.

Teague also recognized an exception for "watershed" procedural rulings exemplified by *Gideon v. Wainwright*. In the years since *Teague*, however, it became increasingly apparent that the "watershed rulings" category was a class of one—to wit, *Gideon* itself. The Antiterrorism and Effective Death Penalty Act of 1996 codified the process for state prisoners seeking federal habeas relief. That portion of the AEDPA, 28 U.S.C. §2254(d), purports to preclude federal habeas relief if the prisoner's claim was adjudicated on the merits in state court, *unless* the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]"

Under *Teague*, new constitutional rules of substantive criminal law have full retroactive effect. SCOTUS decisions have full retroactive effect if they reverse state convictions because the definition of the forbidden conduct or the severity of the sentence violates the federal Constitution. For example, the Court's Eighth Amendment decisions limiting juvenile sentences to death or life-without-parole apply even to offenders whose cases have been final for years.

Under *Teague*, *Edwards* was relatively straightforward for a Supreme Court case! *Ramos* declared a new procedural rule, and unless it qualified as "watershed" the new procedural rule would not apply to Edwards. But each of the opinions in *Edwards* went beyond a straightforward application of *Teague.*

The majority opinion, per Justice Kavanaugh, joined by the Chief Justice Roberts, Justice Thomas, Justice Alito, Justice Gorsuch, and Justice Barrett, reviewed the precedents under *Teague* and came to the predictable result. The majority, however, went further and openly announced the death of the "watershed" category. Henceforth, a new procedural ruling applies to all cases still pending on direct review to the Supreme Court—and to no others. Justice Kagan, joined by Justice Breyer and Justice Sotomayor in dissent, would have breathed new life into the "watershed" category by overturning Edwards's conviction. Given the six-to-three result, the Kagan opinion looks like watershed-under-the-bridge.

Justice Thomas and Justice Gorsuch filed interlocking concurrences, each joining the other's separate opinion. Justice Thomas castigated the majority for approaching the issue through the lens of *Teague* rather than from the perspective of the post-*Teague* AEDPA. Justice Gorsuch hearkened back to the common-law roots of the Great Writ, which, prior to *Brown v. Allen*, was understood as a writ to try or release a prisoner rather than as a vehicle for appellate review. Before *Allen*, habeas would not lie to vacate a conviction because of errors at trial. Unless the conviction or sentence exceeded the trial court's jurisdiction, a conviction was a good return to the writ.

Before *Allen*, this jurisdictional error category was not rigidly defined. *Allen* itself equated *any* violation of the federal constitution with jurisdictional error. That was at a time before *Mapp*, *Gideon*, and *Miranda*. *Teague* was one of several post-*Allen* decisions recognizing constitutional claims that were *not* cognizable on federal habeas,

without questioning *Allen's* starting point—for example, that federal constitutional claims are cognizable on habeas, subject to various specific, pragmatically-justified exceptions.

So what was left unsaid in *Edwards* is more interesting than what was said. Arguably, *Teague*'s substantive-law category mirrors the older concept of jurisdictional errors. What if those concepts diverge? Justice Thomas and Justice Gorsuch seem to believe that, in case of a conflict, the statute prevails over *Teague*. The majority ignored both the statute and the concurring opinions, an omission especially curious given the majority's detailed rejoinder to the dissent.

Going forward, convictions can be returned only by unanimous juries. On the long-standing and difficult issues raised by federal habeas for state prisoners, the jury is still out.

V. A Blow to Cancel Culture in *Americans for Prosperity Foundation v. Bonta*

Maimon Schwarzschild

On the final day of this year's Supreme Court term, the Court struck down a California requirement that charitable organizations must disclose the identities of their major donors to the state Attorney General's office. The disclosure requirement—dormant for many years—was revived by Kamala Harris when she was Attorney General of California. With a 6-to-3 vote along ideological lines, the Court in *Americans for Prosperity Foundation v. Bonta* held the California disclosure regime to be unconstitutional on its face because it would chill First Amendment freedoms of association and speech and could not be justified as narrowly tailored to an important government interest.

The case arose from a challenge to the disclosure policy by two conservative charitable organizations. The district court held in their favor, finding that the groups and their supporters had already received violent threats and harassment in the past and that

donors would be less likely to contribute if they might be identified and made the targets of reprisals. The Ninth Circuit reversed the district court and ruled for the state, holding that the policy enhanced the efficiency of enforcing the charity laws. The Supreme Court's decision reverses the Ninth Circuit, noting that although California promises to keep confidential the identities of donors, thousands of disclosures had been inadvertently posted on the Attorney General's website even during the course of the litigation. Donors might also reasonably be concerned that they could be "doxxed" by deliberate leaks.

