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Steven D. Schwinn

Introduction

Steven D. Schwinn*

We're thrilled to bring you our Second Annual *American Constitution Society Supreme Court Review*. Building on our First Edition, this volume includes yet another outstanding collection of essays by some of the nation's top constitutional scholars and practitioners, exploring the key cases and other highlights from the Court's October Term 2017.

By any measure, this was an overwhelmingly conservative term, with a Court that tilted decidedly to the right in nearly every major case it decided. For example, the Court upheld President Trump's infamous "travel ban."[1] It overturned a ruling that a "cake artist" unlawfully discriminated against a gay couple when he declined to make them a wedding cake.[2] It made it easier for states to purge registered voters from their voting rolls.[3] It struck down a state law designed to inform women of their right to an abortion.[4] And it snatched the rug out from under public-sector unions by invalidating a state's mandatory fair-share fee in the name of free speech.[5] The Court also extended its trend to limit access to the courts in labor and human-rights cases by strictly enforcing

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[1] Trump v. Hawaii, 138 S. Ct. 2392 (2018). Christina Rodriguez covered this case for us.

[2] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). Mary Bonauto and Jon Davidson wrote on Masterpiece for this volume.

[3] Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018). Gilda Daniels contributed a piece on *Husted*

[4] Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

[5] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018). Catherine Fisk wrote about this case.

employment contract arbitration clauses[6] and further limiting the application of the Alien Tort Statute.[7]

In lower-profile, structural cases, too, the Court lurched to the right. Thus, the Court again permitted Congress in effect to dictate the outcome of pending litigation, trading on the independence of the federal judiciary.[8] It also expanded its atextual, states-rights-affirming "anticommandeering principle" to cases where Congress tells a state what *not* to do.[9] And it ruled that Securities and Exchange Commission administrative law judges are "officers" under the Appointments Clause,[10] inviting broader challenges to congressionally imposed, merit-based appointment restrictions in the civil service.

Some of these cases drew some of the progressive justices in the majority. Others drew some of the conservatives in dissent. But here's a measure of just how conservative this term was: Justice Kennedy did not side with the progressives in a single, significant, ideologically divided 5-4 decision.

Still, there were some bright spots for progressive constitutionalists in the areas of criminal procedure. In the most important of these cases, the Court ruled that the government's acquisition of cell-site records from a wireless carrier was a "search" under the Fourth Amendment.[11] The Court also ruled that a driver in lawful possession of a rental car has a reasonable expectation of privacy for Fourth Amendment purposes,[12] and that the Fourth Amendment's automobile exception does not allow the

[6] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018). Charlotte Garden wrote on arbitration at the Court this term.
[7] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018). Martin Flaherty wrote on this case for us.
[8] Patchak v. Zinke, 138 S. Ct. 897 (2018).
[9] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
[10] Lucia v. SEC, 138 S. Ct. 2044 (2018). I'm thrilled to cover this one myself.
[11] Carpenter v. United States, 138 S. Ct. 2206 (2018). Marc Rotenberg contributed a piece on *Carpenter*.
[12] Byrd v. United States, 138 S. Ct. 1518 (2018).

warrantless entry of a home or its curtilage in order to search a motorcycle sitting under a carport, right outside the home.[13] In an offbeat case involving repeat and eccentric Supreme Court litigant Fane Lozman, the Court held that the existence of probable cause for Lozman's arrest did not bar his First Amendment retaliatory arrest claim.[14] In a Sixth Amendment case, the Court held that a criminal defendant has the right to choose the objective of his defense and to insist that his attorney refrain from admitting guilt, even when the attorney thinks that admitting guilt gives the defendant the best chance of avoiding the death penalty.[15]

Finally, there were a couple of important cases that defy conventional left-right labeling. For example, the Court ruled that a state's ban on wearing political apparel at a polling place violated the First Amendment.[16] The ruling favored the politically conservative challengers of the state law, but the holding necessarily sweeps more broadly to protect any political apparel—right, left, or otherwise—at a polling place. And in one of the most important and politically charged issues this term—whether political gerrymandering violates the Constitution—the Court simply punted.[17]

Our very talented authors examine many of these cases in the excellent essays that follow. I'm honored to be able to share these pieces with you; I hope you enjoy them as much as I have.

I want to thank our authors for contributing these essays. I also want to thank Caroline Fredrickson, President, for her continued support for this project, and Kara H. Stein, Vice President of Policy and Program, Christopher Wright Durocher, Senior Director of

[13] Collins v. Virginia, 138 S. Ct. 1663 (2018).
[14] Lozman v. City of Riviera Beach, Fla., 138 S. Ct. 1945 (2018).
[15] McCoy v. Louisiana, 138 S. Ct. 1500 (2018).
[16] Minn. Voters Alliance v. Mansky, 138 S. Ct. 1876 (2018).
[17] Gill v. Whitford, 138 S. Ct. 1916 (2018); Benisek v. Lamone, 138 S. Ct. 1942 (2018).

Policy and Program, and Law Fellows Melissa Wasser and Tom Wright for their tireless efforts to keep this *Review* going strong in its second year, and beyond.

Foreword

David A. Strauss*

We didn't know it at the time, but the 2017 Term was a transitional year for the Supreme Court. It was, of course, the last Term in which Justice Anthony Kennedy had the deciding vote on many high-profile issues. It is not hard to predict that Justice Kennedy's replacement, Brett Kavanaugh, will make the Court more conservative. But as the essays in this collection show, the 2017 Term anticipated that conservative trend. When the Term began, progressives could be a little optimistic. There were cases in which, if the Court had done its job well, it would have moved the law in a progressive direction—protecting minority groups that are subject to unfair discrimination and making sure that the democratic process is truly democratic. But the Court did not do that. And then in other cases, in which there was little realistic basis for hope, the Court did what was expected—continuing to move the law in a conservative direction, sometimes very aggressively so. In these and other respects, the 2017 Term seems likely to be a toned-down trailer for the movie that we will see in the next few years.

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[1] the owner of a bakery refused to sell a cake to a couple that wanted it for their same-sex wedding. That violated a Colorado law forbidding discrimination in public accommodations.

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[1] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).

The owner of the bakery claimed that by applying the law to him, Colorado had infringed his rights to freedom of speech and the free exercise of religion. Colorado courts rejected that claim.

As Mary Bonauto and Jon Davidson explain, it was not clear why the Supreme Court even agreed to hear the case. No lower court had ever accepted such a claim. The religious freedom argument was pretty clearly foreclosed by precedent, and the free speech claim, if taken seriously, would undermine antidiscrimination laws that have been a central part of the law in the United States for more than a half century. But claims like the baker's had been cropping up in the wake of the Court's decisions recognizing the rights of LGBT people, and maybe—some of us thought—the Court just wanted to make it clear that those claims would not succeed.

The Court did not do that. Instead, the Court ruled in favor of the baker for a very odd reason--because of supposed anti-religious bias shown by the Colorado authorities in this particular case. The claim of bias was weak and, more to the point, having taken the case, the Court decided it in a way that did not establish any general principle. As Bonauto and Davidson show, some of the language in the opinion will be helpful in the future in rebutting claims that there is a constitutional right to discriminate against gay people. But the Court did not close the door to those claims.

Protecting the right to vote has, for a long time, been a central progressive priority. Recently, various techniques of vote suppression—voter ID laws, purging voting rolls, manipulating registration requirements—have become more and more popular among conservatives. In *Husted v. A. Philip Randolph Institute*,[2] the Court dealt with a procedure adopted by Ohio that removed

[2] Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018).

people from the list of registered voters because they did skipped voting in a few elections and did not return a postcard. The Court rejected the argument that that procedure violated the National Voter Registration Act. As Gilda Daniels explains, the decision in *Husted*, based on an interpretation of the NVRA that was at least highly questionable, encourages even more aggressive efforts to suppress voting.

Early in the Term, though, *Husted* did not even seem to be the most important case about the kind of democracy we will have. In *Gill v. Whitford*,[3] it looked as if the Court might do something about partisan gerrymandering. The question whether there are constitutional limits on partisan gerrymanders had come before the Court before. There was not much doubt that this was one of those questions on which Justice Kennedy's vote would be decisive. Justice Kennedy had suggested before that he was open to an argument that partisan gerrymandering is unconstitutional, but he said that he had not yet seen a standard that could be applied in resolving that question.

After spending practically the whole Term considering the case—it was one of the first cases argued and one of the last decided—the Court again left the central issue undecided. Instead, the Court ruled, without dissent, that the plaintiffs had not shown that they had standing to sue and remanded the case to the district court to give the plaintiffs a chance to do that. The effect of the Court's ruling was, probably, to preclude some but not all of the theories the plaintiffs had offered as workable standards for determining the constitutionality of partisan gerrymanders; there was some skirmishing in separate opinions by the justices about what avenues, if any, were left open for a future challenge. But

[3] Gill v. Whitford, 138 S. Ct. 1916 (2018).

with Justice Kennedy's retirement, the likelihood that such a challenge will succeed in the future has certainly diminished, to say the least.

In other important cases last Term, the outcome was, unfortunately, predictable, and the Court continued on a regrettable path. *Janus v. American Federation of State, County and Municipal Employees Council 31*[4] was probably the most high-profile example. Some of the justices seem openly hostile to public employee unions, and several years ago they had invited a challenge to agency fees—fees that public employees who are represented by a union pay to the union to defray the cost of the services the union provides. Unions have a duty to represent all employees in a bargaining unit, whether or not they are union members. As Catherine Fisk explains, if agency fees were not required, the union would face a potentially fatal collective action problem: each employee, acting out of self-interest, could free-ride by taking advantage of the union's duty of representation without paying.

The Court ruled that agency fees violated the First Amendment because employees were required to fund speech with which they disagreed. Some public employee unions do engage in political activity, but under a forty-year-old precedent, *Abood v. Detroit Board of Education*,[5] employees had a right to decline to pay the portion of their fees that went to political activity; they could be required only to pay for the union's activity as collective bargaining representative. In *Janus* the Court overruled *Abood*, despite strong arguments against doing so: an extensive structure of labor relations had built up around *Abood*; *Abood* fit comfortably

[4] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).
[5] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

in the fabric of First Amendment law; and there were no severe problems in administering the regime that *Abood* established. In addition, as Professor Fisk shows, *Janus* interpreted the First Amendment in a way that is impossible to square with other well-established principles and that, if taken seriously, would undermine many long-standing institutions in which people indirectly support speech with which they disagree. More generally, as Professor Fisk also notes, *Janus* continued the trend, manifested in several cases in recent years, of using the First Amendment as a way to attack the regulatory state.

Epic Systems Corp. v. Lewis,[6] like *Janus*, was another step in a series of decisions that undermined the ability of employees to protect their shared interests. As in *Janus*, the result was not a surprise. And while the result in *Epic Systems* was not as unprincipled as the result in *Janus*, it seems quite clearly wrong nonetheless. The question in *Epic Systems* was whether the National Labor Relations Act (NLRA), which guarantees employees the right to act collectively, meant that an arbitration clause could not prevent employees from bringing class action-type claims against employers. As Charlotte Garden notes, in a series of decisions the Court has ruled that the Federal Arbitration Act (FAA) makes arbitration clauses in employment contracts enforceable and held that state law may not limit their enforceability. As a result, employers increasingly include arbitration clauses in employment contracts, and those clauses often require employees to pursue arbitration as individuals, not as a class.

But a foundational provision of U.S. labor law, §7 of the NLRA, provides that employees have "the right to self-

[6] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[7] The National Labor Relations Board ruled that the right "to engage in . . . concerted activities for the purpose of . . . mutual aid and protection" meant that an arbitration clause could not bar employees from engaging in collective forms of litigation or arbitration.

The Court disagreed, reading §7 essentially to extend only to activity in the workplace. As Professor Garden explains, the Court's decisions on arbitration have systematically limited the ability of employees to pursue collective relief, which—because an individual employee's claim is often for a small amount, compared to the cost of litigation—is frequently the only effective remedy that an employee has. Professor Garden shows that it is far from clear that the Court was right in the first place to say that the FAA even applies to employment contracts. Even assuming the Court was right about that, it is not clear that the FAA preempts state laws to the extent the Court has said it does, or—the issue in *Epic Systems*—that it should prevail over the protection of "concerted activities" in §7 of the NLRA. At each step, the Court has chosen the course that insulates employers from being effectively challenged for breaching their contracts or violating the law. And Professor Garden identifies troubling language in the Court's opinion in *Epic Systems* that suggests that some justices may be receptive to a *Lochner* era view of the employment relationship, in which employees are simply assumed to have enough bargaining power to protect their own interests.

[7] 29 U.S.C. § 157.

Jesner v. Arab Bank[8] continued yet another trend in the Court's decisions—to limit the use of the Alien Torts Statute (ATS) against violations of human rights. The Alien Torts Statute, which was part of the Judiciary Act of 1789, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[9] As Martin Flaherty explains, for almost 200 years the ATS was more or less ignored, but beginning in 1980 victims of human rights violations used U.S. courts at least to establish the truth of their claims (it was often impossible to recover damages).

In 2004, in *Sosa v. Alvarez-Machain*,[10] the Supreme Court dealt with the ATS for the first time. The Court interpreted the statute somewhat narrowly, but it reaffirmed the basic point that it could be used against egregious violations of human rights. When plaintiffs sued corporations under the ATS, however, the Court took a different turn. First the Court held that the ATS did not extend outside the territory of the United States, and then it held, in *Jesner*, that the ATS applies only to natural persons, not to corporations. As Professor Flaherty says, ATS plaintiffs have alleged that corporations worked hand-in-glove with foreign individuals and nations that are among the worst human rights violators. While the ATS can still be used to sue for violations of human rights, even after *Jesner*, that case forecloses important avenues of accountability. And opinions of some of the justices call the ATS into question on even more fundamental grounds.

[8] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).
[9] 28 U.S.C. § 1350.
[10] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

Trump v. Hawaii[11] was the most high-profile case of the last Term. The Court, of course, upheld the travel ban issued by President Trump. As Cristina Rodríguez shows, on one level, the decision was unsurprising. The travel ban was an action by the president, not just an administrative agency; it invoked an exceptionally broadly-worded statute; and it concerned both immigration and national security, areas in which the courts have been highly deferential to the executive. In a normal administration, the combination of those things would leave no doubt about the outcome of a challenge to the president's action.

We do not live in normal times, though, and the travel ban was accompanied by truly extraordinary evidence of President Trump's hostility to Muslims. In that way, the case involved one of the central commitments not just of progressives but of U.S. constitutionalism: the special responsibility of the courts to protect minority groups from unfair discrimination. So there was, maybe, some reason to hope that the Court would find a way to avoid endorsing the travel ban.

The Court, of course, did not. Professor Rodríguez concludes that the statutory challenges to the travel ban should not have succeeded, given the breadth of the provision on which they were based and the tradition of deference to the executive. But the Court's decision to "elide[ ] powerful evidence of discriminatory motive," she says, amounted to "an abdication of judicial responsibility." The Court treated the evidence of anti-Muslim animus in a way that is inconsistent with basic principles of antidiscrimination law and, for that matter, inconsistent with common sense. The Court concluded that the travel ban should survive because it contained no explicit reference to religion; it did

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

not apply to all majority-Muslim countries; and it was justified, by the executive branch, by a plausible-sounding rationale. Someone who wanted to engage in even the most malign form of discrimination—and who had a little bit of creativity—would be able to satisfy criteria like that.

Still, Professor Rodríguez shows *Trump v. Hawaii* was not as bad as it might have been. The Court did not endorse the position, suggested by language in some infamous cases decided in the wake of World War II, that the Constitution simply does not apply to a decision to exclude noncitizens from the United States. More specifically, she says, *Trump v. Hawaii* did nothing to undermine Due Process Clause challenges to coercive actions against noncitizens, and that allows lower courts to continue to protect noncitizens in important ways.

Two other important decisions from last Term, while relatively narrow, engaged with long-standing issues that are certain to recur. In *Carpenter v. United States*,[12] the Court held that the government must obtain a warrant before it acquires, from a telecommunications company, historical information about the location of a cell phone. It has been clear for a while that established Fourth Amendment doctrine is not well adapted to deal with technology that has developed in recent years. One example is the "third-party" doctrine, according to which the government does not "search" an individual within the meaning of the Fourth Amendment—and therefore does not have to conform to the amendment's requirements, such as (in some circumstances) showing probable cause and getting a warrant—when it obtains information from a third party to whom the individual has voluntarily disclosed it. The principal application of that doctrine

[12] Carpenter v. United States, 138 S. Ct. 2206 (2018).

is the use of informants; the Court extended it, in the 1970s, to the use of a pen register (a device that records the numbers dialed from a phone; the idea was that the individual disclosed that information to the telephone company) and to the government's seizure of an individual's financial records from a bank.

As Marc Rotenberg explains, it is hard to see how *Carpenter* can be reconciled with the third-party doctrine. But the Court avoided overruling the key third-party doctrine cases, leaving the law in an uncertain state (although, to be fair, simply overruling some of the cases would still have left it unclear when the government can obtain information about a suspect from a third party). More generally, *Carpenter* is only the latest example of how the Court has struggled, understandably, to adapt doctrines developed decades ago to a world in which it is much easier for the government both to obtain and to retain information about individuals, and effectively impossible for individuals to live a normal life without disclosing vast amounts of sensitive personal information to third parties like telecommunications companies, internet service providers, credit card companies, and the like. As Professor Rotenberg says, *Carpenter* raises questions not just about the third-party doctrine but about the foundations of Fourth Amendment law. And he describes a path forward for both the courts and Congress.

Finally, *Lucia v. SEC*,[13] another relatively narrow decision on its face, also may turn out to be part of a larger trend—in this instance, a more troubling trend. The Court in *Lucia* ruled that Securities and Exchange Commission Administrative Law Judges (ALJs) are "inferior officers" within the meaning of the Appointments Clause, so that they must be appointed

[13] Lucia v. SEC, 138 S. Ct. 2044 (2018).

by the president or Commission, not (as had been the case) by Commission staff. The decision itself does not have very significant consequences—it is an easy matter for the Commission to ratify the decisions of the staff—and the narrow terms in which it was cast do not by themselves suggest that the decision will have major doctrinal significance. But the narrow nature of the ruling may have been a form of damage control by justices who understood—what Steven Schwinn explains—that the challenge to the appointment of ALJs was part of an attack on the regulatory state that has been an agenda item for some of the justices for several years.

There were no real surprises in the 2017 Term, except, perhaps, for the Court's failure, in *Masterpiece Cakeshop* and *Gill v. Whitford*, to decide important issues that were before it and that should have been decided. In those cases, and in the travel ban case, the Court passed up opportunities to develop the law in ways that the Constitution actually demanded and that would have struck a blow against discrimination and made the nation more democratic. In other cases, the Court continued on a course—often a very questionable course—that it had already set. The 2017 Term was consistent with what went before; it also may have given us an idea of what the future will look like.

Masterpiece Cakeshop v. Colorado Civil Rights Commission: What Was and Wasn't Decided

Mary L. Bonauto and Jon W. Davidson*

After conferencing the petition more than a dozen times,[1] the U.S. Supreme Court granted a writ of certiorari in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* on June 26, 2017.[2] Some of us were surprised. A bakery and its owner had asked the high court to review a Colorado appellate ruling rejecting their claims that the First Amendment's free exercise and free speech guarantees entitled them to refuse to sell wedding cakes to same-sex couples that they sold to other couples, notwithstanding the state's public accommodations nondiscrimination law. That ruling was consistent with longstanding precedents regarding both freedom of expression and the free exercise of religion.[3]

* Mary L. Bonauto is the Civil Rights Director at GLBTQ Legal Advocates & Defenders (GLAD). Jon W. Davidson is Chief Counsel at Freedom for All Americans Education Fund. The authors thank Gary D. Buseck for collaboration on this article, and GLAD also thanks attorneys Shannon Minter and Chris Stoll of the National Center for Lesbian Rights (NCLR) and attorneys Catherine Connors and Nolan Reichl of Pierce Atwood LLP for working together on the GLAD-NCLR amicus brief in *Masterpiece Cakeshop*. Brief for GLBTQ Legal Advocates & Defenders and National Center for Lesbian Rights as Amici Curiae Supporting Respondents, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4946903. Numerous friend of the court briefs were filed in support of Respondents, which are collected by the ACLU, counsel for Charlie Craig and David Mullins. See https://www.aclu.org/cases/masterpiece-cakeshop-v-colorado-civil-rights-commission.

[1] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, SCOTUSblog (last visited Sept. 13, 2018), SCOTUSBLOG.com/case-Files/cases/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commn/.

[2] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017).

[3] *See*, *e.g.*, Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990); Hishon v. King & Spalding, 467 U.S. 69 (1984); Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968); *see also* Brief for Respondents Charlie Craig and David Mullins, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2016 U.S. S. Ct. Briefs LEXIS 4396.

Lower courts had readily—and unanimously—rejected similar claims,[4] and even the Supreme Court had denied certiorari in an analogous case just three years earlier.[5] Given the Court's more recent resetting of the boundaries in cases in which freedom of religion or expression had been raised to challenge government action, however,[6] would this case become a vehicle for curtailing nondiscrimination protections or minimizing marriages of same-sex couples?[7] While the Court's decision does not answer those questions, it embraces long-standing rules in this area and provides important guidance for the road ahead.

I. Background

The facts of *Masterpiece Cakeshop* are relatively simple and largely undisputed. On July 19, 2012, Charlie Craig and David Mullins, accompanied by Craig's mother, entered the doors of Masterpiece Cakeshop, a business that sells baked goods to the general public out of a Denver suburb storefront. Craig and Mullins had decided to get married, but Colorado at the time

[4] *See*, *e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 102 P.3d 937 (Alaska 2004); North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959 (Cal. 2008); Gifford v. McCarthy, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016); State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017).

[5] Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

[6] *See*, *e.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011); Citizens United v. FEC, 558 U.S. 310 (2010).

[7] *See*, *e.g.*, Rev. Irene Monroe, *Will the Supreme Court Allow Businesses to Discriminate Against LGBT People?*, Bilerico Report (June 28, 2017), https://www.lgbtqnation.com/2017/06/will-supreme-court-allow-businesses-discriminate-lgbt-people/. Also of concern, Petitioners' counsel, the Alliance Defending Freedom, took a leading role in opposing marriages of same-sex couples. Some of Petitioners' amici also called out *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), as wrongly decided in their view. *See*, *e.g.*, Brief for Christian Bus. Owners Supporting Religious Freedom as Amicus Curiae Supporting Petitioners at 23 n. 6, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005666.

banned marriage by same-sex couples,[8] and *U.S. v. Windsor* and *Obergefell v. Hodges* were not yet the law of the land.[9] The couple accordingly planned to travel to Massachusetts, where they would marry, and have a reception for friends and family back home afterwards.

Like most engaged couples, Craig and Mullins wanted a cake for their reception. They chose to go to Masterpiece Cakeshop on the recommendation of their reception planner. Upon entering the store, they sat down with Jack Phillips, the bakery's owner, and explained that they wanted to buy a cake for a wedding reception. When Phillips asked them whom the cake was for, Craig and Mullins told him it was for them. Phillips responded that, while his bakery would sell baked goods to lesbian and gay customers for other purposes, it would not sell them baked goods for weddings.

A horrible silence followed. Mullins recalls that they felt dehumanized, mortified, and embarrassed, and they quickly left the store. As they later explained to NBC News, for Craig,

> the interaction was devastating. He remembered how bullies had taunted him for being gay in the small Wyoming town where he grew up. He later attended the University of

[8] Colorado's state constitutional provision that "Only a union of one man and one woman shall be valid or recognized as a marriage in this state," Colo. Const. art. II, § 31, was struck down as violative of the U.S. Constitution by a state district court on July 9, 2014, and by the U.S. District Court for the District of Colorado on July 23, 2014. *See* Brinkman v. Long (Denver District Ct. Case No. 14-CV-30731), *available at* https://www.courts.state.co.us/userfiles/file/Court_Probation/17th_Judicial_District/Adams/brinkman%20sj%20order%20july%209%20final%2007%2014.pdf; Burns v. Hickerlooper, Civil Action No. 14-cv-01817-RM-KLM (D. Colo.), *available at* https://www.scribd.com/document/234913376/1-14-cv-01817-45. Colorado's Attorney General dismissed appeals in these cases and ordered all counties in the state to allow same-sex couples to marry after the U.S. Supreme Court on October 6, 2014, refused to hear appeals from Fourth, Seventh, and Tenth Circuit rulings favoring marriage equality. Deb Stanley, *Colorado Attorney General Orders All County Clerks to Issue Marriage Licenses to Same-sex Couples*, Denver Channel (last updated Oct. 7, 2014, 6:24 PM), https://www.thedenverchannel.com/news/local-news/colorado-supreme-court-lifts-injunctions-against-3-clerks-involving-same-sex-marriage-licenses.

[9] *See* United States v. Windsor, 570 U.S. 744 (2013); *Obergefell*, 135 S. Ct. 2584.

> Wyoming, around the same time gay student Matthew Shepard was murdered. He moved to Denver after he graduated, hoping to find sanctuary in the liberal city encircled by mountains and high plains.[10]

Craig never expected to be shunned there because of his sexual orientation.

The next morning, Craig's mother called the bakery to ask Phillips why he had refused to sell her son a cake. Phillips said that the bakery had a policy of refusing to provide baked goods for weddings of same-sex couples, based on his personal religious beliefs. Craig and Mullins later learned that Masterpiece Cakeshop had turned away at least five other same-sex couples who had sought to buy baked goods for their wedding receptions or for commitment ceremonies, including one couple who simply wanted to order cupcakes.

Because the bakery refused to provide any kind of cake for the couple's reception, there was no discussion of what the couple wanted the cake to look like or how it might be decorated. Nonetheless, as the Supreme Court stated, the parties disagreed about the extent of the baker's refusal to provide service, that is, whether it was limited to putting particular words or symbols on a cake, or "a refusal to sell any cake at all."[11]

II. The Colorado Legal Proceedings

Longstanding Colorado state law prohibits public accommodations—including businesses that open their doors to

[10] Julie Compton, *Meet the Couple Behind the Masterpiece Cakeshop Supreme Court Case*, NBC News (Dec. 6, 2017, 1:28 PM), https://www.nbcnews.com/feature/nbc-out/meet-couple-behind-masterpiece-cakeshop-supreme-court-case-n826976.

[11] *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719, 1723 (2018).

the public such as Masterpiece Cakeshop—from refusing service to individuals based on personal characteristics like race, religion, or sexual orientation.[12] Craig and Mullins filed a complaint with the state. Following an investigation and hearings, the Colorado Civil Rights Commission determined that the bakery and Phillips violated Colorado law when they refused to sell Craig and Mullins a product that the bakery regularly sold to other couples.[13]

The Commission rejected the bakery's and Phillips's defense that they did not discriminate because they were willing to sell goods other than wedding cakes to lesbian and gay customers, ruling that Colorado law required that lesbian and gay customers be offered any goods and services that the bakery "otherwise offers to the general public."[14] In other words, a business can decide *what* goods or services it will create or sell—and here, the bakery refused "to bake cakes containing alcohol, cakes with racist or homophobic messages, cakes criticizing God, and cakes celebrating Halloween,"[15]—but the state' s public accommodations anti-discrimination law means that businesses cannot limit *to whom* they will provide those goods or services based on a customer's sexual orientation or other protected characteristic.

[12] The Colorado Anti-Discrimination Act (CADA) has origins dating back in the state to 1885. The ban on sexual orientation discrimination by public accommodations, Colo. Rev. Stat. § 24-34-601(2), was added to CADA in 2008. The legislature explicitly excluded "a church, synagogue, mosque, or other place that is principally used for religious purposes" from its definition of public accommodations. *See Masterpiece Cakeshop*, 137 S. Ct. at 1725 (citing Colo. Rev. Stat. § 24-34-601(1) (effective Aug. 6, 2014)).

[13] The initial decision of the state administrative law judge, dated December 6, 2013, which granted summary judgment in favor of the complainants and denied Masterpiece Cakeshop's and Jack Phillips's cross-motion, is available at https://www.aclu.org/legal-document/craig-and-mullins-v-masterpiece-cakeshop-decision. The final agency order of the Colorado Civil Rights Commission, dated May 30, 2015, which adopted the administrative law judge's initial decision in full, is available at https://www.aclu.org/legal-document/craig-and-mullins-v-masterpiece-cakeshop-commissions-final-order.

[14] Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 282 (Colo. App. 2015).

[15] *Masterpiece Cakeshop*, 138 S. Ct. at 1745 (Thomas, J., concurring).

The bakery challenged the Commission's decision by appealing to the Colorado Court of Appeals (the state's intermediate appellate court), which unanimously affirmed the Commission's decision.[16] The Court of Appeals rejected the bakery's argument that it and Phillips had not discriminated, in the words of the Colorado Anti-Discrimination Act (CADA), "'because of' [Mullins' and Craig's] sexual orientation" but instead because of the couple's intended conduct of "entering into a marriage with a same-sex partner" and a message of personal approval of the marriage that baking the cake would allegedly convey.[17] The court pointed out that the U.S. Supreme Court had previously rejected such a distinction between the status of being gay and conduct closely associated with that status.[18] It reasoned that, "[b]ut for their sexual orientation, [the couple] would not have sought to enter into a same-sex marriage, and but for their intent to do so, Masterpiece would not have denied them its services."[19]

The Colorado Court of Appeals also rejected the bakery's argument that application of CADA in this situation infringed its and Phillips's federal and state constitutional rights of freedom of speech by compelling them to convey a celebratory message about same-sex couples marrying, in conflict with Phillips's beliefs. The court concluded that the bakery and Phillips would not be conveying a message supporting marriage equality merely

[16] *Craig*, 370 P.3d at 272.

[17] *Id*. at 280.

[18] Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 689 (2010) (stating "[o]ur decisions have declined to distinguish between status and conduct" in the context of sexual orientation); *see also Obergefell*, 135 S. Ct. at 2604 (noting that the "denial to same-sex couples of the right to marry" is a "disability on gays and lesbians" which "serves to disrespect and subordinate them"); Lawrence v. Texas, 539 U.S. 558, 575 (2003) (targeting "homosexual conduct" in criminal law is "an invitation to subject homosexual *persons* to discrimination") (emphasis added); *id*. at 583 (O'Connor, J., concurring) (noting where the law applies to conduct "closely correlated with being homosexual" then the law is about "more than conduct" and is "instead directed toward gay persons as a class").

[19] *Craig*, 370 P.3d at 281.

by abiding by state law and serving all customers equally. It held that, to the extent any message at all is sent by a wedding cake, it is more likely to be perceived as the message of the couple whose wedding it is, not the bakery that provided it.[20] The court additionally stated the bakery could post a disclaimer in the store or on the internet indicating that the provision of its services does not constitute an endorsement or approval of its customers or their celebrations, and further emphasizing that its baked goods do not express a message of approval by the company or its owner of any particular customer or event.[21]

Masterpiece Cakeshop further argued that application of Colorado's anti-discrimination law violated its and Phillips's federal and state constitutional rights of free exercise of religion. The Colorado Court of Appeals rejected this claim as well. First, it found that Colorado's anti-discrimination law is a permissible, neutral law that applies equally to all businesses, and that, in accord with prevailing law, an incidental burden on religion does not support a free exercise claim.[22] Second, it held that freedom of religion does not provide a right to discriminate against or otherwise harm others. The court further held that application of Colorado's law reasonably furthers a compelling interest in ending discrimination, which causes economic and dignitary harms to the state and its residents.[23]

After the Colorado Supreme Court refused to hear the bakery's further appeal,[24] Masterpiece Cakeshop petitioned the U.S. Supreme Court for certiorari. The Court agreed to review the case and heard argument on December 5, 2017.

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[20] *Id*. at 286-87.
[21] *Id*. at 288.
[22] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).
[23] *Craig*, 370 P.3d at 290-94.
[24] Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 2016 Colo. LEXIS 429, 2016 WL 1645027 (Apr. 25, 2016).

III. The Supreme Court Decision

The Supreme Court issued its decision on June 4, 2018.[25] By a 7-2 vote, it reversed the judgment below, but it did so based not on the compelled speech and free exercise grounds that had been the focus of the parties' briefing and the 95 amicus briefs submitted to the Supreme Court after certiorari was granted. Instead, Justice Kennedy, in one of his final opinions for the Court, reversed based on the conclusion that Masterpiece Cakeshop and Phillips had been denied "neutral and respectful consideration" of their claims in the Colorado proceedings,[26] and that the Colorado Civil Rights Commission's treatment of their claims thereby "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint."[27]

A. What the Court Said About Governing Principles and the Legal Arguments

Before considering that holding, it is important to appreciate how the Court conceptualized the case and what it said about the principal issues that were on appeal. First, the Court described the case as involving "reconciliation" of two principles: state authority "to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services," and the "right of all persons to exercise fundamental freedoms under the First Amendment."[28]

As to the first principle, the decision vindicates lesbian, gay, and bisexual (and presumably transgender) people's right to equal treatment, stating:

[25] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).
[26] *Id*. at 1729.
[27] *Id*. at 1731.
[28] *Id*. at 1723.

> Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight by the courts.[29]

Taking the equal treatment principle to a concrete level, the Court approvingly cited the bakery's statement at oral argument that a baker's refusal to "sell any goods or any cakes for gay weddings" would be a denial of goods and services beyond any protected rights of the baker subject to an anti-discrimination law.[30]

As to the second principle, the Court stated that "religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."[31] Yet, these controversies should be rare, the Court suggests, as "there are no doubt innumerable goods and services that no one could argue implicate the First Amendment."[32]

All told, however, the Court did not reconcile those principles because it ruled on the narrower grounds that the state civil rights

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[29] *Id*. at 1727.

[30] *Id*. at 1728. Some may say that all these statements rejecting broad religious exemptions and reaffirming the Constitution's protection of the equal dignity of lesbian, gay, and bisexual people are dicta (statements not necessary to the decision that do not create binding precedent), but lower courts rarely view considered statements of the Supreme Court that way. *See* McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (concluding that "federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement" and collecting cases to like effect from other circuits); *see also* Galli v. N.J. Meadowlands Comm'n, 490 F.3d 265, 274 (3d Cir. 2007) ("Because the 'Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket,' failing to follow those statements could 'frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there.'") (citations omitted); Laub v. U.S. Dep't of Interior, 342 F.3d 1080, 1090 n.8 (9th Cir. 2003) ("Supreme Court dicta is not to be lightly disregarded.").

[31] *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

[32] *Id*. at 1728.

commission had not acted with religious neutrality in adjudicating the case.[33] It left for another day questions of "the confluence of speech and free exercise principles" and the "delicate question" of when "free exercise of religion must yield to a valid exercise of state power."[34]

B. Free Exercise of Religion

Although the Court found no need to reconcile the principles in this case, it set forth generally applicable parameters for future disputes. Crucially, the Court reaffirmed its 50-year old precedent in the historically unique context of race as embracing discrimination against LGBT people as well: "It is a general rule that [religious] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."[35]

Alongside *Newman v. Piggie Park Enterprises, Inc*., the Court cited *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*,[36] a case relied on by the bakery and its supporters to cram cake-baking in the commercial marketplace into the speech paradigm of the privately organized and inherently expressive parade at issue in *Hurley*. But the Court used *Hurley* for a different point: that there is nothing per se problematic about sexual orientation anti-discrimination laws, which are "well within the State's usual power to enact" and "do not, as a general matter, violate the First or Fourteenth Amendment."[37] The Court repeated that point, characterizing as "unexceptional" the government's

[33] *Id*. at 1724.
[34] *Id*. at 1723-1724.
[35] *Id*. at 1727 (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. at 400, 402, n.5 (1968)).
[36] Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos., 515 U.S. 557 (1995).
[37] *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (citing Hurley, 515 U.S. at 572 (1995)).

power to enact anti-discrimination laws and their scope in "protect[ing] gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."[38]

Specifically as to the claim that the First Amendment's Free Exercise Clause provides a constitutional right for those seeking exemptions from public accommodation anti-discrimination laws, the majority opinion reiterated that "[t]he Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws."[39] No justice dissented from the majority opinion's reaffirmation of this longstanding precedent.[40]

The majority opinion built on the Court's landmark gay-rights opinions in *Romer v. Evans*,[41] *Lawrence v. Texas*,[42] *United States v. Windsor*,[43] and *Obergefell v. Hodges*,[44] to signal that "gay persons and couples cannot be treated as social outcasts or as inferior in dignity and worth," and must be allowed to "exercise . . . their civil rights," and "freedom on terms equal to others."[45] Accordingly, lower courts should analyze these claims by according "great weight and respect" to claims by LGBT people seeking to

[38] *Id*. at 1728.
[39] *Id*. at 1723-24; *see also id*. at 1728 ("Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, . . . the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations laws.").
[40] *See id*. at 1732 (Kagan, J., concurring); *id*. at 1734 (Gorsuch, J., concurring); *id*. at 1740 (Thomas, J., concurring); *id*. at 1748 (Ginsburg, J., dissenting).
[41] Romer v. Evans, 517 U.S. 620 (1996).
[42] Lawrence v. Texas, 539 U.S. 558 (2003).
[43] United States v. Windsor, 570 U.S. 744 (2013).
[44] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[45] *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

"exercise . . . their freedom on terms equal to others."[46] In so ruling, the Court effectively rejected the arguments advanced in support of the bakery that trivialized the stigma and dignitary harm from being refused service or urged that no harm occurs at all when alternative service providers are available.[47]

The Court set a high bar for free exercise claims that might even be considered constitutionally protected in part because of the community-wide harms that accepting such claims could cause—harms that anti-discrimination laws exist to guard against. The Court first posited that clergy members who object to marriages of same-sex couples cannot be compelled to perform a ceremony because of free exercise of religion guarantees.[48] (Of course, clergy members are not public accommodations under Colorado's law or the similar laws of other states.) The Court's real point was to state why any "exception" must be "confined," or else "a long list of persons" who provide goods and services for weddings could refuse to do so for gay persons, "resulting in a community-wide stigma" of gay people "inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations."[49] Likewise, the Court rejected as "impos[ing] a serious stigma" signage that would refuse services for "gay

[46] *Id*.

[47] Some amici briefs supporting the Petitioners argued there was no harm when an alternate service provider is available, *e.g.* Brief for The Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 34-35, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4004526; Brief for The Cato Institute and Individual Rights Found. as Amici Curiae Supporting Petitioners at 17, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004528. Others argued that the dignitary harm experienced by Craig and Mullins is insufficient harm for a discrimination claim, particularly where the service provider or vendor also experiences dignitary harm. Brief for the Petitioners at 50-52, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762; Brief for The Christian Legal Soc'y et al. as Amici Curiae Supporting Petitioners at 5, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005662.

[48] *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

[49] *Id*.

marriages."[50] The Court not only recognized the possibility of widespread service denials if religiously-based service refusals were permissible, but that such refusals would effectively subordinate LGBT people and undermine the core purpose of anti-discrimination laws in ensuring equal access to and participation in places of public accommodation.

What is not obvious from the majority opinion but matters to future cases is the Court's adherence to the status quo in the face of an intense assault on anti-discrimination laws. For example, by aligning this case with *Piggie Park*, the Court implicitly rebuffed arguments that the bakery discriminated based on the conduct of the customers—that is, Craig and Mullins's celebration of their wedding, rather than on their sexual orientation or "status."[51] The majority opinion also did not embrace several direct attacks on anti-discrimination laws, such as challenges to the conventional

[50] *See also id*. at 1728-29 ("[A]ny decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons.").

[51] This argument has been rejected by the Court previously. *See* discussion *supra* note 18. *But see* Brief for Petitioners, at 52-53, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762 (arguing that the couple had no compelling dignitary interest, because Phillips would sell them other products, but not "a custom wedding cake that would celebrate their marriage"); Brief of The Becket Fund for Religious Liberty, as Amici Curiae Supporting Petitioners at 25, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004526 (arguing that the baker objected to baking this wedding cake because of opposition to this marriage of a same-sex couple (conduct) and not opposition to the respondents' sexual orientation (status)); Brief of Council of Christian Colleges and Universities, et al. as Amici Supporting Neither Party at 34, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4023116 (arguing that the baker did not discriminate based on status, but declined to "participate (directly or indirectly) in their same-sex wedding because . . . for religious reasons he viewed that ceremony as reflecting a moral choice.").

rationales and compelling interests served by anti-discrimination laws[52] and to the scope of such laws.[53]

Still, there remains at least a theoretical possibility of a future "constrained" religious exemption to anti-discrimination laws. Crafting such an exemption would be onerous, given the "all but endless" factual complications involved in determining whether a free exercise claim might exist, including whether a baker refused to attend the wedding and cut the cake in a particular way, or refused to put "certain religious words or decorations on the cake."[54] Also potentially looming over all of this is the future of the holding laid down in *Employment Divison, Dept. of Human Resources of Oregon v. Smith*, that "a neutral and generally applicable law will usually survive a constitutional free exercise challenge."[55] The bakery, in a footnote, argued that *Smith* should be "reevaluated" if that case did not protect Phillips,[56] and others openly criticized *Smith* or urged its abandonment.[57] Only Justice Gorsuch explicitly referred to *Smith* as purportedly "remain[ing] controversial in many quarters."[58]

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[52] *See, e.g.*, Brief for Petitioners, at 34, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762 (arguing that the state's asserted compelling interest in eradicating discrimination was too broad and that the justification must be assessed with reference to facts of case); Brief for Law and Economics Scholars as Amicus Curiae Supporting Petitioners at 11-16, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4118065 (arguing that there were no monopoly concerns and that same-sex couples may seek alternate vendors).