The Court cited a vivid precedent for its decision: the 1958 civil-rights-era case *NAACP v. Alabama ex rel. Patterson*. The NAACP had opened an office in Alabama to support racial integration, and in response, NAACP members were threatened with economic reprisals and violence. As part of an effort to oust the NAACP from the state, the Alabama Attorney General demanded the group's membership lists. The Supreme Court held that effective advocacy is "undeniably enhanced by group association," and that the Alabama Attorney General's demand violated freedom of association and free speech rights under the First Amendment.

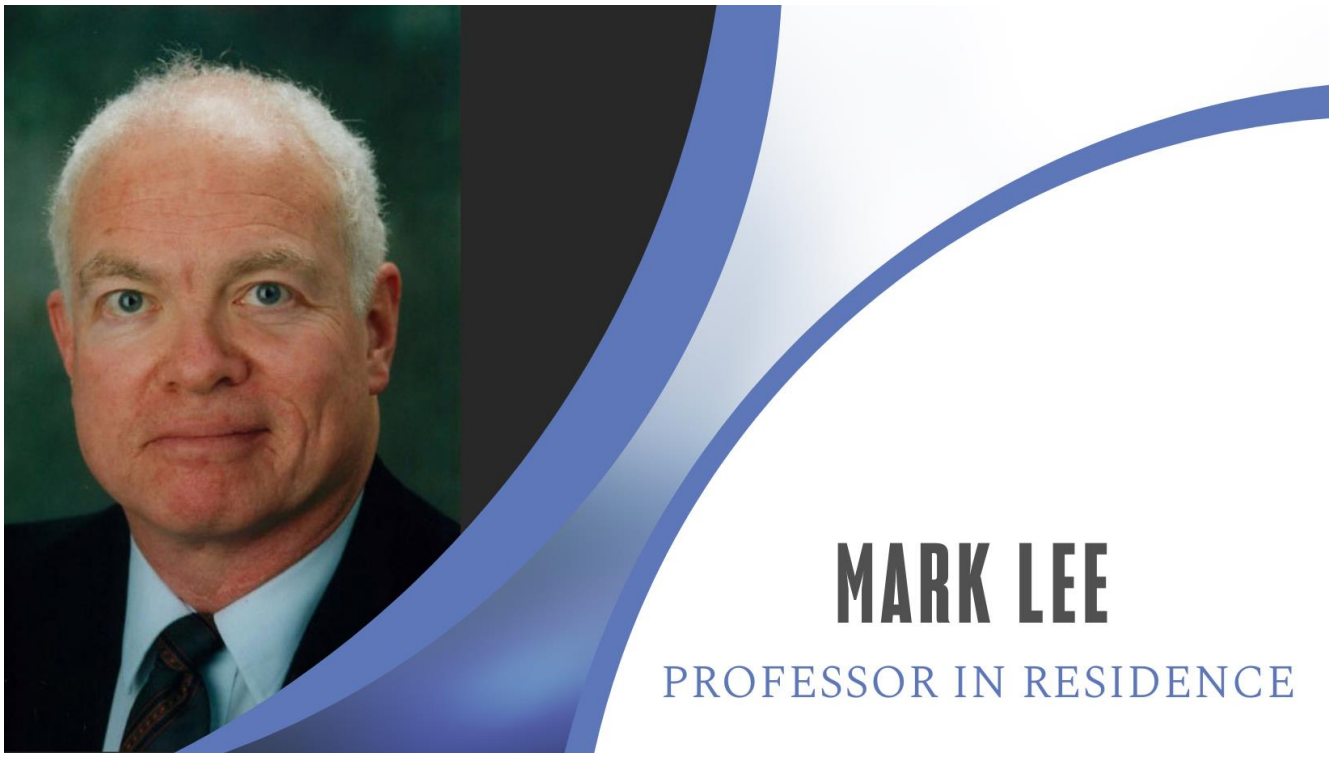
Although the parties to the present case were conservative organizations, they were joined by hundreds of other groups across the political spectrum, including the American Civil Liberties Union and the Council on American-Islamic Relations, which filed amicus briefs on behalf of the challengers and against compulsory disclosure of donors. Nonetheless, Justice Sotomayor, joined by Justices Breyer and Kagan, dissented from the Court's decision. The dissenters would have accepted California's promise of confidentiality and the state's claim that identifying donors would be conducive to law enforcement.