[53] *See, e.g.*, Brief for Liberty Counsel as Amicus Curiae Supporting Petitioners at 17, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005663 (arguing that laws should be limited to addressing racial discrimination only).

[54] *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

[55] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990).

[56] Brief for Petitioners at 48 n.8, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 3913762.

[57] *See, e.g.*, Brief for The Christian Legal Soc'y et al. as Amici Curiae Supporting Petitioners at 6, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4005662.

[58] *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., dissenting).

C. Free Speech

With respect to the argument that the First Amendment's Free Speech Clause can provide a defense to those who object to complying with public accommodations anti-discrimination laws, the Court did not hold that wedding cakes are speech or expression entitled to First Amendment protection.[59] In a terse discussion, Justice Kennedy called the free-speech aspects of the case "difficult."[60] He noted that "few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech," and yet "the application of constitutional freedoms in new contexts can deepen our understanding of their meaning,"[61] a point he also made in his LGBT-rights cases.[62] He also mused that, "[i]f a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all."[63]

Justice Kennedy further wrote, as noted above, that "the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression,"[64] and quoted from his opinion for the Court in *Obergefell* that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths."[65] By basing the decision in *Masterpiece Cakeshop* on the Court's perception of the Colorado Civil Rights

[59] *Id*. at 1748, n.1 (Ginsburg, J., dissenting).
[60] *Id*. at 1723.
[61] *Id*.
[62] *See, e.g*. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015); Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).
[63] *Masterpiece Cakeshop*, 138 S. Ct. at 1723.
[64] *Id*. at 1727.
[65] *Id*. (quoting *Obergefell*, 135 S. Ct. at 2607).

Commission's hostility toward religion, however, the Court did not further specify whether, or in what circumstances, these objections to the marriage of same-sex couples might justify violating public accommodations laws. Instead, the majority opinion ends as it began, with a call for "tolerance, without undue disrespect for religious sincere beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[66]

While there was little appetite overall for the speech arguments, Justice Thomas's concurrence in the judgment, joined by Justice Gorsuch, took issue with the Colorado Court of Appeals's conclusion that Phillips's conduct was neither expressive nor protected speech.[67] As the bakery argued, Justice Thomas asserted that the "creation of custom wedding cakes is expressive;" that Phillips's message communicated through the cake is that a wedding has occurred, a marriage has begun, and the couple should be celebrated; and that, by discussing the engaged couple's desires and delivering the cake to the reception, "Phillips is an active participant in the wedding celebration."[68] Justice Thomas concluded that strict scrutiny should be applied because, in his view, Colorado was punishing Phillips because of the content of his speech, which Justice Thomas described as "refus[ing] to create custom wedding cakes that express approval of same-sex marriage."[69] Because the Colorado Court of Appeals did not address whether strict scrutiny could be satisfied, Justice Thomas stated that he "will not do so in the first instance," but nonetheless asserted that protecting dignitary harms is not sufficient to overcome free speech, which he claimed

[66] *Id*. at 1732.
[67] *Id*. at 1740.
[68] *Id*. at 1742-43.
[69] *Id*. at 1746.

cannot be suppressed due to audience reaction or offense.[70]

Justice Gorsuch's concurrence (joined by Justice Alito) likewise found that provision of a wedding cake conveys a message, because no one can "reasonably doubt that a wedding cake without words conveys a message."[71] In Justice Gorsuch's view, whether there are "[w]ords or not and whatever the exact design," a "wedding cake [that] is made for a same-sex couple . . . celebrates a same-sex wedding" and Phillips should be able to withhold that approval both as a matter of his religious faith, and as a matter of protected speech.[72] Accordingly, Justice Gorsuch contended, Phillips was justified in refusing to engage in the act of making the wedding cake based on his religious views of approval or disapproval of the wedding at hand—regardless of what the cake looks like. This assertion rests on the supposition that a wedding cake made for a same-sex couple's reception is somehow different from the exact same wedding cake made for a different-sex couple's reception. Whether in a future case Justices Gorsuch, Alito, and Thomas can convince Chief Justice Roberts and Justice Kennedy's successor of this framing remains to be seen.

D. The Religious Non-Neutrality Aspect of the Case

Returning to the opinion's actual grounds for reversal of the decision below, Justice Kennedy found that three aspects of the Colorado Civil Rights Commission's treatment of the bakery's claims had "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the bakery's] objection."[73]

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[70] *Id*. The U.S. Department of Justice made comparable arguments about speech, but contended that application of public accommodations law to protected expression "may" not violate the Constitution in the case of laws targeting race-based discrimination. Brief for United States as Amicus Curiae Supporting Petitioner at 32, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004530.

[71] *Masterpiece Cakeshop*, 138 S. Ct. at 1738.

[72] *Id*. at 1737-39.

[73] *Id*. at 1729.

1. Timing

The first concern was the context of the times when the dispute arose. The dispute arose in 2012, and the Court says that Phillips's "dilemma was particularly understandable" given that Colorado barred marriages of same-sex couples in 2012, and the *Windsor* and *Obergefell* decisions governing access to marriage and respect for existing marriages had not yet been decided.[74]

2. Commissioners' Comments

The timing observation feeds into the second point, namely the comments of two Commissioners before and after ruling on the merits, that the Court understood as expressing "hostility toward the sincere religious beliefs that motivated [Phillips's] objection."[75] One Commissioner had stated that the baker could "believe 'what he wants to believe,' but cannot act on his religious beliefs 'if he decides to do business in the state,'" and also that "he needs to look at being able to compromise."[76] A second commissioner (months later) stated that

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[77]

[74] *Id*. at 1728.
[75] *Id*. at 1729.
[76] *Id*.
[77] *Id*.

Justice Kennedy acknowledged the first Commissioner's comments were ambiguous in that they might simply mean "that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views."[78] But the Court found it "more likely," that these comments "might be seen as inappropriate and dismissive . . . [and] showing lack of due consideration for [the baker's] free exercise rights and the dilemma he faced," particularly in light of the second Commissioner's comments.[79] Justice Kennedy stated that describing Phillips's faith as "despicable . . . rhetoric" disparages his faith both by "describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. . . . This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law."[80] Justices Kagan and Breyer were also troubled by these comments, because "state actors cannot show hostility to religious views."[81]

Whatever one may think of the comments, and distinctions can certainly be made, there is no basis from the *Masterpiece Cakeshop* ruling for arguing that mere enforcement of anti-discrimination laws amounts to religious hostility. As to the comments, it is worth noting that the second Commissioner's comment came two months after substantive decisionmaking

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[78] *Id*.

[79] *Id*.

[80] *Id*. at 1729.

[81] *Id*. at 1732 (Kagan, J., concurring). Others have also observed the tension between Justice Kennedy's reliance on these statements of two of seven commissioners given his joinder in the Supreme Court's the majority opinion in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), less than three weeks later. As Justice Sotomayor objected in her dissent in that case,

> Unlike in *Masterpiece*, where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant.

Id. at 2447.

concluded. Based on precedent about religious prejudice, the four independent layers of decisionmaking in the state proceedings, and the lack of evidence that "prejudice infected the determinations of the adjudicators in the case before and after the Commission," the dissent argues that the few comments should not "overcome Phillips' refusal to sell a wedding cake to Craig and Mullins."[82] Moreover, the comments about "rhetoric" can be understood more about seeking to use beliefs as a defense to conduct that harms others than a direct attack on Phillips's belief system itself.

3. (Claimed) Disparate Treatment of Phillips and Other Bakers

a) Majority Opinion

Justice Kennedy also relied on what he said "could reasonably be interpreted" as inconsistencies between how the Colorado Civil Rights Commission addressed "whether speech was involved" in the case involving Masterpiece Cakeshop and the three other cases of an individual—William Jack—who was a potential bakery customer but was denied cakes with anti-gay messages by other businesses. In the so-called "Jack cases," Jack entered bakeries and requested two cakes,

> made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red 'X' over the image. On one cake, he requested [on] one side[,] . . . "God hates sin. Psalm 45:7" and on the opposite side of the cake "Homosexuality is a detestable sin. Leviticus 18:2." On the second cake, [the one] with the

[82] *Masterpiece Cakeshop*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting).

> image of the two groomsmen covered by a red 'X' [Jack] requested [these words]: "God loves sinners" and on the other side "While we were yet sinners Christ died for us. Romans 5:8."[83]

Justice Kennedy questioned why, in each of the Jack cases, the Commission ruled in favor of the bakeries that had rejected the cake order, whereas the Commission ruled against Masterpiece Cakeshop.[84] First, he pointed to the fact that the Commission ruled against Phillips on the ground that any message that might be expressed by the wedding cake would be attributed to the customer rather than the baker, thereby eviscerating his speech claim, whereas in the Jack cases, the Commission did not address that issue.

Second, Justice Kennedy noted that, at the Colorado Court of Appeals, Phillips had "protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs," and Justice Kennedy's majority opinion concluded that "the Commission had treated the other bakers' conscience-based objections as legitimate," while treating Phillips's objections as illegitimate, thus sitting "in judgment of his religious beliefs themselves."[85]

Finally, the Court of Appeals had rejected the assertion of double standards because "[the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the requested cakes, but because "the Division found that the bakeries . . . refuse[d] the patron's request

[83] *Id*. at 1749 (Ginsburg, J., dissenting).
[84] *Id*. at 1730-31.
[85] *Id*. at 1730.

. . . because of the offensive nature of the requested message."[86] Justice Kennedy seized upon the characterization of the messages on the cakes as "offensive" to complain that "[t]he Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs."[87]

Looking to the future, the Court set forth factors drawn directly from *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,[88] that are relevant to the assessment of government neutrality. These include the historical background of the decision as well as the immediate steps leading to it, and the legislative or administrative history of the policy, including contemporaneous statements of the decision-making body.[89]

All of this said, it is crucial to note that the majority opinion does not go so far as to say that the Phillips and Jack cases are subject to the same rules. Instead, it says Colorado was "inconsistent as to whether speech was involved," which is "quite apart from whether the cases should ultimately be distinguished."[90] And to be sure, there are forceful distinctions aplenty to be made, as addressed in the concurring opinion of Justice Kagan and the dissent, discussed below.

b) Concurring and Dissenting Opinions

It is because the majority suggests that the Phillips and Jack cases might be distinguished in a regime which, in its view, fairly applies the law, that the concurring and dissenting opinions

[86] *Id*. at 1730-31.
[87] *Id*.
[88] Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540 (1993).
[89] *Masterpiece Cakeshop*, 138 S. Ct. at 1731.
[90] *Id*. at 1730; *see also id.* at 1728 (noting "[t]here were, to be sure, responses to these arguments that the State could make" in contending for a different rule in the two sets of cases).

spar over the mode of analysis to be applied in future cases. Justice Gorsuch (joined by Justice Alito) found the two cases indistinguishable, sharing both "all legally salient features"—such as refusing the service of producing a cake they would not sell to anyone based on personal conviction, and having the same effect of denying service to a person with a protected trait.[91]

Justice Kagan's concurrence (joined by Justice Breyer) as well as Justice Ginsburg's dissent (joined by Justice Sotomayor) demonstrate the appropriate legal analysis for distinguishing the Phillips and Jack cases, something the Court found lacking in the Colorado adjudications.[92] For one, the Phillips and Jack cases can be distinguished by "a plain reading and neutral application of Colorado law."[93] Phillips rejected Craig and Mullins's request for a wedding cake because of their sexual orientation, while he regularly sold wedding cakes to other customers. By contrast, Jack requested cakes "denigrating gay people and same-sex marriage" that the bakers would not make for any customer, regardless of the customer's religion. The difference in result was therefore warranted as well: there was no discrimination when the bakers treated Jack "the same way they would have treated anyone else" but Phillips denied the "'full and equal enjoyment' of public accommodations irrespective of their sexual orientation" by refusing wedding cakes he would otherwise produce only to same-sex couples.[94]

As to the issue of "offensiveness" of the message, Justice Ginsburg distinguishes between the "offense" Phillips experienced "where the offensiveness of the product was determined solely

[91] *Id*. at 1735-36 (Gorsuch, J., concurring).
[92] *Id*. at 1729-31.
[93] *Id*. at 1733 (Kagan, J., concurring).
[94] *Id*.

by the identity of the customer requesting it," and the offense of the three bakeries in the Jack cases who "object[ed] to the product . . . due to the demeaning message the requested product would literally display."[95] Since Craig and Mullins "mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold,"[96] the,

> Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination.[97]

Essentially for the same reasons, both Justice Kagan's concurrence and the Justice Ginsburg's dissent also reject the position of Justice Gorsuch's concurrence that Phillips would not sell a "cake celebrating a same-sex marriage" to anyone, just as the Jack bakers would not sell the requested cakes to any customer.[98] But the cake requested of Phillips was "simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike."[99] Although Justice Gorsuch would allow the wedding cake to become something different—*i.e.*, a same-sex wedding cake[100]—because

[95] *Id*. at 1750-51.
[96] *Id*. at 1749.
[97] *Id*. at 1751 (Ginsburg, J., dissenting).
[98] *Id*. at 1733, n.* (Kagan, J. concurring).
[99] *Id*.
[100] *Id*. at 1738 (Gorsuch, J., concurring).

the vendor "invests its sale to particular customers with 'religious significance,'" that position cannot be squared with governing law.[101] For one, public accommodations laws apply even when a vendor's "religion disapproves of selling a product to a group of customers."[102] And the rule flowing from *Piggie Park* is that "[a] vendor can choose the products he sells, but not the customers he serves—no matter the reason."[103]

Justice Gorsuch makes the further argument that the Commission erred in presuming intent to discriminate on the basis of sexual orientation in the case of Phillips and not making the same presumption of intent to discriminate based on religion in the Jack cases, since the person most likely to ask for a cake with those particular religious messages is a person with a particular set of religious beliefs.[104] This obscures the fundamental point, however, that there is nothing discriminatory about refusing to sell a particular product that a vendor would sell to no one. There was no evidence that Jack was being singled out for his religious beliefs when he was denied cakes that disparaged other people, and that disparagement constitutes a legitimate nondiscriminatory reason.[105] To illustrate the point, "Change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the

[101] *Id*. at 1733, n.* (Kagan, J., concurring) (internal citation omitted).
[102] *Id*. (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.5 (1968) *(per curiam)*).
[103] *Masterpiece Cakeshop*, 138 S. Ct. at 1733, n.* (Kagan, J. concurring). Justice Gorsuch's view that the cake is different if it is for a same-sex couple's wedding than if it is for a different-sex couple's wedding is at odds with the rulings in *Windsor* and *Obergefell* that rejected the notion that when same-sex couples marry they are doing something fundamentally different than when different-sex couples marry, *i.e.*, they are entering a "gay marriage" rather than a "marriage." Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (ruling that "same-sex couples may exercise the right to marry" and the reasons marriage is fundamental "apply with equal force to same sex couples"); United States v. Windsor, 570 U.S. 744, 769 (2013) (holding that married same-sex couples have a lawful status "worthy of dignity and equal with all other marriages"); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (holding that same-sex couples have the same right as opposite sex couples of to enjoy intimate association).
[104] *Masterpiece Cakeshop*, 138 S. Ct. at 1736-37.
[105] *See id.* at 1733-34, (Kagan, J., concurring); *id*. at 1751 (Ginsburg, J., dissenting).

cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request. . . . [T]he bakers simply refused to make cakes bearing statements demeaning to people protected by CADA."[106] Finally, as Jim Oleske rightly observes, no presumption is warranted, because sexual orientation is "inextricably tied" to the conduct of marrying a partner of the same sex whereas opposition to gay people and marriage of same-sex couples is not inextricably tied to any particular creed, or any creed at all.[107] In sum, there is a world of difference in "the role the customer's 'statutorily protected trait'" in the two examples.[108]

Last, Justice Gorsuch suggests that Justice Kagan's concurrence and Justice Ginsburg's dissent manipulate "the level of generality" as to the messages of the Jack and Phillips cakes: both "convey a message regarding same-sex marriage," and both should be subject to the same rule.[109] This is certainly a high level of abstraction, particularly where the Jack cakes literally contained words and symbols expressing a point of view about gay people and their marriages, and where the majority recognized that a refusal "to design a special cake with words or images . . . might be different from a refusal to sell any cake at all."[110] While Justice Gorsuch's concurrence contends that any wedding cake made by

[106] *Id*. at 1750, n.3 (Ginsburg, J., dissenting).

[107] Jim Oleske, *Justice Gorsuch, Kippahs, and False Analogies in Masterpiece Cakeshop*, TAKE CARE BLOG (June 19, 2018), https://takecareblog.com/blog/justice-gorsuch-kippahs-and-false-analogies-in-masterpiece-cakeshop (citing Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661 (2010)).

[108] *Masterpiece Cakeshop*, 138 S. Ct. at 1750 n.3 (Ginsburg, J., dissenting) (internal citation omitted). In addition, Justice Gorsuch's concurrence claims that both the Jack baker and Phillips agreed they would sell other products to people of faith (Jack) and gay people (Phillips), thus negating any intent to discriminate. The majority opinion lacked the assurance that this was so. *Id*. at 1723 ("One of the difficulties of this case is that the parties disagree as to the extent of the baker's refusal to provide service."); *id*. at 1726 (noting Phillips's refusal to sell cupcakes to a lesbian couple for their commitment celebration and the affidavits submitted asserting the cakeshop's policy of "not selling baked goods to same-sex couples for this type of event").

[109] *Id*. at 1739.

[110] *Id*. at 1723.

Phillips conveys his approval of the customer's wedding, much like "'an emblem or flag,' a cake for a same-sex wedding is a symbol . . . [and] signif[es] approval,"[111] no Supreme Court case has "suggested the provision of a baked good might be expressive conduct."[112] Moreover, while Phillips has expressed his "own views on the messages he believes his cakes convey," the legal test requires conduct to be reasonably understood to an observer to be expression, and to be the expression of the vendor rather than the couple marrying.[113]

All told, it may be that Justice Kennedy chose to read the record below as permeated with hostility toward religion in order to find grounds for deciding the case that could command a majority without reaching the substantive issues raised in the appeal. Along with pressing for resolution of the substantive issues in future cases, some see new opportunities for challenging the enforcement of anti-discrimination laws. As Professors Douglas Laycock and Thomas Berg have suggested, "testers" may be closely reviewing all judicial and administrative litigation for "double standards" in how laws are applied.[114]

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[111] *Id*. at 1738.

[112] *Id*. at 1748, n.1 (Ginsburg, J., dissenting). While this discussion in Justice Ginsburg's dissent is directed at Justice Thomas's concurrence on free speech grounds, the same points can be made as to the speech-infused elements of the Gorsuch concurrence. *Id*. at 1748, n.5.

[113] *Id*. (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 (1984)). Two blog posts concisely explain the question of whether a vendor speaks at all. *See* Tobias Wolff, *Symposium: Anti-Discrimination Laws Do Not Compel Commercial-Merchant Speech*, SCOTUSblog (Sep. 14, 2017, 10:25 AM), http://www.scotusblog.com/2017/09/Symposium/anti-discrimination-laws-do-not-compel-commercial-merchant-speech/; Robert Post, *An Analysis of DOJ's Brief in* Masterpiece Cakeshop, TAKE CARE Blog (Oct. 18, 2017), https://takecareblog.com/blog/an-analysis-of-doj-s-brief-in-masterpiece-cakeshop.

[114] Douglas Laycock and Thomas Berg, *Symposium:* Masterpiece Cakeshop – *Not as Narrow as May First Appear*, SCOTUSblog (June 5, 2018, 3:48 PM), hppt://www.scotusblog.com/2018/06/symposium-masterpiece-cakeshop-not-as-narrow-as-may-first-appear/.

IV. Supreme Court Action After the *Masterpiece Cakeshop* Ruling

After the Supreme Court decided *Masterpiece Cakeshop*, it issued an order in another case in which certiorari had been sought contesting a lower court's rejection of religious and expressive defenses to the enforcement of a sexual orientation anti-discrimination law in the context of wedding goods and services.[115] The Court granted certiorari, vacated the decision below, and remanded it to the Washington Supreme Court for reconsideration in light of *Masterpiece Cakeshop*.[116] Presumably, the only question for consideration on remand is whether anywhere in the record there is a demonstrated and relevant lack of neutral and respectful consideration of the floral shop owner's religious beliefs.

The Alliance Defending Freedom (ADF)—counsel for the businesses in both *Masterpiece Cakeshop* and *Arlene's Flowers*—is already claiming that the Washington Attorney General's simple act of enforcing the state's anti-discrimination law against someone asserting that they were following their religious beliefs is evidence of impermissible religious hostility.[117] That approach seems doomed where the Court just reaffirmed its *Piggie Park* precedent, which involved enforcement of an anti-discrimination law to an individual who claimed a religious justification.

This new attempt to craft a "religious hostility" defense, its contours and what it may mean, will likely come to the Court in due course, although one would hope that comments about a party's defenses, including religious defenses, would not

[115] Arlene's Flowers v. Washington, 86 U.S.L.W. 3640 (June 25, 2018).
[116] *Id*.
[117] Supplemental Brief of Petitioner, *Arlene's Flowers*, 138 S. Ct. 2671 (mem.) (No. 17-108), 2018 WL 3019588, *available at* https://www.supremecourt.gov/DocketPDF/17/17-108/49474/20180606162140535_17-108%20Supplemental%20Brief%20of%20Petitioners.pdf.

ordinarily elicit comment from enforcement and adjudicatory officials. In addition to the likelihood that the *Arlene's Flowers* case will generate another petition for a writ of certiorari once the Washington Supreme Court rules upon the remand, there are numerous other cases that may provide additional opportunities for U.S. Supreme Court review. For example, the Oregon Supreme Court declined review in another ADF case in which a baker was found to have violated state law by refusing to sell a wedding cake to a same-sex couple,[118] and the Hawaii Supreme Court declined review in a further ADF case in which the owner of a bed-and-breakfast was found to have violated a state law by refusing to rent a room to a same-sex couple.[119]

In addition, within days after the Supreme Court decided *Masterpiece Cakeshop*, the Arizona intermediate Court of Appeals relied on *Masterpiece Cakeshop* to reject religious and expressive objections to hypothetical enforcement of a sexual orientation nondiscrimination law in a wedding services context,[120] and ADF has already sought review by the state supreme court.[121] Along with the Arizona case, ADF has advanced several pre-enforcement challenges to anti-discrimination laws, such as T*elescope Media Grp. v. Lindsey*,[122] and *303 Creative LLC v. Elenis*.[123] These are

[118] Klein v. Or. Bureau of Labor & Indus., 410 P.3d 1051 (Or. Ct. App. 2017); *see* Aimee Green, *Oregon Supreme Court Won't Hear Sweet Cakes by Melissa's Appeal*, Oregonian/Oregon Live (June 22, 2018), https://www.oregonlive.com/pacific-northwest-news/index.ssf/2018/06/oregon_supreme_court_wont_hear.html.

[119] Cervelli v. Aloha Bed & Breakfast, SCWC-13-0000806, 2018 WL 3358586, (Haw. July 10, 2018). ADF is advancing numerous additional similar cases forward as well. *See* Brennan Suen, *Masterpiece Cakeshop Was Just the Beginning*, Media Matters (June 5, 2018, 1:32PM), https://www.mediamatters.org/blog/2018/06/05/Masterpiece-Cakeshop-was-just-the-beginning-ADF-is-pushing-several-other-license-to-discri/220381.

[120] Brush & Nib Studio v. Phoenix, 418 P.3d 426 (Ariz. Ct. App. 2018).

[121] *Arizona Supreme Court Gets Appeal on Discrimination Issue*, AP (July 10, 2018), https://www.apnews.com/71683eb6dbd24bde9c029b75daa8ca64.

[122] Telescope Media Grp. v. Linsey, 271 F. Supp. 3d 1090 (D. Minn. 2017), *appeal pending*, No. 17-3352 (8th Cir.).

[123] 303 Creative LLC v. Elenis, 2017 U.S. Dist. LEXIS 203423 (D. Colo. Sept. 1, 2017), *appeal dismissed*, 2018 U.S. App. LEXIS 22516 (10th Cir. Aug. 14, 2018).

certainly inauspicious settings for identifying religious hostility, given that enforcement proceedings had not even commenced.

V. Conclusion

We are not alone in discerning a message of pluralism in the majority opinion, particularly where it concludes by noting that future cases "must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."[124]

A crucial way of managing that pluralism, as the Supreme Court ruled decades ago in *Piggie Park*, is to ensure an open marketplace without a vendor's right to refuse goods and services based on religious belief. As the NAACP LDF argued in its amicus brief, "the journey out of Jim Crow" has shown that free exercise and equal protection principles "can live in harmony when neutral laws of general applicability, such as public accommodations statutes, are uniformly enforced and reasonably applied."[125] Specifically, while our nation "rightly cherish[es] religious liberty and go[es] to great lengths to accommodate individuals in their beliefs and practices," those liberties "must yield to such neutral laws, especially when they are supported by the compelling interest in eliminating discrimination."[126] Changing that rule threatens to change much more than same-sex couples' access to wedding cakes.[127]

[124] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1732 (2018).
[125] Brief for NAACP Legal Defense Fund as Amici Curiae Supporting Respondents at 20, Masterpiece Cakeshop, Ltd.,v. Colo. Civil Rights Comm'n, 138 S.Ct. 1719 (2018) (No. 16-111), 2017 WL 5127302).
[126] *Id*.
[127] Paul M. Smith, *The Real Cost of Masterpiece; It's Personal*, Balkinization, (Apr. 7, 2018), https://balkin.blogspot.com/2018/04/the-real-cost-of-masterpiece-its.html.

Others are already advancing proposals to provide certain accommodations to vendors or service providers with a sincere religious objection so long as doing so would not impair that pluralism by exposing LGBT customers to harm. For example, Chai Feldblum argues for greater latitude for religious organizations:

> When dealing with individuals, the government should respect a statement by a religious person that complying with a non-discrimination law or some other law will place a burden on that person's religious beliefs, unless there is a good reason to believe that statement is false. If there is a way to accommodate the person and still achieve the compelling purpose of the law, the government should do that. If there is no way to accommodate the person, and still ensure that the compelling purpose of the law is achieved, then the accommodation should not be made.[128]

No doubt other proposals will surface as well.

Whatever lies on the road ahead, we hope people will heed both the Court's admonitions that government hostility to religious belief is off limits and that gay people, and all people, are entitled to enjoy "freedom on terms equal to others."[129]

[128] *See, e.g.*, Chai Feldblum, *What I Really Believe About Religious Liberty and LGBT Rights*, Medium (Aug. 1, 2018), https://medium.com/@chaifeldblum/what-i-really-believe-about-religious-liberty-and-lgbt-rights-2cc64ade95a2.

[129] *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

Husted v. A. Philip Randolph Institute — To Vote, or Not to Vote: That is the Question.

Gilda R. Daniels*

In William Shakespeare's most famous soliloquy, Hamlet ponders whether it is better to live or to die.[1] He wonders if death would ease the pressures of the present day, which he describes as a type of sleep. He asserts that the only power one has over the tumultuous battle of life is to sleep. He argues that the only reason we endure the pains of life is the fear of death. He asks the question of whether it is better to live or to die. While rather dramatic, the juxtaposition of life and death seems appropriate in analyzing the Supreme Court's decision in *Husted v. A. Philip*

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[1] William Shakespeare, Hamlet act 3, sc. 1.

To be, or not to be: that is the question:
Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune,
Or to take arms against a sea of troubles,
And by opposing end them? To die: to sleep;
No more; and by a sleep to say we end
The heart-ache and the thousand natural shocks
That flesh is heir to, 'tis a consummation
Devoutly to be wish'd. To die, to sleep…

Id.

Randolph Institute.[2] In this case, the Court analyzed whether the National Voter Registration Act prohibited Ohio's process of using the practice of not voting as a death knell to the right to vote. The state administered what it called the Supplemental Process to clean up its voter rolls. In this process, if you failed to vote in a two-year period, or the equivalent of missing a mid-term election—as a large swath of American citizens choose to do—you would face the distinct possibility of losing the right to vote because you made the choice not to vote.

Husted posits a number of interesting questions and contradictions, including how legislation with a stated purpose of increasing participation can actually punish those who choose not to vote and remove them for inactivity It also is important to consider the impact and import of the case in the context of recent attempts to place the right to vote in a dream state, where it is not accessible but available to those who may awaken and endure the "sea of troubles" and obstacles to regain the right to vote.

Shortly after the election of the nation's first African American President, Barack Hussein Obama, the fight to vote began anew. Since the election of President Obama, forces have been laser-focused on eliminating the large-scale impact of voters of color through new laws that diminish the right to vote through restrictive voter-identification requirements, laws and practices that permit and encourage voter challenges, laws and practices that promote voter deception, and overly punitive felon disenfranchisement laws. Between 2010 and 2018, Republican legislatures have attempted slowly but surely to pass legislation that restricts access to the ballot box. All are important pieces in the disenfranchisement puzzle. The effort to displace and

[2] Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018).

disenfranchise voters of color was not as obvious as the Southern Strategy employed during a different time in our history. Nonetheless, the impact continues to be just as effective.

In Part I of this essay, we will wade through some of the historical hurdles to obtain the right to vote. In Part II, we will review the National Voter Registration Act and challenges to the enforcement of this legislation. In Part III, we will discuss the Supreme Court's decision in *Husted*. Finally, we will consider *Husted's* impact and how to mitigate its effects for those who may or may not choose to vote.

I. The Fight to Vote

The right to vote is the lynchpin of our democratic process; without it, our democracy dies. It is the right to vote that separate us from other forms of governance. Due to its import, our Constitution has more amendments that address the fundamental right to vote than any other right[3]--more than speech or assembly,[4] and more than the ability to own a gun.[5] In fact, the ability to vote is also one of the most regulated rights in this democracy.[6] So much so, that age, economic circumstances, and ability to read and to understand English can in many ways determine whether you have an effective right to vote.[7] Throughout our history, we have seen forces deliberately disenfranchise groups of citizens—e.g., voters of color, women, and persons who do not speak English—in

[3] U.S. Const. amends. XV, XIX, XXIV, XXVI.
[4] U.S. Const. amend. I.
[5] U.S. Const. amend. II.
[6] *See, e.g.*,Voting Rights Act of 1965, 52 U.S.C. § 10101 *et seq.* (2016).
[7] *See* Gilda R. Daniels, *A Vote Delayed Is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. Louisville L. Rev. 57 (2008); Joshua A. Douglass, *Is the Right to Vote Really Fundamental?*, 18 Cornell J.L. & Pub. Pol'y 143 (2008); *see also* Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 Stan. L. Rev. 611 (2004); Royster v. Rizzo, 326 S.W.3d 104, 110 (Mo. Ct. App. 2010).

an effort to predetermine electoral outcomes. This type of political gamesmanship tears the democratic fabric of our country. Courts have both prevented and permitted these efforts. From its founding, our country has considered the ideal of who should vote and who should not vote.

The Founding Fathers realized the significance of the right to vote and the ability to elect representatives—so much so, that one of the country's first compromises involved limiting the right to vote and representation in states that had large numbers of persons who were enslaved and could not enjoy the benefits of citizenship. The three-fifths compromise was one of the first constitutional actions that recognized the less-than-human, less-than-equal-status of the slave and canonized it for perpetuity. The founders recognized that question could someday lead to the demise of the country. Yet, they found the compromise necessary to ensure the continued progress of the new republic. Consequently, their decision to provide less-than-equal representation was the price paid to ensure that the new country could continue.

As a few of the Founders feared, the question of slavery would tear the country apart. The Civil War took a toll on this country's soul. Those who fought to continue to treat and mistreat those of a darker hue as less than human, thankfully, lost the war. Out of the ashes of the war rose the Civil War Amendments that provided certain freedoms for the formerly enslaved population. The Civil War Amendments prohibited enslavement, provided equal protection under the law, and prohibited discrimination in the right to vote.[8]

[8] The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution are commonly referred to as the Civil War Amendments. The Thirteenth Amendment abolished slavery and involuntary servitude. U.S. Const. amend. XIII, § 1. The Fourteenth Amendment prohibits states from denying "any person within [their] jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fifteenth Amendment grants the right to vote to citizens of the United States regardless of "race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

The amendments and emancipation of the former slaves delivered a glimpse into a true democratic state. Indeed, during a short period in American history, after the passage of the Civil War Amendments, we witnessed newly enfranchised citizens voting and electing representatives to local, state, and federal offices.[9] Voter participation, turnout, and involvement continued in glorious levels, until it stopped. The former slaves' newfound independence intimidated and threatened Southern whites. Accordingly, they negotiated yet another compromise and removed the federal protections in the South that made new citizens able to participate in the franchise.[10] Once the Southern states and the federal government negotiated a deal that removed military protection, whites began eliminating blacks from elected positions in legal and illegal ways.[11] During this period of "redemption,"[12] whites used violence as the primary means of ensuring that blacks did not participate in the voting process. The diminishing presence of black elected officials ensured that whites would return to the three-fifths compromise of sorts. New disenfranchisement methods—e.g., literacy tests, poll taxes, felon disenfranchisement, and grandfather clauses—began stripping the right to vote from its new citizens.[13] The Jim Crow laws and violence effectively killed the right to vote for the newly enfranchised citizen. The right to vote was no longer a reality; and democracy, a government for the people and by the people, ceased to exist. It would take almost a century before the descendants of the former slaves would

[9] *See* Xi Wang, *Black Suffrage and the Redefinition of American Freedom*, *1860-70*, 17 Cardozo L. Rev. 2153 (1996).
[10] *See id*. at 2168–74.
[11] *See generally* James W. Fox Jr., *Imitations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 How. L.J. 113 (2006).
[12] *See id*. at 156-58.
[13] *See generally* George Brooks, *Felon Disenfranchisement: Law, History, Policy and Politics*, 32 Fordham Urb. L.J. 851 (2005).

overcome the many obstacles set before them prohibiting access to the ballot in a meaningful way.

Interestingly, the period between the great equalizers—the Civil War Amendments and the Voting Rights Act (VRA)—took approximately one hundred years.[14] America needed the VRA because of the anemic ability of the constitutional amendments to protect its citizens from nefarious voting regulations meant to disenfranchise, frustrate, and intimidate voters of color. U.S. Attorney General Nicholas Katzenbach deemed the Act necessary to combat the many disenfranchising devices and methods that were prevalent throughout the South.[15] President Lyndon B. Johnson considered the VRA a "monumental" piece of legislation.[16] In a speech to Congress introducing the VRA, he stated:

> Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to insure that right. Yet, the harsh fact is that in many

[14] The Fifteenth Amendment was ratified in 1870, and the Voting Rights Act was passed into law in 1965.

[15] In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the court noted the need for a national approach to end voter discrimination instead of the piecemeal approach that the Department of Justice was forced to employ.

> Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. The Civil Rights Act of 1957 authorized the Attorney General to seek injunctions against public and private interference with the right to vote on racial grounds. . . . [T]he Civil Rights Act of 1960 permitted the joinder of States as defendants, gave the Attorney General access to local voting records, and authorized courts to register voters in areas of systematic discrimination. Title I of the Civil Rights Act of 1964 expedited the hearing of voting cases before three-judge courts and outlawed some of the tactics used to disqualify Negroes from voting in federal elections.
>
> Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination.

Katzenbach, 383 U.S. at 313.

[16] *See* David J. Garrow, Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965 132 (1978).

> places in this country men and women are kept from voting simply because they are Negroes. . . . For the fact is that the only way to pass these barriers is to show a white skin. . . . We have all sworn an oath before God to support and to defend that Constitution. We must now act in obedience to that oath.[17]

The VRA provided the second entrée for African Americans to the ballot box in a century. The impact of the Act cannot be overstated. Black and white voters achieved parity in voter registration rates in less than twenty years in most Southern states after passage of the Act.[18] The VRA woke the country from a dream state and into the continual and ongoing battle to ensure that all persons were free to engage in the electoral process.

After passage of the VRA, once again the country witnessed the truth of its promise, an inclusive government, by the people and for the people. The country imagined a new reality, where access to the ballot was not subject to racial or economic discrimination. Clearly, we endured countless stops and starts with litigation over the VRA's constitutionality[19] and implementation, as well as the reach of the Civil War Amendments in securing the right to vote.[20] While this country has made great strides in the decades after passage of the VRA, Congress would once again seek to enlarge the franchise.

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[17] President Lyndon B. Johnson, We Shall Overcome (Mar. 15, 1965).

[18] The VRA helped to close the voter registration disparities in the South. *See* Bernard Grofman, Lisa Handley and Richard G. Niemi, Minority Representation and the Quest for Voting Equality (Cambridge University Press 1992).

[19] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (holding that the VRA was a constitutionally sound exercise of Congress's grant to use "full remedial powers" of the Fifteenth Amendment to secure the franchise for Black citizens); Northwest Austin Mun. Util. Dist.No. 1 v. Holder, 557 U.S. 193, 210-11 (2009) (holding that the district in question was eligible to "bail out" of Section 5 preclearance under the VRA, however the Court declined to rule on the merits of Section 5 itself).

[20] *See generally* Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 Geo. Wash. L. Rev. 1928 (2013).

II. The NVRA and the Right to Vote

In spite of the overwhelming success of the VRA, our democracy needed more legislation to elevate voter registration and participation. In 1993, Congress passed the National Voter Registration Act (NVRA), commonly referred to as the "Motor Voter Law."[21] The purpose of the NVRA is:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
> (2) to make it possible for Federal, State, and local governments to implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
> (3) to protect the integrity of the electoral process; and
> (4) to ensure that accurate and current voter registration rolls are maintained.[22]

In developing the law, Congress surveyed best practices across the country and surmised that implementing a few fundamental reforms could increase voter participation. Congress was deliberate and intentional in its decisions to require states to provide voter-registration opportunities at, *inter alia*, the Department of Motor Vehicles, public assistance agencies, and veterans' facilities. Nonetheless, states argued that the NVRA was an unfunded mandate. In the NVRA, Congress used its authority provided in the Civil War Amendments and the Elections Clause to justify its imposition on the states. It provides uniform registration

[21] 52 U.S.C. § 20501 *et seq.* (2016).
[22] 52 U.S.C. § 20501.

procedures at federal agencies, a uniform mail-in voter-registration form, and standards for removal from the voter rolls. The NVRA explicitly refers to the right to vote as fundamental.[23] It also includes list-maintenance procedures that allow removal in limited circumstances, such as mental incompetency and felony conviction.[24] The NVRA was constitutional and its purposes clear: to increase registration and participation and to keep voters on the voter rolls, removing them for a small set of circumstances, but *never* for failing to vote. Additionally, it explicitly warned that persons should not get penalized for not voting, finding that citizens "have an equal right not to vote, for whatever reason."[25] Significantly, in enacting the NVRA Congress recognized that states utilized purges disproportionately against minority voters.[26]

In 2002, after the *Bush v. Gore*[27] debacle, Congress once again attempted to provide guidance and assistance to the states to improve voter participation and confidence. It passed the Help America Vote Act (HAVA)[28] to provide resources for antiquated election systems and established the Election Assistance Commission as the clearinghouse for information on election systems. As mentioned, the NVRA's purpose was to simplify voter registration and to increase voter participation. The NVRA also included a list-maintenance requirement to allow election officials the ability to remove certain voters, but explicitly forbade removal for not voting. Ten years after the NVRA's passage, Congress enacted the HAVA as a means to provide clarity on list

[23] "[T]he right of citizens of the United States to vote is a fundamental right." *See* 52 U.S.C. § 20501(a)(1).
[24] *See* 39 U.S.C. § 3629; 52 U.S.C. §§ 20501 - 20511.
[25] S. Rep. No. 103-6, at 17 (1993).
[26] *See id*. at 18.
[27] Bush v. Gore, 531 U.S. 98 (2000).
[28] Help America Vote Act of 2002, 52 U.S.C. 20901 *et seq.* (2018) (providing robust federal investments into local voting infrastructure to facilitate access to the franchise and set basic standards for election administration).

maintenance. It is the combination of list-maintenance functions in the NVRA and the HAVA that stands at the pinnacle of yet another attempt to reduce the voter rolls and, in particular, the number of voters of color. While these were laws meant to encourage citizens to vote, the Supreme Court and legislatures across the country are using them to make it easier for people to lose the right to vote.

III. The Making of Husted

I earned the right to vote . . . . Whether I use it or not is up to my personal discretion. They don't take away my right to buy a gun if I don't buy a gun.[29]

When I joined the Department of Justice (DOJ) as a staff attorney after the passage of the NVRA, I had the assignment to defend it against claims that it was an unconstitutional unfunded mandate.[30] States across the country argued that the NVRA required them to spend funds they did not have, and that it was an unconstitutional congressional act. DOJ attorneys in the Civil Rights Division, Voting Section, argued that Congress had the authority under the Civil War Amendments and the Elections Clause to enact the NVRA. This litigation was consistent with the first wave of cases challenging the VRA's constitutionality, followed with attempts to strip away protections contained within the Act.

Years later, as I served in the George W. Bush administration as a Deputy Chief in the Voting Section, the narrative of bloated voter rolls and the propensity for widespread voter fraud was presented as an Orwellian fact that supported plans for voter suppression. We

[29] Nina Totenberg, *Supreme Court Upholds Controversial Ohio Voter Purge Law*, NPR (June 11, 2018, 10:30 AM), https://www.npr.org/2018/06/11/618870982/supreme-court-upholds-controversial-ohio-voter-purge-law.

[30] *See, e.g.*, Condon v. Reno, 913 F. Supp. 946, 949 (D.S.C. 1995).

have, unfortunately, watched this narrative grow exponentially in its reach across the country. Moreover, jurisdictions have utilized these unsupported charges to advocate for stricter voter-ID and proof-of-citizenship laws, among others. Accordingly, we have seen an extensive increase in the number of election-related cases. Prior to 2000, election-related cases averaged less than 100 per year. In the period from 2000 to 2016, the average number of cases has increased to more than 250 each year.[31]

The politicization that began in a previous administration has exponentially advanced in this present age. The Attorney General of the United States serves as a chief enforcer of these and other federal voting-rights statutes. For more than two decades, the Department of Justice consistently interpreted the "Failure to Vote Clause" in the NVRA as explicitly prohibited using the failure to vote as a rationale for removal from the voter rolls.[32] In the lower courts' decisions in the *Husted* litigation, the Department of Justice consistently argued that Ohio violated the NVRA by removing voters from the rolls because they did not vote in three consecutive federal elections and failed to return a state mailer.

After the 2016 election, the DOJ, led by Attorney General Jeff Sessions, switched its position in the case and urged the Supreme Court to reverse the Sixth Circuit Court of Appeals' decision that Ohio's voter-removal scheme violated the NVRA and allow Ohio to remove voters from the rolls.[33] This change was consistent with other positions the DOJ took under Attorney

[31] *See*, Richard L. Hasen, *The 2016 Voting Wars: From Bad to Wors*e, 26 Wm. & Mary Bill Rts. J. 629, 630 (2018) (Figure 6.2 "Election Challenge" Cases Per Year: 1996-2016).

[32] I served as amici in Brief for Eric H. Holder, et al., filed September 22, 2017 (arguing that for almost three decades, through Republican and Democratic administrations, the Department of Justice had maintained the position that the NVRA prohibited removal for not voting). *See* Brief for Eric H. Holder, Jr. et al. as Amici Curiae Supporting Respondents at 8-9, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4483918.

[33] Brief for the United States as Amicus Curiae Supporting Petitioner at 10, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 3485554.

General Session against increasing voter access and championing various voter-removal strategies. Former DOJ managers filed an amicus brief that explained to the court the longstanding position that the NVRA not only protected the fundamental right to vote, but also the right not to vote.[34] The Trump administration did a complete reversal on the meaning of the clause. Astonishingly, the Department cited only "the change in administration" as the impetus for the shift.[35]

With this newfound advocate of voter removal, the state of Ohio sharpened its scheme that allowed it to remove voters for inactivity.[36] In continuance of this effort to make voting less accessible and in the name of voter integrity, Ohio election officials interpreted the NVRA in conjunction with the HAVA to allow the removal of voters for the failure to vote. Ohio's decision, however, affects real voters. For example, Ohio resident and Navy veteran Larry Harmon decided not to vote in the 2012 presidential election. He regularly voted in presidential elections. However, when he decided not to vote in 2012, after voting in 2008, the state of Ohio initiated the removal process. As part of its Supplemental Process, Ohio sends notifications to those persons who choose not to vote within a two-year period. Ohio uses the notification to determine if persons have moved from their previous place of residence. Mr. Harmon had not moved. Actually, he had maintained the same residence for more than sixteen years. He does not recall receiving

[34] Brief for Eric H. Holder, Jr. et al. as Amici Curiae Supporting Respondents at 8-9, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4483918.

[35] *See*, Brief for the United States as Amici Curiae Supporting Petitioner at 14, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 3485554.

[36] Ohio has a sordid history in the area of voting rights. It has attempted to employ a number of disenfranchising methods through the years. *See, e.g.*, Stewart v. Blackwell, 356 F.Supp.2d 791 (N.D. Ohio 2004); Ne. Ohio Coalition for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 2265 (2017); *see also* James Dao, Ford Fessenden, and Tom Zeller Jr., *Voting Problems in Ohio Spur Call for Overhaul*, N.Y. Times (Dec. 24, 2004), https://www.nytimes.com/2004/12/24/us/voting-problems-in-ohio-spur-call-for-overhaul.html.

a notice, nor did he return a notice. When he decided to vote against a ballot initiative seeking to legalize marijuana, he learned that the state of Ohio had removed him from the voter rolls for inactivity. He maintained, "I earned the right to vote . . . . Whether I use it or not is up to my personal discretion. They don't take away my right to buy a gun if I don't buy a gun."[37] Notwithstanding his declaration, the Supreme Court of the United States decided to examine the process.

A. Supreme Court Review

The Supreme Court granted certiorari in *Husted* to decide whether Ohio's Supplemental Process violated federal voting statutes.[38] Specifically, the Court considered whether the NVRA allowed Ohio's list-maintenance process to remove voters from the state's voter rolls for not voting.[39] The Ohio Secretary of State argued that a combined reading of the NVRA and HAVA permitted the Ohio Supplemental Process.[40] The A. Philip Randolph Institute (APRI), however, maintained that the Supplemental Process violated both the NVRA and HAVA in that it used not voting as a trigger for removal. The Sixth Circuit agreed, holding that the Ohio Supplemental Process used HAVA to bypass the requirements of Section 8 of the NVRA.[41] Conversely, the district court previously disagreed, reasoning that the federal statutes allowed Ohio's process. Indeed, the district court accepted the argument that the failure to respond to the notice, not the failure to vote, served as the proximate cause for removal under the Ohio Supplemental Process.[42]

[37] Totenberg, *supra* note 29.
[38] *Husted*, 138 S. Ct. 1833.
[39] *Id*. at 1833.
[40] *Id*. at 1841.
[41] A. Philip Randolph Inst. v. Husted, 838 F.3d 699 (6th Cir. 2016).
[42] Brief for Petitioner at 14, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 3412011.

1. The Majority Rules

It has been estimated that 24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate. And about 2.75 million people are said to be registered to vote in more than one State.[43]

Justice Alito's opening lines for the majority of the Court set the stage for the demise of the NVRA. The tension between voter access and voter integrity was at the forefront of the *Husted* case and Ohio's plan for removing voters for failure to vote. It is consistent with the political framework that was set decades ago in a previous administration.[44]

The majority in *Husted* opined that the primary issue was whether the failure to vote served as the *sole* reason for removal. Justice Alito wrote, "When Congress clarified the meaning of the NVRA's Failure-to-Vote Clause in HAVA, here is what it said: '[C]onsistent with the [NVRA] . . . no registrant may be removed *solely* by reason of a failure to vote.'"[45] The Court then engaged in a formalist jurisprudential exposition and referred to the plain meaning of the word "solely," referring to several dictionaries.[46] It landed on the proposition that a jurisdiction violates the NVRA if not voting served as the *only* reason for removal: "[A] State violates the Failure-to-Vote Clause only if it removes registrants for no reason other than their failure to vote."[47] The Court approached the case as merely one of statutory interpretation. As such, it spent a considerable amount of time determining the

[43] *Husted*, 138 S. Ct. at 1838.
[44] *Id*.
[45] *Id*. at 1842 (citing 52 U.S.C. § 21083(a)(4)(A) (emphasis added)).
[46] *Id*. ("'Solely' means 'alone.' Webster's Third New International Dictionary 2168 (2002); American Heritage Dictionary 1654 (4th ed. 2000). And 'by reason of' is a 'quite formal' way of saying '[b]ecause of.' C. Ammer, American Heritage Dictionary of Idioms 67 (2d ed. 2013).") (citations included).
[47] *Id*.

level of causation intended in the NVRA and HAVA regarding the Failure-to-Vote Clause. It finally landed on "sole causation," finding that such a reading "harmonize[d] the Failure-to-Vote Clause and subsection (d), because the latter provision does not authorize removal solely by reason of a person's failure to vote. Instead, subsection (d) authorizes removal only if a registrant also fails to mail back a return card."[48] Accordingly, it found, as the district court before, that the failure to vote combined with the failure to return the notice card permitted the state to remove eligible voters from the voter rolls without violating the NVRA.

2. Dissenters Are Dismissed

[T]he majority does more than just misconstrue the statutory text. It entirely ignores the history of voter suppression against which the NVRA was enacted and upholds a program that appears to further the very disenfranchisement of minority and low-income voters that Congress set out to eradicate.[49]

Clearly, Justice Alito completely disregarded the historical and contemporaneous facts surrounding the implementation of Ohio's removal process. In fact, he criticized Justice Sotomayor's dissent as ignoring the language of the NVRA and focusing on the history of voter suppression. He further contended that her characterization of Ohio's Supplemental Process as discriminatory was misplaced, because APRI did not assert a claim under the NVRA's discrimination prohibition.[50] Justice Alito disregarded the need for protections to ensure the right to vote, in favor of a cramped, overly formalistic statutory interpretation, to the detriment of

[48] *Id*. at 1843.
[49] *Id*. at 1865.
[50] *Id*. at 1861 ("shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965 (42 U.S.C. § 1973 *et seq.*) [now 52 U.S.C. § 10301 *et seq.*].").

eligible, registered voters. Moreover, his comrade, Justice Thomas, took the opportunity to champion states' rights and his view that the United States Constitution provides a wide breadth of authority for states to freely determine the times, place, and manner for persons to exercise the right to vote.[51] Essentially, he, too, overlooks how states have created laws that limit the fundamental right to vote and maintains that the Ohio Supplemental Process does not deviate from the state's right to disenfranchise voters in whatever manner it chooses.[52]

Conversely, Justice Breyer's dissent found that Ohio's Supplemental Process violated the NVRA's prohibition against "removing registrants from the federal voter roll 'by reason of the person's failure to vote.'"[53] Justice Breyer stressed that Congress originally intended that the NVRA would "protect the integrity of the electoral process," "increase the number of eligible citizens who register to vote in elections for Federal office," and "ensure that accurate and current voter registration rolls are maintained."[54] Importantly, Justice Breyer argued that Congress forbade removal for failure to vote, because it was "mindful that 'the purpose of our election process is not to test the fortitude and determination of the voter, but to discern the will of the majority.'"[55] Further, he

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[51] *Husted*, 138 S. Ct. at 1848-50 (Thomas, J., concurring).

> But, as originally understood, the Times, Places and Manner Clause grants Congress power "only over the 'when, where, and how' of holding congressional elections," not over the question of who can vote. The "'Manner of holding Elections'" was understood to refer to "the circumstances under which elections were held and the mechanics of the actual election." It does not give Congress the authority to displace state voter qualifications or dictate what evidence a State may consider in deciding whether those qualifications have been met. The Clause thus does not change the fact that respondents' reading of the NVRA is constitutionally suspect.

Id. at 1850 (citations omitted).

[52] *Id*. at 1849 ("As I have previously explained, constitutional text and history both 'confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied.'").

[53] *Id*. at 1850 (Breyer, J., dissenting).

[54] *Id*.

[55] *Id*. at 1850-51.

recognized that the Court erred in its attempt to reconcile the NVRA and HAVA to justify the practice of removing eligible voters for spurious reasons.

Additionally, Justice Breyer considered the impact of Ohio's process on the removal of eligible citizens. He referred to amici arguments and statistics that demonstrated that the notification process was severely flawed. The data indicate that: when most registered voters move they remain in their county of registration; large numbers of registered voters choose not to vote in every election; most registered voters who fail to vote also do not respond to the state's "last chance" notice; and the number of registered voters who fail to vote *and* fail to respond to the "last chance" notice far exceeds the number of registered voters who move outside of their county each year. According to the state of Ohio, nationwide only four percent of Americans actually move outside of their county annually, and in 2014, around fifty-nine percent of Ohio's registered voters failed to vote.[56] Even more disturbing,

> [i]n 2012 Ohio identified about 1.5 million registered voters—nearly 20% of its 8 million registered voters—as likely ineligible to remain on the federal voter roll because they changed their residences. Ohio then sent those 1.5 million registered voters subsection (d) "last chance" confirmation notices. In response to those 1.5 million notices, Ohio only received back about 60,000 return cards (or 4%) which said, in effect, "You are right, Ohio. I have, in fact, moved." In addition, Ohio received back about 235,000 return cards which said, in effect, "You are *wrong*,

[56] *See* Brief of the League of Women Voters et al. as Amici Curiae Supporting Respondents at 16, n.12, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 6939164.

> Ohio, I have *not* moved." In the end, however, there were *more than 1,000,000 notices*—the vast majority of notices sent—to which Ohio received back *no* return card at all.[57]

Under Ohio's process, these 1,000,000 registrants could now find themselves removed from the voter rolls. Basically, despite many registrants failing to vote and only a small number actually moving, under Ohio's Supplemental Process, using a registrant's failure to vote to identify that registrant as a person whose address has been changed amounts to an unreasonable (and inaccurate) determination of registrants who have actually moved.

Likewise, in her dissent, Justice Sotomayor emphasized that the explicit purpose of the NVRA was to increase the registration and enhance the participation of eligible voters in federal elections.[58] She reminded the Court that the NVRA sought to correct against the substantial efforts by states to disenfranchise low-income and minority voters, including programs that purged eligible voters from registration lists because they failed to vote in prior elections. Justice Sotomayor pointed to the importance of this history when interpreting the text of the statute and the majority's ultimate sanctioning of the very purging that Congress expressly sought to avoid. Justice Sotomayor highlighted a number of amici briefs that emphasized the inaccuracies and the impact of Ohio's flawed process, including a brief that I helped draft on behalf of the National Association for the Advancement of Colored People

[57] *Husted*, 138 S. Ct. at 1856 (Breyer, J., dissenting) (citations omitted).
[58] *Id*. at 1863 (Sotomayor, J., dissenting).

(NAACP) and the Ohio NAACP discussing the disproportionate impact of purges on voters of color.[59]

IV. Cases Have Consequences

In *Husted*, the Court discussed cause without considering the effects of the Ohio Supplemental Process. Irrefutably, the Court's fundamentalist approach to jurisprudence ignores the discriminatory impact and results of this law. Still, the NVRA is clear: states should not use the failure to vote as a reason to remove eligible persons from the voter rolls. Should a citizen choose to vote or not to vote, that is their prerogative. Moreover, choosing not to vote should not serve as a reason, proximate or otherwise, to remove an eligible citizen from the voter rolls. The Court ignored the question of whether the Supplemental Process served as an effective mechanism for determining how states should maintain their lists of eligible voters. The majority chose to advance a number of jurisprudential propositions while ignoring the accuracy of the state's actions and refusing to preserve and protect the fundamental right to vote.

[59] *See* Brief of the Nat'l Assoc. for the Advancement of Colored People and the Ohio State Conference of the NAACP as Amici Curiae Supporting Respondents, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4387145. As one example, *amici* point to an investigation that revealed that in Hamilton County, "African-American-majority neighborhoods in downtown Cincinnati had 10% of their voters removed due to inactivity" since 2012, as "compared to only 4% of voters in a suburban, majority-white neighborhood." *Id*. at 18. *Amici* also explain at length how low voter turnout rates, language-access problems, mail delivery issues, inflexible work schedules, and transportation issues, among other obstacles, make it more difficult for many minority, low-income, disabled, homeless, and veteran voters to cast a ballot or return a notice, rendering them particularly vulnerable to unwarranted removal under the Supplemental Process. *See* Brief of Asian Americans Advancing Justice | AAJC et al. as Amici Curiae Supporting Respondents at 15–26, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4387148; Brief of National Disability Rights Network et al. as Amici Curiae Supporting Respondents at 17, 21–24, 29–31, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4483919; Brief for VoteVets Action Fund as Amicus Curiae Supporting Respondents at 23–30, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4386883. *See also* Brief for Libertarian National Committee as Amicus Curiae Supporting Respondents at 19–22, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980), 2017 WL 4308366 (arguing that Ohio's rule places weighty burdens on principled nonvoters).

A. Impact on Voters

Unfortunately, the majority's decision gives a green light to states to purge a voter without confirmation that the person merits removal pursuant to the constraints of the NVRA. Justice Alito's dismissal of the dissenters' cautions against the shameful practice of unregistering lawful voters emboldens other jurisdictions anxious to rid their voter rolls of citizens who regularly opt-out of elections, which essentially purges voters for not voting. The Court is correct that the Ohio Supplemental Process does not solely remove voters for not voting. The process uses not voting as a trigger for sending a confirmation and then on a second swipe will remove a voter for not voting in additional years. Ohio's Supplemental Process and its implementation, however, are at odds with the primary purposes of the NVRA: the expansion and simplification of voter registration processes designed to increase registration and participation in federal elections.[60] Ohio's history of disenfranchising voters of color through purges, incomplete or inaccurate voter rolls, voter challenges, overuse of provisional ballots, poll-worker error, and long lines are only a few of the barriers that voters of color experience. The voter removal two-step permits yet another opportunity for the state to shrink not only the voter rolls but also the number of voters of color who enjoy the opportunity to vote or not vote.

1. Aggressive Purge Process

Husted invites states to engage in the risky and disenfranchising behavior present in Ohio's Supplemental Process. Recent experience is informative; after the *Shelby County v.*

[60] Common Cause of Colo. v. Buescher, 750 F. Supp. 2d 1259, 1274 (D. Colo. 2010).

Holder decision[61] states almost immediately began implementing laws meant to disenfranchise certain voters. In fact, since *Shelby County*, the nation has seen an increase in the number of purges, particularly in jurisdictions once covered under Section 5 of the Voting Rights Act.[62] According to a Brennan Center report, from 2014 to 2016, states removed nearly sixteen million voters from the voter rolls.[63] This represents a four-million-person increase, or thirty-three percent, when compared to 2006 to 2008. This increase exceeds the increase in registered voters and total population.[64]

Similarly, in the wake of *Husted*, voting rights advocates are concerned that jurisdictions will increase the level of purges, resulting in a widespread discriminatory process divesting voters from registration. In Georgia, registrants are placed on the inactive list for "not vot[ing], updat[ing] their voter registration information, fil[ing] a change of name or address, sign[ing] a petition or respond[ing] to attempts to confirm their last known address for at least the past three years."[65] In Georgia, approximately 750,000 additional names were removed from 2012 and 2016 than between 2008 and 2012. In Texas, more than 350,000 registrants were removed between 2012 and 2014, and in Virginia approximately 380,000 were removed from 2012 to

[61] Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (holding that Section 4 of the Voting Rights Act of 1965 was unconstitutional, and effectively stripping federal protections found in Section 5 of the Act, using a states-rights rationale). *See generally* Gilda R. Daniels, *Unfinished Business: Protecting Voting Rights in the Twenty-First Century*, 81 Geo. Wash. L. Rev. 1928 (2013).

[62] Jonathan Brater, Kevin Morris, Myrna Pérez, & Christopher Deluzio, Brennan Ctr. for Justice, Purges: A Growing Threat to the Right to Vote 3-5 (2018), https://www.brennancenter.org/sites/default/files/publications/Purges_Growing_Threat_2018.pdf.

[63] *Id*.

[64] *Id*.

[65] Kristina Torres, *Georgia Cancels Registration of More than 591,500 Voters*, Atlanta Journal-Constitution (July 31, 2017, 3:32 PM), https://politics.myajc.com/news/state--regional-govt--politics/georgia-cancels-registration-more-than-591-500-voters/ozSuX227UpNe18YGQ0hYUJ/.

2016.[66] The result of heeding Justice Thomas's proclamation that states should be given the flexibility to implement any and all voting laws pursuant to the Elections Clause and without federal supervision is higher rates of purging voters in previously covered jurisdictions.

2. Inaccuracies and Burdens

Justice Alito's lack of focus on the inaccuracy of voter rolls is consistent with the Republican mantra of undocumented and unproven voter fraud or bloated voter rolls from past eras. While proponents argue for accuracy in the voter rolls, they have little appetite to ensure that the removal lists are accurate. Removal devices like Crosscheck are riddled with errors.[67] Yet removed voters are given the burden of demonstrating that they should remain on the rolls, instead of states having the duty to ensure that the removal of any and every voter accurately captures those persons who have moved, died, are incompetent, or committed a disenfranchising felony. Battleground states like Wisconsin, Georgia, and Pennsylvania have similar removal processes and will remove hundreds of thousands of voters for not voting. Clearly, this was not the intent of the NVRA.

Moreover, Post-*Shelby*, voters do not have the protection of federal oversight, and the DOJ under the current administration has, in fact, aligned itself with those seeking to limit voter access. The DOJ has even sent letters to jurisdictions encouraging them to "clean up" their voter rolls, which will lead to more purges. Actions, such as those exhibited in Ohio and Georgia, do not

[66] Jacqueline Thomsen, *Study: States with Racial Discrimination History Purge Voter Rolls More Aggressively*, Hill (July 20, 2018, 10:40 AM), http://thehill.com/homenews/campaign/398038-report-states-with-history-of-racial-discrimination-more-aggressively.

[67] *See, e.g.*, Brater et al., *supra* note 62.

necessarily "clean" the registration lists. It usually strips large swaths of eligible voters from the voter lists, causes confusion, and encourages voter apathy. Purge proponents have wholeheartedly accepted the false notion that it is best to utilize a process that disenfranchises eligible voters instead of investing in an accurate removal system. Notwithstanding these obstacles, we have weapons to contest these formidable assaults on the right to vote.

B. Protection from Purges

1. Federal Protection in the NVRA

The NVRA provides uniform standards and protections for purged voters. However, *Husted* makes it easier for states to remove people without confirmation that they have moved or are otherwise ineligible. Additionally, more states will use a failure to vote as the trigger to place voters on an inactive list, which prematurely makes them susceptible to a purge. These voters are those who may only vote in presidential elections. If registrants continue the practice of only voting in presidential elections or in those elections where they feel compelled to vote, they run the risk of having to re-register every six years. For example, an Ohio voter who voted in the 2012 presidential election and did not vote in 2016 will find herself removed from the voter rolls if she attempts to vote in the 2018 midterms and did not return the notice. Likewise, voters who sit out the 2018 midterms and have a dislike for the 2020 crop of presidential candidates would also find themselves on the outside looking in to the electoral process. In both examples, these voters would find themselves, effectively, unable to cast a ballot without re-registering to vote.

Accordingly, voters could find themselves required to re-register simply for choosing not to vote in a midterm election. This creates a nightmare for election officials, who already have

inaccuracies on the list of voters. The constant removal and updating of voters could lead to duplicate entries, removal of eligible voters, and voter apathy. We already know the harder states make it to vote, the lower the turnout. Additionally, if a voter does not know that she is on the voter rolls, she is less likely to participate or have confidence in the electoral process. A lack of voter confidence leads to voter apathy. Politicians would then get what many of them want, i.e., a select few voters determining the outcomes of important local, state, and federal elections.

The NVRA contains federal standards for the purge process and requires that states notify voters. Voter access advocates should petition election officials to ensure that removed persons are notified and instructed on how to regain the right to vote. Additionally, the NVRA includes a private right of action. Thus, private citizens can bring claims under the NVRA. While the Supreme Court has now authorized removal for reasons that the statute did not intend, because of the racial discriminatory impact of purges, advocacy groups should consider challenging voter purges that violate the anti-discrimination prohibition in the NVRA and Section 2 of the Voting Rights Act.[68]

While the NVRA prescribes federal standards, states are encouraged to develop even more protections than the federal government provides. States that have constitutions with an affirmative right to vote may find it harder to remove citizens for not voting. Purges of the type in Ohio and Georgia could find states facing litigation for violation of their state constitutions.[69]

[68] 42 U.S.C. § 1973 (2016). Section 2 of the VRA prohibits voting practices and procedures that discriminate on the basis of race or color. Traditionally, Section 2 cases have involved challenges to at-large methods of election. However, Section 2's nationwide prohibition against racial discrimination in voting applies to any voting standard, practice, or procedure, including redistricting plans.

[69] *See generally* Gilda R. Daniels, *Voting Realism*, 104 Ky. L. J. 583 (2016).

2. Compulsory Voting

With the decision in *Husted*, the Court has essentially developed a system of de facto compulsory voting in states that disenfranchise voters for not voting in short periods, i.e., every two years. Compulsory voting would make voting mandatory.[70] If a citizen chose not to vote in an election, he would receive a penalty. Australia has mandated voting for its citizens since 1924, and voter turnout has never fallen below ninety percent.[71] The penalty for not voting in Australia is a monetary fine.[72] After *Husted*, the penalty in places like Ohio for not voting is removal from the voter rolls. In this way, *Husted* could have the unintended consequence of increasing voter participation.

3. Same Day/Election Day Registration

An additional way to offset the impact of rabid purges is to allow same-day registration, which would permit citizens to register to vote on the same day that they cast a ballot. Same-day registration could eliminate the thirty-day preregistration requirement in most states and blunt the force of inaccurate purges. Approximately seventeen states and the District of Columbia allow same day registration, while two states permit Election Day registration.[73] If adopted, states increase the ability for citizens to participate in the electoral process. Conversely, we have seen states

[70] Waleed Aly, *Voting Should Be Mandatory*, N.Y. Times (Jan. 19, 2017), https://www.nytimes.com/2017/01/19/opinion/voting-should-be-mandatory.html.

[71] *Compulsory Voting in Australia*, Australian Election Commission (Feb. 14, 2011), https://www.aec.gov.au/About_Aec/Publications/voting/index.htm.

[72] If an Australian fails to vote, he would receive a $20 fine for a first offense and $50 fine for a subsequent offense. *See*, *Failure to Vote*, Western Australian Election Commission, https://www.elections.wa.gov.au/vote/failure-vote.

[73] *Same Day Voter Registration*, Nat'l Conf. of State Legislatures (Mar. 27, 2018), http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx.

reverse course in providing same day registration, resulting in lower turnout.[74]

4. Remove Residency Requirements

The early voting process has demonstrated the antiquated nature of mandating that voters only cast ballots in their district of residence.[75] During primary and general elections, early voting allows voters to provide their current address and to cast ballots in a central location like a courthouse or community center. Ohio's out-of-district requirements result in more provisional ballots if a voter does not provide the appropriate documentation in the specified period. Consequently, during federal elections, the state discards the entire ballot, including ballots for those contests that do not require district residency, e.g., state-wide and federal elections. If residency requirements are removed, election officials should accept voters' ballots with an attestation or affirmation of residency, which will in turn increase the number of votes cast and counted.

V. Conclusion

Husted highlights the reality that the Supreme Court has been complicit in the disenfranchisement war. From *Crawford v. Marion County*[76] to *Husted v. A. Philip Randolph Institute*,[77] with *Shelby County v Holder*[78] in between, the right to vote is surely and

[74] *See, e.g., id.* ("There is strong evidence that same day and Election Day registration increases voter turnout.").

[75] For example, Ohio requires voters to live in the district where they vote. *See* Ohio Rev. Code Ann. § 3503.01(A) (West Supp. 2017); *see Voting by Nonresidents*, Nat'l Conf. of State Legislatures (June 20, 2018), http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx.

[76] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding Indiana's voter-ID requirement).

[77] *Husted*, 138 S. Ct. at 1833.

[78] Shelby Cnty. v. Holder, 570 U.S. at 529 (2013).

emphatically being compromised, and with it our democracy. Like Hamlet, the United States must confront the quandary: will we allow the vote to live, or will it slumber as "flights of angels sing [it] to [its] rest?"[79] The forces of voter access and voter integrity are in a battle to allow citizens to vote, a battle for the soul of our democracy. We fight against those who work to make it harder for certain demographics to cast a ballot. The battle between these two forces will either be or not be. These are cyclical battles that ebb and flow throughout our history. Dr. Martin Luther King advised, "*The [voting] rights issue is not an ephemeral, evanescent domestic issue that can be kicked about by reactionary guardians of the status quo; it is rather an eternal moral issue which may well determine the destiny of our nation*."[80] The question is who will win the war? Onward.

[79] SHAKESPEARE, *supra* note 1, act 5, sc. 2.
[80] Dr. Martin Luther King, Jr., *Give Us the Ballot* (May 17, 1957).

Janus and the Future of Unions

Catherine L. Fisk*

For nearly 100 years, union relationships with employers and with the workers whom the union represents have operated on the model of electoral democracy. A union, chosen by a majority in an election, represents all workers in the unit, just as a legislative or executive official represents everyone. But unlike a political leader, a union owes a duty of fair representation to *every* employee in the unit and cannot act arbitrarily or discriminatorily in deciding whose interests to prioritize. And in enforcing a contract, the union must treat all workers—union members and nonmembers alike—adequately and without discrimination. Democracy is foundational to everything unions do, from the way they govern their internal affairs to their efforts on behalf of workers to create workplace democracy to their role in civil society. Their responsibility to respect the interests and rights of minorities is what makes unions different from political leaders and what has made the contemporary fight over how unions fund their work so significant.

Like other large groups, union employees face a collective action problem; indeed, theirs is the paradigmatic collective action problem—the one used by economists to explain the theory of collective action. It is in the interest of every member of the large group to engage in collective action to improve wages and working conditions. It is equally in the interest of every member of the group to let others incur the costs of engaging in the collective

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action. But if every person acts rationally as an individual in free-riding on the efforts of other, *all* will be worse off because no one will get the benefit of collective action.[1] Union security provisions were the ingenious contractual solution to this collective action problem: requiring everyone to support the collective representative prevents the individually rational decision to free-ride, thus promoting the economically optimal collective action.

Courts long ago prevented unions from solving their collective action problem by requiring workers to actually join the union. Rather, the most that unions could do is to require represented workers to share in the cost through payment of what was known as an "agency" or "fair share" fee. In *Janus v. American Federation of State, County and Municipal Employees Council 31*, the Court declared unconstitutional fair-share fee provisions in the labor laws and union contracts of twenty-two states, the District of Columbia, and Puerto Rico.[2] The case is the latest, though probably not the last, in a series of cases in which the Roberts Court, always split on ideological 5-4 lines and always with the majority opinion written by Justice Alito, continued its attack on public employee unions. Finding the contractual solution to the collective action problem to violate the First Amendment, the Supreme Court continued its use of the First Amendment to invalidate well-established regulations of economic and social legislation.

Part I of this Article describes the legal background to *Janus*. Part II explores the reasoning of the majority and its possible implications for labor law. Part III explores the conceptualizations of complicity and compulsion embraced or at least hinted at in Janus and their troubling implications for an array of regulations.

[1] Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965).
[2] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

Part IV describes the efforts of anti-union litigation and lobbying to extend their win to other areas of labor law. Part V describes legislative efforts to provide for union security after Janus.

I. Union Security Before *Janus*

Republican Bruce Rauner was elected governor of Illinois on a pledge to destroy public sector unions.[3] Rather than negotiate with the state's public employee unions to address the state's budget issues, or work with the Illinois legislature to repeal laws he considered an obstacle to that goal, Governor Rauner filed a federal suit to get fair share fees declared unconstitutional.[4] That says quite a bit about *Janus*—it was from the start an effort to use the federal courts in a political fight that Governor Rauner felt he could not win on his own.

The state laws and contracts that Governor Rauner asked the federal courts to invalidate were settled principles of federal, state, and local labor law. For well over a hundred years, labor unions have sought contract terms that require all employees represented by the union to either join the union or pay their fair share of the costs the union incurs in negotiating and enforcing a labor contract. Administering a fair personnel process is expensive. In a unionized workplace, employees have some say in the process, unlike nonunion employees. But if workers are partly responsible for HR, the union must raise the money to support it. Unions are,

[3] *See* Monica Davey and Mitch Smith, *Illinois Governor Acts to Curb Power of Public Sector Unions*, N.Y. Times (Feb. 9, 2015), https://www.nytimes.com/2015/02/10/us/illinois-governor-bruce-rauner-acts-to-curb-power-of-public-sector-unions.html; Lydia DePillis, *Why Public-Sector Unions Lost Big in Illinois*, Wash. Post (Nov. 14, 2014), https://www.washingtonpost.com/news/storyline/wp/2014/11/14/why-public-sector-unions-lost-big-in-illinois/?utm_term=.db4520a9b218; Steven Greenhouse, *Illinois Governor Bruce Rauner: Organized Labor's Public Enemy No. 1?*, Guardian (Feb. 17, 2015, 7:00 AM), https://www.theguardian.com/us-news/2015/feb/17/illinois-governor-bruce-rauner-unions-labor.

[4] Rauner v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31, AFL-CIO, 2015 WL 2385698 (N.D. Ill. May 19, 2015).

in this respect, just like governments. A city or state requires every resident to pay taxes to support schools, parks, police, firefighters, and prisons. Some people deeply oppose policing and prisons, or don't use schools or parks, but they pay taxes to support them. These are what economists call common goods, and an elementary principle of economics is that no economically rational person will voluntarily choose to pay for them so long as others pay to support them.[5]

Before 1947, federal law allowed unions and employers to require employees to pay dues or fees to a union, as well as contractual terms requiring employees to be union members at the time of hire, not merely to pay fees to it.[6] These were known as closed shops. An organization was founded by business groups to combat these closed shops, arguing that they violated employees' "right to work."[7] In 1947, the right to work group scored a big legislative win, as Congress amended § 8(a)(3) of the National Labor Relations Act (NLRA) to prohibit these "closed shop" agreements, instead allowing employers and unions to agree only that employees must become union members within thirty days of hire (a "union shop" agreement). In addition, Congress added a new § 14(b) to the statute, which allowed states to choose whether to allow contracts with fair share fees, though it's ultimately up to

[5] *See* Olson, *supra* note 1.

[6] Section 8(3) of the National Labor Relations Act, as originally written, provided "[t]hat nothing in this Act . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein." 49 Stat. 499 (1935), as codified at 29 U.S.C. § 158(3).

[7] Sophia Lee, The Workplace Constitution from the New Deal to the New Right 59 (2014) ("deep-pocketed executives like the du Ponts, anti-New Deal activist groups like [the National Association of Manufacturers], and populist mobilizers ... formed a loose and hazily defined movement in the early 1940s. 'Right to work' was its emerging slogan.").

each union and agency to decide whether to require them.[8]

When the Supreme Court in the 1960s expanded individual freedoms of speech and association through new interpretations of the First Amendment, the Court further restricted the ability of unions and employers to require employees to join unions. It did so both as a matter of interpretation of the NLRA and under the First Amendment.

As to the NLRA, it adopted a broad reading of what was prohibited by § 8(a)(3)'s and § 14(b)'s restrictions on compulsory union "membership." A strictly literal reading of these two sections would allow employers and unions to negotiate contracts (under § 8(a)(3)), or states to forbid such contracts (under § 14(b)), that require a worker actually to become a *member* of the union, but would not prohibit anything else. But in a pair of cases from 1963, the Supreme Court held that the sections' definition of "membership" is broader. In *NLRB v. General Motors*, the union had proposed a contract provision that did not require workers to join the union but only to pay a fee for the union's representation services (an "agency fee").[9] The employer insisted that the only form of union security device permissible under the NLRA was one requiring workers actually to join the union; it was all or nothing. The Court rejected the employer's argument and held that the Taft-Hartley Act changed the "meaning of 'membership' for the purposes of union security contracts" so that § 8(a)(3)

[8] As amended in 1947, § 14(b) of the NLRA provided: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (2018). Section 8(a)(3) as amended in 1947 prohibited agreements requiring membership at the time of hire, but authorized agreements requiring employees to become members within 30 days after hire. However, it also stated that employees cannot be disciplined if they did not become members if denial of membership was for reasons other than failure to pay dues. 29 U.S.C. § 158(a)(3) (2018).

[9] NLRB v. Gen. Motors Co., 373 U.S. 734 (1963).

"'membership' as a condition of employment is whittled down to its financial core."[10] That is, workers could be required to pay full dues, but they could not be required to join. In the same year, in *Retail Clerks v. Schermerhorn*, the Court extended the *General Motors* narrowing of "membership" to the preemptive scope of § 14(b).[11]

But *Schermerhorn* did not hold that states may forbid contract provisions that require less than full membership. In fact, it suggested that states could not forbid such provisions. The union in *Schermerhorn* had argued that its agreement was distinguishable from the agreement in *General Motors* because it confined the use of nonmember dues to collective bargaining, rather than other union institutional goals (such as political activity).[12] But the Court explained that the union's contract did not limit how nonmember payments could be used. And, the Court pointed out, the union charged nonmembers *the same as members*, which suggested that the union would use nonmember fees to fund union activities other than contract negotiation and enforcement.[13] This matters, because if states could ban *any* compulsory nonmember fees, it would have been unnecessary for the Court to emphasize that the contract at issue in the case didn't restrict the use of nonmember fees and charged nonmembers the same as members.[14]

But that is not how lower courts and litigants have read *Schermerhorn*. Rather, it has been read to allow states to prohibit *any* payments from nonmembers. Now, twenty-eight states prohibit unions and employers from agreeing to require employees

[10] *Id*. at 742.
[11] Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn, 373 U.S. 746 (1963).
[12] *Id*. at 752.
[13] *Id*. at 753-54.
[14] This analysis is developed at further length in Catherine L. Fisk & Benjamin I. Sachs, *Restoring Equity in Right-to-Work Law*, 4 U.C. Irvine L. Rev. 857 (2014).

to pay any fees or dues to the union. In those states, the union is obligated to provide contract negotiation and administration services to nonmembers for free. The union is required to represent all workers in the bargaining unit equally, and may not discriminate between those who become union members and those who do not.[15] The duty extends not just to collective bargaining—where the union cannot bargain terms that favor members over nonmembers—but to disciplinary matters as well.[16] The union must grieve and arbitrate on behalf of nonmembers just as zealously (and, more to the point, as expensively) as they do on behalf of members. In *non*-right-to-work states, federal law enables unions to require that nonmembers pay for the services they receive. In right-to-work states, on the other hand, the union still bears the same federal duty to represent nonmembers, but state law precludes a requirement that the nonmembers pay for that representation.

Having held in *General Motors* that private sector employees cannot be required to join a union, for twenty-five years the law was settled that private sector employees could not be required to join a union. But they could be required to pay full dues, even if the union spent some portion of the revenue from dues on political activity, unless the employee worked in a state that had enacted a so-called right-to-work law prohibiting any payment of fees. But in *Communications Workers v. Beck*, the Supreme Court held that § 8(a)(3) permits a collective bargaining agreement to require nonmembers to pay fees only to support the union's contract negotiation and enforcement functions, and not to support

[15] Furniture Workers Div., 291 N.L.R.B. 182, 183 (1988); Columbus Area Local, Am. Postal Workers Union, 277 N.L.R.B. 541, 543 (1985); Int'l Ass'n of Machinists & Aerospace Workers, Local Union No. 697, 223 N.L.R.B. 832, 835 (1976).

[16] Vaca v. Sipes, 386 U.S. 171 (1967).

the union's political operations.[17] Thus, the most that a union and employer can require of an objecting employee is to pay an "agency" or "fair share" fee representing the employee's fair share of the union's costs of services "germane" to the union's role as bargaining agent. The employee cannot be required to subsidize "political" expenditures. This "fair share" fee arrangement had its origin in two strands of cases involving railway and then public sector unions.

The first strand began with *Railway Department Employees v. Hanson*.[18] In *Hanson*, the National Right to Work Committee argued that the Railway Labor Act (RLA) was unconstitutional because it preempted a Nebraska right-to-work law and therefore compelled employees to support unions. The Supreme Court made two significant holdings. First, the Court agreed with the plaintiffs that the RLA's preemption of state right-to-work laws was sufficient state action to subject the union security agreement between the private union and the private railroad to constitutional scrutiny. Second, the Court held that the compelled subsidization of the employee's exclusive bargaining representative did not violate the employees' First Amendment rights. But the Court reserved the lower-court ruling that the expenditure of those employees' dues or fees over their objection on political candidates violated their First Amendment rights.[19]

The Court reached the issue it reserved in *Hanson* in *International Association of Machinists v. Street*.[20] To avoid the question whether compulsory dues violated the First Amendment, the Court interpreted the RLA not to require dissenting employees

[17] Commc'n Workers of Am. v. Beck, 487 U.S. 735 (1988).
[18] Ry. Emps. Dep't v. Hanson, 351 U.S. 225 (1956).
[19] *Id*. at 238.
[20] Int'l Ass'n of Machinists v. S.B. Street, 367 U.S. 740 (1961).

to provide financial support for union political speech. Noting the importance of allowing self-governance of work on the railroads, the Court deemed it important to avoid a situation in which nonunion members "share in the benefits[21] derived from collective agreements negotiated by the railway labor unions but bear no share of the cost of obtaining such benefits." Moreover, the Court recognized the right of the majority of workers and their union to engage in political activity, "without being silenced by the dissenters."[22] The Court thought a sensible compromise was to prohibit the expenditure of agency fees on political expression not germane to the union's role as bargaining agent.[23]

The second strand of cases began with *Abood v. Detroit Board of Education*, the Court's first case about the constitutionality of public sector unions.[24] The Court held that government employees have First Amendment rights to refuse to join the unions that represent them and to refuse to provide financial support to their unions' political activities unrelated to the union's duties in negotiating and enforcing the collective bargaining agreement.