The six justices in the majority were themselves divided on a somewhat technical question. Chief Justice Roberts, joined by Justices Kavanaugh and Barrett, said that when government seeks to compel disclosure of advocacy groups' members or donors, the Court should review the need for disclosure with "exacting scrutiny." Justices Alito and Gorsuch on the other hand implied, and Justice Thomas explicitly said, that the standard should be "strict scrutiny." This might seem a recondite—if not almost medieval—verbal difference: angels, pin. But given the way the courts use these standards, "strict scrutiny" is stricter than "exacting scrutiny." The implication is that Chief Justice Roberts and Justices Kavanaugh and Barrett might be more willing to uphold a disclosure requirement if there were a better justification for it in another case, whereas Justices Alito, Gorsuch, and Thomas might require a truly "compelling" state interest before they would uphold such a thing.

But the majority were united on the essential point in this case. As Chief Justice Roberts wrote, the California disclosure requirement "'creates an unnecessary risk of chilling' in violation of the First Amendment, indiscriminately sweeping up the information of every major donor with reason to remain anonymous. The petitioners here, for example, introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence. Such risks are heightened in the 21st century and seem to grow with each passing year, since 'anyone with access to a computer [can] compile a wealth of information about anyone,' including such sensitive details as a person's home address or the school attended by his children."

There is a long tradition of anonymity in American political debate, running back to the Federalist Papers and Tom Paine's Common Sense; both originally published anonymously or under pseudonyms. The Supreme Court's decision protects the ability of groups with unpopular causes—especially if unpopular with the government—to raise

funds and to make their points in public debate, without exposing their members, donors, or supporters to have their lives or livelihoods cancelled.



VI. *National Collegiate Athletic Association v. Alston*: College Athletes 9, NCAA 0

Mark Lee

Seeking a larger share of the gargantuan revenues generated by college football and basketball, college athletes sued the National Collegiate Athletic Association (NCAA), alleging that the association and a number of its conferences violated antitrust laws by agreeing to restrict the compensation that member institutions may offer their players. The district judge held that the NCAA's restrictions on "education-related" compensation ran afoul of the law and enjoined enforcement of these "unreasonable restraints." The Ninth Circuit affirmed, and in *National Collegiate Athletic Association v. Alston*, a unanimous Supreme Court did likewise.

Whether the restrictions on compensation violated antitrust law depended on whether they were likely to have anticompetitive consequences, such as inefficient production or allocation of resources. The college athletes claimed that the restrictions did just that by causing the compensation that the athletes received to fall below the level that would

prevail in a competitive market. To evaluate this claim, standard antitrust analysis required the court to assess the NCAA's power to set below-market compensation. Assessment of this "market power," in turn, required the court to define the "relevant market." On cross motions for summary judgment, the district court defined it as the market for the student-athletes' athletic services. After summary judgment was entered, the NCAA challenged this definition, but the challenge was untimely and inadequately supported. The NCAA did not pursue the challenge on appeal.

The definition of the relevant market played an outsized role in the outcome of this case, as it has in many, probably most antitrust cases, including the NCAA's previous losing trip to the Supreme Court, *NCAA v. Board of Regents*. In a market defined as student-athletes' athletic services, the NCAA was practically the only buyer, a "monopsonist" in antitrust speak. Accordingly, the Court found that the NCAA had the power to set below-market compensation, which made it almost inevitable that the court would conclude that the restrictions on compensation caused the compensation to fall below the competitive level.

That the compensation restrictions had this anticompetitive consequence did not necessarily mean that they ran afoul of the antitrust laws. Under the "rule of reason," the Court was obliged to weigh this anticompetitive consequence against any procompetitive consequences that the NCAA showed the restrictions had. At the Supreme Court, the NCAA argued that the principal procompetitive consequence of its compensation restrictions was that they "preserve[d] amateurism, which in turn widen[ed] consumer choice by providing a unique product—amateur college sports as distinct from professional sports."

This argument failed to carry the day, and it is this failure that has potentially powerful implications for college sports. The argument failed for two interrelated reasons. First,

the NCAA did not offer a coherent definition of "amateurism" that comported with its own frequently changing rules about what compensation was permitted—some of it non-education-related—and what was prohibited. Second, the NCAA offered no persuasive evidence either (a) that, in formulating its restrictions on compensation, it considered their impact on consumer demand or (b) that its widening of the scope of permissible compensation since 2015 had any negative impact on consumer demand.