The notion embraced in both *Street* and *Abood* that contractually required union membership involved compelled speech in violation of the First Amendment produced sharp dissent from some justices. As Justice Frankfurter (joined by Justice Harlan) stated in dissent in *Street*, "what is loosely called political activity of American trade unions . . . indissolubly relat[es] to the immediate economic and social concerns that are the raison d'etre of unions."[25] The dissent went on to note the many examples throughout the nineteenth and twentieth centuries through which

[21] *Id*. at 762.
[22] *Id*. at 773.
[23] *Id*. at 768.
[24] Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).
[25] *S.B. Stree*t, 367 U.S. at 780 (Frankfurter, J., dissenting).

labor unions achieved improved working conditions through "an extensive program of political demands calling for compulsory education, an eight-hour day, employer tort liability, and other social reforms."[26] Justices Frankfurter and Harlan insisted that the use of union dues to support political activity did not constitute compelled speech.

> Plaintiffs here are in no way subjected to such suppression of their true beliefs or sponsorship of views they do not hold. Nor are they forced to join a sham organization which does not participate in collective bargaining functions, but only serves as a conduit of funds for ideological propaganda. No one's desire or power to speak his mind is checked or curbed. The individual member may express his views in any public or private forum as freely as he could before the union collected his dues.[27]

The dissent also pointed out that payment of taxes, like payment of union dues, supports political speech "to propagandize ideas which many taxpayers oppose. . . . It is a commonplace of all organizations that a minority of a legally recognized group may at times see an organization's funds used for promotion of ideas opposed by the minority."[28]

But that point of view was a dissent. Since 2012, the conservative majority of the Supreme Court twice expanded the protections for union dissenters,[29] culminating in 2018 with overruling *Abood*.

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[26] *Id*.
[27] *Id*. at 806.
[28] *Id*. at 808.
[29] Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012); Harris v. Quinn, 134 S. Ct. 2618 (2014).

II. The *Janus* Decision

The *Janus* majority, in an opinion by Justice Alito (joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch), held that the payments for representation services are speech protected by the First Amendment because the union uses the money to engage in speech (negotiating and administering a contract), and payment cannot be compelled.[30] The case produced a stinging dissent by Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor. Each step of the Court's reasoning has significant implications not only for the future labor law, but for the First Amendment more generally.

A. When Are Fees Compelled Speech?

The first step in the *Janus* reasoning is to equate paying a fee to compelling a statement of belief. The majority began with the proposition that "compelling individuals to mouth support for views they find objectionable violates [the] cardinal constitutional command" that (quoting the compulsory flag salute case) "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or *force citizens to confess by word or act their faith therein*."[31] Equating payment of a fee to forced confession of a belief is a bold and controversial move. All of us are compelled by law to pay money to entities that use it to engage in speech activities: taxes, homeowners association dues, health insurance premiums, pension plan contributions, licensing fees, public school and university student fees. The majority in *Janus* did not say anything about these other fees.

[30] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).
[31] *Id*. at 2463 (quoting W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis in *Janus*)).

The implications of *Janus* will depend on how the Supreme Court and lower courts expand on the idea that compulsory payments are tantamount to compulsory professions of belief. Although *Janus* said nothing about other fees, in *Harris v. Quinn*, the same five-justice majority (who held unconstitutional fair share fees for unionized home health aides paid by Medicaid) said they thought that the government has a more compelling interest in requiring attorneys to pay state bar dues and public university students to pay activity fees. But it did not say why, which makes it hard to discern how the Court expects other fees to be analyzed. *Harris* said that bar dues "served the State's interest in regulating the legal profession and improving the quality of legal services" and "[s]tates also have a strong interest in allocating to the members of the bar, rather than the general public, the expense of ensuring that attorneys adhere to ethical practices."[32] It did not say why the state's interest in requiring lawyers to pay the cost of regulation is greater than its interest in requiring public employees to pay the cost regulation. As to university fees, *Harris* said that universities "have a compelling interest in promoting student expression in a manner that is viewpoint neutral."[33] That is not a principle that could explain other forms of compulsory fees, because there is no requirement that health insurers spend employee contributions in a viewpoint neutral manner. *Harris* also said that creating an opt-out regime for public-university student fees would create "administrative problems [that] would likely be insuperable."[34] It is unclear what principle is used to decide when administrative problems are "insuperable" or when that becomes the basis for upholding a compulsory fee system.

[32] *Harris*, 134 S. Ct. at 2644.
[33] *Id*.
[34] *Id*.

The failure to distinguish contrary authority is, of course, common in constitutional and common law adjudication. What's troubling about this line of cases, though, is the fact that the only thing that distinguishes one case from another is whether the Court believes the government's interest is compelling. If every regulation is subject to strict scrutiny, constitutional analysis in the end will turn on whether the Court's majority thinks the government's interest is compelling.

B. Misunderstanding the Collective Action and Free Rider Problem

The next step in the majority's reasoning addressed the collective-action problem, which the majority incorrectly reduced simply to a free-rider problem involving fees for representational services. The collective-action problem is not simply whether an employee must pay for the cost of contract enforcement once a contract is negotiated. Rather, it is that without being able to make a credible commitment to stick with the group, a large group will be unable to engage in economically optimal collective action (such as achieving a union contract) in the first place.

The difference is simple to illustrate. When I first took a job at the University of California in 2008, I agreed to work in a non-union position for a salary. When the state's budget crashed in 2009, the university unilaterally reduced my salary by ten percent, though none of my responsibilities changed. (To be clear, I'm not complaining about my salary: I was well paid and I loved my job.) It could do so because faculty had never joined together to negotiate collectively for enforceable contracts. Unionized employees, by contrast, had enforceable contracts, so the state

could not unilaterally reduce their pay.[35] The significance of unionization is not just that employees shouldn't free ride on the union dues paid by their co-workers so that when bad things happen they have the union to handle their grievance. Rather, it's that without unionizing, they never get the contractual protection in the first place. The *Janus* majority assumed that, even without union security, public employees would still have labor contracts and the only question is whether employees should have to pay to get union representation in enforcing the contract. It's like health insurance: the majority assumed that the problem is whether an employee will get his medical bills paid by the insurance company after he gets sick. But without the union to bring everyone together, or without the ability to require employees to join a large group to form a risk pool, there would be no contract, no insurance policy, in the first place. So when the majority said that unions could solve the free rider problem by declining to represent nonpayers or by charging them for handling grievances, it misunderstood that, without the union's ability to require *everyone* to support the union, nobody gets the contractual protections.

The benefits of collective action accrue to the employer, too. California teachers before 1976 did not have a majority representative system. Rather, teachers could choose the union they wanted, or no union at all, and school districts had limited bargaining obligations with each different union, depending on the size of the membership. School districts had multiple different contracts with different groups of teachers. And, not surprisingly, they hated it. The system was cumbersome, confusing, and expensive to administer. It generated enmity among teachers at the

[35] Actually, it did. But at least it was compelled to give them a corresponding ten percent reduction in work hours.

same school. The Court recognized all this in *Abood* in explaining why union security is constitutionally required:

> designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.[36]

Union critics seem to assume that the alternative to majority unions is either no union or a plethora of weaker unions and that will strengthen the ability of employers to set policy, to fire poor workers, to lower salaries and benefits costs, and to avoid periodic strikes. That is true only in times of labor shortage. As everyone witnessed in the spring of 2018, weak unions did not lead to better schools, better teachers, or better educational outcomes in West Virginia, Oklahoma, and the four other states that experienced massive strikes.

C. The First Amendment and Public Employee Speech

The third fundamental point in the *Janus* opinion concerns the speech rights of public employees. Under 50-year-old Supreme Court precedent, public employees have relatively few First Amendment rights. In particular, they have no First Amendment

[36] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220-21 (1977).

right to speak to their supervisor about their working conditions. In *Garcetti v. Ceballos*, the Court upheld the discipline of an assistant district attorney who raised concerns with his supervisor about false police testimony that could lead to a wrongful conviction.[37] That speech, the Court held, is not protected by the First Amendment no matter how important the issue, because it was speech about the DA's work. On matters outside of their job duties and in forums outside the workplace, the Court held in *Pickering v. Board of Education* that public employees have a right to speak out as citizens, but only on matters of public concern, and only if their speech does not disrupt the government's interests as employer.[38]

Janus dismisses this area of law. First, explained the majority, *Pickering* and *Garcetti* are a different strand of First Amendment doctrine, and "[w]e see no good reason, at this late date, to try to shoehorn *Abood* into the *Pickering* framework."[39] The notion seems to be that one strand of cases holding that employees have few speech rights need not be consistent with another. That is not convincing; there aren't multiple First Amendments. All of these cases concern public employees' free speech rights, and the Court needs to explain *why* employees can get fired for complaining about their work, but not for refusing to pay fair share fees.

The second reason for dismissing *Pickering* and *Garcetti* was that they concern the rights of individual employees, whereas fair share fees are "a blanket requirement," and a "speech-restrictive law with widespread impact . . . gives rise to far more serious concerns than could any single supervisory decision."[40] That is not the law and never has been. Nor was it the facts of *Pickering*,

[37] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[38] Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
[39] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2472 (2018).
[40] *Id*.

Garcetti, or *Janus*. In *Garcetti*, for example, the Los Angeles County District Attorney justified the discipline of Richard Ceballos in terms of policy: his supervisors had decided not to dismiss the case that Garcetti thought should be dismissed, and his defiance of their judgment was the basis for discipline.[41] Similarly, when the Court rejected a First Amendment challenge to the abortion counseling gag rule in *Rust v. Sullivan*, it upheld a blanket policy (prohibiting any recipient of Title X family planning funds from providing information about abortion).[42]

Moreover, finding greater First Amendment protection for speech compelled by a blanket policy than for the speech of an individual isn't even the law that the Court itself applied in a First Amendment case handed down the day before *Janus*. In *National Institute of Family and Life Advocates v. Becerra*, the same conservative five justices held that the First Amendment invalidated California laws requiring women's health clinics to give accurate information.[43] This involved a blanket policy (a California state law) regulating the speech of all health providers, not individual restrictions. Similarly, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commissio*n, a bakery argued that a state law prohibiting discrimination in places of public accommodation violated its alleged free-speech right to refuse to serve gay couples.[44] The Court did not decide the First Amendment issue, sending the case back to the lower court to reconsider, but the Court never suggested that the First Amendment wouldn't

[41] Brief for the Petitioners, *Garcetti*, 547 U.S. at 410 (No. 04-473).

[42] Rust v. Sullivan, 500 U.S. 173 (1991).

[43] Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA), 138 S. Ct. 2361, 2378 (2018); *see* Cal. Health & Safety Code § 123472(a)(1) (requiring certain primary care clinics to post a notice stating: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [telephone number]").

[44] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 138 S. Ct. 1719 (2018).

apply because the law affects all businesses rather than just Masterpiece. First Amendment rights don't get stronger when it is one person rather than many whose speech is restricted.

The *Janus* majority also distinguished *Pickering* and *Garcetti* on the ground that they were cases in which employees were prevented from speaking, not compelled to speak. Outside a situation involving speech as part of an employee's official duties, the majority said, "it is not easy to imagine a situation in which a public employer has a legitimate need to demand that its employees recite words with which they disagree."[45] Leaving aside the fact that nobody was forced to "recite words," the First Amendment generally has not distinguished between compulsion and restriction of speech. Take the Court's original compelled speech case, *West Virginia Board of Education v. Barnette*, which struck down discipline of students with a religious objection to reciting the Pledge of Allegiance:[46] would it matter if a student were disciplined for refusing to recite the Pledge, or for reciting it but changing the words to avoid offending the student's beliefs? Of course not. Moreover, the Court has upheld laws requiring speakers to "recite words." As Justice Breyer pointed out in his dissent in *NIFLA*, in *Planned Parenthood v. Casey* the Court upheld a law requiring medical personnel providing abortions to inform patients about the nature of the procedure, the health risks of abortion and childbirth, and the "probable gestational age of the unborn child," and to inform the patients of printed materials "describing the fetus, medical assistance for childbirth, potential child support,

[45] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2473 (2018).
[46] W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

and the agencies that would provide adoption services (or other alternatives to abortion)."[47]

This aspect of the Court's reasoning in *NIFLA* raises a point the *Janus* Court never considered. It has never before held that there is a constitutional right to refuse to subsidize speech where the underlying speech is not protected by the First Amendment. The only basis on which Janus could resist paying fees to subsidize collective bargaining would be if the collective bargaining is speech that is protected by the constitution. One doubts that the Court would hold that a group of employees who demanded collective bargaining over terms of employment would be protected by the First Amendment. But why not? If subsidies for collective bargaining are protected, why on earth not the bargaining itself? Many states do have a right to bargain collectively in their state constitutions.[48]

Perhaps the argument would be that compelled subsidies for collective bargaining are unconstitutional even though collective bargaining is not constitutionally protected speech, because public sector bargaining is bad. The attack on union security, both in *Janus* and in political critiques of unions and collective bargaining, is fueled, in part, by the sense that unions in both the public and private sectors are political organizations that should not be able to intervene in the policy-making process through collective bargaining. The critique is that union security gives unions too much power over the workers they represent and too much power over employers. Much of the *Janus* critique of union political activity focuses on the notion that unions do not reflect the

[47] *NIFLA*, 138 S. Ct. at 2384 (Breyer, J., dissenting) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 881 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (quoting 18 Pa. Cons. Stat. § 3205 (1990)).

[48] *See, e.g.*, NY Const. art. I § 17 ("Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.").

interests of the employees they represent. Union supporters believe union security arrangements are democratically devised solutions to collective-action problems facing democratic organizations. Union critics see union security provisions, including fair-share fees, as perpetuating the power of more-or-less corrupt and oligarchic special interest groups that use money coerced from dissenting employees and taxpayers to pursue a political agenda closely tied to the values of the Democratic party and the unions' leadership. The legitimacy of union security thus turns, in part, on whether laws and union rules effectively promote democratic self-governance within labor unions.

Justice Alito's third way of reconciling the Court's newly-invented First Amendment right with precedent was that some forms of political-patronage hiring are unconstitutional and, therefore, union fees should be unconstitutional too.[49] Apart from the false syllogism, the reasoning falls apart because the Court has upheld many laws prohibiting political activity of government employees. It upheld the federal Hatch Act (which prohibits certain partisan political activity on federal government employees' free time).[50] It upheld state laws that prohibit patronage appointments in low-level jobs.[51] The only anti-patronage law the Court has declared unconstitutional is a restriction on awarding policymaking jobs based on political affiliation.[52] (There might be many reasons why Democrats wish Jeff Sessions were not the Attorney General, but one cannot argue that his early political support for Donald Trump makes it unconstitutional for Trump to choose him.)

[49] *Janus*, 138 S. Ct. at 2470.
[50] United Pub. Workers v. Mitchell, 330 U.S. 75 (1947); U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973).
[51] Elrod v. Burns, 427 U.S. 347 (1976).
[52] Rutan v. Republican Party, 497 U.S. 62 (1990).

III. Complicity, Compulsion, and Democracy

Although, as will be explained below, the impact of *Janus* is enormous for governments and their employees, those outside the labor field may think it will have little impact on other areas of free-speech law. But there are disturbing aspects to the Court's reasoning in *Janus* and in its other compelled speech case, handed down the day before, *NIFLA*. Those may portend much more radical changes in how the Court considers the constitutionality of the what Justice Kagan in her *Janus* dissent: "Speech is everywhere – a part of every human activity (employment, health care, securities trading, you name it)."[53]

First, the Court appears to have launched itself on its own form of viewpoint discrimination in how it handles speech restrictions. The day before the Court handed down its decision in *Janus*, the same five conservative justices decided that California lacks a compelling interest in requiring so-called crisis pregnancy centers to inform pregnant women that low-cost abortions are one available alternative.[54] Yet, the Court did hold several years ago that states do have a compelling interest in requiring health care providers to inform patients seeking abortions about certain facts about fetuses and about certain debatable propositions about abortion. As Justice Breyer remarked in dissent, the Court essentially believes that the government has a compelling interest in forcing health care providers to try to talk women out of having abortions but no compelling interest in forcing them to identify abortion as one way of dealing with an unwanted pregnancy.[55]

It upheld compelled speech warnings attempting to dissuade women from having abortions (including compelling health

[53] *Janus*, 138 S. Ct. at 2502 (Kagan, J., dissenting).
[54] Nat'l Inst. of Family Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2379 (2018).
[55] *Id*. at 2384 (Breyer, J., dissenting).

care providers to tell patients information that science considers misleading or wrong).[56] But it struck down notices alerting women to the availability of abortions in *NIFLA*.[57] If a legislature were to adopt the rule the Court has created, under the Court's own precedents condemning viewpoint discrimination in law, the rule would be unconstitutional. Moreover, the Court has compelled speech in the labor area too. In *Hudson*, the Court invented a constitutional rule compelling unions to notify workers they represent of their right to free-ride on the fees paid by their co-workers. It's worse than ironic that the Court engages in viewpoint discrimination while invalidating laws on the grounds of viewpoint discrimination.

The tension between *Janus* and *NIFLA* is troubling. Compelling a private organization to give a message to its members that is antithetical to the organization's own deeply held values is precisely what Justice Thomas found objectionable in *NIFLA*. Yet, *Janus* dramatically expands public sector unions' obligation to undermine their own mission by doing exactly that. If it is unconstitutional to require a pregnancy service provider "to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option" it should be equally unconstitutional to require unions to notify their members of their right to quit the union "at the same time [unions] try to dissuade [workers] from choosing that option."[58]

More generally, as many have observed, the Court has suddenly cast into constitutional doubt an enormous array of regulations of lawyers and a host of other service providers. Laws

[56] *Id*.
[57] *Id*.
[58] *See id*. at 2371.

require sellers of goods and services routinely to warn prospective consumers about their goods and services because the government, sometimes controversially, deems certain uses of a product or service to be objectionable. Purveyors of alcoholic beverages are required to warn pregnant women of the dangers of drinking because the government condemns drinking while pregnant, even though some research suggests that modest consumption is not hazardous. Most of the law regulating lawyers operates as restrictions and compulsions on speech. When the majority in *NIFLA* explained that most professional speech is protected by the First Amendment, and the Court's decision upholding certain restrictions on lawyer solicitation and advertising in *Zauderer* does not apply because "[t]he notice in no way relates to the services that licensed clinics provide," it was ignoring most of the law of professional responsibility.[59]

The tension between how *Janus* treats unions and how state rules of professional conduct treat lawyers extends beyond the bar-dues issue noted above. Lawyers are required to counsel clients about the wisdom of hiring another lawyer to give a second opinion on a business transaction between lawyer and client and on a retainer agreement that limits malpractice liability. Lawyers must make elaborate disclosures about contingency fees. Organizations receiving funding from the Legal Services Corporation must warn prospective clients that the lawyers will have to terminate the representation if the client loses her lawful immigration status or starts to reside with someone who has ever been convicted of certain crimes, even if the representation is not funded by the LSC. While the Court in *NIFLA* suggested that compulsory disclosure is acceptable when it takes the form of an informed consent law,

[59] *Id*. at 2372.

these are not informed consent laws, they are disclosure laws. Some lawyers feel these warnings are irrelevant or inimical to their effective representation, just as NIFLA objects to the disclosure laws, but that has never made them unconstitutional. Justice Thomas's notion that abortion is different because it is controversial (unlike, presumably, restrictions on lawyer speech) ignores the controversy surrounding many rules prohibiting or compelling lawyer speech. In some states, lawyers *cannot* report a client's likely harmful conduct toward a third party; in some states lawyers *may* report; but in most states psychotherapists *must* report. These are highly controversial rules and they do not fit within the categories of informed consent and professional conduct that the *NIFLA* majority suggests are the only exceptions to First Amendment protection for professional speech.

The justices have snuck two especially baffling statements about general free speech rules into its compelled speech cases from June 2018. First, in *Janus*, the Court created confusion about the degree of constitutional scrutiny for compelled speech in the commercial area. The *Janus* Court said that *Knox*, a prior fair-share fee case, held that "exacting scrutiny" should be applied to such restrictions, even if they are commercial speech and not subject to strict scrutiny. The *Janus* majority continued:

> Even though commercial speech has been thought to enjoy a lesser degree of protection, see, *e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-563 (1980), prior precedent in that area . . . had applied what we characterized as "exacting" scrutiny, *Knox*, 567 U.S. at 310, a less demanding test than the "strict" scrutiny that might be thought to apply outside the commercial sphere. Under "exacting" scrutiny, we noted, a compelled subsidy must "serve

> a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms." *Ibid*. (internal quotation marks and alterations omitted).[60]

That passage makes no sense. *Central Hudson* applies intermediate scrutiny to commercial speech.[61] But the "exacting scrutiny" standard that the Court articulates here is identical to strict scrutiny. The majority in *Janus* then continued:

> [P]etitioner in the present case contends that the Illinois law at issue should be subjected to "strict scrutiny." The dissent, on the other hand, proposes that we apply what amounts to rational-basis review, that is, that we ask only whether a government employer could reasonably believe that the exaction of agency fees serves its interests. This form of minimal scrutiny is foreign to our free-speech jurisprudence, and we reject it here. At the same time, we again find it unnecessary to decide the issue of strict scrutiny because the Illinois scheme cannot survive under even the more permissive standard applied in *Knox* and *Harris*.[62]

The "more permissive standard" appears to be the same as strict scrutiny, and it is indeed fatal in the union dues cases. Is that something that the Court will pick up on next year or thereafter to say that it has already decided that regulation of commercial speech is no longer subject to intermediate scrutiny?

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[60] Janus v. Am. Fed,'n of State, Cnty., & Mun. Emps. Council 31, 138 S. Ct. 2448, 2464-65 (2018).

[61] "For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[62] *Id*. at 2465 (citations omitted).

The second disturbing aspect of the holdings in *Janus* and *NIFLA* is the statement in *NIFLA* that the disclosure requirements are content regulation subject to strict scrutiny and invalid if they are under- or over-inclusive or if the interests they serve are not compelling or not real or if compliance with the disclosure rule is "unduly burdensome" or if the government could convey the required information itself.[63] All disclosure rules are, by definition, content regulation. Most disclosure rules are under- or over-inclusive because some people will not need or want the disclosure, and some will require more disclosure. Compelled disclosure in English will not help those who do not understand English. And the government can *always* convey the message itself rather than require the private entity to convey it.

Moreover, compelled subsidies of others' speech are ubiquitous. Drivers and employees are compelled to purchase liability and health insurance, and insurers use some part of that money for speech. Employees covered by pension plans subsidize speech of the financial-services companies that collect pension contributions. The *Janus* majority suggested that union fair-share fees become unconstitutional because, in the aggregate, the effects of public-sector bargaining are substantial for public policy. But of course the effect of insurance and financial-services industry lobbying (using the insureds' compulsory payments) is equally substantial and equally controversial.

The conservative majority's answer to all of these examples is that the government has a compelling or substantial interest in some restrictions but not in the ones it struck down. Justice Alito said exactly this in *Harris v. Quinn* in explaining why requiring lawyers to pay bar dues and public university students

[63] *NIFLA*, 138 S. Ct. 2361, 2377 (2018).

to pay activity fees serves an overriding government interest, while fair-share fees do not.[64] But it is not enough simply to posit that states need the bar to charge dues to fund bar admission and discipline more than they need to maintain public-employee personnel systems. That is like saying chocolate ice cream is better than vanilla. It's self-evident only to those who share the justices' values. And even if it were true, can it really be said that the Federal Aviation Administration has a substantial interest in requiring airlines to tell passengers how to fasten a seatbelt? Is there anyone on a plane who has never seen or used one? And how many people who can afford to buy a plane ticket are unaware of questions about alcohol consumption during pregnancy?

It might be that the Court will not follow the broadest implications of its compelled-speech reasoning to all forms of compulsory disclosure or compulsory subsidies, and will instead limit these cases to speech or subsidies that it thinks requires speakers to be complicit in speech they abhor. What underlies the Court's hostility to speech in *NIFLA* and *Janus* is the notion that the anti-abortion "crisis pregnancy centers" and Mark Janus were philosophically opposed to giving the notice or paying fees and that the speech made them complicit in conduct they abhor. In other words, *Janus* and *NIFLA* are not necessarily broad pronouncements on compelled speech but, rather, are narrower condemnations of speech or subsidies that require complicity. Even if the opinions are thus narrowed, one may be troubled by the Court's approach to complicity.

Justice Kennedy said in his concurring opinion in *NIFLA*: "Governments must not be allowed to force persons to express

[64] Harris v. Quinn, 134 S. Ct. 2618, 2643 (2014).

a message contrary to their deepest convictions."[65] He found the claim of complicity so weighty in *Masterpiece Cakeshop* that a baker who refused to bake a cake for the wedding reception of a gay couple was entitled to have his claim judged by a state agency that hadn't had a member say that atrocities have been committed in the name of religion.[66] The *NIFLA* and *Janus* majority's approach to the complicity theory of compelled speech, like the *Masterpiece* approach to free speech and free exercise claims, pick up the idea that the Court rejected in *Employment Division v. Smith*[67] but revived in *Hobby Lobby*, when it found a statutory right to freedom of religion violated by requiring employers to provide contraceptive coverage in their employee benefit plans.[68] These are extravagantly broad claims about what makes one complicit in the actions of another. This isn't requiring people to have an abortion or use contraception or marry someone of the same sex, and it's not even asking someone to officiate at a marriage or attend or help someone get an abortion or contraception. Rather, it is simply having to make a statement of fact or decorate a cake or include coverage in a benefits plan. To turn disclosure, nondiscrimination laws, and employee benefits into complicity is to render religion or conscience a basis for opting out of life in a diverse community.

IV. Implications of *Janus* on the Ground and in the Courts

Janus poses four very significant problems for labor. First, and most obvious, is the question whether it will lead to a dramatic drop in membership. Anti-union groups have already hired canvassers to go door to door in blue states encouraging employees

[65] *NIFLA*, 138 S. Ct. at 2379 (Kennedy, J., concurring).
[66] Masterpiece Cakeshop v. Col. Civ. Rights Comm., 138 S. Ct. 1719 (2018).
[67] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990).
[68] Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

to quit their union and quit paying dues by convincing them that they can get the benefits of the union contract without paying for it.[69] Their goal is to get so many teachers, home health aides, and others to leave the unions that the unions lack the money to provide services to all the workers they represent. As the quality of services falls, more will leave the union, until ultimately the union will wither away. Unions have anticipated this and have been vigorously signing up fee-payers as full members.

Second, dozens of suits have been filed seeking repayment of fees paid going back for as many years as the statute of limitations will allow. The potential liabilities are staggering if courts conclude that *Janus* applies retroactively and requires refund of fees paid for many years past.

Third, litigation has been filed seeking to build on the *Janus* ruling to extend the prohibition on agency fees to the private sector. Some cases focus on the Railway Labor Act, and some on the National Labor Relations Act.

Fourth, litigation has also been filed to build on *Janus* to extend the prohibition on agency fees to a prohibition on union representation based on majority rule. The plaintiffs in these cases argue that, if paying fees to support bargaining is unconstitutional, it should be unconstitutional for a union to negotiate a contract on behalf of those who do not want union representation at all. Anti-

[69] *See, e.g.*, Dirk Vanderhart, *Following Decision On Union, Canvassers Target Public Workers in Oregon*, NW News Network (July 2, 2018), http://nwnewsnetwork.org/post/following-decision-union-canvassers-target-public-workers-oregon; Bloomberg, *Group Funded by Conservative Billionaires Launches Anti-Union Campaign Following Supreme Court Ruling*, L.A. Times (June 28, 2018, 12:10 PM), http://www.latimes.com/business/la-fi-freedom-foundation-20180628-story.html.

union advocates have lost those cases before.[70] The majority stated that it was not calling majority-rule representation into doubt.

Whether *Janus* will change that ultimately depends on how the Supreme Court chooses to build on a few passages in *Janus*. Justice Alito said Mark Janus was not free-riding "on a bus headed for a destination that he wishes to reach but is more like a person shanghaied for an unwanted voyage."[71] Elsewhere, the majority said that majority rule representation is "a significant impingement on associational freedoms that would not be tolerated in other contexts"[72] and "[d]esignating a union as the employees' exclusive representative substantially restricts the rights of individual employees."[73] In a footnote, the majority noted that "under common law, collective bargaining was unlawful, and into the twentieth century, every individual employee had the liberty of contract to sell his labor upon such terms as he deemed proper," but then said "[w]e note this only to show the problems inherent in the Union respondent's argument; we are not in any way questioning the foundations of modern labor law."[74]

V. Unions Security for the Twenty-First Century

The outcome in *Janus* was anticipated from November 2016, when it became apparent that Donald Trump would fill the Scalia seat rather than Hillary Clinton. Unions and worker advocates

[70] *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 346 (1944) (reasoning that if individual agreements could supersede collective bargaining agreements, "statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually"); NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949) (holding that, when an employer excluded the majority elected representative by increasing wages outside of the negotiation, the side agreement constituted unfair labor practices).

[71] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2466 (2018).

[72] *Id*. at 2478.

[73] *Id*. at 2460.

[74] *Id*. at 2471 n.7.

have had time to think about union security in a world in which all forms of union security as it has been known for a century have been declared unconstitutional (in the public sector) and are in the sights of the five conservative justices (in the private sector).

The most important and most promising set of ideas are going by the name "Together We Rise." They focus on legislation and executive action to facilitate communications among workers about unions, to ease membership sign-up, to promote stability of bargaining units, and to create alternative dues-payment systems. Some of these provisions have been enacted into law in California, New York, and New Jersey.[75] As for membership, unions insist that their best protection is to enable them to recruit and retain members. Unions seek, and in California and other states have obtained, mandatory access to new employee orientations.[76] Under these rules, unions have a right to receive notice of when all public-sector employers conduct all new employee orientations and have a right to meet with new employees at the orientations without the presence of supervisors or other entities (such as anti-union organizations).[77] Unions also seek legislation and contract terms requiring delivery of new hire and bargaining unit lists to the exclusive representative and also protections against disclosure of such lists to other organizations.[78] To enable unions to keep their members engaged and to ensure effective communications, unions seek opportunities to communicate with workers at employer

[75] *See* Cal. Gov't Code §§ 3555-3559 (effective Jun. 27, 2018) (requiring California public employers to provide unions mandatory access to new bargaining unit employees at orientation); 2018 Sess. Law News of N.Y. Ch. 51 (S. 7501) (requiring public sector employers to furnish labor organizations with employee contact information and permitting union representatives to meet with new public sector employees within thirty days); A. 3686, 218th Gen. Assem., Reg. Sess. (N.J. 2018) (allowing labor representatives to meet with members during work hours and requiring public employers to furnish labor organizations with contact information of covered employees).

[76] *See id.*

[77] *See id.*

[78] *See, e.g.*, Assem. Bill 119, 2017-2018 Reg. Sess. (Cal. 2017).

trainings or other in-service meetings and to be allowed to use the email system or website of the employer to communicate with workers. Finally, unions seek to ensure the employer remains neutral about unionization by restricting the ability, especially the differential ability, of employers to use supervisors to dissuade employees from joining the union.[79]

Even with rights to communicate with the employees, still unions must have the ability to collect member dues in order to have a stable source of funding to support the union's role as representative. To that end, unions seek to ensure, through statute or contract, that the employer remains required to deduct dues from the employees' paycheck if the employee allows it and to allow employees to authorize payroll deduction through electronic signatures. To some extent, the loss of agency fees could be partially offset by allowing union representatives to adjust grievances or engage in other contract enforcement tasks on paid time. (This is the system that is used in the federal service.)[80] But many unions are attentive to the need to ensure that this "official time" does not become the union's only source of support, because it may have the unintended consequence of making union representatives less responsive to their membership and more responsive to the employer to continue the union representative in his or her job.

These proposals also insist that unions should remain democratically chosen organizations that are member-driven and

[79] *See* 29 U.S.C. § 158(a)(3) (2018) ("It shall be an unfair labor practice for any employer to . . . encourage or discourage membership in any labor organization."); 29 U.S.C. § 152(2) (2018) ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . ."); *but see* NLRB v. CNN America, Inc., 865 F.3d 740, 762 (D.C. Cir. 2017) (finding that although supervisors' statements reflected an anti-union animus, the "employer's hiring process must be either upcoming or ongoing" because if hiring were completed a "no-union statement could not generally suggest coercion.").

[80] 5 U.S.C. § 7131 (2018).

member-governed. They reject ideas that unions should disclaim their obligation to represent all workers in a bargaining unit; in other words, they reject members-only bargaining.

The most controversial set of proposals to protect union finances without agency fees are proposals to require government employers to pay money directly to the union for representational services.[81] If governments fund unions directly, the money never comes out of the employees' paycheck, and this would avoid the First Amendment problem the Court perceived in *Janus*. But this kind of system has serious problems.

When the union receives money directly from the government, it is at risk of becoming less responsive and accountable to its members and more responsive to its funder. Moreover, turning the union into a line item in the government's budget risks catastrophic cuts to the union's budget whenever a new government is elected or whenever the public-sector agency budget is cut, and these are the times when government employees may most need the union to advocate for the interests of government workers.

The four major public-sector unions (not including those representing public safety workers)—American Federation of State, County and Municipal Employees (AFSCME), American Federation of Teachers (AFT), National Education Association (NEA), and Service Employees International Union (SEIU)—have all endorsed policies that encourage and enable unions to be responsive to and to represent all workers in the bargaining unit. They unite in opposing members-only bargaining or any

[81] *See* Daniel Hemel and David Louk, *Is* Abood *Irrelevant?*, 82 U. Chi. L. Rev. Dialogue 227, 229 (2015) ("If a public sector employer wants to make sure that a labor union is compensated for the cost of representing nonmembers, the employer could just as easily reimburse the union for those expenses directly.").

other incursion on the principles of majority-rule representation in both contract negotiation and contract enforcement. They unite in opposing authorization of representation of bargaining unit employees by attorneys or other representatives not appointed by the union. They also unanimously oppose creating fee-for-service arrangements for non-members, including the system of per-capita payment by the government to the union.

Conclusion

Janus was one of fourteen 5-4 decisions this Term in which Justice Anthony Kennedy joined with Justices Roberts, Alito, Thomas and Gorsuch in reaching a conservative result. In no case did Justice *Kennedy* join with the liberals against the conservatives. Therefore, one may say that October Term 2017 marks the beginning of what will surely be a more conservative Supreme Court era. If Brett Kavanaugh is confirmed, he is unlikely to adopt a more tolerant or egalitarian interpretation of the Constitution. Those concerned about the growing divide between rich and poor and who support workplace democracy on the principle of majority rule are, to paraphrase *Janus*, on an unwanted voyage to a destination they would rather not reach. And the Republican-appointed justices are the captains of the ship, navigating with only their own personal policy preferences as a guide.

Jesner and the Supreme Court's Ongoing Assault on International Human Rights

Martin S. Flaherty*

For a time, the federal judiciary was a scourge of some of the most evil people, who committed some of the most heinous crimes in the world. Almost uniquely, U.S. courts for over a generation oversaw civil suits against dictators, despots, and their authoritarian henchman involved in prolonged arbitrary dentation, torture, crimes against humanity, extrajudicial murder, and genocide regardless of where it occurred. Even a partial list of those called to answer for their misdeeds reads like a Who's Who of the most despicable figures to appear on the world stage in recent times: Radovan Karadžić, Ferdinand Marcos, the leaders of South Africa's apartheid regime, Muammar Gaddafi and associated terrorist groups, not to mention a host of lesser accomplices like Americo Pena-Irala, effectively the head of a Uruguayan death squad under the regime of strongman Alfredo Stroessner. Add to this various multinational corporations that credible press reports indicated were complicit in such activities as the clearing of indigenous peoples and murder of environmental activists who stood in their way. As journalist and author Cam Simpson recently

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stated, "American courts were the centerpiece for people to bring international human rights cases."[1] In this role they served as a rare bastion of accountability in a world of impunity.

Simpson knows whereof he speaks. Consider the harrowing case he recounts in his recent book, *The Girl From Kathmandu: Twelve Dead Men and a Woman's Quest for Justice*.[2] The twelve dead men were Nepali workers who were brutally killed by insurgents at the outset of the second Gulf War in Iraq. The video of their execution was the first of its kind to go viral on the Internet. The victims did not wind up in a warzone out of free choice. The Nepalis had travelled to Jordan in the belief that they would have jobs waiting there. Instead they were trafficked with the knowledge of the American contractor, KBR Haliburton, for whom they were sent to work at a U.S. military base in Iraq under a U.S. government contract. Back in Nepal, the devastated young widow of one of the men who was killed, Kamala Magar, put her life back together against daunting odds. With the help of American human rights lawyers, including a former Peace Corps volunteer in Nepal, Magar decided to become a plaintiff in a suit against KBR, among others, for the kidnapping and trafficking of the twelve men.[3] At the end of the proceedings, the District Judge stated that what had occurred was "more vile than anything that this court has previously confronted."[4]

By hearing such cases, "the least dangerous branch" enhanced American foreign policy in innumerable ways. For a start it showed that the U.S. government, or part of it, could side with

[1] *Author Discussion on War*, C-SPAN (June 10, 2018), https://www.c-span.org/video/?446055-9/author-discussion-war.
[2] Cam Simpson, The Girl from Kathmandu: Twelve Dead Men and a Woman's Quest for Justice (2018).
[3] Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674 (S.D. Tex. 2009).
[4] Simpson, *supra* note 2, at 366 (quoting Adhikari v. Daoud & Partners, 95 F. Supp. 3d 1013, 1024 (S.D. Tex. 2015).

the vast majority of the voiceless and oppressed against powerful authoritarian governments and interests, even when these were associated with other U.S. agencies. Such willingness helped offset the many blunders of the political branches—that seeking short-term strategic gain with an authoritarian ruler alienated the many whom they ruled in the long run. No less importantly, American judges helped render credible the nation's until-recently perennial claims to global leadership in human rights. Most fundamentally, U.S. courts demonstrated that the nation's commitment to the rule of law, domestic and international, was not empty diplomatic rhetoric.

The judiciary could play this underappreciated role in American foreign policy not through indifference to the law, but precisely through fidelity to it. The international human rights litigation that the courts shepherded was and remains faithful to history, both to the dictates of the First Congress of the United States, and more generally to the founding generation's commitment to separation of powers in foreign and domestic matters alike. Subsequent precedent and custom have yet to overturn these foundational commitments, and in certain respects have strengthened them. In this light, the workings of modern international relations have only made the need for the judiciary to apply the law, especially in foreign affairs, all the more urgent. Modern international relations have proven to be yet one more (and underappreciated) factor in the inexorable rise of executive power in particular. The need for the courts to preserve their historic role of maintaining a balance among the three branches has grown, not diminished. For all these reasons, the legacy the courts had established in international human rights litigation

remained singularly faithful to the Constitution, domestic law, and international obligations.

And then the Supreme Court got involved.

I. Glory Days

The vehicle for most, though not all, international human rights litigation in the U.S. is, of course, the Alien Tort Statute (ATS). The ATS in its totality states that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[5] Once upon a time, almost every account of the ATS began with Judge Henry Friendly's observation that it "is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."[6] Scholarship has since shed light on the statute's origins, in no small part to meet the demands of modern opponents and proponents. Yet it was true enough that for nearly 200 years the ATS lay unknown and unused.

Then came *Filartiga v. Pena-Irala*.[7] In 1979, Dr. Joel Filartiga and his daughter, Dolly, both citizens of Paraguay, filed the first modern ATS suit in U.S. Federal District Court in Brooklyn against Americo Norberto Pena-Irala, also a Paraguayan citizen, for the kidnapping, torture, and murder of Filatiga's 17 year old son, Joelito. They alleged that Pena, who had been the inspector-general of the local police, had orchestrated the crimes. Dolly asserted that later on the day of the abduction, the police brought her to Pena's home, "where she was confronted with the body of her brother, which evidenced marks of severe torture. As she fled,

[5] 28 U.S.C. § 1350 (2016).
[6] ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
[7] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

horrified, from the house, Pena followed after her shouting, 'Here you have what you have been looking for for so long and what you deserve. Now shut up.'"[8] The Filartigas claimed that Joelito had been targeted because of his father's opposition to Paraguay's then-dictator, Alfredo Stroessner. Dolly had ultimately fled to the U.S. and settled in Washington, D.C. Not long thereafter, she discovered that Pena-Irala had moved to Brooklyn. After consulting with the Center for Constitutional Rights, she decided to attempt a civil action under the ATS.