Accordingly, the district court enjoined the enforcement of the NCAA's restrictions on "education-related" compensation. This opened the door for colleges and universities to offer the athletes on their teams "computers, science equipment, musical instruments and other items. . . related to the pursuit of various academic studies. . . post-eligibility scholarships to complete undergraduate or graduate degrees at any school; scholarships to attend vocational school; expenses for pre- and post-eligibility tutoring; [reimbursement for] expenses incurred in connection with studying abroad. . . ; and paid post-eligibility internships." Of course, this sort of compensation would be small beer compared to "non-education-related" compensation, such as salaries and signing bonuses.

For the most part, the district court declined to enjoin the NCAA's restrictions on "non-education-related compensation," and the college athletes did not ask the Justices to review this decision. Had they, would they have prevailed? They would have picked up Justice Kavanaugh's vote, as he went out of his way to make clear in his concurring opinion. Using Justice Gorsuch's opinion for the Court as a guide, one would predict that the athletes' ability to secure the votes of the other justices would have depended largely on the NCAA's evidence that its restrictions on non-education-related compensation had a positive impact on consumer demand. The NCAA did not have much. The district court cited only the testimony of "[s]ome lay witnesses, particularly those who have professional experience with third-party networks such as CBS or

ESPN, . . . that the value of media rights contracts has a relationship to the popularity of college sports as being distinguishable from professional sports." Such evidence may not stand up against contrary empirical evidence marshalled by college athletes in a future case challenging the NCAA's restrictions on non-education-related compensation.

VII. In *Ford Motor Company*, the Justices Offer Competing Visions of Minimum Contacts

Shaun P. Martin

In *Ford Motor Co. v. Montana Eighth Judicial District Court*, the Supreme Court unanimously concluded that the state in which an auto accident occurred could constitutionally exercise personal jurisdiction over a manufacturer for alleged defects in a vehicle that injured a resident of that state. However, the justices offered strikingly divergent views as to why jurisdiction exists in such cases.

The opinion involved two consolidated cases. In the first, a suit was filed in Montana by the estate of a Montana resident killed when the tread allegedly separated from the tire of her 1996 Ford Explorer as she drove the vehicle near her home. In the second, the airbag of a 1994 Crown Victoria allegedly failed to deploy during an accident that occurred in Minnesota, injuring a Minnesota resident who subsequently sued Ford Motor Company in that state.

Both actions were filed by in-state residents based upon an accident that transpired in the state. However, in both cases, the vehicles were originally purchased outside the state. The defendant argued that because the defective vehicle was sold elsewhere, the requirements of specific personal jurisdiction were not satisfied because the lawsuit did not arise out of activity that occurred in the forum. The lower courts disagreed, holding that specific jurisdiction existed, and the Supreme Court granted certiorari.

The narrowest view of personal jurisdiction in such cases was articulated by Justice Alito, who maintained that while personal jurisdiction existed, that was only because the lawsuit "arose out of"—i.e., was directly caused by—Ford's contacts with the forum state. Ford indisputably advertised in the forum state, sold vehicles of the same make and model in the forum state, and serviced those same types of vehicles in the forum state. Such contacts, Justice Alito argued, likely encouraged the purchase and use of the defective vehicles at issue, thereby creating specific jurisdiction.

By contrast, the majority opinion, authored by Justice Kagan, did not believe that a strict causal relationship necessarily existed here, nor that such a causal connection was required by either precedent or common sense. Justice Kagan cited prior opinions that held that personal jurisdiction existed if a cause of action either "arose out of" or "related" to the defendant's contacts with the forum state. Because Ford's advertising, sales, and service in the forum state "related to" the vehicles involved in the accident, the majority held that specific jurisdiction existed notwithstanding the potential absence of a "but for" causal relationship between those in-state events and the out-of-state purchase of the vehicles.

A final vision of personal jurisdiction was articulated by Justice Gorsuch's concurrence, joined by Justice Thomas. Justice Gorsuch maintained that the doctrine of specific jurisdiction articulated in *International Shoe v. State of Washington* was outdated, and he

argued for an alternative "originalist" view of jurisdiction. As the majority opinion noted, Justice Gorsuch did not elaborate on the precise contours of such an alternative approach; however, Justice Gorsuch's reasoning seemed to suggest that because, in his view, states could constitutionally bar out-of-state manufacturers from entering their state entirely (notwithstanding modern dormant Commerce Clause jurisprudence), states could similarly condition doing business in the state upon consent to the exercise of personal jurisdiction there.