Their case fell literally within the terms of the statute. They were aliens. They sought to bring an action for a tort only. The violations they asserted, torture and extrajudicial murder, were well established under customary international law as it had developed since World War II. The District Court nonetheless dismissed the complaint. The Second Circuit reversed and let the suit go forward. The opinion could not have come from a more improbably source. Judge Irving Kaufman had come to national prominence as the district judge who presided over the trial of Ethel and Julius Rosenberg, whom he sentenced to death after their convictions for passing nuclear secrets to the Soviets. Worse, in considering the sentence, he had allegedly engaged in impermissible *ex parte* contacts with the federal prosecutors on the case, including the notorious Roy Cohn.[9] Kaufman nonetheless effectively wrote a manifesto for the domestic enforcement of international human rights. The main issue centered on whether customary international law addressed how nations treated persons within their own borders and jurisdiction. Kaufman and the court answered yes, drawing upon numerous sources to satisfy the first main

[8] *Id*. at 878.
[9] *An Open Letter to Judge Irving Kaufman*, N.Y. Times (June 19, 1977), https://www.nytimes.com/1977/06/19/archives/an-open-letter-to-judge-irving-r-kaufman.html.

requirement of international custom—that a principle command a near consensus of the world's nations. Typical of American courts, the Second Circuit did not address the other main requirement that international lawyers consider—whether nations have acted out of a sense of legal obligation. That did not prevent the court from rightly concluding that torture in particular was a core violation of international law.[10]

Filartiga ushered in over thirty years of often high profile, international human rights litigation in U.S. courts. The cases roughly came in two waves. The first fifteen years or so witnessed something of a golden age. On the *Filartiga* model, foreign victims of authoritarian regimes used the federal judiciary as a kind of "truth commission" to establish that they or their loved ones had been arbitrarily detained, disappeared, or killed, whether or not they could actually obtain damages. Representative successes, often default judgments, included the following: a suit against an Indonesian general for a summary execution of a New Zealand national in East Timor;[11] an action brought by Kanjobol indians against a former Guatemalan defense minister for torture, disappearance, and extrajudicial killing;[12] and a suit against Radovan Karadžić, the leader of the Republika Srpska, for, among other things, genocide.[13] Successes in this vein continued in cases such as *Yousuf v. Samantar*, in which the courts denied a former prime minister of Somalia immunity from suit for torture, arbitrary detention, and extrajudicial killing.[14]

Every circuit court to consider the new spate of ATS cases approved. Outside the courtroom, Congress lent tacit approval, as

[10] *Filartiga*, 630 F.2d at 878.
[11] Todd v. Panjaitan, No. 92-12255-PBS, 1994 WL 827111 (D. Mass. Oct. 26, 1994).
[12] Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. Apr. 12, 1995).
[13] Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995).
[14] Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012).

well, in passing the Torture Victim Protection Act of 1991, which opened ATS-type suits to U.S. citizens for torture and extrajudicial killing.[15] Likewise supportive was the executive, Republican and Democratic, in numerous amicus briefs. Among the few prominent dissenting voices was Judge Robert Bork, who argued that the law-of-nations violations on which the ATS permitted suit were frozen to those that existed when the act was passed in 1789.[16] That would have meant that not even torture, much less much else in modern human rights law, would have been covered. Bork, however, was all but a lone voice.

Then human rights victims started suing corporations. And the pushback began. This second wave of ATS suits reflected a simple reality. Multi-national corporations, often more powerful than most states, not infrequently work hand-in-hand with authoritarian regimes on mutually beneficial projects. And sometimes pursuing such joint projects involves horrific human rights violations. An early case, *Doe v. UNOCOL*,[17] illustrates the dynamic. In 1996 a group of Burmese villages brought suit against UNOCOL, a multi-national oil company, for aiding and abetting the Myanmar military dictatorship in committing human rights violations to, in turn, assist UNOCOL to put an oil pipeline in their region. Among the alleged violations were forced labor, torture, rape, and extrajudicial killing. The parties ultimately settled.[18] Cases such as *UNOCOL* multiplied. Yet as anyone might have predicted, suing major corporations meant more formidable opposition than suing former Paraguayan police officials. For one thing, the position of the executive branch at the highest levels switched from support

[15] 28 U.S.C. § 1350 (2016).
[16] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812-16 (D.C. Cir. 1984) (Bork, J., concurring).
[17] Doe 1 v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
[18] *Unocal Lawsuit (re Myamar)*, Bus. & Hum. Rts. Resource Ctr., https://www.business-humanrights.org/en/unocal-lawsuit-re-myanmar.

to opposition. More importantly, corporate defendants could hire the nation's most prestigious law firms. Such firms came complete with, among other assets, former Supreme Court clerks and Justice Department officials more than willing to use their legal talents and creativity to make sure that human rights victims would come nowhere near having their day in court.[19]

II. No Steps Forward, No Steps Back

The counterattack ultimately reached the Supreme Court. The first ATS case the justices would hear in fact would decide the fate of all litigation under the statute. For proponents of human rights, *Sosa v. Alvarez-Machain*[20] could scarcely have presented either a bolder challenge or worse facts. Dr. Humberto Alvarez-Machain allegedly had kept alive Enrique Camarena-Salazar, a U.S. Drug Enforcement Administration agent, so he could be tortured longer before being executed by a Mexican drug cartel that discovered he was an undercover agent.[21] Alvarez had already had a case go to the Supreme Court when he challenged his abduction by U.S. officials, who had spirited him out of Mexico to stand trial in the U.S. rather than obtain custody under a U.S./Mexican extradition treaty. The doctor did stand trial and was acquitted. Turning the tables, he then brought suit against his abductors. In the case of the Mexican authorities who aided and abetted their U.S. counterparts, Alvarez brought a claim under the ATS, alleging arbitrary detention in violation of customary international law.[22] His acquittal notwithstanding, his case did not exactly conjure the

[19] For a prescient analysis, see Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 Notre Dame L. Rev. 1645, 1665-67 (2014).
[20] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[21] *Id*. at 697-99.
[22] United States v. Alvarez-Machain, 504 U.S. 655 (1992).

sympathetic story of a noble dissident crushed and tortured by an authoritarian regime.

Conversely, the challenge to the ATS put forward on behalf of Sosa, the lead Mexican defendant, was far-reaching. Not coincidentally, they reflected the views of the solicitor general as well as an array of corporate associations. The argument was simple and fatal. The only thing that the text of the ATS did was to confer jurisdiction on federal district courts. It did not provide for a cause of action—in essence a license to sue—a necessary requirement for any civil action to go forward. The modern legal axiom held that a statute granting jurisdiction without another creating a cause of action meant that the courts could hear a given claim, but no one could bring it.[23] Had the justices accepted this argument, the results would have been momentous. Such a conclusion would have meant that the ATS cases of the previous quarter-century had been illegitimate. Prospectively, it would also have meant that no more ATS suits could have gone forward, whether against corporations or the official henchmen of authoritarian regimes.

A majority decided otherwise.[24] In an especially rigorous and nuanced opinion, Justice Souter preserved what had been the first wave of ATS suits, and partially left the door open for the second. The *Sosa* Court conceded that had the ATS been enacted today, a jurisdictional grant without an express cause of action would indeed have put an end to the matter. The ATS was, however, passed by the First Congress in the late eighteenth century. Here Justice Souter rightly argued that in that period, a grant of jurisdiction brought with it an expectation that courts

[23] *Sosa*, 542 U.S. at 712-24.
[24] *Id*. at 696-738.

would use their common-law-making power to fashion a cause of action. He further followed the dominant view of recent historical scholarship on the ATS to conclude that the First Congress would have specifically expected the federal courts to fashion three causes of action based on the contemporary law of nations: claims by ambassadors who had suffered assault; suits for violation of "safe conduct" (basically a guarantee by a national government that specified individuals could travel unmolested through its territory); and actions against pirates. Justice Souter then distilled two features common to these examples that would serve as the requisites for new causes of action as customary international law evolved. Any new such judge-made causes would have to command a "consensus of civilized nations." They would also have had to develop with a degree of specificity.

The Court's formulation preserved reliance on international law, yet did not get it exactly right. Modern customary international law—effectively the successor to "the law of nations"—conventionally must also meet two requirements. The first is "general practice," which might better be conceived as general public commitment. To meet this condition, an overwhelming majority of the world's states must consistently, and for some sustained period, act or pledge to prohibit or require some action. Next, it must be determined that states behaved as they did out of a sense of legal obligation, somewhat pretentiously known as *opinio juris (sive necessitatus)*. *Sosa* adopts half this formulation, but substitutes for the other. The Court's slightly off-putting requirement of a "consensus of civilized nations" accords with the idea of general practice closely enough. Justice Souter, however, overlooked *opinio juris* and instead insisted that a proposed norm be specific.

All that said, the distinction did not make much of a difference. For many commentators, the *opinion juris* hurdle is all but circular—establish a legal obligation by showing that states acted out of a sense that they were subject to the obligation sought to be established—and does little work. Generally, *opinio juris* is inferred from the existence of general practice. For its part, specificity could lead to the rejection of certain claims. The Convention Against Torture, for example, gives a detailed definition of the practice. It does not, however, define "cruel, inhuman and degrading treatment." An especially lazy American judge might throw up his or her hands as to the meaning of "cruel, inhuman and degrading treatment," rather than look to comparative and international decisions, much less to the general comments of the Convention's implementation committee defining the concept. For the most part, however, the important test remained, establishing a general practice that amounted to a consensus.

Whatever else, the *Sosa* formula meant that at the very least the "classic" *Filartiga*-type ATS suits were safe. Torture, extrajudicial killing, slavery, genocide, and prolonged arbitrary detention all easily meet both prerequisites. Also clear was that Alvarez might have won the war for the statute, but would lose the battle himself. The Court correctly observed that prolonged arbitrary detention was an established violation of international custom, but no less correctly held that the doctor's 24-hour detention in no way was "prolonged." Less clear would be the idea that private corporations could "aid and abet" such state-sanctioned human rights violations.[25]

[25] *Id*. at 725-38.

III. Retreat, Baby, and Surrender

For this reason, the opponents of the ATS were far from done. Success came out of the blue from the same Court of Appeals that handed down *Filartiga*. In fact, as recently as 2007, the Second Circuit had endorsed the idea that a human rights victim could allege that a corporation had aided and abetted state human rights violations.[26] Then, just three years later, came *Kiobel v. Royal Dutch Petroleum Co*.[27] This case involved a group of Nigerian nationals suing Dutch, British, and Nigerian oil companies for, among other things, torture and extrajudicial killing in connection with the running of a pipeline. In a stunning exercise of judicial activism, the majority baldly declared that corporations could not be sued under the statute. It reached this conclusion notwithstanding the absence of supporting statutory text and the usual presumption that tort liability runs to both natural and corporate persons under domestic law. As Judge Leval's masterful separate opinion makes clear, the majority mainly relied on the irrelevant determination that customary international law does not impose criminal, as opposed to civil, liability on corporations for human rights violations.[28]

The Supreme Court took the case, but not ultimately the issue it originally presented. It did grant certiorari, accept briefs, and hear oral argument on corporate liability. But in a rare move, it ordered the case be held over and reargued on a different issue—whether and to what extent the ATS applied extraterritorially. In a greater blow to human rights accountability, the Court answered with a qualified no.[29]

[26] Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007).
[27] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).
[28] *Id*. at 149 (Leval, J., concurring).
[29] Kiobel v. Royal Dutch Petroleum Co. (*Kiobel II*), 569 U.S. 108 (2013).

Writing for the majority, Chief Justice Roberts began his analysis with the presumption against applying federal statutes abroad. Curiously, he noted that this rule "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[30] He further suggested that this concern weighed even more heavily when, as *Sosa* concluded, Congress left it to the courts to craft the cause of action. Why any of this mattered when the only causes of action the courts could create were, by definition, universal, the opinion did not address. The Chief Justice stumbled even more badly over the statute's history. Among other things, he ran into obvious difficulties arguing that piracy, one of the three law-of-nations violations that the First Congress had in mind when enacting the ATS, was not extraterritorial. Likewise, he could not fully reconcile the 1795 statement of Attorney General Edmund Bradford that suggested that causes of action under the ATS applied to conduct in Africa. Despite all these difficulties, the presumption carried the day. According to the Court, future claims would have to "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."[31] On this view, *Filartiga* itself arguably should have been dismissed.

Justice Breyer, joined by three others, concurred with an alternative approach.[32] He rejected outright applying the presumption against extraterritoriality for the obvious reasons. It does not square either with Attonery General Bradford's opinion or the contemporary concern about piracy. More obviously, judicial authorization of a suit for the violation of a universal norm by

[30] *Id*. at 115 (2013) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).
[31] *Kiobel II*, 569 U.S. at 124-25.
[32] *Id*. at 127 (Breyer, J., concurring).

definition cannot create clashes between U.S. law and the laws of other nations. Instead, Justice Breyer argued that any limits on applying the ATS abroad should come from international law. On this basis, he suggested that he would find jurisdiction under the statutes where: "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest," including the interest of insuring that the U.S. does not become a safe harbor for torturers and other violators of fundamental international human rights.[33] In this instance, Kiobel's claim did not fit into any of the three categories. Nonetheless, on *this* view, *Filartiga* and many of the cases in its wake could have gone forward.

Justice Breyer's approach is at once more faithful to the ATS and, no less importantly, to the separation of powers. First consider the relevant history. As Justice Breyer points out, the presumption cannot be easily reconciled with the role of piracy or the views of Attorney General Bradford. Nor can it be easily reconciled with scholars who stress the founding generation's desire for the U.S. to be seen as fully committed to the law of nations. Beyond this, Justice Breyer might also have pointed out that the First Congress's expectation that the judiciary fashion a cause of action based on international law in no way cuts against judges limiting these to a U.S. territory. The founding generation, to the contrary, expressed confidence in the ability of the judiciary to say what the law is, including international law, as a further power for it to maintain balance among all three branches. Second, nothing in intervening constitutional custom undercuts this role. If anything, two generations of current ATS jurisprudence point the other

[33] *Id.*

way. Finally, modern international relations have only made the need for judicial accountability that much greater. The mutual empowerment of executives worldwide, especially in ways that put pressure on fundamental rights and evade domestic checks, makes those domestic checks even more essential. For that reason, a more expansive reading of Justice Breyer's third category would ideally include Kiobel's claim as well.

IV. Bring on Your Wrecking Ball: *Jesner*

Much the same critique applies to the Court's most recent blow to the ATS, which adds insult to *Kiobel II*'s injury. For the opponents of human rights litigation, even *Kiobel II* left untied one substantial loose end—whether corporations could be sued when a claim touched and concerned the territory of the United States. The Court finally decided the issue this past term in *Jesner v. Arab Bank*.[34] As before, its decision accepted the invitation of the corporate bar not merely to limit ATS litigation, but to eviscerate it. In this instance, the judicial overreaction took the form of adopting the Second Circuit's activist reading of the statute to confine liability to natural persons rather than the multinational corporations that aid and abet, employ, or otherwise encourage them. In short, no matter how heinous the human rights violation, a corporation cannot be sued.

The case itself involved mainly foreign nationals alleging that a New York branch of a Jordanian bank aided and abetted multiple acts of terrorism over the course of a decade in the Middle East. The underlying human rights violations at issue, had they been more thoroughly considered, would easily have met the *Sosa* test. These centered on a series of suicide bombings against civilians

[34] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

conducted by such groups as Hamas. Such acts could qualify as extrajudicial killing and violations of the customary international humanitarian law of armed conflict, among others. These violations, in turn, command both an international consensus and are defined with reasonable specificity.

The suit, however, focused not on the terrorist groups that committed these heinous acts, but one of the institutions that financed them. The defendant, Arab Bank, is a major financial organization based in Jordan with branches around the world, including New York. According to the victims and their families, Arab Bank maintained bank accounts for the terrorists and their front groups and allowed the accounts to be used to pay the families of suicide bombers. On this basis, the complaint claimed that the bank had aided and abetted the underlying human rights violations. In contrast to extrajudicial killing, the "aiding and abetting" in ATS litigation is less clear-cut. On one theory, it meets the *Sosa* test as a matter of customary international law. On another view, federal courts can recognize the claim as filling interstices in the statute as a matter of federal common law. Perhaps ironically, the Second Circuit itself had upheld an ATS claim against a corporation for aiding and abetting, with different members of the panel endorsing each approach. They did so prior to Judge Cabranes endorsing a very different and novel approach that eliminated the possibility of suing corporations under any theory.

With *Jesner*, the Court adopted this corporate version of a nuclear option. Yet apart from this core conclusion, the justices for the most part went their separate ways. The main opinion came from Justice Kennedy, only slivers of which commanded a majority.[35] Most of that consisted of a more-or-less anodyne

[35] *Id*. at 1388.

recounting of the history of the ATS and its reception by the Supreme Court. The only operative portion of his analysis that commanded a majority was a fairly pedestrian and muddled excursion speculating on international relations. Here the Court notes that the ATS was intended to promote harmony "by ensuring foreign plaintiffs a remedy for international-law violations."[36] Countering a number of scholars, the opinion narrows this commitment to "circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable,"[37] rather than a more positive vision of U.S. promotion of international law and human rights. From here, the opinion does not ask whether corporate liability per se accords with its narrower conception of international harmony. Rather, it focuses on a narrow subset of cases in which suits against a *foreign* corporation might lead to tension between the U.S. and a foreign state. At no point does the Court consider the foreign policy implications of an American multinational aiding and abetting human rights violations. Or of a foreign corporation aiding and abetting in which concerned states, including the state in which the violations may have occurred, applaud the effort at accountability. Or of suits in which the objections come from authoritarian states with the result that such suits promote harmony and goodwill toward the U.S. with both a majority of that state's population and democratic states that themselves promote international law and fundamental rights—arguably the chief effect of the previous four decades of ATS litigation.

No more compelling is the main part of Justice Kennedy's opinion, endorsed by only Chief Justice Roberts and Justice

[36] *Id*. at 1406.
[37] *Id*.

Thomas. For the most part, this reads more-or-less like a cover version of the Second Circuit's original *Kiobel* decision. First, it recycles the mistaken proposition that international law controls the issue of corporate liability. As in *Kiobel*, the plurality does not engage in extensive independent analysis. Instead, the opinion mainly relies on a footnote in *Sosa* that noted that a "related consideration" in ATS claims "is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation."[38] Having posed the wrong question, the plurality offers a more plausible answer. As Justice Kennedy happily notes, even Judge Leval conceded that corporate liability for international human rights violations had not achieved the type of consensus among states that *Sosa* envisioned , and that there was no universal, specific, or obligatory norm that holds corporations directly accountable for human rights violations.[39]

The opinion ends in the last refuge of a court seeking to avoid applying the law in foreign affairs. Specifically, Justice Kennedy sounds the historically recent yet already tired idea that "the political branches, moreover, *surely* are better positioned than the Judiciary to determine if corporate liability would, or would not, create special risks of disrupting good relations with foreign governments."[40] Several passages along these lines, in fact, did command a majority. These similarly recycle a trope that arose with the nation's rise as a global power and the corresponding ascent of the executive. The courts, for example, should hesitate to create new ATS causes of action because, "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity

[38] *Id*. at 1399-1400.
[39] *Id*. at 1396.
[40] *Id*. at 1408.

to weigh foreign-policy concerns."[41] The courts should hesitate and not allow suits against corporations because they "are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one."[42] Foregoing international relations analysis, however, apparently applies only when it supports the Court's conclusion. Earlier, not just the plurality, but the actual majority concluded that one reason to reject corporate human rights liability was precisely because their take on international relations suggested that U.S. foreign policy would be better off if U.S. courts could not entertain suits against foreign corporations, whether engaged in trafficking, torture, extrajudicial killing, crimes against humanity, or genocide.[43]

Not even this conclusion sufficed for the Court's newest justice. In a lone, partial concurrence, Justice Gorsuch would have dispensed with the ATS nearly root and branch.[44] His opinion first attacks *Sosa*'s conclusion that the ATS contemplates that the federal courts would fashion new causes of action based upon customary international law. On this point he notably bypasses *Sosa*'s careful historical analysis that the First Congress, in the pre-positivist context of the late-eighteenth century, expected that courts would fashion causes of action once granted jurisdiction. Next, the concurrence argues that the only constitutional basis for the ATS is diversity jurisdiction, which in turn means that the only suits that can be brought must have a U.S. party as the defendant. Finally, Justice Gorsuch argues that the ATS nonetheless did serve an important purpose in its day. Specifically, the provision addressed violations of safe-conduct—the law-of-nations

[41] *Id*. at 1403.
[42] *Id*. at 1407.
[43] *Id*. at 1407-08.
[44] *Id*. at 1412 (Gorsuch, J., concurring in part).

protection accorded to designated foreigners passing through a state—by U.S. citizens. This conclusion does cite certain respected scholars. It fails to point out, however, that it interprets their work as narrowly as possible. More importantly, the opinion fails to mention that *Sosa* relied on the prevailing scholarly opinion that the ATS also sought redress for violations against ambassadors and for piracy. Justice Gorsuch does admit that his historical conclusions are open to dispute. At this point, he justifies erring on the side of judicial self-abnegation with the same tropes against judicial involvement in foreign affairs that the plurality rehearsed.

Justice Sotomayor, in a four-justice dissent, offered a corrective based upon international law, statutory text, history, and purpose, and, finally, foreign policy concerns.[45] First, the dissent at great length plausibly argues that international law focuses on conduct, such as extrajudicial killing, not on the mechanisms for penalizing such conduct, such as tort liability against corporate persons who facilitate such conduct. Next, the dissent pointedly notes that the text of the ATS places no limits on possible defendants, that tort suits against corporate persons have a long history under federal common law, and that allowing suits against corporations who assist in wanton violations of international law surely furthers the statute's express purpose. Laudably, the dissent also directly ventures into foreign affairs. Among other points, Justice Sotomayor asserts that there is no "reason to believe that the corporate form in itself raises serious foreign policy concerns" any more than does suits against natural persons.[46] In all, the only significant specific argument that the dissent overlooks goes back to the statute's immediate history. At the time the First Congress

[45] *Id*. at 1419 (Sotomayor, J., dissenting).
[46] *Id*. at 1436.

convened, English common law already had numerous precedents of early corporations, such as the British East India Company, being sued for violations of the law of nations.[47] Otherwise, Justice Sotomayor's opinion is as rigorous as it is forceful in concluding:

> [W]e permit a civil suit to proceed against a paint company that long knew its product contained lead yet continued to sell it to families, or against an oil company that failed to undertake requisite safety checks on a pipeline that subsequently burst. There is no reason why a different approach should obtain in the human rights context.[48]

The saga of the Alien Tort Statute once more shows a conflicted Court threatening to more and more cede its proper role. Whatever else, the statute demonstrates that the founding generation had some concern about judicial enforcement of individual rights guaranteed under international law. Since its rediscovery in *Filtartiga*, much has been written about its specific legislative history. While not the only plausible reading, Justice Souter's take in *Sosa*, as noted, reflects what fairly represents the majority view among scholars. Likewise, there is every reason to believe that the First Congress would have expected suits against corporations. Yet more generally, and no less importantly, nothing in the founding's history justifies the current judicial timidity on display in the fragments that commanded a majority in *Jesner*. After a century-and-a-half hiatus, what custom had emerged in the lower courts consistently upheld a broad reading of the ATS, that both *Kiobel*

[47] Brief of Professors of Legal History Barbara Aronstein Black, William R. Casto, Martin S. Flaherty, Nasser Hussain, Stanley N. Katz, John V. Orth, and Anne-Marie Slaughter in Support of Plaintiffs-Appellants for Reversal at 12, Jesner v. Arab Bank. PLC, 808 F.3d 144 (2d Cir. 2015) (No. 13-3605), 2014 WL 1647606, at *11-*17.

[48] *Jesner*, 138 S. Ct. at 1436 (Sotomayor, J., dissenting).

II and *Jesner* effectively ignored. Finally, modern international relations further serve to confirm the need for precisely the type of international human rights litigation that the ATS represents. Executive officials worldwide increasingly interact to empower one another. This development has, among other things, increased their power compared to other domestic institutions, and accordingly made it easier for them to evade the constraints of those institutions, even when violating fundamental rights. This is all the more reason to maintain the ability of domestic checks in any given nation, including the United States, to hold violators and their accomplices accountable for flouting universal norms.

V. The Rising?

Between the Court and the corporate bar, the Alien Tort Statue today resembles the human rights victims that put it to such notable use. The ATS may be bruised and battered. Yet, like the Filartigas through Kamala Magar, it also may not pay to count it out too soon. Despite Justice Gorsuch's best efforts, the Court would clearly permit certain suits, and has arguably left room for still others. Beyond this, the Court's assault on international human rights litigation is not so well entrenched as to preclude a rollback. To the contrary, other justices have already provided reasoning based on text, history, structure, precedent, and even international relations, which offers greater fidelity to the founders and the First Congress, as well as a more enlightened understanding of American courts providing redress for modern international human rights atrocities. Whether by a change in the Court's composition or a change in the viewpoint of one of their colleagues, this group needs but one additional vote to prevail.

Even on the most hostile reading, the Court has not prohibited ATS suits altogether. Most obviously, after *Jesner* an alien may still

bring suit for an international human rights violation that occurred within U.S. territory so long as the defendant is not a corporation. Then again, various Catch-22's lurk. Most international human rights violations effectively require some underlying state action nexus. Assuming that any such violations occurring within U.S. territory would be committed by American officials, a host of immunity doctrines face potential litigants. That would leave open several less likely scenarios. Suit could be brought against a private (natural) person for a violation such as genocide on U.S. soil, an act that does not require state involvement. Or an official from a foreign state, perhaps aided and abetted by a private (natural) person, may travel to the U.S., commit torture or extrajudicial killing, and so be open to suit.

Still, nothing in the Court's current case law precludes much broader applications. Here Justice Breyer pointed the way. Chief Justice Roberts's majority opinion may have bequeathed the restriction that an ATS claim must "touch and concern the territory of the United States."[49] But it made no attempt to define it. To claims arising on U.S. territory, Justice Breyer's four-justice concurrence added the sensible suggestion that any case involving U.S. defendants would justify applying the ATS abroad. Immunity doctrines aside, this category would and should hold accountable U.S. officials involved in such practices as trafficking Nepali workers to U.S. bases. Justice Breyer's third category holds open the possibility of a broader application still. As noted, he suggested that "touch and concern" include cases in which "the defendant's conduct substantially and adversely affects an important American national interest."[50] For Justice Breyer, that idea at the very

[49] Kiobel v. Royal Dutch Petroleum Co. (*Kiobel II*), 569 U.S. 108, 124-25 (2013).
[50] *Id*. at 133 (Breyer, J., concurring).

least meant that the U.S. should not be seen as a safe haven for human rights violators, such as Pena. Yet it could be applied even further. One possibility would be violations committed by foreign officials allied or trained by the U.S., as was too often the case with authoritarian regimes in Latin America in the 1980s. Still one more would simply be the idea that the violation of universal human rights norms always concerns the U.S., with the corollary that federal court redress for such violations on balance enhances the nation's standing around the world. None of this would get around *Jesner*'s carve out on behalf of multinational corporations. But such applications would help mitigate the damage that the Court has done both to human rights litigation and to a proper understanding of its statutory basis.

Pushing back from within the recent precedents may be fine so far as it goes. The true corrective, however, remains reconsidering those precedents as, if not unworkable in practice, then unsound in principle, textual interpretation, historical understanding, structural inference, decades of previous custom, and international relations analysis. *Jesner*'s missteps, not to mention those of *Kiobel*, have already been sketched. What remains is the necessity to keep pointing them out, even as litigants navigate within the many limitations these cases impose. That task will be none the easier if and when Judge Brett Kavanaugh takes his seat on the Court. He has already demonstrated that his views on the ATS, and international law in general, are downright antediluvian.[51] Then again, the Kavanaugh appointment does not alter the current voting configuration, other than arguably adding a voice even more hostile to international human rights than Justice Gorsuch.

[51] Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007) (Kavanaugh, J., dissenting). *See* Jamie Mayerfeld, *Brett Kavanaugh and the Risk of a Return to Torture*, Just Security (Aug. 10, 2018), https://www.justsecurity.org/60238/brett-kavanaugh-risk-return-torture/.

The good news is that any reconsideration of the Court's recent missteps will be easier with regard to *Jesner*. Four justices stand united under Justice Sotomayor's strong, cogent dissent. Their counterparts in the majority, by contrast, appear to share an antipathy to corporate liability, but not a coherent approach on which to base it. *Kiobel* presents a greater challenge. There, all nine members of the Court effectively endorsed a canon against extraterritorial application of a statute that addresses violations, which by definition are universal, therefore impose no distinctive American rule abroad, and so obviate the basis for the canon. Yet even here, four justices subscribing to Justice Breyer's concurrence offer a way to mitigate much of the damage.

No doubt *Jesner*, as *Kiobel* before it, marks a giant leap backward from the most meager accountability for some of humanity's most despicable acts. It reflects, among other things, the combined forces of wooden legal analysis and sustained corporate power. This is not a combination easily overcome, but neither are the human rights violations that the ATS addresses. To do so requires leveraging the last forty years of ATS litigation and scholarship, the better to resist, even to roll back, the new status quo that a bare majority of the Court offers. To the extent that effort succeeds, American courts may again become seen as the "centerpiece" of accountability in a world in which that value is in increasingly short supply.

Epic Systems v. Lewis: The Return of Freedom of Contract in Work Law?

Charlotte Garden*

Of the U.S. Supreme Court's most high-profile cases in the October Term 2017, *Epic Systems Corp. v. Lewis*[1] was also among the most predictable: much like with the Court's other major labor case, *Janus v. AFSCME*,[2] court watchers could reliably anticipate the outcome as soon as it was apparent that a nine-member Court that included Justice Neil Gorsuch was going to hear the case. The Court did not surprise, splitting 5-4 to decide that pre-dispute individual arbitration clauses are enforceable, notwithstanding that the National Labor Relations Act (NLRA) protects employees' "concerted activity," and the Norris-LaGuardia Act (NLGA) renders unenforceable so-called "yellow dog contracts," in which employees agree not to join a labor union as a condition of employment.[3]

Epic Systems will yield a range of consequences for workers—all of them negative. Justice Gorsuch's majority opinion reads narrowly the NLRA's protection for "other concerted activities," planting the seeds for further retrenchment in the National Labor Relations Board (NLRB), which is now controlled by Trump

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[1] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[2] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).

[3] *Epic Sys. Corp.*, 138 S. Ct. at 1612.

appointees, and in the courts. In addition, Justice Gorsuch's reliance on the rhetoric of "freedom of contract" signals that his approach to labor and employment law is likely to ignore the reality of workplace power dynamics, just as progressive court-watchers feared (and corporate lobbyists hoped) during his confirmation process. And most concretely, Justice Gorsuch's opinion in *Epic Systems* will make it harder for employees to enforce their rights. This also means the decision will give a leg up to unscrupulous employers who either deliberately violate employment law or are indifferent to compliance, as compared to law-abiding employers.

This Essay has three parts. First, it describes how the NLRB's rule on individual arbitration clauses came about, and analyzes how the *Epic Systems* majority opinion relied on an ahistorical, decontextualized understanding of both the Federal Arbitration Act (FAA) and labor law to reverse the Board's rule. Second, it discusses *Epic System*'s likely consequences for workers who are compelled to bring their claims in individual arbitration or not at all. Finally, it discusses the threats to workers posed by the *Epic Systems* majority's reading of the NLRA and reliance on "freedom of contract" rhetoric.

I. Individual Arbitration & Labor Law

To understand the ahistorical nature of the *Epic Systems* decision, it helps to trace key legal developments beginning in the early twentieth century. The purpose of this section is twofold: first, it sketches the legal background that led up to *Epic Systems*; and second, in the course of doing so, it offers an object lesson in the Court's repeated interference with workers' collective action.

A. Regulating Work in the New Deal

In the late 1800s and early 1900s, the American labor movement was gaining members and power, and strikes and boycotts aimed at improving working conditions were on the rise. In addition to "primary" strikes involving only the employer and employees locked in a labor dispute, unions increasingly relied on "secondary" or "sympathy" strikes, which greatly increased strikers' leverage by expanding the scope of labor disputes to include the employees of "neutral" employers. But employers found a way to derail these efforts: some federal courts were willing to enjoin these strikes under a range of legal theories, including that they violated the Sherman Act. Congress attempted to end this practice in 1914, declaring in the Clayton Act that "[t]he labor of a human being is not a commodity or article of commerce,"[4] and sharply limiting the authority of federal courts to issue injunctions in response to labor disputes.

The Supreme Court limited the Clayton Act's effect by interpreting it narrowly in a pair of cases decided in 1921. In *Duplex Printing Press Co. v. Deering*, the Court declared that "Congress had in mind particular industrial controversies, not a general class war," and held that federal courts could still enjoin secondary strikes and boycotts.[5] And in *American Steel Foundries v. Tri-City Central Trades Council*, the Court approved an injunction against striking workers who were picketing in groups of four to twelve, limiting strikers to one picketer at each entrance to the employer's plant. The effect of these cases was to increase the frequency with which federal courts issued (often *ex parte*) injunctions against labor unions and members engaged in

[4] 15 U.S.C. § 17.
[5] Duplex Printing Co. v. Deering, 254 U.S. 443, 472 (1921).

secondary strikes, boycotts,[6] or picketing—a practice now referred to "government by injunction."[7]

Congress's second effort to end government by injunction was more successful. In 1932, Congress passed the NLGA, which stripped federal courts of jurisdiction "to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute."[8] But that wasn't all: the statute also declared "yellow dog contracts"—employment contracts that required employees to promise not to join a union on pain of job loss—to be contrary to public policy and unenforceable.

This time, government by injunction receded. Perhaps even more surprisingly, the Court did not review the constitutionality of the anti-yellow dog provision of the NLGA. This was significant because the Court had struck down legislative attempts to make it a crime for employers to impose yellow dog contracts on their employees in two previous *Lochner*-era cases.[9]

And finally, there was the NLRA itself, which was enacted in 1935 and upheld by the Supreme Court in 1937.[10] The NLRA as originally enacted declared a preference for workers' collective action:

[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce . . . and the purchasing power of wage earners in industry.[11]

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[6] Am. Steel Foundries v. Tricity Cent. Trade Council, 257 U.S. 184, 206 (1921).

[7] *See* Melvyn Dobofsky, The State and Labor in Modern America (1994); William E. Forbath, Law and the Shaping of the American Labor Movement (1991).

[8] 29 U.S.C. § 101 *et seq*.

[9] Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). These cases, and their parallels to *Epic Systems* are discussed in Part III.

[10] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[11] 29 U.S.C. § 151.

In other words, the NLRA was expressly premised on an understanding of workplace power dynamics: because workers were dependent on employers for their livelihoods, they often lacked the leverage to negotiate meaningfully with their employers, and the employment "agreements" they reached reflected the employer's will rather than any sort of two-sided give-and-take. This insight would be obvious to anyone who has ever held a low-wage job—but it was also at odds with the Supreme Court's *Lochner*-era caselaw, which was committed to preserving employers' authority to set work rules without interference from the state under the guise of freedom of contract between workers and employers.

Section 7 of the NLRA, which contains the core substantive protection for workers' rights to engage in collective action was drafted broadly: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[12] That single sentence, with its list of protected activities, forms the backbone of workers' labor rights. Moreover, while the Supreme Court has notoriously restricted workers' NLRA rights where, for example, it perceived a conflict with employers' property rights,[13] it has also emphasized the capacious nature of the Act. For example, it has long been beyond doubt that the NLRA protects employees' collective action whether or not they are unionized (or are looking to unionize), even when they will not personally benefit from their collective action, and when they are enforcing other statutory

[12] 29 U.S.C. § 157.
[13] *See, e.g.*, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

rights, such as the right to be free from workplace sexual harassment.

B.The Federal Arbitration Act and Employment

In 1925, during the *Lochner* era and amidst turmoil regarding workers' collective action and the regulation of work, Congress enacted the Federal Arbitration Act (FAA).[14] The statute was aimed at providing for "enforceability of arbitration agreements between merchants—parties presumed to be of approximately equal bargaining strength—who needed a way to resolve their disputes expeditiously and inexpensively."[15] Accordingly, it contains an exemption: "nothing [in the Act] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[16] That language excluded from the FAA's purview the employment relationships that Congress was understood to be able to regulate in 1925, in light of the Court's narrow view of the Commerce Clause.[17]

For decades, arbitration was relatively rare in the employment context, in part because of doubts about whether arbitration clauses in employment contracts were enforceable under the FAA. Those doubts were ultimately resolved in favor of arbitration in a series of cases decided beginning in 1991. First, in *Gilmer v. Interstate/Johnson Lane Corp*., the Court enforced an arbitration clause between an employee and employer that was imposed as a condition of registering as a securities representative with the

[14] 9 U.S.C. § 1 *et seq*.
[15] Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 106 (2006).
[16] 9 U.S.C. § 1.
[17] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 55 S. Ct. 837 (1935).

New York Stock Exchange.[18] The *Gilmer* Court wrote that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context," but left open the possibility of defenses such as fraud or coercion, and signaled that "claim[s] of unequal bargaining power" could be resolved "in specific cases."[19] However, because the arbitration clause in *Gilmer* was imposed by the NYSE rather than the employer, the Court chose not to address the scope of the FAA's exemption of "workers engaged in foreign or interstate commerce."[20]

Then, in the 2001 case *Circuit City Stores, Inc. v. Adams*,[21] the Court rejected the argument that Congress's decision to exclude from the FAA all of the employment contracts over which it had jurisdiction in 1925 manifested an intent to exclude employment contracts from enforcement under the FAA more generally. The Court did not disagree about Congress's likely intent, but it instead prioritized a plain-text approach to interpreting the FAA. Thus, since 2001, the Court's view has been that the FAA's exemption for employment contracts covers only workers engaged in interstate transportation. Finally, following *Gilmer* and *Circuit City*, the Court significantly limited states' abilities to place limits on the use of arbitration clauses, and held that individual arbitration clauses were enforceable even when the costs of prosecuting a case on an individual basis exceed the possible recovery.[22]

The result of these and other decisions has been steadily increasing numbers of employers that demand that employees

[18] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[19] *Id*. at 33.
[20] *Id*. at 40 (Stevens, J., dissenting) (citing 9 U.S.C. § 1).
[21] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
[22] *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

agree to arbitrate their workplace disputes. Thus, one recent study found that whereas only about two percent of employees were covered by individual arbitration clauses in 1992 (the year after *Gilmer*), now more than half of employees are.[23] Moreover, these clauses often require workers to resolve their disputes on an *individual* basis, placing many low-dollar-value claims out of reach as a practical matter.

C. The *D.R. Horton*/*Murphy Oil* Rule at the Board and in the Courts

Against this backdrop of increasing reliance on individual arbitration by employers, it is hard to understate the importance of the NLRB's *D.R. Horton* decision. The decision held that employers could not require their employees to commit to resolve workplace disputes on an individual basis. Instead, the Board held that arbitration clauses in employment contracts were consistent with the NLRA only if they left employees with at least one forum—either judicial or arbitral—in which they could resolve disputes on an aggregated basis.[24] In other words, employers could still require employees to commit to resolve disputes in arbitration—but if they did that, they also had to agree to allow employees to band together to arbitrate their claims, including in class or collective actions. As a practical matter, the *D.R. Horton* rule likely would have limited the use of employment arbitration, because arbitration involves very limited appellate review, and employers would have chosen to litigate class or collective actions in court rather than risk large, unappealable losses.

[23] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol'y Inst. (Sept. 27, 2017), *available* at https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/.
[24] *In re* D. R. Horton, Inc., 357 NLRB 2277 (2012).

The Board's reasoning in *D.R. Horton* was straightforward. First, it pointed to the long-accepted principle that Section 7 covers collective action that takes place outside of the workplace, including through litigation. As the Board put it, "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA."[25] Indeed, the Supreme Court had already agreed, in *Eastex, Inc. v. NLRB*, that Section 7 protects "employees' efforts to 'improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.'"[26] In *Eastex*, the Court upheld the Board's view that Section 7 protects unions' and employees' rights to advocate for pro-worker public policy even when they might not benefit directly from the particular policy being advanced.[27] As far back as the 1940s, the NLRB had also held that Section 7 protects employees when they resort to court or agency enforcement processes, and courts of appeals, though not the Supreme Court, have repeatedly affirmed these decisions.[28]

Relatedly, the Board noted that other caselaw prohibits employers from demanding that employees promise to resolve their disputes individually rather than through collective action—that is, employers cannot demand that employees individually waive their statutory rights.[29] That is true under the NLRA, but the Board wrote that the NLGA also has a role to play; if one accepts

[25] *Id.* at 2279.
[26] Eastex, Inc. V. NLRB, 437 U.S. 556 (1978)
[27] For example, workers who make $20/hour are protected by the NLRA when they advocate raising the minimum wage to $15/hour.
[28] *In re D. R. Horton, Inc.*, 357 NLRB at 2280
[29] *Id.* at 2281.

that class or collective litigation to improve working conditions is a form of collective action, then a pre-dispute individual arbitration clause is a form of yellow-dog contract.

Next, the Board considered whether the NLRA's protection for collective litigation was in conflict with the FAA. Concluding that the two statutes could be reconciled, the Board relied on the Supreme Court's statements in cases including *Gilmer* that the FAA does not require the waiver of substantive rights; moreover, the FAA contains a "savings clause" stating that arbitration agreements are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*."[30] The Board reasoned that the substantive right protected by the NLRA was the right to act collectively—meaning that an order invalidating an individual arbitration clause "does not conflict with the FAA, because the waiver interferes with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed."[31]

Finally, the Board emphasized that it was not mandating class arbitration—to the contrary, it was holding "only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial."[32] Instead, employers could choose between litigating their employees' collective claims, or arbitrating them. Thus, an employer could presumably require employers to sign, as a condition of employment, either an agreement committing employees to arbitrate their disputes, but allowing them to do so on a concerted basis; or an agreement committing employees to arbitrate their individual disputes, but permitting them to file cases seeking relief on behalf of multiple employees in court.

[30] 9 U.S.C. § 2 (emphasis added).
[31] *In re D. R. Horton, Inc.*, 357 NLRB at 2286.
[32] *Id*. at 2288.

The Board applied the *D.R. Horton* rule in dozens of cases, facially invalidating employer policies requiring employees to accept individual arbitration or lose their jobs. One of these cases, *Murphy Oil*,[33] re-affirmed *D.R. Horton* while also mooting questions about whether one of the Board members who decided *D.R. Horton* had been invalidly appointed to the Board without Senate consent.[34] In addition, numerous employees who sought to sue their employers under statutes such as the Fair Labor Standards Act (FLSA) invoked the *D.R. Horton* rule to oppose their employers' motions to compel (individual) arbitration.

Through both of these routes, cases testing the Board's *D.R. Horton* rule soon made their ways to the courts of appeals, where they met with initial rejection and ultimately a mixed reception. In the appeal from *D.R. Horton* itself, the Fifth Circuit seemed to credit the NLRB's reasoning that class or collective litigation or arbitration is protected by Section 7, but nonetheless held that the FAA required enforcement of individual arbitration agreements. In reaching that conclusion, the court first wrote that under Supreme Court precedent, "arbitration has been deemed not to deny a party any statutory right."[35] From there, the Fifth Circuit wrote that the "use of class action procedures . . . is not a substantive right," citing a number of cases rejecting arguments that different statutory schemes contained rights to class action procedures.[36] Turning to the Supreme Court's more recent arbitration decisions, the *D.R. Horton* court then concluded that "the Board's rule does not fit

[33] Murphy Oil USA, Inc., 361 NLRB 774 (2014).

[34] *Id.* at 775 n.16 (describing and rejecting arguments about validity of Member Becker's appointment and participation in *D.R. Horton*, but observing that "[i]n any case, the Respondent's arguments . . . are now moot, given our independent reexamination of D.R. Horton tody").

[35] D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 357 (5th Cir. 2013) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)). In fact, this reading was itself debatable; the case to which the *D.R. Horton* court cited disclaimed the proposition "that all controversies implicating statutory rights are suitable for arbitration." *Mitsubishi*, 473 U.S. at 627.

[36] *D.R. Horton, Inc.*, 737 F.3d at 359.

within the FAA's saving clause,"[37] apparently because a prohibition on class action waivers in arbitration would make arbitration too unappealing to employers: "Requiring a class mechanism is an actual impediment to arbitration and violates the FAA."[38] Finally, having set up a direct conflict between the NLRA (and the NLGA) and the FAA, the Fifth Circuit held that the NLRA's guarantee of collective action was not specific enough to override the FAA's policy favoring arbitration.[39]

However, the *D.R. Horton* rule fared better in the Seventh and Ninth Circuits. First, in *Lewis v. Epic Systems Corp*., the Seventh Circuit considered the Board's rule in the context of a putative collective action filed under the FLSA. The employer, Epic, responded to Lewis's complaint by seeking to enforce an individual arbitration clause that it had imposed by means of an email stating that any employee who "continue[d] to work at Epic" was deemed to have agreed to waive "the right to participate in or receive money or any other relief from any class, collective, or representative proceeding," and instead to bring wage-and-hour claims in individual arbitration.[40] Unlike the Fifth Circuit, the Seventh Circuit agreed with the NLRB's view of the interaction between the NLRA and the FAA, including that an individual arbitration clause was an illegal agreement under the NLRA—and therefore unenforceable according to the FAA's savings clause. But the Seventh Circuit's most important point of disagreement with the Fifth Circuit was its understanding of the substantive rights that the NLRA guaranteed: "While the FLSA and [the Age Discrimintation in Employment Act] allow class or collective

[37] *Id*.
[38] *Id*. at 360.
[39] *Id*. at 362.
[40] Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151, 1154 (7th Cir. 2016).

actions, they do not guarantee collective process. The NLRA does. . . . Just because the Section 7 right is associational does not mean that it is not substantive."[41]

Following on the Seventh Circuit's heels, the Ninth Circuit also affirmed the *D.R. Horton* rule in *Morris v. Ernst & Young, LLP*.[42] *Ernst & Young* also involved employees who were required to sign individual arbitration clauses as a condition of employment, but who then sought to litigate an FLSA claim in court. As the Ninth Circuit saw it, the "NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration."[43] Thus, the court reasoned, the *D.R. Horton* was not at odds with the FAA's pro-arbitration policy: "The problem with the contract at issue is not that it requires arbitration; it is that the contract term defeats a substantive federal right to pursue concerted work-related legal claims."[44] Accordingly, the Ninth Circuit agreed with the NLRB and the Seventh Circuit that Ernst &Young's individual arbitration clause fell under the FAA savings clause because it illegally waived a substantive federal right.

In September 2016, the United States solicitor general sought certiorari after the Fifth Circuit refused to enforce the NLRB's decision in *Murphy Oil*, in a decision that largely tracked the analysis from its *D.R. Horton* decision.[45] (Needless to say, the solicitor general urged in the petition for certiorari that the Board's rule was correct and should be upheld.) Likewise, the employers in *Epic Systems* and *Ernst & Young* also sought Supreme Court review. The Court consolidated the three cases and granted review in January 2017.

[41] *Id.* at 1161.
[42] Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016).
[43] *Id.* at 984.
[44] *Id.* at 985.
[45] Petition for Writ of Certiorari at 9-19, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (No. 16-307), (citing Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2013)).

When it came time to file merits briefs, the (post-2016 election) solicitor general's office did an about-face; it filed an amicus brief in support of the employers in the three cases, arguing that the NLRB should have given greater weight to the FAA's pro-arbitration policy. This was one of a handful of cases in which the Trump administration reversed an Obama administration position—a list that notably included the other major labor case on the OT 2017 docket, J*anus v. AFSCME*.[46] At the same time, the solicitor general authorized the NLRB's general counsel, Richard Griffin Jr., to litigate on the Board's behalf in the Supreme Court. (Griffin was appointed by President Obama to a term that ended in October 2017, shortly after argument in *Epic Systems*.) In other words, the federal executive branch took two opposing positions in *Epic Systems*.

Paul Clement argued for the employers before the Supreme Court. His main argument was that Section 7 protects "collective action by the employees in the workplace,"[47] but not in courts or arbitrations. In response to questioning by Justice Breyer, Clement spelled out what he meant by this:

[F]rom the very beginning [of the NLRA], the most that has been protected is resort to the forum, and then, when you get there, you are subject to the rules of the forum. So, for example, if an atypical worker decides that he wants to bring a class action on behalf of a handful of fellow employees . . . the employer doesn't commit an unfair labor practice by [arguing that the worker doesn't satisfy the numerosity or typicality requirements of the class action rule, Fed. R. Civ. P. 23].[48]

[46] Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018).
[47] Oral Argument at 10:06, *Epic Sys. Corp*., 138 S.Ct. 1612 (No. 16-285), *available* at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-285_1qm2.pdf.
[48] *Id*.

In other words, Clement conflated two things: the right not to be subject to a pre-dispute waiver of the right to engage in collective action and the (mostly non-existent) right to preclude an employer from countering its employees' collective action, or even to compel some third party to accommodate workers' collective action. But the fact that workers' concerted activity can yield employer counter-moves is both well known to anyone with even minimal familiarity with labor law and distinct from the question of whether employees can execute advance waivers of their Section 7 rights. That is, an employer cannot ask employees to execute advance waivers of their Section 7 rights, but it is free to respond to employees' collective action once it begins, such as by permanently replacing economic strikers, or locking employees out of the workplace in order to secure a favorable collective bargaining agreement. And while the NLRA can limit the responses available to employers (for example, employers may temporarily, but not permanently, replace workers who go on strike in response to unfair labor practices), the NLRB has never suggested that the NLRA would preclude an employer from opposing a motion for class certification. Moreover, the NLRA does not constrain entities other than employers, unions, and employees, so the suggestion that the NLRB might deem it inconsistent with the NLRA for a district court to apply Rule 23's requirements had no basis in reality.

Arguing for the U.S. solicitor general, Jeffrey Wall made a similar argument to Clement, and also emphasized the FAA's "clear congressional command" to enforce arbitration agreements, which Wall argued meant that the NLRB could not "interpret the NLRA's ambiguity [as reflecting congressional intent to invalidate collective action waivers in employment arbitration agreements] .

. . in the face of the FAA and federal rules like Rule 23."[49] Finally, both Clement and Wall chided the NLRB for the newness of the *D.R. Horton* rule, with Clement suggesting that if the NLRA really precluded individual arbitration clauses, then the AFL-CIO should have argued as much in amicus briefs in previous employment arbitration cases.

During Griffin's argument for the NLRB, several justices asked questions that suggested they accepted Clement's premise about the scope and meaning of the *D.R. Horton* rule. For example, Justice Alito asked whether Rule 23 abrogated Section 7; later, Chief Justice Roberts asked whether an arbitral forum rule that imposed a 50-person numerosity requirement on putative class arbitrations meant that "you have a right to act collectively, but only if there are 51 or more of you."[50] As a result, Griffin had to spend much of his time at the lectern explaining Labor Law 101, with occasional assists from Justices Kagan and Breyer. Likewise, Chief Justice Roberts asked Daniel Ortiz, counsel for the employees in *Epic Systems* and *Ernst & Young*, a variation on his 50-employee hypothetical. As with Griffin, the exchange seemed to yield more confusion than clarity, although Justice Sotomayor usefully observed that an employer's intent in choosing an arbitral forum with particularly restrictive rules governing class or joint litigation was relevant to whether an arbitration agreement violated Section 7. Thus, an employer could violate the NLRA by intentionally restricting forum access to defeat collective litigation—but freestanding forum-imposed limits on collective litigation were entirely consistent with the Act.

While he asked no questions during oral argument, Justice Gorsuch wrote the majority opinion in *Epic Systems*.[51] He first

[49] *Id.*
[50] *Id.*
[51] *Epic Sys. Corp.*, 138 S.Ct. at 1619.

emphasized that the NLRA had existed for "77 years" before the NLRB adopted the *Epic Systems* rule, implying that the rule was therefore illegitimate—though without mentioning that individual arbitration of employment disputes was not prevalent until much more recently. Next, Justice Gorsuch reasoned that the FAA savings clause did not apply because it "recognizes only defenses that apply to 'any' contract,'"[52] and "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent."[53] Thus, the majority's view was that even if individual arbitration clauses are illegal because they violate Section 7, the savings clause would not apply. Here, the majority analogized *Epic Systems* to *Concepcion*, which involved a state law that declared class action waivers to be unconscionable in either litigation or arbitration. But that analogy seems to fall short: whereas the law in *Concepcion* was aimed exclusively at preserving class actions, Section 7 applies equally to any employment contract that asks employees to waive their rights to engage in any activity that qualifies as protected concerted activity under the NLRA. Or, to put it another way, the *Concepcion* Court was dealing with a statute whose main function was to respond to class waivers in arbitration contracts. But—as the *Epic Systems* majority went on to argue at length—the NLRA was enacted to preserve a range of activities, of which the right to concerted litigation was at most one aspect.

Next, the majority turned to whether Section 7 encompassed the right to concerted litigation or arbitration at all, concluding that "[t]he notion that Section 7 confers a right to class or collective

[52] *Id*. at 1622.
[53] *Id*. at 1623.

actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935."[54] The Court majority used that argument about likely legislative intent (which did not discuss other procedures for concerted litigation, such as joinder) to frame its views on the core text of Section 7: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[55] According to the majority, the "catchall" term "other concerted activities for . . . mutual aid or protection" should be "understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words'" under the *ejusdem generis* canon.[56] And those specific words, the Court continued, "serve to protect things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, courtroom-bound "activities" of class and joint litigation.'"[57] That formulation—"things employees just do for themselves in the workplace"—came from Judge Sutton's partial dissent in a Sixth Circuit case that affirmed the *D.R. Horton*/*Murphy Oil* rule.[58] There are many things that might be said about this reading of the scope of protected concerted activity, but one is that it is premised on a narrow reading of the remainder of Section 7 that assumes, for example, that the rights to "self-organization" and to "assist labor organizations" can be exercised only at work—and further, that

[54] *Id*. at 1624.
[55] *Id*. at 1635 (quoting 29 U.S.C. § 157).
[56] *Id*. at 1625 (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)).
[57] *Id*. (quoting NLRB v. Alternative Entertainment, Inc., 858 F. 3d 393, 415 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part)).
[58] *Id*.

it did so without delving into NLRB or case law about the actual scope of those rights.

After reading Section 7 narrowly, the Court turned to the inaccurate version of the *D.R. Horton*/*Murphy Oil* rule on which Clement and Wall partially premised their arguments: that Section 7 guaranteed access to class procedures, rather than simply banning waivers that cover access to available concerted litigation vehicles. Having set up that straw man, Justice Gorsuch proceeded to blow it down: "[w]ithout some . . . specific guidance, it's not at all obvious what procedures Section 7 might protect. Would opt-out class action procedures suffice? Or would opt-in procedures be necessary? . . . What standards would govern class certification?"[59] Then, characterizing as a "slight reply" the response that the foregoing did not correctly reflect the *D.R. Horton rule*, Justice Gorsuch added that "if the parties really take existing class and collective action rules as they find them, they surely take them subject to the limitations inherent in those rules—including the principle that parties may (as here) contract to depart from them."[60] But this reasoning assumes its conclusion, and it is also inconsistent with the NLRA as it is understood in other contexts—for example, employees are subject to various restrictions on the right to strike, but that does not mean that employers may require individual employees to waive that right.

Given the majority's reasoning thus far, it is unsurprising that it also rejected the argument that even if the NLRA's text did not clearly encompass the right to engage in concerted litigation, the NLRB's interpretation of Title VII was entitled to *Chevron* deference. Specifically, the Court wrote that the Board was not

[59] *Id*. at 1625.
[60] *Id*. at 1626.

entitled to *Chevron* deference for three reasons: first, it sought to reconcile the NLRA with a statute it did not administer; second, the executive branch was divided on the NLRA's meaning; and third, the Court could resolve the potential statutory ambiguity using "traditional tools of statutory construction."[61]

Justice Ginsburg dissented, joined by the three other liberal-leaning justices. She framed the ability of individual arbitration clauses—often imposed by adhesion contract as a condition of employment (or continued employment)—to make it practically impossible for employees to vindicate their rights as an example of the imbalance of power between workers and employers that led Congress to enact the NLRA. Thus, she identified individual arbitration clauses as simply another species of yellow-dog contract, illegal under the NLGA and the NLRA. Moreover, she wrote that the majority's narrow reading of protected concerted activity was "conspicuously flawed" in light of the NLRA's capacious language and NLRB and court decisions that interpret the statute's protections broadly.[62] After refuting this and other aspects of the majority's opinion, Justice Ginsburg concluded that "[t]he inevitable result of today's decision will be the underenforcement of federal and state statutes designed to advance the well-being of vulnerable workers."[63]

II. Consequences for Workplace Arbitration and Work Law

A recent Ninth Circuit decision illustrates *Epic System's* consequences for workers, and shows why Justice Ginsburg's

[61] *Id*. at 1630 (internal quotation marks omitted).
[62] *Id*. at 1639 (Ginsburg, J., dissenting).
[63] *Id*. at 1646

warning was precient.[64] *O'Connor v. Uber* involved a class of more than 240,000 individuals who had driven for Uber in California or Massachusetts.[65] The drivers argued that they had been misclassified as independent contractors rather than employees, and that the company had therefore violated the law when it failed to pay benefits (such as mileage reimbursements and tips) required of employers under state law. These claims were unlikely to be worth more than a few thousand dollars per driver, but could have added up to massive liability for Uber.

In a series of orders, a district court had certified the large class over the objections of the company, which argued that nearly all of the drivers had accepted individual arbitration clauses when they signed up to drive for Uber. (A very small percentage of drivers had opted out of arbitration.) However, the Ninth Circuit rejected most of the district court's reasoning in a 2016 decision,[66] leaving the NLRB's *D.R. Horton/Murphy Oil* rule as a basis to keep the class intact.

The Supreme Court's *Epic Systems* decision deprived the *O'Connor* plaintiffs of their last serious argument in support of keeping the class together. Thus, it is unsurprising that the Ninth Circuit easily reversed the district court's class certification orders. On remand, it is possible that the district court will recertify a class of drivers who opted out of arbitration—but such a class would include a relatively small number of drivers. For example, in one

[64] I have previously written about the *O'Connor v. Uber* case and individual arbitration agreements in the gig economy more generally. *See* Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. Chi. Legal F. 205 (2018). This and the next sections of this article draw on that piece, which was published before the Ninth Circuit's recent decision decertifying the *O'Connor* class based on *Epic Systems*.

[65] O'Connor v. Uber, No. 14-16078, 2018 WL 4568553, (9th Cir. Sept. 25, 2018).

[66] Mohamed v. Uber Techs, Inc., 836 F.3d 1102 (9th Cir. 2016).

case involving California Uber drivers, the court found that only 270 drivers out of 160,000 had opted out.[67]

What will happen to the drivers who did not opt out of Uber's individual arbitration clause? It is possible that they will decide to pursue individual arbitration. In fact, counsel for the *O'Connor* class has pledged to represent every former-class-member driver who wants to proceed to arbitration, and some drivers have already done just that. However, this promise of competent legal representation in low-value individual arbitrations is unusual—here, it is likely an artifact of the investment of time and money that class counsel has already made in the case, and maybe also the prospect that Uber will see a global settlement as a better outcome than litigating thousands of individual arbitrations, which would also involve fronting substantial arbitral forum costs. (These costs include the arbitrator's fee as well as the costs of conference room rentals and similar, and could easily exceed the value of many drivers' individual claims.) The more typical result in cases affected by *Epic Systems* will be that employees simply will not pursue low-value claims that would otherwise be candidates for concerted litigation if not for individual arbitration clauses. The result will be to virtually immunize from liability many employers who operate close to the legal line, and even some of those who willfully violate the law.

III. What's Next for Workplace Arbitration and Work Law?

Justice Gorsuch began his opinion with two rhetorical questions resting a premise that might best be described as a work of legal fiction: "Should employees and employers be allowed to

[67] Gillette v. Uber Techs., No. C-14-5241 EMC, 2015 WL 4481706, at *4 (N.D. Cal. July 22, 2015).

agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?"[68] The extent to which this question echoes the *Lochner*-era Court's assumptions about individual workers' supposed freedom of contract is breathtaking. It probably will not surprise many readers to hear that the current Court is skeptical of the very idea of the need for collective rights at work—and in light of the Court's circumscribed description of the rights that Section 7 protects, there is a real risk that the Court will further cut back on the NLRA's already-limited protections for workers' concerted activity.

Despite these setbacks in labor rights, administrative agencies charged with enforcing work laws can still do their jobs even when employees are subject to individual arbitration clauses. This is an important route to both substantive enforcement of workers' rights and the development of law despite the growing use of individual arbitration. But that rule was unsuccessfully challenged in an earlier case that resulted in a 6-3 decision in which the majority held—over the objections of Justices Thomas, Rehnquist, and Scalia—that agencies such as the EEOC could "obtain victim specific relief" in court for an employee who "waived his right to seek relief for himself in a judicial forum by signing an arbitration agreement."[69] While the Court may ultimately lack the appetite to revisit this decision, it is conceivable that Chief Justice Roberts and Justices Alito and Kavanaugh would side with the dissenters in *Waffle House*, and vote to restrict the authority of administrative agencies to obtain relief that would benefit an employee on whom

[68] *Epic Sys. Corp.*, 138 S.Ct. at 1619.
[69] EEOC v. Waffle House, Inc., 534 U.S. 279, 305 (2002).

an employer has imposed an arbitration agreement—a possibility that could dampen many employees' willingness to file EEOC charges in the first place.

This possibility could also imperil one of the leading "blue state" responses to the rise of individual arbitration in employment: the authorization of representative actions, in which employees may step into the shoes of the state to enforce state work law on behalf of themselves and their coworkers. For example, California's Private Attorney General Act (PAGA) authorizes statutory damages of $100 per affected employee per pay period, with double damages available against employers who are repeat offenders.[70] Then, 75 percent of any amount collected goes to the state of California, to help fund the state's own enforcement of work law. So far, the Supreme Court has denied certiorari in cases challenging aspects of PAGA, but of course it is impossible to predict what the Court will do in coming years.

As *Uber v. O'Connor* demonstrates, *Epic Systems* will do immediate, concrete harm to employees. Further, it likely signals further retrenchment of workplace rights at the Supreme Court. The one silver lining is that workers are rediscovering that they have collective power whether or not their concerted activity benefits from statutory protections. As this summer's wave of teacher strikes showed, workers in a hostile legal and political environment can still move forward, together.

[70] Cal. Lab. Code § 2698 *et seq.*

Trump v. Hawaii and the Future of Presidential Power over Immigration

Cristina M. Rodríguez*

Since his inauguration, President Donald Trump has been consistent in delivering on a core campaign promise. In the immigration arena, he has transformed vivid campaign statements into actual government policy. The Trump White House, along with the Departments of Justice and Homeland Security, have given political and bureaucratic expression to the restrictionist vision. They have exploited the authorities delegated by the Immigration and Nationality Act (INA) to advance a maximalist enforcement agenda and reduce "undesirable" immigration.

President Trump launched one of the most visible and brazen of these initiatives within a week of taking the oath of office, signing the first in a series of executive actions designed to make his most incendiary campaign rhetoric a reality. On January 27, 2017, Trump's promise of a "total and complete shutdown of Muslims entering the United States"[1] became a presidential executive order. The president prohibited the entry of all nationals from seven designated Muslim-majority countries and ordered the government to conduct a worldwide review of the information it received from those countries about their nationals who sought entry to the United States.[2] This

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[1] Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

[2] Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017).

first of what became three "entry bans" swept the most broadly, covering all types of potential immigrants and visitors, including lawful permanent residents. It emerged without much by way of inter-agency deliberation. It sowed confusion and disarray at airports upon its release and sparked significant protests across the country.[3]

Instantly, private litigants and state attorneys general rushed to federal court to enjoin the sweeping assertion of presidential power to exclude non-citizens from the United States. Courts in the Ninth Circuit quickly enjoined the first order.[4] After its rebuke at the court of appeals,[5] the administration issued a second order, again directing a worldwide review of foreign states' security measures, while keeping a set of slightly narrower exclusions in place pending the review.[6] In September 2017, with the worldwide

[3] For a deconstruction of the Trump administration's failures on this front, both with respect to the entry ban and in other contexts, see W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 Yale L.J.F. 825, 829-35 (2018), *available at* http://www.yalelawjournal.org/forum/the-trump-administration-and-the-breakdown-of-intra-executive-legal-process. As they describe, the executive order "plunged the country into temporary chaos while cabinet members reportedly learned through the media that the new policy had become effective." *Id.* at 826.

[4] Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (issuing preliminary injunction).

[5] Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (denying government's emergency motion for stay, leaving injunction in place).

[6] Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017). The second order was narrower in scope; it dropped Iraq from the list of countries to which it applied and excepted lawful permanent residents and diplomatic visas. *Id.* §§ 1(g), 3. The order made its reasoning explicit: "In light of the conditions in these six countries, until the assessment . . . is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high." *Id.* § 1(f). Before the order could go into effect, district courts in Hawaii and Maryland enjoined it. *See* Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017); Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017). On appeal, the Ninth and Fourth Circuits affirmed the injunctions. *See* Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir. 2017). The Supreme Court issued a partial stay, allowing the Order to go into effect except for foreign nationals with "bona fide relationship[s] with a person or entity in the United States." Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017). However, both cases were subsequently found to be moot after provisions of the order expired, and the Supreme Court thus vacated and remanded the decisions. Trump v. Hawaii, 138 S. Ct. 377 (2017) (mem.); Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 353 (2017) (mem.).

review complete, the Trump administration issued its third order: Presidential Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. In it, the president announced the results of the review and imposed a set of indefinite exclusions applicable to nationals from eight foreign states, six of which had overwhelmingly Muslim populations. The proffered justification was that the states' systems for sharing information about their nationals did not meet the government's security standards.[7]

All of the lower courts that considered the various iterations of the entry ban concluded that it likely contained legal defects, either because aspects of the orders exceeded the statutory authority of the president or because they violated the Constitution.[8] But in a 5-4 ruling announced at the end of October Term 2017, the Supreme Court of the United States turned this tide of litigation

[7] No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017). The proclamation banned nationals of the listed states from entering the country on certain types of visas. Chad, Libya, and Yemen were labeled counterterrorism partners with inadequate information-sharing practices; for nationals from those countries, immigrant visas and nonimmigrant business or tourist visas were suspended. *Id.* §§ 2(a), (c), (g). Iran, North Korea, and Syria "regularly fail[ed] to cooperate" or "[did] not cooperate" in identifying security risks. All immigrant and nonimmigrant entry from these countries was suspended, except for Iranians entering on nonimmigrant student and exchange visas. *Id.* §§ 2(b), (d), (e). For Venezuela, the proclamation suspended entry of certain government officials and their immediate family members on nonimmigrant business or tourist visas. *Id.* § 2(f)(ii). And for Somalia, the proclamation suspended entry of nationals seeking immigrant visas and required additional scrutiny of nonimmigrant visas. *Id.* § 2(h)(ii). The order also contained a case-by-case waiver provision. *Id.* § 3(c)(i).

[8] *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539 (D. Md. 2017) (enjoining the second executive order on Establishment Clause grounds); Hawai'i v. Trump, 265 F. Supp. 3d 1140 (D. Haw. 2017) (enjoining the presidential proclamation on statutory grounds, for exceeding authority under § 1182(f) and violating § 1152(a)). The district court in *Washington v. Trump* enjoined the section of the first executive order that halted refugee admissions, as did the Hawaii district court. Washington v. Trump, 2017 WL 462040. In October 2017, as the third order was being litigated, the administration released an executive order resuming refugee admissions, thereby mooting the issue. Exec. Order No. 13,815, 82 Fed. Reg. 50,055 (Oct. 27, 2017). Ultimately, the INA delegates to the president the power to determine the number of refugees admitted each year, and a statutory challenge to a decision to eliminate admissions would have faced an uphill battle. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 §§ 207(a)(2)-(3) (codified as amended at 8 U.S.C. §§ 1157(a)(2)-(3) (2000)).

back, effectively upholding the final proclamation.[9] The Court concluded that the challengers' statutory claims were wrong and that they had failed to establish the likely success of their constitutional claims. In *Trump v. Hawaii*, the Court elided powerful evidence of discriminatory motive and proclaimed vast presidential powers at the intersection of two highly sensitive realms of regulation—national security and the policing of entry to the nation.

In the immediate aftermath of the Supreme Court's decision, commentators widely decried it as an abdication to the will of the president. A debate began in earnest over whether the decision would become the Roberts Court's *Korematsu v. United States*—the reviled decision by a previous generation to accept the government's national security justifications for interning Japanese Americans during World War II.[10] President Trump, after all, had justified his call to shut down Muslim immigration by claiming that Franklin D. Roosevelt had done the "same thing."

In his opinion, Chief Justice Roberts forcefully resists the analogy and condemns *Korematsu*. But whether the analogy is apt or disingenuous, Justice Sotomayor painstakingly lays out the evidence of the president's anti-Muslim motive in her dissenting opinion. If we were to take the man who signed the presidential proclamation at his word, she seems to be saying, he was intent on curtailing Muslim immigration to the United States. And he came to this view, in no small part, through familiar stereotyping and by

[9] Trump v. Hawaii, 138 S. Ct. at 2392.

[10] Korematsu v. United States, 323 U.S. 214 (1944). For representative examples of the debate, see Joseph Fishkin, *Why Was* Korematsu *Wrong?*, Balkinization (June 26, 2018), https://balkin.blogspot.com/2018/06/why-was-korematsu-wrong.html; Aziz Huq, *The Travel Ban Decision Echoes Some of the Worst Supreme Court Decisions in History*, Vox (June 26, 2018), https://www.vox.com/the-big-idea/2018/6/26/17507014/travel-ban-internment-camp-supreme-court-korematsu-muslim-history; and Richard Primus, *The Travel Ban and Inter-Branch Conflict*, Take Care (June 26, 2018), https://takecareblog.com/blog/the-travel-ban-and-inter-branch-conflict.

crediting anti-Muslim propaganda.[11]

Chief Justice Roberts's opinion does indeed amount to an abdication of judicial responsibility—but not for all of the reasons bandied about in the aftermath of the opinion's release, and not necessarily with the far-ranging implications feared. The chief justice is on firm analytical and historical ground in rejecting the claim that the president exceeded his statutory authority. But the Court's analysis goes awry in two ways. First, the Court treats the president's proclamation as the product of an ordinary presidency and a properly functioning executive branch; the Court refuses to see our particular president for who he actually revealed himself to be. Second, and more important, in considering whether the president's proclamation violated anti-discrimination norms embodied in the Establishment Clause, the Court applies a novel and toothless standard of review that prevents the courts from striking down discrimination on racial, religious, or other invidious grounds, in the selection of immigrants to the United States, as long as the government can also present a facially plausible reason for its actions. The Court does not go so far as to say the Constitution does not apply to the president's exclusion judgments, but in permitting discrimination that almost certainly would have been struck down in another regulatory context, it might as well have.

In reaching its breathtaking conclusion, the Court did not utterly compromise the power of judicial review over all matters immigration and presidential power. Herein lies a crucial coda

[11] As Justice Sotomayor noted, on the campaign trail, President Trump called for "a total and complete shutdown of Muslims entering the United States" and stated that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." As he signed the first executive order, he read the title – Protecting the Nation from Foreign Terrorist Entry into the United States – and stated "We all know what that means." Trump v. Hawaii, 138 S. Ct. at 2435-38. (Sotomayor, J., dissenting).

to *Trump v. Hawaii*. The battle over the scope of the president's power to enforce the immigration laws has only just begun—in fact, it began in earnest in the Obama years. But there is no reason to treat the deference extended in *Trump v. Hawaii* in a totalizing fashion, even though Chief Justice Roberts invokes the sensitivity of immigration and national security each time the going gets rough in his analysis. For one thing, the weakness of the statutory arguments against the proclamation notwithstanding, the intricacies of the INA do cabin the scope of the president's power. More important, lower courts and commentators can and should actively read *Trump v. Hawaii* as limited to its very particular context—to an intent-based anti-discrimination claim against the decision to exclude non-citizens, for national security reasons, on the precipice of entry and outside the custody and control of the United States.

With respect to immigration enforcement generally, including at the border, long-recognized constitutional constraints apply to the president's choices (and Congress's, for that matter), even when those choices can be cloaked with the veneer of national security. The courts historically have played an especially important role in their application of the Fifth Amendment's Due Process Clause to the federal government's enforcement policies. The Court in *Trump v. Hawaii* did not purport to overturn any of the precedents that rely on this clause to limit the government's power, nor would the mode of analysis in *Trump v. Hawaii* even make sense in a due process inquiry, which does not revolve around the decision-maker's motives. Serious questions about the actual depth or extent of the protections afforded under the Due Process Clause remain unanswered and the subject of hot-button litigation. But nothing in *Trump v. Hawaii* prevents the ongoing and vigorous application of the clause to limit abusive behavior. In my view, then, the lower courts should continue to apply and even

extend the reach of the Due Process Clause, in all cases where the government exerts control or coercive authority over non-citizens, particularly through detention and deportation.

I. Of Statutes and Constitutions

Though the import of *Trump v. Hawaii* rests mainly with its constitutional analysis, we should begin where is traditional, with the statute at issue. Statutory claims against government action are often safer than constitutional ones. In immigration law, in particular, where courts historically have extended great deference to the political branches, and the scope of immigrants' rights is either limited, uncertain, or non-existent, litigants often turn to statutory strategies. Our recent jurisprudential past is filled, for example, with preemption rather than equal protection claims against state laws designed to crack down on illegal immigration,[12] as well as constitutional avoidance claims meant to produce narrow readings of federal law, thereby enabling courts to side-step profound questions about the reach of constitutional due process.[13] In this vein, challengers of the entry-ban orders forcefully argued that President Trump's actions exceeded the president's statutory authority and therefore had no legal basis.

President Trump grounded each of his executive actions in a simple and powerful provision of the INA. Section 212(f)

[12] *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012); United States v. Alabama, 691 F.3d 1269 (11th Cir. 2012); Georgia Latino Alliance for Human Rights v. Governor of Georgia, 691 F.3d 1250 (11th Cir. 2012).

[13] *See, e.g.*, Brief for Petitioner at 27-28, Zadvydas v. Davis, 533 U.S. 678 (2001) (No. 99-7791), 2000 WL 33709238 (arguing against statutory construction allowing indefinite detention on ground that such a reading would "raise serious constitutional questions"). The Court ultimately accepted this argument, reading an implicit limitation on post-removal-period detention to avoid a due process problem. *Zadvydas*, 533 U.S. at 689-90. *See also* Brief for Respondents at 33, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 6123731 ("The Court need not decide the constitutional issues, because a 'fairly possible' construction of the detention statutes is available that avoids these serious constitutional concerns.").

gives the president the power to deny entry to "any aliens or class of aliens" whose entry would be "detrimental to the United States."[14] In *Trump v. Hawaii*, the Supreme Court rejects a central conclusion reached by the Ninth Circuit and pressed widely by the advocacy community—that the president's use of section 212(f) was inconsistent with the complex statutory scheme Congress had elaborated over the years to screen potential immigrants, including for national security risks.[15]

Not surprisingly, Chief Justice Roberts begins with straightforward textualism. As he point out, the terms of section 212(f) itself are quite clear and broad. The delegation contains no qualifications, except to establish that the power to deny entry kicks in when the president finds that entry would be detrimental to the nation's interests. Indeed, the legislators who drafted section 212(f) in 1952 understood its breadth. Representative Emanuel Celler argued that it did too little to constrain the reasons the president might invoke to suspend immigration, permitting "the President of the United States willy-nilly, on good grounds, or—if I may be facetious—on coffee grounds, to suspend totally any

[14] 8 U.S.C. § 1182(f).

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

Id.

[15] Respondents made such an argument in their briefing, echoing the Ninth Circuit decision ultimately reversed and remanded by the Supreme Court. Brief for Respondents at 30-32, 36-37, 45-50, Trump v. Hawaii, 138 S.Ct. 2392 (2018) (No.17-965), 2018 WL 1468304; Hawaii v. Trump, 878 F.3d 662, 687 (9th Cir. 2017) (concluding that indefinite suspension of entry "nullifies . . . existing statutory scheme"). *See also* Peter Margulies, *Trump's Travel Ban at the Supreme Court: Deference Joined by Nudges Toward Civility*, Lawfare (June 26, 2018), https://www.lawfareblog.com/trumps-travel-ban-supreme-court-deference-joined-nudges-toward-civility ("Unfortunately, the majority's broad view of 1182(f)'s delegation missed its more tailored role in the INA's overall plan."); Peter Margulies, *The New Travel Ban: Undermining the Immigration and Nationality Act*, Lawfare (Sept. 25, 2017), https://www.lawfareblog.com/new-travel-ban-undermining-immigration-and-nationality-act.

immigration into this country."[16] Others argued that such broad authority, while perhaps appropriate as a war-time emergency measure, should never be made a permanent fixture of immigration law. But by the statute's terms, Congress rejected these warnings.

For the Court, the results of the worldwide review (of foreign governments' cooperation in providing information needed by the immigration officials to assess security risks) more than suffices to meet the minimal national interest prerequisite of the statute. Moreover, the proclamation itself contains findings more extensive than those provided by any previous president invoking section 212(f)[17]—the sort of national security findings whose veracity or relevance courts rarely second guess. It proves immaterial to the Court that no previous presidential proclamation has swept quite as broadly, or that the worldwide review accompanying Proclamation 9645 only occurred after the botched roll out of an incompletely vetted order issued in the first week of Trump's presidency.[18]

The Court then rejects Hawaii's claim that the structure of the INA precludes the president's actions and allows him only to supplement but not supplant Congress's work when invoking his authority under section 212(f). The Court treats the president's actions as complements to the security screenings conducted by immigration officials pursuant to the meticulous detail of the immigration code. And "in any event," the Court writes, "no Congress that wanted to confer on the President only a residual

[16] 98 Cong. Rec. 4304 (1952) (statement of Rep. Celler). When another congressman interrupted, to remind Celler that the provision permits exclusion only when entry would be "detrimental to the interest of the United States," Celler responded that this language was no safeguard, since the decision of whether entry would be detrimental to the United States was left entirely to the president. *Id*. at 4305.

[17] Trump v. Hawaii, 138 S. Ct. at 2409.

[18] *See* Eggleston & Elbogan, *supra* note 3, at 830 ("Neither the White House nor the Department of Justice appears to have asked career lawyers within the Department of State, the Department of Defense, the Department of Homeland Security, or any other agency to review EO-1 before it was issued.").

authority to address emergency situations would ever use language of the sort in [section 212(f)]"—language that by its terms vests authority in the president to make exclusion beyond those the INA provides.[19]

We have seen this type of statutory claim—that the complexity of the INA limits presidential power—before. Leading opponents of President Obama's efforts to grant deferred action and work authorization to millions of unauthorized immigrants living in the United States invoked the INA to claim that he acted unlawfully, usurping Congress's comprehensive authority to control immigration policy. The statutory context for the debate over President Obama's relief plans differed in important respects from section 212(f), not least because President Obama had far less of an explicit, textual basis for his actions than President Trump. But opponents of the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) relied on the same structure of argument as the challengers of President Trump's orders. The former even succeeded in convincing lower courts that President Obama's proposal went beyond the reticulated statutory

[19] Trump v. Hawaii, 138 S. Ct. at 2412. The second statutory argument the Court rejects should give us more pause. In 1965, Congress amended the INA to provide that "no person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1). The Court is correct that this provision clearly applies only to non-citizens seeking visas for lawful permanent residency, because in immigration parlance, all other would-be immigrants (students, tourists, temporary workers) are "nonimmigrants." Trump v. Hawaii, 138 S. Ct. at 2414-15. Even so, the Court's basis for rejecting this statutory claim—that Hawaii confused visa issuance (which consular officials handle) and admissibility determinations (what the president made under section 212(f))—is not obvious and reads like a legalistic attempt to draw a fine but not very meaningful distinction. On this question, compare Josh Blackman, *The Legality of the 3/6/17 Executive Order, Part I: The Statutory and Separation of Powers Analyses*, Lawfare Blog (Mar. 11, 2017, 9:47 PM), https://www.lawfareblog.com/legality-3617-executive-order-part-i-statutory-and-separation-powers-analyses (distinguishing between entry and visas), with Ian Samuel, *"See the Sights of Terminal 4!" A Reply to Section 1182(f) Enthusiasts*, 36 Yale J. on Reg.: Notice & Comment (Feb. 11, 2017), *available at* http://yalejreg.com/nc/see-the-sights-of-terminal-4-a-reply-to-section-1182f-enthusiasts-by-ian-samuel/ (arguing that the distinction is illogical).

scheme Congress created to concretize the nation's commitment to humanitarian relief and family unification.[20]

In the case of *Trump v. Hawaii*, if the Supreme Court had followed the Ninth Circuit and limited the INA's "facially broad grant of power"[21] with reference to the INA's complex scheme for processing visas and screening for national security risks, it would not just have flouted the narrow textualist conventions beloved by conservative judges and lawyers.[22] It would have cast legal uncertainty over DACA and DAPA, as well as the numerous presidential policy initiatives across history. Take, for example, the president's invention of U.S. refugee policy. From the end of World War II until 1980, presidents used discrete powers delegated to them by Congress to admit hundreds of thousands of refugees to whom Congress had not otherwise opened avenues for entry. Even after Congress objected, presidents continued their actions, advancing a vision of the country as open to people

[20] Texas v. United States, 809 F.3d 134, 179 (5th Cir. 2015) (holding that the INA "expressly and carefully provides legal designations allowing defined classes of aliens to be lawfully present" which does not include those "who would be eligible for lawful presence under DAPA were it not enjoined"), *aff'd by an evenly divided court*, United States v. Texas, 136 S. Ct. 2271 (2016) (per curiam). The Fifth Circuit's ruling enjoined DAPA as well as the expansion of a 2012 program—Deferred Action for Childhood Arrivals (DACA). Several legal challenges to DACA during the Obama years failed. *See*, *e.g.*, Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015) (holding that ICE employee must bring claim through processes for adjudicating civil service disputes); Arpaio v. Obama, 797 F.3d 11 (D.C. Cir. 2015) (finding that sheriff of Maricopa County lacked standing to challenge DACA), *cert. denied*, 136 S. Ct. 1250 (2016). President Trump has attempted to rescind the program, and though he has been stymied by the courts thus far, Texas, among others, has filed suit in the same district court that enjoined DAPA, arguing that DACA exceeded the president's authority, thus setting up a clash for the Supreme Court to resolve eventually. *See* Maggie Astor, *Seven States, Led by Texas, Sue to End DACA Program*, N.Y. Times (May 1, 2018), https://www.nytimes.com/2018/05/01/us/daca-lawsuit-texas.html.