Justice Gorsuch's view, if adopted, would likely result in an expansion of the constitutionally permissible exercise of personal jurisdiction by state courts. Justice Alito's concurrence expressed some support for this alternative vision, and Justice Barrett did not participate in the case. The opinion in *Ford Motor Company* accordingly suggests that there is substantial support amongst some of the conservative members of the Court for a departure from the minimum contacts test applied for the past 75 years since *International Shoe*, although at present, not by a majority of the justices.

VIII. A Fair Application of the Fair Use Factors in *Google, LLC v. Oracle America, Inc.*

David McGowan

The Supreme Court's opinion in *Google, LLC v. Oracle America, Inc.*, brought closure to a protracted copyright case and strengthened fair use arguments in cases where copying facilitates production of complementary, rather than substitute, technology.

The copyrighted works at issue were part of the Java technologies developed by Sun Microsystems. Sun sought to make Java a "cross-platform" technology that would allow developers to write programs that would run on different operating systems. It therefore promoted widespread use of Java, and millions of programmers learned to use it.

When Google began to develop the Android operating system for mobile phones, it sought to take advantage of industry familiarity with Java by incorporating certain Java technology into the Android platform. Google negotiated with Sun for a license, but the negotiations failed. Google went ahead on its own, with over 100 engineers working for

three years to develop Android. Google copied approximately 11,500 lines of Java code relating to APIs—interfaces between the operating system and application programs.

Oracle bought Sun in 2009. The following year, Oracle sued Google for copyright infringement. The parties called the specific code at issue "declaring code," which meant code that provides both the name for specific tasks and the location of each task within the API's organizational system. The case was tried twice. Oracle won neither trial but won two appeals: the first holding that the relevant code was copyrightable and the second that Google's copying was not fair use. The Supreme Court assumed the first issue was correctly decided and reversed on the second.

The Copyright Act lists four nonexclusive fair use factors: (1) the purpose and character of the use (copying), including whether it is commercial; (2) the nature of the copied work; (3) the amount and substantiality of the copied portion in relation to the copyrighted work as a whole; and (4) the effect of the copying upon the potential market for or value of the copyrighted work. Factors one and four often reduce to asking if the copying substituted for purchase or license of the copied work, and they tend to point the same way. In most cases, they are the most important factors.

Justice Breyer wrote for the majority. He was the justice most familiar with the issues, having written in 1970 an article assessing whether software should be treated as copyrightable subject matter (he was skeptical), a question resolved by later amendment to the Copyright Act. His opinion began with the nature of the work (factor two). The majority thought the declaring code inseparably tied to uncopyrightable ideas and implementing code, in which Oracle did not hold the rights. Unlike many programs, the majority thought the value of declaring code "in significant part derives from the value that those who do not hold copyrights, namely, computer programmers, invest of their own time and effort to learn the API's system."

The Court's analysis of the nature of the code was reflected in its analysis of the first factor—the nature of the copying. Case law distinguishes "transformative" uses from others, with "transformative" referring to copying to create something new rather than just to reproduce the copyrighted work. The majority found that Google's copying was transformative because it facilitated the creation and use of new works—programs written by programmers using Java declaring code. In economic terms, the majority saw the copied declaring code as facilitating creation of complements rather than substitutes for the declaring code itself. This analysis was sound, particularly given that much of the value of the declaring code appeared to derive from developer familiarity rather than from an intrinsic property of the code.

With respect to the amount of copying (factor three), the majority noted that one can either consider a nominal amount—the 11,500 lines of code Google copied—or a fraction. If it is a fraction, a denominator must be chosen. The majority chose the latter approach because the purpose of the copied declaring code was to invoke execution of other code, which means the utility of the copied code was inextricably tied to a greater whole. Google did not copy the declaring code for its standalone value—as one might copy just the best parts of a story, or the juiciest revelation in a book ("why I pardoned Nixon" was the part of Gerald Ford's biography most people cared about). Instead, Google's copying allowed developers to take advantage of their own knowledge of Java to work with the APIs as a whole. Java APIs had 2.86 million lines of code, of which the copied code comprised 0.4 percent, which the majority found weighed in favor of fair use, particularly given that the copied code was tied to transformative uses.

The majority's analysis of the fourth factor—market effects—considered the cost to the rightsholder (Oracle), the nature of that cost (whether by substitution or reduction of demand as might result from a negative review), and the public benefit. The majority cautioned that it did not hold that each of these elements must always be considered in

every case, but its full-blown cost-benefit approach has no logical bound and future litigants would do well to cover each element. The history of the technology hurt Oracle on this point. Sun was not a smartphone company, and its former CEO testified that Google's copying did not cause Sun to fail in the smartphone market. In addition, Sun's plans for Java depended in part on popularizing the technology so developers might embrace it, a purpose that suggested that copying furthered rather than hindered Sun's business model. And the majority noted that pointing to the revenue Google earned from Android, was not by itself, enough to answer the question whether revenue was generated by declaring code rather than by developer investments in learning.

In dissent, Justice Thomas argued that the majority gave insufficient weight to Congress's decision to extend copyright protection to software. He thought this decision effectively foreclosed the distinction between declaring code and implementing code, which the majority stressed. The majority opinion took a functional approach; the dissent was comparatively formal and categorical.

On balance, the majority's analysis is sound and strikes a good balance between the creator's interest in earning a return and the public interest in access to works. The formal approach adopted by the dissent is at odds with the run of copyright cases, and it is heartening that the approach received little support.

IX. In *California v. Texas*, The Affordable Care Act Survives Yet Again

Miranda McGowan

Since its enactment in 2010, the Affordable Care Act has provoked Tasmanian-devil-like fury among conservatives, resulting in at least three major Supreme Court challenges. This term's *California v. Texas* is the latest episode. The ACA has dodged these attacks so far—and, as with Bugs Bunny, sometimes improbably.

Justice Alito's dissent in *California v. Texas* summarized the history of the ACA's improbable survival.

> *No one can fail to be impressed by the lengths to which this Court has been willing to go to defend the ACA against all threats. A penalty is a tax.*

Here, Justice Alito referred to Chief Justice Roberts's opinion in 2012's *NFIB v. Sebelius*, which upheld the "individual mandate" against the attack that Congress lacked authority to impose a monetary penalty on people who did not buy minimum, essential

health insurance. Five justices, including Roberts, did agree that Congress lacked commerce clause power to do so, reasoning that the ACA did not regulate a market but forced people to enter one. But Roberts provided the fifth vote to uphold the mandate under the taxing power, even though construing a "penalty" to be a tax was not the most "natural reading" of the ACA.

> *The United States is a State.*

Here, Justice Alito referred to Chief Justice Roberts's opinion in 2015's *King v. Burwell*. The ACA authorized states and the federal government to create insurance "exchanges" to make it easier for individuals to buy individual policies and gave them tax credits for buying policies through "an Exchange established by the State." But what about insurance purchased through the federal exchange? As he had in *NFIB,* Roberts rejected the challenge and brushed aside the most "natural reading" of the ACA in favor of a "fairly possible" one that preserved the tax credits.

> *And 18 States who bear costly burdens under the ACA cannot even get a foot in the door to raise a constitutional challenge. So a tax that does not tax is allowed to stand and support one of the biggest Government programs in our Nation's history.*

That's this term's *California v. Texas*. State and individual plaintiffs had argued that the individual mandate was no longer a constitutional exercise of the taxing power because in 2017 Congress had set the penalty/tax to zero. Because the "individual mandate" was central to the ACA's scheme, they argued, it could not be severed from the rest of the ACA, and the ACA must fall as a whole.

Once again, the ACA survived. This time, the ACA owed its survival to the Court's holding that the plaintiffs lacked Article III standing. The individuals' claims were easy to dismiss. People faced no penalty if they didn't buy insurance, so there was no injury

in fact. To the extent the states argued that their "injury" derived from costs flowing from individuals' insurance purchases, the states too lacked standing.

Justice Alito dissented, arguing that the states had standing on a different theory—the theory of "inseverability." Other *constitutional* provisions of the ACA (the expansion of Medicaid, for example) undoubtably imposed costs on the states, and thus, injured them. Justice Alito contended that the Court could redress these injuries by invalidating the ACA as a whole, which should follow if the individual mandate was both unconstitutional (not a tax and not justified under the taxing power) and not severable.

The Court refused to address this theory as being raised too late. But if it had, it likely would have rejected it. Chief Justice Roberts had scoffed in oral argument that it "really expands standing dramatically." "[S]omebody not injured [by] the provision that needs challenging. . . [could] roam around through" a major piece of legislation like the ACA and "pick out whichever" provisions "he wants to. . . attack." Standing must be more constrained because "the only reason we have the authority to interpret the Constitution is because we have the responsibility of deciding actual cases."