[21] Trump v. Hawaii, 138 S. Ct. at 2410.

[22] The Court does address Hawaii's claims that the legislative history of section 212(f), coupled with past executive practice involving narrower applications of section 212(f), bolstered the state's position. But it finds each of these reasons wanting. The Court's exploration of past executive practice is particularly instructive, because it underscores how past uses of the suspension power have been largely without standards; presidents have invoked section 212(f) to serve not just national security goals, but also their own policy and diplomatic goals. Trump v. Hawaii, 138 S. Ct. at 2409-10.

fleeing oppression.[23] Trump was arguably on firmer statutory ground than his predecessors, because the delegation on which he relied was written in clear and broad terms, whereas the parole power employed by numerous twentieth-century presidents to admit refugees was drafted for individualized, not categorical, humanitarian relief.[24]

Of course, each example of past, creative statutory interpretation by executive officials can be distinguished from one another with fact-based, lawyerly acumen. But the basic mode of statutory analysis pressed by Hawaii is inconsistent with how presidents have acted under the INA for decades. We would be wise to think twice before limiting presidential authority over immigration by invoking an approach to statutory interpretation and a conception of congressional policy tailored to the outcomes we seek in an individual case. As Adam Cox and I have shown in our work together, the president has been a vital immigration policy maker throughout our history, complementing and challenging Congress where the legislature has otherwise been unable or unwilling to address genuine policy problems. That role has depended on making creative use of statutes.

As Cox and I also have argued, the form of statutory analysis advanced by challengers in *Trump v. Hawaii* is indeterminate and gives far too much credence to the notion that the immigration

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[23] *See* Adam B. Cox & Cristina M. Rodriguez, The President and Immigration Law, Chapter 2 (forthcoming Oxford University Press 2019).

[24] 8 U.S.C. § 1182(d)(5)(A).

> The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

Id.

code constitutes an internally consistent and comprehensive plan.[25] Despite having enacted and repeatedly amended a sprawling code, Congress has not articulated a comprehensive plan for the implementation of the immigration laws. Initially adopted in 1952 and amended in significant fashion many times since, the INA consists of "a long series of legislative accretions."[26] Each addition to the code embodies efforts to weigh different and even conflicting priorities by multiple Congresses across time. As we have written: "[t]he legislative 'plan' of the INA is so full of internal contradictions and complexities as to be nearly impossible to characterize as pursuing concrete 'priorities' at anything other than the highest level of generality."[27] On the merits, and in the case of section 212(f), it does not seem inconsistent to have an elaborate screening process with detailed rules for consular and border officials to follow and to also give the president broad power to prevent the entry of aliens. The former establishes rules for the operation of the vast immigration bureaucracy, and the latter gives the president a power to act in an occasional and targeted fashion, even if particular uses of section 212(f) end up trumping the ordinary operation of immigration law.

The statutory problem with President Trump's orders stemmed not from his interpretation of his authority, but from the very breadth of the authority Congress had delegated. In the hands of another president acting without any inkling of a discriminatory motive, a similarly broad but targeted entry ban may not have attracted legal challenge. Presidents have used section 212(f) to advance legitimate national security objectives. But in light

[25] Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104, 158-59 (2015).
[26] *Id*. at 158-59.
[27] *Id*. at 159.

of what President Trump's executive orders have revealed to us about the potential of section 212(f), it seems prudent if not urgent for Congress to scale back the power it once gave. It could make explicit the numerous limitations advocates sought to pull from the interstices of the INA, including by requiring that a president who invokes his power under section 212(f) present detailed factual findings to justify his exclusions, or that exclusions be limited to times of national emergency, or to particular human rights violators or bad actors (in line with other section 212(f) proclamations).

Until Congress takes steps of this sort (admittedly a legislative fantasy in our current polarized environment), we can understand section 212(f) as the most capacious single expression of our contemporary reality, in which the president stands at the center of U.S. immigration policy. This is not to say that the INA does not constrain the president. Even though section 212(f) delegates broadly, the intricate statutory scheme does keep executive power within bounds. The president could not, for example, begin deporting non-citizens on grounds not specified by Congress. And it is still possible to identify limits imposed by the INA itself on the scope of section 212(f). As this essay goes to press, for example, President Trump appears to be testing the provision's outer limits by invoking it to stymie asylum applications from Central America—a move that the courts already have rebuked as an unlawful attempt by the president to rewrite explicit asylum provisions of the INA.[28] But whatever we think of the reach

[28] *See*, *e.g.*, East Bay Sanctuary Covenant v. Trump, 909 F.3d 1219, 1231 (9th Cir. 2018) (denying government's motion for stay of temporary restraining order issued by district court on the ground that DHS rule is "likely inconsistent with existing United States law"). In rejecting the administration's rule, the court concluded that the "President may not 'override particular provisions of the INA' through the power granted him in [section 212(f)])." *Id*. at 1236 (quoting Trump v. Hawaii, 138 S. Ct. at 2411 ("We may assume that [section 212(f)] does not allow the President to expressly override particular provisions of the INA.")). The court also concluded that the rule was not a "suspension" of entry under the terms of section 212(f) because it applied to "aliens already present within our borders." *Id*. at 1250.

of section 212(f) or even the INA, the enormous scope of the president's power atop the immigration enforcement machinery makes it vital to be clear and determined about the constraints the Constitution places on his behavior. This realization is part of what makes *Trump v. Hawaii* so dispiriting, because the opinion profoundly limits the reach of constitutional review.

II. The President, the Presidency, and Discrimination

A. The Facial Presidency

In his opinion for the Court, Chief Justice Roberts reasons abstractly about the challenges the president faces when engaged in national security decision-making. Roberts treats the executive branch as consisting of a national security bureaucracy under the direction of a chief executive, managing our perilous world by bringing expertise, gathered intelligence, and the nuances of foreign policy to bear.[29] The Court expresses its disappointment at the anti-Muslim statements made by the president himself, comparing him unflatteringly to his predecessors who spoke about Muslims and minorities using words of inclusion. But the Court resists treating the decision-making process behind the proclamation as the product of that actual person. The opinion comes close to positing a world where the president is nothing more than a synecdoche, and where Donald Trump and his Twitter account do not exist. It treats the process that produced the final version of the entry ban as part of an ordinary presidency operating in our era of heightened national security deference, rather than as the culmination of a very particular and highly insidious political

[29] Trump v. Hawaii, 138 S. Ct. at 2421. ("But we cannot substitute our own assessment for the executive's predictive judgments on [national security] matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" (quoting Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948))).

process. It therefore accepts at face value the national security justification for the proclamation offered by the government in litigation, dismissing the copious evidence of the president's anti-Muslim intent as legally beside the point.

In the course of turning *Trump v. Hawaii* into a separation of powers case, with an archetypal presidency in mind, the Court begins in a conventional place, but then takes the opinion in a radical direction. Chief Justice Roberts opens by articulating a standard of review that embodies the abstract concept of the presidency. In *Kleindienst v. Mandel*, a 1972 exclusion case, the Court acknowledged the propriety of a "circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U.S. citizen."[30] But the Court in *Mandel* limited review of the attorney general's decision—to deny a visa to a revolutionary Marxist invited to speak at Stanford University—to whether the executive had given a "facially legitimate and bona fide reason" for the decision.[31] Under this standard, the Court will neither look behind the exercise of discretion nor balance the government's interests against the interests of U.S. citizens, as long as a facially plausible, good faith

[30] Trump v. Hawaii, 138 S. Ct. at 2402.

[31] Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972) (limiting review of attorney general's denial of admission where a "facially legitimate and bona fide reason" for action existed). In *Kerry v. Din*, in which the justices considered whether the Due Process Clause had been violated by the cursory denial of a visa to the spouse of a U.S. citizen on terrorism-related grounds, Justice Kennedy in concurrence deploys the standard similarly, emphasizing that it has special import in immigration cases that also implicate national security. He declined to decide whether a protected liberty interest (in family unity across the border) existed in the case. Instead, he relied on *Mandel's* "facially legitimate and bona fide" standard to find that any due process interests were met when the government provided notice of its denial of admission under the relevant INA provision, emphasizing the Court's inquiry into the government's visa decision was limited. Kerry v. Din, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring). The plurality, by contrast, held that denying a visa to the spouse of a U.S. citizen did not violate the Due Process Clause. *Id.* at 2138 (plurality opinion).

reason for the immigration action at issue exists.[32]

Chief Justice Roberts makes very clear that the *Mandel* standard alone would have been enough to decide the case before the Court. On *Mandel's* first requirement, he seems correct. The national security justifications for suspending the entry of the groups listed in the proclamation would seem to satisfy facial plausibility; to say otherwise really would substitute the Court's national security judgment for the president's and threaten the presidency's institutional prerogatives.[33] But in finding the worldwide review to be bona fide, Chief Justice Roberts doubles down on the formality of his analysis, in a way that is arguably inconsistent with the standard itself. He prioritizes the hypothetical president, for whom the worldwide review would have been a sincere exercise. He does not engage with the possibility that this particular president's judgments—that the whole worldwide review process—were in bad faith, with a pre-determined outcome.

To question the president's good faith in setting national security policy might seem in tension with the heavy dicta in numerous Court opinions calling for delicacy. But unless some inquiry into the integrity of the reason given by the executive is permitted under the *Mandel* standard of review, the concept

[32] It can be unproductive, even pointless, to compare the ins and outs of different deferential standards of review. But it is ultimately not clear that the *Mandel* standard is meaningfully different from the rational basis review the courts apply when assessing classifications on the basis of nationality or alienage, except that one applies to exclusion and the other applies to the way the federal government discriminates against immigrants already present in the United States. The rhetoric about sovereign authority may be more muscular in *Mandel*-type cases, and the rational basis standard may purport to look beyond facial neutrality to weigh relative government and individual interests. But both standards embody considerable deference to the federal government's immigration judgments and presume good faith in the enactment of nationality classifications. It remains to be seen, however, how the federal courts would deal with policies targeting immigrants in the United States supported by the same considerable evidence of animus that existed in *Trump v. Hawaii*, i.e., whether the rational basis standard would permit recognition of discriminatory motive to override the immigration interest. For further discussion of this point, see Part III of this essay.

[33] Trump v. Hawaii, 138 S. Ct. at 2409.

of "bona fide" does no work. It could well have been that the worldwide review itself was conducted in good faith by the officials who performed it, and there may be no reason to doubt the conclusions drawn about the reliability of the information provided by the countries listed in the proclamation. But the Court does not even explore this question, preferring instead to emphasize facial plausibility.[34] The Court thus leaves it to Justices Breyer and Kagan in dissent to call for more of a probe into whether the national security claims were concocted to justify a pure political choice.[35]

In the aftermath of the opinion's release, a piece of conventional wisdom about the Court's abstract approach to the presidency began to emerge among the decision's supporters. According to this view, Chief Justice Roberts acted to preserve the prerogatives of the presidency, ensuring that future leaders would have the flexibility to make tough national security choices without the Court looking over their shoulders to scrutinize their intentions. But this observation is a distraction. The institutional prerogatives the Court supposedly preserved would not have been threatened by meaningful judicial consideration of President Trump's discriminatory motives.

To put it bluntly, no future president needs to feel free to indulge his prejudices in the making of national security or

[34] *Id*. at 2418-20 (quoting Mathews v. Diaz, 426 U.S. 67, 81-82 (1976)) ("The upshot of our cases in this context is clear: 'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained.").

[35] Justice Breyer, joined by Justice Kagan, sought more evidence to help determine whether the president had bad motives, namely by probing whether the waivers included in the proclamation, which would enable case-by-case security assessments, were genuine limits on the order or just makeweights. As Justice Breyer noted in his dissent, some evidence—including a sworn affidavit from a consular official and a report on the U.S. Embassy in Djibouti—suggested that the waiver process was "window dressing." Trump v. Hawaii, 138 S. Ct. at 2432-33 (Breyer, J., dissenting). On July 29, 2018, a class action complaint was filed against DHS and related agencies for "failure to provide a meaningful, orderly, and accessible [waiver] process," arguing violations of the APA, the INA, and due process rights. First Amended Complaint, Emami v. Nielsen, No. 3:18-cv-01587, Dckt. No. 34, at *4 (N.D. Cal. July 29, 2018).

immigration policy. To strike down the proclamation based on the record of Donald Trump's statements revealing his reasons for signing it would not have created a chilling effect on decision-making genuinely addressed to mitigating security risks. Even in an alternate future in which the Court had struck down Trump's proclamation, policies that required nationality classifications or had a disparate impact on certain groups would still have benefitted from the deferential review afforded national security-related immigration judgments, for reasons I explore in more detail in Part III of this essay.[36] Holding our current president to account for blatantly discriminatory conduct would not have changed that.

Still and all, the Court's application of the *Mandel* standard, though worthy of debate, is not what makes the decision so radical. If Chief Justice Roberts had begun and ended his analysis with the application of the *Mandel* standard, the outcome would have been startling and would have seemed willfully obtuse about the president's motives. But it would not have so clearly licensed discrimination by the president. In accepting the federal government's invitation to peer behind the order and apply rational basis to it, the chief justice's opinion grants that license.

B. Rational Basis Goes Awry

As Adam Cox, Ryan Goodman, and I observed in the immediate aftermath of the opinion's release, the Court does more than apply a deferential standard of review. It suggests that even

[36] A decision striking down the proclamation could have given future presidents and officials the incentive to "hide" any prejudicial or biased reasons for seeking particular immigration restrictions, but that is just a feature of intent analysis. Creating incentives for government officials, especially the president, to suppress prejudicial sentiments can also advance symbolic and expressive interests of the groups that would otherwise be maligned. Moreover, these sorts of incentive are part of what makes it so hard today to prove that facially neutral laws have invidious intent. That clear statements of discriminatory intent are so rare is precisely what makes President Trump's repeated utterances all the more extraordinary and worth calling out.

an established discriminatory motive would not have warranted invalidation of the government's actions, as long as another, facially legitimate reason for the exclusion existed, at least in national security-tinged determinations.[37] The Court thus gives the president, and Congress for that matter, a free pass to violate constitutional equality norms when deciding who may enter the country and who may not, as long as the government can come up with another plausible motive for its actions. This feat will not be difficult to pull off, given that the Court is usually loath to challenge the plausibility of the government's national security claims.

As we noted, this form of deference "marks a departure from the past [in immigration law], not continuity with it."[38] When *Trump v. Hawaii* came before the Court, the so-called plenary power—the specific name given to immigration deference—had never been used to uphold an immigration policy that would have been unconstitutional under ordinary constitutional review at the time. But Chief Justice Roberts articulates a standard of review that incorporates that very possibility. And in applying the standard, the Court—for the first time since the era of Chinese exclusion in the 1890s—upholds an act that a reasonable observer could have concluded was intended to exclude people on the basis of characteristics usually deemed

[37] Adam Cox, Ryan Goodman, & Cristina Rodriguez, *The Radical Supreme Court Travel Ban Opinion – But Why It Might Not Apply to Other Immigrants' Rights Cases*, Just Security (June 27, 2018), https://www.justsecurity.org/58510/radical-supreme-court-travel-ban-opinion-but-apply-immigrants-rights-cases/ (describing the Court as "essentially admit[ting] that the policy could very well be based on unconstitutional grounds, but conclud[ing] that this fact is irrelevant so long as a separate and additional non-illicit reason for the policy is available."). For an argument that takes this view even further, see Aziz Huq, *The Future of Constitutional Discrimination Law After* Hawai'i v. Trump, Take Care (June 26, 2018), https://takecareblog.com/blog/the-future-of-constitutional-discrimination-law-after-hawai-i-v-trump (characterizing the opinion as affirming the view that "[s]o long as the government asserts some kind of public security justification when it wishes to coerce or confine, a litigant alleging bias must lose.").

[38] Cox, Goodman, & Rodriguez, *supra* note 37.

illegitimate grounds for state action.[39]

Perhaps by going down the rational basis road, Chief Justice Roberts hopes to assimilate the proclamation with ordinary constitutional law, to demonstrate that the Court is not just rubber stamping an action labeled national security. But his rational basis analysis goes awry in two ways. First, his insistence on applying rational basis and nothing more departs from the way courts typically address challenges to facially neutral laws that might be motivated by discriminatory intent. And second, the way he actually applies rational basis does not follow from the precedents he cites.[40]

On the first score—in grappling with the meaning of the facially neutral government action before him—Chief Justice Roberts at least begins on firm ground. He says that rational basis requires considering whether the entry policy is plausibly related to the government's stated objective to protect the country and improve immigration vetting processes. He then turns to where he should—to the formal, facial reach of the proclamation—concluding correctly that the order is facially neutral as to religion. This feature is what allows him to say that the presidential proclamation is nothing like the order to intern Japanese Americans during World War II upheld by the Court in *Korematsu*—one of the deepest stains on the Court's reputation that Chief Justice Roberts make a production of expressly overruling.[41]

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[39] *Id.*; *see also* Adam Cox, *Why a Muslim Ban is Likely to Be Held Unconstitutional: The Myth of Unconstrained Immigration Power*, Just Security (Jan. 30, 2017), https://www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power/ ("The Supreme Court has never upheld an immigration policy that openly discriminated on the basis of race or religion during a period of constitutional history when such a policy would have been clearly unconstitutional in the domestic context.").

[40] *Cf.* McCreary County v. American Civil Liberties Union of Ky., 545 U.S. 844 (2005) (anti-discrimination component of Establishment Clause); Larson v. Valente, 456 U.S. 228 (1982) (same).

[41] Trump v. Hawaii, 138 S. Ct. at 2423.

But it's only his tendency toward formalism that allows him to reach his *Korematsu* conclusion with indignation. Even a facially neutral law can be motivated by intent to discriminate, making it no better or more constitutional than a law that classifies on its face. And a facially neutral government action that might otherwise survive rational basis scrutiny becomes a different constitutional animal altogether when there is evidence of intent to discriminate.[42]

Chief Justice Roberts's own opinion, not to mention Justice Sotomayor's incredulous dissent, lays out evidence of intent aplenty. The record was replete with statements that reasonably could have been construed as evincing discriminatory intent, by no less than the chief decisionmaker—the actual signatory to the government orders—himself. Chief Justice Roberts could have concluded or intimated that President Trump's litany of proclamations concerning Muslim immigrants and Islam did not constitute sufficient evidence of intent. He could have discounted campaign statements and dismissed political rhetoric as non-probative of executive branch motivation.[43] But he did not take this tack. Perhaps it occurred to him that the totality of the context for the proclamation, including the shoddy roll-out of the initial order, would have made such a conclusion unpersuasive. Indeed, evidence of intent to discriminate rarely gets much better than what

[42] *Id.* at 2442 (Sotomayor, J., dissenting) ("Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.").

[43] *See, e.g.*, Eugene Kontorovich, *The 9th Circuit's Dangerous and Unprecedented Use of Campaign Statements to Block Presidential Policy*, Wash. Post (Feb. 9, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/02/09/the-9th-circuits-dangerous-and-unprecedented-use-of-campaign-statements-to-block-presidential-policy/ ("There is absolutely no precedent for courts looking to a politician's statements from before he or she took office, let alone campaign promises, to establish any kind of impermissible motive."); *see also* Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 Tex. L. Rev. 71, 129, 138 (2017) (detailing categories of presidential speech and arguing that courts generally should not rely on statements "offered in the spirit of advocacy, persuasion, or pure politics" except in a subcategory of cases where presidential speech provides evidence of a "constitutionally impermissible purpose").

the Court had in front of it.[44]

Instead, Chief Justice Roberts makes the case that the president's statements were untoward but not legally relevant, because *even if* the president had a discriminatory intent, his actions should be upheld if supported by another, legitimate basis.[45] He says, "we may consider plaintiffs' extrinsic evidence, but will uphold the policy so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."[46] And he concludes, "because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification."[47]

This is not the way the Court typically reviews facially neutral laws where allegations (and evidence) of discriminatory intent have been raised. Though he doesn't quite say it in these terms, Chief Justice Roberts appears to be rejecting the possibility that the proclamation was the product of legally relevant mixed motives, or the possibility that a policy with a plausible, legitimate motive might be struck down because an illicit motive also drove its promulgation. Hawaii based its claims against the proclamation in the Establishment Clause, but the Court's equal protection precedents are illuminating in underscoring Chief Justice Roberts's departure.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp*., the Court makes clear that the intent standard

[44] Trump v. Hawaii, 138 S. Ct. at 2435 (Sotomayor, J., dissenting) ("The full record paints a far more harrowing picture, from which a reasonable observer would readily conclude that the Proclamation was motivated by hostility and animus toward the Muslim faith.").

[45] *Id*. at 2418 ("[T]he issue before us is not whether to denounce the statements. It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core executive responsibility.").

[46] *Id*. at 2420.

[47] *Id*. at 2421.

announced in *Washington v. Davis* does not require a showing that the government action at issue rested only on discriminatory grounds.[48] Its rationale is worth quoting in full:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision solely motivated by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.[49]

In the face of such proof, the government can still defend its policy on the ground that it would have been enacted even absent the discriminatory motive.[50] The Court in *Trump v. Hawaii* could have applied this standard. It could have acknowledged the discriminatory motive, but then concluded that legitimate national security concerns were more proximate to the final decision than

[48] Doctrinally, these cases apply to equal protection claims, not ones arising under the Establishment Clause. But there is no apparent reason why the logic of the former would not apply to the latter—why religious-based animus should require one test of causation, whereas race-based animus requires another.

[49] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

[50] Hunter v. Underwood, 471 U.S. 222, 228 (1985) (striking down Alabama law disenfranchising felons and holding that "[o]nce racial discrimination is shown to have been a 'substantial' or 'motivating' factors behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor," a standard Alabama could not meet); *cf.* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977) ("In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused.").

the bias reflected in the president's statements, or that national security concerns would have led the administration to pursue the course that it did, regardless of the president's malign motivations. It could even have concluded that the government's national security interests outweighed the costs of discrimination—the basic conclusion in *Korematsu*, where the Court purported to apply heightened scrutiny but was similarly unwilling to question the underlying national security rationale (and similarly misled about evidence relevant to the government's claims).[51]

Chief Justice Roberts instead assiduously avoids putting the government's national security rationale to any kind of test. He doesn't try to answer the admittedly thorny questions of causation these precedents raise,[52] nor does he send the case back to the lower courts to do so. He instead declares this whole anti-discrimination scaffolding irrelevant, because a facially plausible reason was enough to justify an immigration exclusion, even if the exclusion was also motivated by unconstitutional bias. In dissent,

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[51] Jed Shugerman, *A New* Korematsu: *The Travel Ban Ruling Will be the Roberts Court's Shameful Legacy*, Slate (June 26, 2018, 3:42 PM), https://slate.com/news-and-politics/2018/06/trump-v-hawaii-the-travel-ban-ruling-will-be-the-roberts-courts-shameful-legacy.html ("The justices had asked in oral arguments whether the travel ban's waiver program—the existence of which the DOJ relied on to argue that the ban was a fair and standard presidential directive—was merely 'window dressing.' Statistics and individual cases of denials had already suggested that the waiver process may be a sham. As Jeremy Stahl has reported, a former consular officer said in a sworn affidavit that he had no discretion to actually grant waivers. Another consular officer said 'the waiver process is fraud' and has 'no rational basis.' It's fair to ask whether [Solicitor General Noel] Francisco misrepresented the waiver process.").

[52] Perhaps the Establishment Clause context accounts for this elision, though those precedents raise similar questions and put the government to similar proof requirements by looking at the actual context of the decision as opposed to any facially plausible explanation. *See* McCreary County v. American Civil Liberties Union of Ky., 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality."); Trump v. Hawaii, 138 S. Ct. 2392, 2434 (2018) (Sotomayor, J., dissenting) ("[T]o determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion."(quoting McCreary County v. American Civil Liberties Union of Ky., 545 U.S. 844, 862 (2005))). For a detailed analysis of the conflicting and confusing approaches the Court has taken to intent analysis—a confusion that *Trump v. Hawaii* itself embodies—see Aziz Huq, *What is Discriminatory Intent?*, 103 Cornell L. Rev. 1211(2018).

Justice Sotomayor calls the majority out for failing to follow the Court's intent precedents, but Chief Justice Roberts rebuffs this criticism as irrelevant to national security and foreign affairs decision-making.[53]

This resistance to heightened review notwithstanding, Chief Justice Roberts then proceeds to ground his conclusions not in standard rational basis cases reviewing social and economic legislation, but rather in the line of cases known for applying a heightened form of rational basis, where the Court suspects animus against a group is involved. Perhaps this turn signals that he understood animus to be part of the case before him, or that he hoped to show that the Court's conclusion was not driven by a complete abdication to executive national security judgments. But his application of these cases—*Moreno v. Department of Agriculture*,[54] *City of Cleburne v. Cleburne Living Center*,[55] and *Romer v. Evans*[56]—presents the second way in which his analysis goes awry.

Chief Justice Roberts interprets these rational basis with "bite" precedents as holding that laws otherwise subject to rational basis review will be struck down when *only* animus can explain them—another way of implying that mixed motives do not matter. He writes that the cases have the "common thread" that the "laws at issue lack any purpose other than a 'bare . . . desire to harm a politically unpopular group.'"[57] Again, because he finds "persuasive evidence" that President Trump's entry suspension had a "legitimate grounding in national security concerns, quite apart from any religious hostility," he concludes that this line of cases

[53] Trump v. Hawaii, 138 S. Ct. at 2420, n.5.
[54] Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).
[55] Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
[56] Romer v. Evans, 517 U.S. 620 (1996).
[57] Trump v. Hawaii, 138 S. Ct. at 2420 (quoting *Moreno*, 413 U.S. at 534).

requires the Court to "accept that independent justification."[58]

In dissent, Justice Sotomayor seems to adopt this same approach to *Romer* and its predecessors. She simply concludes that the proclamation had no legitimate purpose. The extensive record of the president's anti-Muslim utterances both before the proclamation and in relation to it effectively revealed the national security justifications to be a sham; the proclamation instead was issued to express hostility toward Muslims and then dressed up as security vetting. Citing *Romer*, she writes, "the Proclamation is 'divorced from any factual context from which we could discern a relationship to legitimate state interests,' and 'its sheer breadth [is] so discontinuous with the reasons offered for it' that the policy is 'inexplicable by anything but animus.'"[59]

While both approaches follow the language and mirror the analysis in *Romer*, it is by no means clear that it was doctrinally necessary in *Trump v. Hawaii* to "prove" that the proclamation had no legitimate purpose. The effort to do so opens the dissent to the critique that it refused to accord any meaningful respect to the executive's national security statements, because the dissent, like Chief Justice Roberts, rejects the possibility of mixed motives.[60] This implication of the dissent may well be driving those who have defended the Court's opinion on the ground that it prioritizes respect for the hypothetical presidency and therefore preserves

[58] *Id*. at 2421.

[59] *Id*. at 2441 (Sotomayor, J., dissenting) (quoting *Romer*, 517 U. S. at 632, 635); *see also Cleburne Living Center, Inc*., 473 U. S. at 448 (recognizing that classifications predicated on discriminatory animus can never be legitimate because the government has no legitimate interest in exploiting "mere negative attitudes, or fear" toward a disfavored group).

[60] Perhaps this is the only way to address the causation questions raised by intent analysis. Admitting that a legitimate national security purpose exists is tantamount to concluding that the government action would have been adopted even absent the discriminatory motive. But a reasonable observer knows, according to Justice Sotomayor, that the administration issued its proclamation only because President Trump promised some sort of Muslim ban. Indeed, in any complex institution, it will be almost impossible to eliminate any plausible motive or prove the negative—that absent the malign motive, the government would have done the same thing.

future presidents' room to maneuver.

But the circumstances surrounding *Romer* ultimately differed in crucial respects from those presented by *Trump v. Hawaii*. The sort of evidence Justice Sotomayor employs in dissent to discount any legitimate motive on President Trump's part was absent in *Romer*. The Court in *Romer* had to infer animus from the overbreadth of the enactment before it, because the record lacked the extensive direct evidence available in *Trump v. Hawaii*. The semantic formulation of the "test" in *Romer*—that the policy was inexplicable by anything other than animus against a particular group—was a product of those factual circumstances, not a holding that the presence of animus invalidates a government action only when there is no other discernable reason for the action.[61]

In *United States v. Windsor*, Justice Kennedy seems to take *Romer's* heightened rational basis standard toward the sort of mixed motive analysis that could have led to invalidation of the entry-ban proclamation without rejecting its facially plausible national security purpose. In *Windsor*, the federal government could claim a more plausible interest than the state of Colorado in *Romer* could. Though there is certainly ambiguity about the standard of review Justice Kennedy applied in *Windsor* (he

[61] For the scholarly debate on the question of whether animus must constitute the sole reason, a primary reason, or simply one reason to justify striking down a law under rational basis, as applied in *Romer* and *Windsor*, see, for example, Susannah W. Pollvogt, Windsor, *Animus, and the Future of Marriage Equality*, 113 Colum. L. Rev. Sidebar 204, 213 (2013) (arguing that Justice Kennedy's opinion in *Windsor* treated animus as a silver bullet that "discredited any purported justifications" and that Chief Justice Roberts's dissent suggests that the presence of animus is not enough to invalidate a government action); Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 Sup. Ct. Rev. 183, 213, 232 (concluding that the Supreme Court left open in *Windsor* whether animus must be a but-for cause or only part of the purpose of the law, to justify invalidation and describing the "tainting" effect of animus); Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv. L. Rev. 4, 62 (1996) (noting that there were "poorly fitting but probably rational justifications" in *Cleburne*, *Moreno*, and *Romer*, suggesting that the Court was engaged in more searching analysis); and Katie R. Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1363 (2018) (reading *Romer* as not suggesting that the Court was required to find animus to conduct searching review).

increasingly eschewed formalistic and legalistic analysis over the years), he invalidated the Defense of Marriage Act after concluding that "no *legitimate* purpose *overcomes* the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[62]

In their dissent in *Trump v. Hawaii*, Justices Breyer and Kagan seem to be willing to take this kind of approach as a matter of law, too, though they do not frame it as an interpretation of *Romer* rational basis review. For them, the question was whether the proclamation's "promulgation or content was significantly affected by religious animus."[63] They simply sought more evidence to prove that the national security justification was questionable, such that they could have concluded that animus played a significant role in the proclamation's issuance.[64] To be sure, this sort of mixed motive standard almost certainly would not have satisfied Chief Justice Roberts. He probably would have recoiled at striking down a presidential order by questioning the centrality of the national security justification through a finding that its promulgation was *significantly* affected by religious animus. But Chief Justice

[62] United States v. Windsor, 570 U.S. 744, 775 (2013) (emphasis added).

[63] Trump v. Hawaii, 138 S. Ct. at 2429 (Breyer, J., dissenting).

[64] *Id.* ("Members of the Court principally disagree about . . . whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content. . . . [T]he Proclamation's elaborate system of exemptions and waivers can and should help us answer this question."); *id.* at 2430 ("[I]f the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a 'Muslim ban,' rather than a 'security-based' ban, becomes much stronger."). A potential virtue of this approach is that it doesn't require second-guessing the executive's national security judgments—the bogeyman of judicial review—at least not to the same extent as the Sotomayor approach. The inquiry into whether the waivers were a meaningful limitation on the order would be a factual one, and if they weren't, that could constitute evidence of motivation to keep Muslims out of the country, regardless of whether the government discovered reason to question the reliability of immigration information coming from the targeted countries. *Cf.* Noah Feldman, *Take Trump's Travel Ban Back to Court*, Bloomberg (June 29, 2018, 12:26 PM), https://www.bloomberg.com/view/articles/2018-06-29/take-trump-s-travel-ban-back-to-court (describing an exchange with Owen Fiss over whether, even under the *Trump v. Hawaii* opinion, plaintiffs "should go back to court and seek a trial on Trump's bias" given a different standard of proof of bias and the opportunity to seek discovery).

Roberts works too hard to make his conclusion—that the Court must consider religious animus legally irrelevant—fit the Court's equality jurisprudence.

The Court in *Trump v. Hawaii* ultimately erects a standard of review alien to existing anti-discrimination doctrines, and it engages in a form of analysis that would not (or should not) succeed outside the immigration context. There may be some small significance to squeeze out of the Court's turn to rational basis review. The best that can be said about this analysis is that it implicitly rejects the strong version of the plenary power—that the Constitution does not apply to the political branches' immigration decisions at all. The Court thus re-enforces a narrower interpretation of the plenary power—that it is a doctrine of judicial review.[65] In his concurrence, Justice Kennedy highlights the symbolic value of this version of the plenary power by suggesting that the proclamation may well have violated the Constitution, even if doctrines of judicial review precluded the Court from doing anything about it.[66] It is arguably worth putting some stock in the idea of the political branches engaging in self-binding to the Constitution.[67] But the way the Court ultimately employs rational basis review very clearly empowers the president, including a president who has little regard for the Constitution, much less the rights of foreigners.

[65] Gerald L. Neuman, Strangers to the Constitution 118-38 (2010).

[66] Trump v. Hawaii, 138 S. Ct. at 2424. (Kennedy, J., concurring) ("There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. . . . It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs.").

[67] Marty Lederman, *Contrary to Popular Belief, the Court Did Not Hold that the Travel Ban is Lawful—Anything But*, Just Security (July 2, 2018), https://www.justsecurity.org/58807/contrary-popular-belief-court-hold-travel-ban-lawful-anything-but-which-ruling-justice-kennedys-deference-presidents-enforcement-ban-indefensible/.

III. The Future of Presidential Power and Immigrants' Rights

President Trump's Proclamation No. 9645 is unprecedented in the scope of its exclusions. The clarity with which its author spoke about his desire to stop immigration by people of a particular faith was arguably unique in modern times.[68] Though the Court's opinion in *Trump v. Hawaii* purported to build on existing doctrines of deferential constitutional review, it reached a watershed conclusion by declaring legally irrelevant a set of facts that likely would have doomed similarly drawn distinctions in any other context not involving immigration and national security. The decision thus raises the obvious question of what's next for judicial review of immigration policy, particularly at a moment when the president and his administration have adopted a maximalist enforcement policy designed to deter and remove as many immigrants as possible.

The president and his administration have vast authority over immigration law and policy, particularly through the power to enforce the immigration laws. Deference to executive judgments has long played a role in a wide variety of cases implicating the immigration power. But has the Court now effectively authorized executive action that would otherwise be unconstitutional simply because immigration (and national security) are in play? Are all immigration judgments now suddenly insulated from anything but the most credulous judicial review? Not surprisingly, after the Court handed down its decision, the government quickly added citations to the rational basis deference of *Trump v. Hawaii* to its

[68] For a discussion of the more limited ways in which presidents have used section 212(f) in the past, see Brief for Respondents at 40-41, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1468304, at *40-41.

filings in other cases challenging executive immigration actions.[69]

The import of *Trump v. Hawaii*—whether it will have significant repercussions or be folded into business as usual—will be determined in the coming years. But whereas the decision may serve to re-enforce and deepen already existing doctrines that permit the federal government to discriminate against non-citizens, it need not and should not disturb the application of the Due Process Clause, or of administrative law doctrines, to curb arbitrary government power and the abuse of non-citizens under the government's jurisdiction and control.[70]

A. The President and Discrimination

One very clear factual cum legal distinction that could be used to limit the reach of *Trump v. Hawaii* is between the government's authority at the precipice of entry and the government's power over immigrants already present in the United States.[71] The highly deferential "facially legitimate and bona fide reason" standard from *Mandel* applies to the former category—to cases where the executive has denied a visa to a foreign national in a way that

[69] *See, e.g.*, Reply in Support of Defendants' Motion to Dismiss, Centro Presente v. Dep't of Homeland Sec., No. CV 18-10340, at *5-6 (D. Mass. June 26, 2018), *available at* https://static.reuters.com/resources/media/editorial/20180727/centrovtrump--mtdreply.pdf (amending motion to dismiss challenge to decision to rescind Temporary Protected Status of non-citizens from Haiti, El Salvador, and Honduras).

[70] I discuss due process limits in greater detail below. For an example of the courts' turn to administrative law to restrain executive immigration policies, consider the litigation surrounding President Obama's deferred action policies and the Trump administration's thus far unsuccessful effort to rescind Deferred Action for Childhood Arrivals.

[71] One way of understanding the legal significance of this descriptive difference is with reference to the clear distinction courts make between the federal government's authority over immigration control and the general regulation of immigrants. The classic statement of this distinction comes from *DeCanas v. Bica*, where the distinction had federalism implications: the Court said that not every measure that touches on immigration is a regulation of immigrant movement and upheld a California law that regulated the employment of unauthorized immigrants. *See* DeCanas v. Bica, 424 U.S. 351, 355 (1976) ("But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.").

might impinge on the constitutional rights of U.S. persons, but not of the foreigner himself, given that non-citizens outside the United States are not generally protected by the Constitution.[72] The *Mandel* standard is further justified because the decision whether to admit someone to the country reflects the ultimate expression of sovereign control. But much of the president's authority over immigration, and most of the controversies generated by the Trump administration, do not involve foreigners who remain outside the United States and have never stepped foot on U.S. soil. Instead, they implicate non-citizens who have clear or colorable constitutional rights, or at least protected interests, by virtue of their ties to the United States—circumstances for which the *Mandel* standard is arguably inappropriate.[73]

When it comes to claims that the government has *discriminated* against non-citizens in some way, it's not clear how much work this distinction between immigration control and immigrants' rights will do. Long-standing doctrines governing whether and how the federal government can discriminate against non-citizens already significantly empower Congress and the president, without *Trump v. Hawaii* even in the picture. The political branches' authority to impose burdens and make judgments on the basis of nationality is well established.[74] Under existing law, federal alienage classifications are subject only to rational basis review, because it is "a routine and normally legitimate part" of the business of the federal government to draw distinctions

[72] *Cf.* Boumediene v. Bush, 553 U.S. 723, 755 (2008) ("[W]e accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. . . [H]owever, we take notice of the obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.").

[73] The Ninth Circuit's injunction of the first of the entry-bans was predicated in large part on the constitutional concerns it raised by virtue of seeming to apply to lawful permanent residents who were also nationals of the listed countries. *See* Washington v. Trump, 847 F.3d 1151, 1164-65 (9th Cir. 2017).

[74] *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 85 (1976).

on the basis of citizenship.[75] Indeed, immigration law relies on nationality classifications; immigration policy is full of examples of nationals from certain countries receiving more or less favorable treatment than others because of particular circumstances tied to their country of origin.[76] Alienage law, or the jurisprudence through which courts have applied equal protection scrutiny to discrimination against non-citizens, is first and foremost a federalism doctrine that limits states' authority to discriminate against non-citizens through the application of strict scrutiny while acknowledging the ordinariness of the federal government doing the same.

Sometimes nationality classifications can end up burdening groups that are also widely disfavored in society, raising the specter of prejudice or bias by the federal government. In the immediate aftermath of 9/11, for example, the Bush administration adopted a series of programs justified by national security concerns that targeted temporary immigrants from Muslim-majority countries. The National Security Entry-Exit Registration System (NSEERS) required so-called nonimmigrants from mostly Muslim countries to register with the INS when they arrived at the port of entry and even if they were already present in the country[77]—regulatory requirements that were only rescinded in 2016 by the

[75] *Id*.

[76] For example, the Visa Waiver program extends more favorable treatment in immigration screening to nationals from certain (mostly advanced industrialized) countries than others. Temporary Protected Status (TPS), which gives a form of status to persons fleeing natural disaster or other calamities, is awarded based on nationality. *See* Designation of Nepal for Temporary Protected Status, 80 Fed. Reg. 36,346 (June 24, 2015); Designation of Haiti for Temporary Protected Status, 75 Fed. Reg. 3,476 (Jan. 21, 2010); Designation of Rwanda Under Temporary Protected Status Program, 59 Fed. Reg. 29,440 (June 7, 1994).