The states would have lost on the merits anyway. True, in 2010, Congress had believed the individual mandate was essential to the ACA. But in 2017, when Congress zeroed the penalty out, Congress no longer thought so, and Congressional intent governs severability. Congress also happened to be right: healthy people buy insurance without a mandate. The mandate is only part of the ACA—among other things. The ACA also dramatically expands Medicaid, subsidizes the purchase of insurance, bars insurance companies from excluding preexisting conditions, requires them to assess risk at the community, not individual, level, and requires many employers to provide their employees with insurance.

More challenges to the ACA loom on the horizon. One, *Kelley v. Becerra*, concerns federal regulations that require insurance companies to cover certain preventative care at low or no cost. These regulations, the plaintiffs claim, are unconstitutional because the regulatory bodies that create the list of mandated preventative care are not Article II "officers of the United States". Congress's delegation of authority to these bodies is also challenged as unconstitutionally vague. According to a couple of legal scholars, this second ground might get traction with at least five justices on a theory of delegation favored by Justice Gorsuch and recently endorsed by four other justices. So, stay tuned!

X. In *Collins v. Yellen*, Another Step on the Road Back to Presidential Removal Authority

Mike Rappaport

In *Collins v. Yellen*, the Supreme Court made clear that the limitation on Congress's ability to restrict the President's removal power over executive officials announced in last year's *Seila Law* case was no aberration. Instead, the Court extended that holding to place additional limits on Congress's ability to create independent agencies and to prevent presidents from removing executive officers. The case also involved interesting disputes over the appropriate remedy for unconstitutional removal restrictions.

Collins involved the Federal Housing Finance Agency (FHFA), an independent agency with regulatory and conservatorship authority over Fannie Mae and Freddie Mac. After the agency was created following the 2008 financial crisis, it placed Fannie and Freddie into conservatorship and negotiated agreements for the companies.

Relying on last year's decision in *Seila Law v. Consumer Financial Protection Bureau*, Fannie and Freddie shareholders challenged one of the agreements on the ground that the office of the director of FHFA was unconstitutional because the director could only be removed for cause by the president. In *Seila Law*, the Supreme Court had significantly cut back on the 1935 case of *Humphrey's Executor v. United States*, which had allowed Congress to place a for-cause removal restriction on the heads of independent agencies. While *Humphrey's Executor* involved a politically bipartisan commission, which exercised mainly quasi-legislative and quasi-judicial authority, *Seila Law* involved the CFPB, an agency that was controlled by a single director and had broad executive authority over financial regulation. The Court concluded that *Humphrey's Executor's* allowance of for-cause removal restrictions could not be extended to the CFPB because it was not a politically bipartisan commission but a single-headed agency, and because it exercised much broader executive authority than the Federal Trade Commission (FTC) did in *Humphrey's Executor*.

In *Collins*, the Court agreed with the shareholders that the removal restriction on the director of FHFA was unconstitutional because—unlike the FTC in *Humphrey's Executor*—the agency was not a political bipartisan commission, but an agency headed by a single official. While defenders of FHFA's removal restriction argued it was distinguishable from the CFPB, in part, because the agency had less executive power in a variety of ways, the Court disagreed. Instead, the Court made clear that removal restrictions on single-headed agencies were unconstitutional even when an agency exercised less than "significant executive authority." This extension of the *Seila Law* precedent suggests that it will be given a broad interpretation, and even raises the possibility that the Court will in the future hold unconstitutional presidential removal restrictions on some or all politically bipartisan commissions.

The three progressive justices parted ways from the majority in *Collins*. Justice Kagan accepted *Seila Law* as a matter of *stare decisis*, even though she had strongly disagreed with the decision. But while she agreed that *Seila Law* dictated the outcome in *Collins*, she refused to join the majority on the ground that its opinion unnecessarily extended the *Seila Law* holding. By contrast, Justice Sotomayor, joined by Justice Breyer, did not believe that *Seila Law* governed *Collins*, but instead was distinguishable in part because the FHFA wielded less than significant executive power.

Finally, the justices differed as to the remedy. The majority concluded that the mere fact that the director of FHFA was subject to a statutory removal restriction did not necessarily render his actions unconstitutional. Instead, his actions would only be unconstitutional if there was evidence that the president would have desired that he take different actions. By contrast, Justice Gorsuch argued that the removal restriction automatically rendered the director's actions unconstitutional. Whatever the merits of this legal debate amongst the justices accomplished, the decision has already had a real-world consequence. In the days after the decision, President Biden promptly removed FHFA's director and the head of the Social Security Administration. In the political sphere, at least, the *Collins* decision is already making its impact felt.

XI. *Fulton v. Philadelphia*: Kicking the Can Down the Road (Again)

Steven D. Smith

Headlines—and vote counts—can be misleading. In the much-anticipated case of *Fulton v. Philadelphia*, the Supreme Court ruled unanimously that Philadelphia had violated the free exercise rights of Catholic Social Services (CSS) by excluding the church agency from the city's foster care program for refusing to sign onto the city's anti-discrimination policy. The conflict between religious freedom and antidiscrimination laws has been fiercely debated—and fiercely litigated—in recent years; and the result in *Fulton* might seem to indicate a resounding victory for the religious freedom side. But your suspicions might be aroused upon learning that the Court's more liberal justices (Kagan, Sotomayor, and Breyer) all joined in the majority opinion by the Chief Justice, while the more reliably conservative justices (Alito, Gorsuch, and Thomas) wrote or joined concurring opinions sharply attacking the majority. And the suspicions would be warranted.

Philadelphia's Department of Human Services contracts with over twenty private agencies, some religious and some secular, to assess applications and make placements in its foster care program. CSS has been one of those agencies for decades, and it is currently the only agency that declines (on religious grounds) to place children with unmarried or same-sex couples. In fact, no same-sex couple has ever applied to CSS. If that were to happen, the agency would refer the couple to one of the other agencies. Nonetheless, when a newspaper criticized the arrangement, the city ceased to refer applications to CSS, and it thereafter declined to renew CSS's contract.

CSS contended that the city's actions violated the First Amendment's free exercise clause. All nine justices agreed. So much for the case itself!

But *Fulton* had been apprehensively watched because of its larger implications. Here is some boiled-down background. In modern debates, two major interpretations of the free exercise clause have dominated discussion. What might be called the "accommodation" interpretation holds that government should affirmatively make space for the exercise of religion. If a law burdens a believer's exercise of religion, the believer should be excused unless the government has an overriding interest in compliance. Such excusals are called "*free exercise exemptions*." The alternative "neutrality" interpretation takes a different view: the free exercise clause does not require exemptions for religious objectors, but merely serves to prevent government from *discriminating against* religion, or against a particular religion.

From at least 1963 through 1990, the Court embraced the accommodation interpretation, with Justice William Brennan as the doctrine's leading champion. But in 1990, in *Employment Division v. Smith*, the Court changed course and embraced the neutrality interpretation (with Justices Blackmun, Brennan, and Marshall dissenting). So long as a law is religiously neutral and generally applicable, Justice Antonin Scalia wrote for the

Court, the fact that it burdens someone's exercise of religion does not create a constitutional problem.

The *Smith* decision was heavily criticized at the time, by scholars, by Congress, and in effect by President Bill Clinton (who enthusiastically supported and signed a law—the Religious Freedom Restoration Act—that attempted to undo the decision on a statutory level). Since then, however, much in the political and academic landscapes has changed. Now, it is more often the conservatives who favor and the liberals who oppose strong protection for religious freedom. When Congress enacted the Religious Freedom Restoration Act in 1993, virtually everyone in and out of Congress applauded. When Indiana enacted a virtually identical law in 2015, all hell broke loose.

Fulton looked to be a fraught case, because in accepting review, the justices had indicated that they would consider overruling *Smith*. In the end, though, they didn't.

To be sure, the three more conservative justices argued vigorously that the Court *should have* overruled *Smith*, and at least two other justices (Barrett and Kavanaugh) strongly indicated that they would be inclined to do so. But although the point had not been argued, the Chief Justice's majority opinion seized on language in the city's foster care contract which the Chief managed to construe (contrary to the city's own interpretation) to mean that the city had discretion to grant exceptions to its nondiscrimination requirements. This authority to grant exceptions meant that the city's policy was not generally applicable, or so the majority maintained.

On this reading, it turned out (contrary to what everyone had supposed) that the *Smith* doctrine did not apply to the case anyway, and there was thus no need to consider overruling that doctrine. The liberal justices joined in that tenuously-maintained

position, it would seem, in order to avoid the more drastic result of a return to pre-*Smith* accommodation.

The bottom line is that, as with the much discussed *Masterpiece Cakeshop* decision of 2018 (the Colorado baker case), the court seized upon a case-specific fact that hardly anyone had even noticed, as a way of kicking the can down the road.