[77] Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,583 (Aug. 12, 2002). Ultimately, nationals from 25 countries were required to register: Iraq, Iran, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. *See* 67 Fed.Reg. 57,032 (Sept. 6, 2002); 67 Fed. Reg. 67,766 (Nov. 6, 2002); 67 Fed.Reg. 70,526 (Nov. 22, 2002); 67 Fed.Reg. 77,641 (Dec. 18, 2002).

Obama administration.[78]

No equal protection challenge to NSEERS ever succeeded. In part, the cases often came styled as selective prosecution claims, which are notoriously difficult to prove.[79] But courts also cited the facial neutrality of the NSEERS regulation,[80] alongside the federal government's broad authority to distinguish among foreign nationals, to brush aside discrimination claims.[81] And even if we applied ordinary anti-discrimination law, the disparate impact alone that NSEERS had would not have violated anti-discrimination protections.[82] So even if the framework for evaluating nationality classifications draws heavily from deference doctrines made for the immigration or national security contexts, it's not clear how much of a difference the deference ultimately makes.

But the question of discriminatory motive still lingers in these alienage cases. The presumption of good faith or legitimate motive that courts give to federal classifications on the basis of citizenship does not, in and of itself, require courts to accept classifications that are in fact the product of illicit motives. As overbroad as NSEERS turned out to be[83]—it seemed to many, even at the time, a

[78] Removal of Regulations Relating to Special Registration Process for Certain Nonimmigrants, 81 Fed. Reg. 94,231 (Dec. 23, 2016).

[79] *See, e.g.*, Malik v. Gonzales, 213 F. App'x. 173, 174 (4th Cir. 2007) (holding that court lacked jurisdiction to consider selective enforcement claims); Daud v. Gonzales, 207 F. App'x. 194, 202-03 (3d Cir. 2006) (same).

[80] Roudnahal v. Ridge, 310 F. Supp. 2d 884, 892 (N.D. Ohio 2003) (citing the Federal Register notice and noting that "the Executive is designed and entrusted to best shape our national security" and that the registration requirements were facially legitimate "[i]n light of current military operations in the Middle East, combined with a heightened terrorist threat-environment at home and abroad").

[81] *See* Rajah v. Mukasey, 544 F.3d 427, 438 (2d Cir. 2008) (noting that an immigration law would "survive a constitutional challenge so long as there is a facially legitimate and bona fide reason for the law") (citing Romero v. INS, 399 F.3d 109, 111 (2d Cir. 2005)).

[82] *See* Washington v. Davis, 426 U.S. 229 (1976) (making it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact).

[83] Muzaffar Chishti & Claire Bergeron, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*, Migration Pol'y Inst. (May 17, 2011), https://www.migrationpolicy.org/article/dhs-announces-end-controversial-post-911-immigrant-registration-and-tracking-program. *See also* Asli Ü. Bâli, *The U.S. Already Tried 'Extreme Vetting' for Muslims. It Didn't Work.*, Wash. Post (Jan. 26, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/26/the-u-s-already-tried-extreme-vetting-it-doesnt-work/.

fear-inspired over-reaction to a very real national security threat—no material evidence of discriminatory motive ever appeared in the litigation surrounding it (or at least, the court opinions upholding it never adverted to any such possibility).[84] But if strong evidence of discriminatory motives on the part of President Bush or other key decision-makers behind NSEERS had emerged in the litigation—particularly of the variety and volume that existed in *Trump v. Hawaii*—those cases could have come out differently. Alienage law would not have required otherwise.

But does *Trump v. Hawaii* alter the picture? The recent decision of a federal judge in Massachusetts provides an example of how lower courts might still entertain discrimination claims against the federal government exercising its immigration power, by citing factual distinctions with *Trump v. Hawaii*. The judge in the Massachusetts case rejected the government's attempt to invoke *Trump v. Hawaii* to insulate the decision by the Department of Homeland Security (DHS) to rescind the Temporary Protected Status (TPS) of nationals of Honduras, El Salvador, and Haiti. The plaintiffs had alleged that the decision was motivated by racial discrimination, citing infamous statements by President Trump: "why are we having all these people from shithole countries come here?" and "why do we need more Haitians?" who "all have AIDS?"[85] The district court treated *Trump v. Hawaii* as inapposite, because the case before it involved non-citizens with substantial ties to the U.S. and did not implicate national security.[86] It declared *Arlington Heights* to provide the appropriate framework for

[84] *Rajah*, 544 F.3d at 439 (noting that there was no basis for the claim that NSEERS was "motivated by an improper animus toward Muslims" as it was "clearly tailored" to the fact that the attacks of September 11 "were facilitated by violations of immigration laws by aliens from predominantly Muslim nations").

[85] Centro Presente v. United States Dep't of Homeland Sec., No. CV 18-10340, 2018 WL 3543535, at *5 (D. Mass. July 23, 2018).

[86] *Id.* at *12.

analysis and observed that "applying review under *Arlington Heights* would not vitiate the deference that courts typically afford the other branches in immigration policy, but would only limit that deference upon a proper showing of unlawful animus on the basis of a protected category."[87]

But even though this kind of analysis remains available, *Trump v. Hawaii* makes it questionable whether it will survive on appeal and through the percolation of these claims throughout the federal courts. *Trump v. Hawaii* did not just apply the *Mandel* standard to the president's proclamation. It applied its version of *Romer* rational basis, too. The outcome of the case shows that the Court, as currently constituted, is willing to look away from discriminatory motives in the application of rational basis review to the federal government's regulation of immigration and national security. If we remove the hypothetical case from the precipice of entry, from the border, and posit the interests of immigrants already present and with lawful status, will the Court entertain mixed motive analysis?[88] Will it step outside of the typical deference given to classifications based on nationality, and outside the parameters of *Trump v. Hawaii*, which calls for upholding policies even in the face of evidence of discriminatory motive? As a principled legal matter, it's hard to see how it could, unless the alienage classifications at issue have an attenuated connection

[87] *Id.* at *13; *see also* New York v. Dep't of Commerce, 1:18-CV-02921-JMF, at 67(S.D.N.Y. July 26, 2018), *available at* https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2018cv02921/491254/215/ (declaring that government's attempt to invoke *Trump v. Hawaii* to require deference to the Department of Commerce decision to include a question about citizenship in the 2020 Census as "somewhere between facile and frivolous").

[88] *See* Gutierrez-Soto v. Sessions, 317 F. Supp. 3d 917, 930-931 (W.D. Tex. 2018) (observing that, "out of an abundance of caution, the Court will adopt the Supreme Court's approach from *Trump v. Hawaii*," and rejecting claim that revocation of humanitarian parole violated Equal Protection Clause because "it could be reasonably understood to result from a justification independent of unconstitutional grounds. This is because Petitioners' extrinsic evidence, President Trump's [discriminatory] statements, lack anything more than a tenuous connection to Respondents' actions").

to national security. TPS falls less clearly in the national security bucket than the Trump entry-ban, but some courts may begin to blend security with public order more generally.

B. The Due Process Clause and Government Coercion

The distinction between immigration control and the rights of immigrants also has limited value when the controversies involve border enforcement, where the government can claim heightened sovereignty and security concerns. Especially when it comes to those who have entered illegally, the imperatives of immigration control could in theory and practice swallow immigrants' rights.[89] Indeed, government lawyers long before the Trump administration have urged the position that certain people who appear at the border—both asylum seekers and unlawful entrants, particularly those with no ties to the United States—are constructively outside the United States.

And so something more than a distinction between sovereign control and ordinary regulation is required to perpetuate meaningful judicial scrutiny of executive immigration actions. Fortunately, existing precedents, including canonical dissents,

[89] *See*, *e.g.*, Respondents' Response in Opposition to Motion for Preliminary Injunction at 21-22, Ms. L. v. U.S. Immigration and Customs Enforcement, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18cv0428 DMS), *available at* https://www.documentcloud.org/documents/4550646-Defendants-Response-in-Opposition-Re-Motion-for.html ("[I]t is essential for DHS to be able to make these discretionary decisions because DHS plays an important role in disrupting smuggling operations. . . . Both ICE and CBP frequently are faced with the need to determine, in a fast-moving and uncertain environment, the legitimacy of a purported family relationship, and to act accordingly. . . . Where concerns arise, CBP and ICE must have the ability to exercise their discretion as to the most appropriate immigration action."); Respondents' Supplemental Response in Opposition to Motion for Preliminary Injunction at 13-14, Ms. L. v. U.S. Immigration and Customs Enforcement, 310 F. Supp. 3d 1133 (S.D. Cal. 2018) (No. 18cv0428 DMS), *available at* https://www.documentcloud.org/documents/4560367-Respondents-Supplemental-Response-in-Opposition.html ("[I]n determining what standard should be applied to a separation decision made by the Government, the Court should consider the immigration enforcement that occurs at the border. . . . [W]hen DHS encounters a purported family group, it . . . must consider the broader issues of safety related to the smuggling of children and the use of children to gain entry into the United States.").

point to a different factor that distinguishes immigration enforcement, including border enforcement, from exclusion decisions of the sort at issue in *Trump v. Hawaii*. Rather than think of the need for sovereign control as the trigger for the type of judicial review on offer in *Trump v. Hawaii*, the inquiry should turn on whether coercive authority has been exercised over the non-citizen. The distinction would be between the abstract decision to exclude hypothetical future entrants in *Trump v. Hawaii* and concrete instances of the government's direct control or power over the person. The scrutiny of such control should extend regardless of whether the person has been present in the U.S. for an extended period or is a recent (and unlawful) border crosser.[90] And it should encompass government actions such as rescission of status, arrest, deportation, and especially custody and detention.[91]

Limits on the government's coercive power in immigration long have been understood to come from the Fifth Amendment's Due Process Clause, which the Court has held, since the turn of the twentieth century, applies to all persons, even recent clandestine

[90] This approach is in harmony with and could be supported by the Supreme Court's landmark decision in *Boumediene v. Bush*, holding that the right to petition for a writ of habeas corpus applied to detainees held at Guantanamo Bay, where the U.S. was not sovereign but had effective control. *See Boumediene*, 553 U.S. at 765 ("Even when the United States acts outside its borders, its powers are not 'absolute and unlimited' but are subject 'to such restrictions as are expressed in the Constitution.'") (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885))). For more on *Boumediene* and extra-territorial application of the Constitution, see Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 Colum. L. Rev. 973 (2009); and Stephen I. Vladeck, *The Problem of Jurisdictional Non-Precedent*, 44 Tulsa L. Rev. 587 (2009).

[91] This line does not help the U.S. citizens and LPRs who have an interest in those hypothetical entrants. In *Trump v. Hawaii*, respondents emphasized the interests of U.S. citizens in "reuniting with close family who have applied for visas . . . welcom[ing] visitors to [a religious] community," and the university interest in recruiting and retaining individuals. Brief for Respondents at 19, Trump v. Hawaii, 138 S.Ct. 2392 (2018) (No. 17-965), 2018 WL 1468304. The Court found these interests were adequate to confer standing but not to prompt anything but the most cursory judicial review. And in *Kerry v. Din*, Justice Scalia wrote on behalf of a plurality that denial of a spouse's visa application does not deprive a citizen of a fundamental liberty interest. Kerry v. Din, 135 S. Ct. 2128, 2132-36 (2015) (plurality opinion). Importantly, Justice Kennedy in concurrence chose not to decide this question. Id. at 2139 (Kennedy, J., concurring).

entrants.[92] The Court does not address and certainly does not purport to disturb these precedents in *Trump v. Hawaii*. That case involved the rights of U.S. persons, not any cognizable rights of immigrants. More to the point, for cases grounded in the Due Process Clause, the form of rational basis review applied in *Trump v. Hawaii* simply is not apposite. The standard would make no sense analytically, because the government's motive has no bearing on whether the Due Process Clause has been violated.

Of course, the possibility of due process review does not mean that the government's interests could not outweigh the constitutional violation, or that courts would not give great deference to the interests the government puts forward, refusing to scrutinize its claims of national security necessity. But the application of a form of rational basis that permits blatantly unconstitutional conduct because it was arguably well intentioned, or undertaken in pursuit of a plausible governmental objective that in and of itself would be legitimate, would reflect a significant stretch of *Trump v. Hawaii*. The lower courts certainly need not acquiesce in such an approach unless and until the Supreme Court has made it clear that the Due Process Clause really is that thin.

As a procedural doctrine, due process is, of course, a relative concept that calls for weighing the extent of a non-citizen's liberty interest against the government's needs.[93] When it comes to the core enforcement question—whether someone is to be removed or excluded—both the liberty interest (in being in the United States) and the government interest (in removing non-citizens the law declares have no entitlement to be in the country) can be weighty,

[92] Yamataya v. Fisher, 189 U.S. 86, 100 (1903) ("[We have] never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'").

[93] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

but variable. Both will depend to some degree on legal status, the extent of ties to the country, and the government's removal rationales in particular cases.[94]

The hallmarks of due process, namely notice and an opportunity to be heard before an adjudicator (if not a court), have long been recognized as attaching as a matter of constitutional law, as well as in statute and regulation, at least for long-term residents.[95] The Supreme Court made clear in the 1980s, for example, that a returning lawful permanent resident was entitled to more than a cursory consideration of her claim against deportation. In fact, this basic principle led the Ninth Circuit panel that considered the first iteration of the Trump entry-ban to question its constitutionality, which in turn pushed the administration to make clear that its orders did not apply to this category of non-citizens.[96]

But within the confines of ordinary procedural due process, even cursory removal processes may suffice. The government, for instance, has plenty of room to dispense quickly with the removal of non-citizens with no ties to the United States, whose liberty interests in remaining are thin to non-existent (except in the vital

[94] Notably, constitutional challenges to the deportation power beyond the procedural have been unsuccessful, whether in the form of Ex Post Facto Clause challenges to the application of new deportation rules to immigrants after they have been admitted, or First Amendment challenges to the grounds of deportation, which historically have included engaging in speech and association that would otherwise be protected by the First Amendment.

[95] *See* 8 U.S.C. § 1229(a) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."); *see generally* 8 U.S.C. § 1129.

[96] Landon v. Plasencia, 459 U.S. 21 (1982); *cf.* Washington v. Trump, 847 F.3d 1151, 1165 (9th Cir. 2017) ("The Government has provided no affirmative argument showing that the States' procedural due process claims fail as to [aliens attempting to reenter after travelling abroad]. For example, the Government has failed to establish that lawful permanent residents have no due process rights when seeking to re-enter the United States.").

case of the refugee).[97] No legal challenge has succeeded against the expedited removal procedure that Congress authorized in 1996, to give immigration officers the power to order a non-citizen removed without further hearing or review, if the officer has determined the non-citizen is inadmissible, unless the person expresses an intent to apply for asylum.[98] To be sure, challenges have foundered because Congress has made judicial review exceedingly difficult. But the bottom line is that the government's efforts over the last two decades to remove people apprehended at the border quickly and without access to courts only presents a problem under existing law (statutory, regulatory, and international) if such processes thwart the effort to claim asylum.

The extent of this last point may soon come in for further development. The executive has yet to make full use of the expedited removal power Congress delegated to it. Congress authorized expedited removal for those inadmissible aliens who could not prove that they had been continuously in the United States for two years, and so the government in theory could deploy the procedure across the United States. The Clinton, Bush,

[97] For robust articulations of this idea, which have eroded over time, see *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (noting that, for "foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law . . . the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law"); and *Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). As the government showed in its position in *Jennings v. Rodriguez*, some interpret cases such as *Knauff v. Shaughnessy* to mean that non-citizens seeking an initial entry have no due process rights. But *Knauff* and cases like it do not so hold. Instead, they are best read as limiting the process owed in certain circumstances while giving significant deference to admission and exclusion judgments. For a full elaboration of this argument, see Brief of Scholars of Constitutional, Immigration, and Administrative Law in Support of Petitioners-Appellees/Cross Appellants, Rodriguez v. Marin, No. 13-56706 (9th Cir. July 27, 2018).

[98] 8 U.S.C. § 1252(e)(3)(B); 8 U.S.C. § 1225(b)(1)(A); *see also* American Immigration Lawyers Association v. Reno, 199 F.3d 1352 (D.C. Cir. 2000) (holding that particular challenges before it only gave rise to a claim that the INS had not followed its own procedures, not a challenge to the legality of expedited removal, and holding that the requirement that challenges be brought within 60 days of implementation or issuance of a new regulation was jurisdictional).

and Obama administrations applied expedited removal only to new arrivals or recent border crossers, either at the ports of entry or within 100 miles of the border.[99] The Trump administration, however, has promised to use its statutory authorities to their full effect, and the complete use of the power of expedited review could generate new questions under the Due Process Clause, provided litigants can navigate the limits on judicial review.[100]

On the merits of the potential constitutional claim against expanded expedited review, a challenger might argue that, as expedited removal expands into the interior, the risk that the government might erroneously deprive a non-citizen of a weighty liberty interest—namely her right to live in the U.S.—will grow. As more settled immigrants enter the government's purview, trial-type procedures arguably become more necessary. The government's interests in policing the border and expelling non-citizens before they develop ties also wane.[101] *Trump v. Hawaii* does not provide any reason for lower courts to apply anything other than this ordinary due process analysis to questions that might arise involving further contractions of procedural safeguards governing deportation.

But even if the Due Process Clause does not require extensive trial-type proceedings for all forms of removal, the clause in its

[99] The Clinton administration applied expedited removal only to those who arrived at ports of entry with fraudulent documents and were not asylum claimants. The Bush administration extended the procedure to all non-citizens encountered within 14 days of entry and within 100 miles of the border. The Obama administration maintained this latter regulation. *See* Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,878 (Aug. 11, 2004).

[100] Memorandum from Secretary of Homeland Security John F. Kelly to Kevin McAleenan, Acting Commissioner U.S. Customs and Border Protection, et al. (Feb. 20, 2017), *available at* https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf.

[101] In such circumstances, the legality of the INA's limitations on judicial review of expedited removal would arguably demand a reconsideration, given the serious threat to due process posed. For a discussion of the constitutional questions raised by greatly restricting due process for those who have lived in the U.S. for an extended time, see Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 969 (1998).

substantive form can operate to prevent abusive treatment. As Justice Breyer put it in his dissent in *Jennings v. Rodriguez* last term, when addressing the Constitution's application to recent border crossers: "No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection. Whatever the fiction, would the Constitution leave the Government free to starve, beat, or lash those held within our boundaries?"[102] Here he echoes Justice Jackson's canonical dissent in *Shaughnessy v. United States ex rel. Mezei*—a case that represented a highwater mark for national security deference to the government. Justice Jackson responded to the majority's acquiescence in the government's decision to deny a non-citizen a hearing before ordering her exclusion at the border with a warning that the Due Process Clause should be understood as restraining the government from extreme proceedings, blending the procedural and substantive dimensions of the clause:

> [Due process] is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice. . . . Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat.[103]

Though these powerful condemnations of cruelty are embodied in dissents, they do reflect deeply rooted constitutional

[102] Jennings v. Rodriguez, 138 S. Ct. 830, 862 (Breyer, J., dissenting).
[103] Shaughnessy v. U.S. *ex rel*. Mezei, 345 U.S. 206, 224, 226 (1953) (Jackson, J., dissenting).

expectations and values, as Justice Breyer lays out in his *Jennings* dissent.[104] Before *Trump v. Hawaii*, and in response to the Trump administration's enforcement policies, the lower courts reflected these same intuitions—that the Due Process Clause stands as a bulwark against governmental abuse. District judges showed their willingness to label actions taken by the government in pursuit of tough enforcement as violations of substantive rights, even going so far as to label some government policies—separating parents from children at the border, for example—as shocking the conscience.[105]

Nothing in *Trump v. Hawaii* necessitates a recalibration or retreat from this form of review.[106] Even if courts in the aftermath of the decision choose to be credulous about the government's reasons for its enforcement policies—e.g., if they choose to credit

[104] Much remains open for debate around this question of what substantive liberty interests a non-citizen under government control would have. Freedom from torture and other similar forms of abuse seem the clearest. But the D.C. Circuit's profound disagreements over whether the Trump administration could slow down (and thwart) the ability of an unaccompanied, undocumented minor in the custody of the United States Department of Health and Human Services from acquiring an abortion underscores that legal status and the imperatives of immigration control can easily shape the way courts see unresolved questions about specific rights. The fact that Judge Kavanaugh dissented from the D.C. Circuit's en banc rebuke of the Trump administration, arguing that the court created a new right to abortion on demand for an unauthorized immigrant, makes this all the more pointed. *See* Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc)(per curiam).

[105] *See* Ms. L. v. U.S. Immigration and Customs Enforcement, 302 F. Supp. 3d 1149, 1165-66 (S.D. Cal. 2018) (citing cases describing practices "'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience,'" or that interfere with rights "'implicit in the concept of ordered liberty,'" and so "'brutal' and 'offensive' that it [does] not comport with traditional ideas of fair play and decency.") (citations omitted).

[106] For other examples of district court pushback, see *V.F.B. v. Sessions*, No. 3:18-cv-01106-VAB, 2018 WL 3421321 (D. Conn. July 13, 2018) (finding that government likely violated substantive due process right to family integrity, as well as procedural due process, and granting writs for habeas corpus, and appearing to apply strict scrutiny); and *Ms. L. v. U.S. Immigration and Customs Enforcement*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (finding that family separation policy likely violated due process and granting class-wide preliminary injunction). *See also* Flores v. Sessions, No. 85-4544-DMG, at *7 (C.D. Cal. July 9, 2018) (denying government's *ex parte* application for exemption from or modification of *Flores* Agreement that requires non-citizen children in the immigration system to be detained in the least restrictive manner practicable, to permit children taken into custody at the border to be detained together with their parents, as "wholly without merit").

the administration's view that separating families will deter asylum seekers, despite powerful evidence to the contrary[107]—marginal deterrence benefits would hardly seem to justify strikingly abusive behavior. It's hard to imagine the courts as a holistic institution concluding that treatment that shocks the conscience (or is just plain abusive) cannot be remedied by courts because the government also had a facially legitimate and bona fide reason for the conduct, namely deterring illegal immigration.[108] That intention could not, even in theory, erase the execrable treatment as it erased the discriminatory motive under the Court's analytical framework in *Trump v. Hawaii*. Again, a court could prove Justice Jackson wrong. It could conclude that the government's interest in deterrence justifies the constitutional violation, much as the Supreme Court concluded that national-security interests justified President Roosevelt's facial race discrimination in *Korematsu*. But to do so would require a substantial step beyond *Trump v. Hawaii*.

We may be heading toward a high-level reckoning on the reach of the Due Process Clause in immigration enforcement. Last term, in *Jennings*, the Supreme Court reversed a Ninth Circuit decision that employed constitutional avoidance to read a congressional statute authorizing mandatory detention for certain classes of non-citizens to require individualized bond hearings after six months of detention. Detention implicates a core liberty interest that the courts, even in immigration, have been careful to protect. But they have done so largely by applying the canon of

[107] Tom K. Wong, *Do Family Separation and Detention Deter Immigration?*, Center for Am. Progress (July 24, 2018, 1:30 PM), https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/ (showing that monthly U.S. Border Patrol apprehensions of families at the southwest border increased after "pseudo-interventions" like the zero tolerance pilot).

[108] A "shocks the conscience" standard is a high bar for relief, but it need not be understood as a threshold requirement.

avoidance to questionable congressional statutes.[109] In *Jennings*, by rejecting one such interpretation as "linguistic trauma," the Court squarely posed the constitutional issue to the lower courts—to what extent does the Constitution limit the detention of non-citizens?

Justice Breyer's dissent in *Jennings*, quoted above, shows the way for the Court to limit mandatory detention and require individualized hearings to assess flight risk and dangerousness. He grounds his conclusions in deep constitutional history, complete with links to Blackstone and contemporary jurisprudence alike. But what kind of weight will the Court as currently constituted give the government's interest in mandatory detention, and will its recommitment to national security deference in *Trump v. Hawaii* re-emerge when this constitutional challenge inevitably comes back to the Court? Will the Court go so far as to credit the government's claim that certain non-citizens, namely first-time entrants, in fact have no due process rights at all?

Justices skeptical of constitutional claims against detention statutes have not needed a holding as sweeping as *Trump v. Hawaii* to acquiesce in the decisions of the political branches to make detention mandatory for certain non-citizens facing deportation.[110] But in recent decades, the Court as a whole has at least thrown

[109] Zadvydas v. Davis, 533 U.S. 678, 692 (2001) ("The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious."); Jennings v. Rodriguez, 138 S. Ct. 830, 846-47 (2018) (rejecting reading an implicit six-month limit on mandatory detention as "fall[ing] far short of a 'plausible statutory construction'" and remanding the case to the lower courts to decide squarely whether mandatory detention, without individualized review of flight risk or dangerousness, pending removal is constitutional).

[110] For example, in *Demore v. Kim*, Chief Justice Rehnquist held that "detention during removal proceedings is a constitutionally permissible part of that process," rejecting a due process challenge. Demore v. Kim, 538 U.S. 510, 531 (2003). The Court noted that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal" and gave credence to "[t]he evidence Congress had before it" when enacting the mandatory detention provision. *Id*. at 528.

safety valves into its opinions that otherwise uphold detention policies, perhaps in order to leave room for invalidation of the truly terrible.[111] With the Court's composition and identity in flux, it is difficult to predict exactly how far respect for the government in immigration and national security will extend. But the operation of the Due Process Clause to prevent arbitrary government action has a long pedigree with many adherents across the ideological spectrum.[112] At the very least, the lower courts can tee up the issue in a way that demonstrates the essentiality of this basic protection to our form of constitutional, limited government.

* * *

Like many of my colleagues in the legal academy, when I teach the *Chinese Exclusion Cases* in my immigration law course, I pose a hypothetical to the students. If Congress were to adopt a law that resembled the Chinese Exclusion Acts of the late nineteenth century—say a law that barred the entry of immigrants from Muslim-majority countries—would a majority of today's justices follow their predecessors and decide that it was beyond the Court's purview to second-guess the judgments of the political branches? To punctuate the discussion that ensues, I typically have made two

[111] As *Jennings* itself highlights, the lower courts have read the Rehnquist opinion in *Demore* as acceding to mandatory detention only for the short periods of time typically required to execute a removal order, and they have seized on language in Justice Kennedy's concurrence suggesting that detention could reach an extent that would make it constitutionally problematic. *Demore*, 538 U.S. at 532 (Kennedy, J., concurring) ("[S]ince the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.").

[112] *Cf.* Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring) (observing, in response to the government's claim that, in the immigration context, the typical due process vagueness inquiry should be relaxed, that "[t]o acknowledge that the *President* has broad authority to act in this general area supplies no justification for allowing *judges* to give content to an impermissibly vague law").

observations. First, the political branches have internalized non-discrimination norms that would make blanket exclusions on the basis of race, religion, and even nationality unthinkable. Second, the modern court would be writing on a completely different slate than the justices of the late nineteenth century, when segregation was still constitutional. The result of the equal protection and civil rights revolutions of the twentieth century, and the concomitant demise of race-based immigration restrictions, would lead the justices to limit any exercise of the immigration power that embodied the sort of discriminatory state action that would be clearly unconstitutional in other contexts.

After *Trump v. Hawaii*, confidence in neither of these observations can be justified; they will seem highly debatable at best and laughable to many. In the face of a barrage of presidential statements that a reasonable observer could have interpreted as reflecting anti-Muslim animus, the Supreme Court concluded that it could not stop the president's indefinite exclusion of most nationals from five Muslim-majority countries. Rather than dispute the evidence, or call for more robust fact-finding to get to the bottom of the motivation behind President Trump's entry-ban proclamation, the Court credited the facially legitimate justification proffered by the government, because the protection of our borders and the nation's security required its acceptance.

It is almost beside the point whether the world-wide review and its results were genuine national security exercises or after-the-fact veneers to make raw discrimination fit within the confines of accepted presidential behavior. Even if the former, the Court's decision is still best read as permitting state action motivated by animus to survive judicial review because of the delicacies of the presidential prerogatives at issue. Though the trappings of deference have been woven into the practices of constitutional

review of immigration regulation for a long time, the Court's willingness to legally erase discriminatory motives marks a new moment.

Whether this departure will infect judicial review of other sorts of immigration and national security policies remains to be seen. But at least the peculiarities of the motive analysis that drives *Trump v. Hawaii* will be inapposite in other types of cases, most importantly in the application of the Due Process Clause to coercion of non-citizens within the jurisdiction and control of the U.S. government, especially border enforcement and detention policy. Because *Trump v. Hawaii* does not even purport to address the complex and still-developing jurisprudence governing the laws that authorize coercion, as well as the executive practices that implement that authority on a day-to-day basis, the lower courts need not feel constrained by the Supreme Court's latest word on the immigration power. Of course, existing jurisprudence provides constraint enough over judicial review. More ominously, the Supreme Court's de facto willingness to tolerate constitutionally offensive conduct for fear of trenching upon presidential prerogatives may well re-emerge if and when the Court takes up the latest iteration of the *Jennings* detention case, or the litigation challenging the Trump family-separation policies. The legal and moral stakes thus could not be greater. But *Trump v. Hawaii* should be far from the final word.

Carpenter Fails to Cabin *Katz* as *Miller* Grinds to a Halt: Digital Privacy and the Roberts Court

Marc Rotenberg

When the U.S. Supreme Court agreed to hear the appeal of Timothy Carpenter, the excitement in the privacy world was widespread. Here was the case that would take the Fourth Amendment into the digital age, the opportunity to put constitutional limits on the collection of location information generated by cell phones, the chance to solidify two recent and favorable decisions by the Court. Perhaps the stakes were not quite as high as the battle between The Machine and Samaritan in the final season of *Person of Interest*,[1] but they were close.

The outcome did not disappoint. Chief Justice Roberts said "we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through"—wait for it—"CSLI [cell site location information.]"[2]

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[1] A popular CBS series that documented the dangers of location tracking in a world without constitutional constraints. In the final season, an evil AI "Samaritan" threatens to defeat a benevolent AI "The Machine." The heroes must escape the location tracking capability of Samaritan to save humanity. *Person of Interest: return 0* (CBS television broadcast June 21, 2016).

[2] Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018).

Rejecting the third-party doctrine, which provided that the Fourth Amendment ends where third parties begin, the chief justice wrote, "After all, when *[Smith v. Maryland]* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements." He continued, "There is a world of difference between the limited types of personal information addressed in *Smith* and *[United States v. Miller]* and the exhaustive chronicle of location information casually collected by wireless carriers today."[3] The Court emphasized that "a person does not surrender all Fourth Amendment protection by venturing into the public sphere."[4] And therefore "when the Government accessed CSLI from the wireless carriers, it invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements."[5]

Moreover, Chief Justice Roberts drew no distinction between whether the government deployed its own technology, such as a GPS tracking device, or sought to access that same information from a wireless carrier. "In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*," the Court wrote.[6] "A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user."[7]

[3] *Id*. at 2219.
[4] *Id*. at 2217.
[5] *Id*. at 2219.
[6] *Id*. at 2218 (referencing United States v. Jones, 565 U.S. 400 (2012)).
[7] *Id*. (citations omitted).

"Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data," Chief Justice Roberts added.[8] "In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection."[9] Dissenting opinions were filed by Justices Kennedy, Thomas, Alito, and Gorsuch.

Henceforth, law enforcement access to the location records will be subject to a Fourth Amendment standard that is higher than the standard established by Congress for the so-called "2703(d) orders" in the 1994 amendments to the federal Wiretap Act.[10] For Mr. Carpenter and the owners of the 396 million cell phone accounts (in a nation of only 326 million people),[11] the outcome is good news. Everyone now has constitutional protections in location data that they did not have before *Carpenter* was decided. But as for the Fourth Amendment in the digital age and the famous *Katz* decision, with its "reasonable expectation of privacy" test, the fun has just begun. Four detailed dissenting opinions, 119 pages, 160 references to "privacy," and a newly-confirmed justice guarantee that. So, too, does new technology.

[8] *Id*. at 2220.
[9] *Id*. at 2223.
[10] A court may issue an order "if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." *See* 18 U.S.C. § 2703(d) (2018).
[11] *Carpenter*, 138 S. Ct. at 2211.

Many looked to the *Carpenter* decision to revise the third-party doctrine. That has not happened. And the prospects are real that in future cases focused on police access to location data, those in possession of personal data will require a judicial warrant before disclosure may occur. But somewhat unexpectedly, the Court has also raised new questions about the future of *Katz*, the case that established the "reasonable expectation of privacy" test for Fourth Amendment searches. That suggests that even as the third-party doctrine is updated for the digital age it may be necessary also to reexamine the foundations of Fourth Amendment privacy.

This article outlines a post-*Carpenter* "Progressive Constitutional" approach to the Fourth Amendment that borrows from the seminal wire-tapping case *Olmstead v. U.S.*,[12] an important nineteenth century case *Boyd v. United States*,[13] and the opinion of Justice Gorsuch in *Carpenter*. I suggest that Congress now has an opportunity to update federal privacy law, providing greater clarity for digital searches after the *Carpenter* decision. And following related developments with communications privacy law, I conclude that even the collection of location data should not be assumed. In some circumstances, the Court could one day hold, it may be impermissible.

I. The Fourth Amendment Collision with Technology

For almost a hundred years, the Court has struggled with the question of what to do when the text of the Fourth Amendment collides with new technology. The most famous and still the most important decision was also the first— *Olmstead v U.S.*[14] "Big Ray" Olmstead was before the Supreme Court because

[12] Olmstead v. United States, 277 U.S. 438 (1928).
[13] Boyd v. United States, 116 U.S. 616 (1886).
[14] *Olmstead*, 277 U.S. at 438.

federal agents tapped the phone lines of his illegal bootlegging operation without a search warrant.[15] The Supreme Court held that the warrantless interception of telephone communications of Olmstead's operation was not a search and therefore permissible under the Fourth Amendment. Chief Justice Taft, relying heavily on a common-law trespass view, concluded that the Fourth Amendment did not protect one who "installs in his house a telephone instrument with connecting wires [because he] intends to project his voice to those quite outside, and [therefore] the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment."[16]

The *Olmstead* case had several interesting dissents. Justice Holmes famously opined "it is a less evil that some criminals should escape than that the Government should play an ignoble part."[17] The reference was to the fact that the federal agents violated a Washington state law against wiretapping—"a dirty business," said Justice Holmes—when they gathered the evidence. Breaking the law to enforce the law, Justice Holmes explained, was not the way to go.

Justice Butler, in a dissent that may someday be cited by Justice Gorsuch, observed that the "contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass."[18] We might describe the Butler view

[15] Say what you will about enforcing the law, but Olmstead was a well-regarded citizen who imported safe liquor from Canada to the Pacific Northwest at a time when prohibition, and homemade moonshine, created a national health crisis in the United States. Not only a community leader, Olmstead also respected the hard work of law enforcement agents. He reportedly left bottles of his product for the federal agents who monitored his operations. *See generally* Philip Metcalfe, Whispering Wires: The Tragic Tale of an American Bootlegger (2007).

[16] *Olmstead*, 277 U.S. at 466.

[17] *Id*. at 470.

[18] *Id*. at 487 (Butler, J., dissenting).

as a defense of "bailment." Or we could say he was describing an expectation of privacy. More on that later.

But the *Olmstead* dissent that provided the basis for the Supreme Court's decision forty years later in *Katz v. United States* and ushered the text of the Fourth Amendment into the modern age was that of Justice Brandeis. Well before cloud-computing services, Justice Brandeis observed,

> the progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.[19]

"What to do?" as Justice Gorsuch would ask ninety years later, when the Fourth Amendment confronts new technology. Justice Brandeis began at the beginning. Citing Chief Justice Marshall in *McCullough v. Maryland*, he explained, "We must never forget that it is a constitution we are expounding"[20] "Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."[21]

Justice Brandeis turned next to *Boyd*, an important nineteenth century case that held that the compelled production of documents violated both the Fourth and Fifth Amendments. Justice Bradley explained in that case, in the passage quoted by Brandeis in *Olmstead* (and referenced later in *Carpenter*):

[19] *Id*. at 474 (Brandeis, J., dissenting).
[20] *Id*. at 472 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819)).
[21] *Id*. at 473 (quoting Weems v. United States, 217 U.S. 349, 373 (1910)).

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.[22]

Justice Brandeis also observed that if the government must obtain a warrant to open the postal mail to view a single letter, as in *Ex parte Jackson*,[23] then it must certainly require one for the far more intrusive act of intercepting and recording telephone communications.

> The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and, although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him.[24]

[22] *Id*. at 474-75.
[23] *Ex parte* Jackson, 96 U.S. 727 (1877).
[24] *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

Rejecting the property-based view of the Fourth Amendment and providing perhaps the first opinion in cyberlaw, Justice Brandeis concluded "Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wiretapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made."[25]

In the *Olmstead* dissent, Justice Brandeis accomplished two remarkable feats: he applied the Fourth Amendment to new technology, and he set the cornerstone of Progressive Constitutionalism, the view that the Constitution should adapt to the times. It took only forty years before the Supreme Court understood all of this.

But before we tell the story of *Olmstead*'s vindication, it is important to make two other points about the history leading up to *Carpenter*. First, the Taft majority and the Brandeis dissent introduced a sharp split in the application of the Fourth Amendment to new technologies. Chief Justice Taft had drawn a bright line at the home. Justice Brandeis viewed the home as largely irrelevant, at least as to the flow of electronic information containing personal data. Not only were the two doctrines difficult to reconcile, descriptively they imagined two different worlds, one of fences and property lines, the other of wires and messages racing through the ether. Chief Justice Taft's view offered no obvious path for the Fourth Amendment to the modern age.

But that did not mean that one side necessarily favored privacy more than the other. Chief Justice Taft did not dismiss the privacy interest before him. His solution was to get Congress on the

[25] *Id*. at 479.

playing field. He wrote, "Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, and thus depart from the common law of evidence."[26] And in fact, Congress took up the invitation in 1934 and enacted § 605, a provision of the Communications Act intended to safeguard communications privacy.[27] That provision, now recast as § 222,[28] reappears in *Carpenter*, as does the *Boyd* opinion, the Brandeis dissent, and the recommendation that Congress take action. To understand *Carpenter*, we must understand *Katz*. And to understand *Katz* we must understand *Olmstead*.

II. A Reasonable Expectation of Privacy

It is conventional wisdom that the Supreme Court in *Katz* reversed *Olmstead* and adopted the Brandeis dissent when it held that a warrant was required to intercept a telephone communication that took place at a payphone in Los Angeles. But that reading to me has never seemed correct. The Brandeis dissent in *Olmstead* was never simply about the warrant requirement. Justice Brandeis also viewed the government conduct as an offense against the Fifth Amendment. His opinion is grounded in the famous 1890 case *Boyd v. United States*,[29] which makes several cameos in *Carpenter*, and raised the very real possibility that even with a warrant, the evidence would simply be beyond the reach of government. Indeed, under the "mere evidence" rule, only instrumentalities, fruits of the crime, and contraband could be searched and seized. Mere evidence, such as records of communications, could not

[26] *Id*. at 465–466.
[27] Communications Act of 1934, 47 U.S.C. § 151 (1934).
[28] 47 U.S.C. § 222 (2016).
[29] Boyd v. United States, 116 U.S. 616 (1886).

be seized. That was the significance of the *Boyd* reference in the Brandeis opinion. And it was not until 1967 that the Court formally abandoned the rule. But the textualists and the originalists should have objected, because the text is clear: no person "shall be compelled in any criminal case to be a witness against himself."[30] The Brandeis dissent, like the Court's opinion in *Boyd*, grounded what we now call Progressive Constitutionalism in sturdy originalism.

In the same year that the Court abandoned the mere evidence rule, the Court held that a warrant was required for the interception of telephone communications. And in a companion case, *Berger v. New York*,[31] that has never received the love that *Katz* did, the Court also held that a New York state law that established some limitations on wiretapping did not go far enough.

But many of the key elements in the Brandeis *Olmstead* dissent did not survive *Katz*. There were no references to the scope of surveillance (there were lots of payphones in L.A. at the time), the *Boyd* decision (except for a contrary reference in Justice Black's dissent), the significance of the Fifth Amendment, or even the need to limit search in space and time. The Court in *Katz* says it overturned *Olmstead*, but it nowhere actually discusses Justice Brandeis's critical dissent explaining why the original case was wrongly decided. Instead we ended up with the holding "privacy protects people not places" and the famous Harlan concurrence setting out the two-factor test for the reasonable expectation of privacy.[32]

[30] U.S. Const. amend. V.
[31] Berger v. New York, 388 U.S. 41 (1967).
[32] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Before we join the *Carpenter* dissenters and pummel the logic in *Katz*, we need to review two recent decisions of the Roberts Court that underpin the majority opinion in *Carpenter*.

The Shadow Majority in *Jones*

In 2012, the Court held in a unanimous opinion that the warrantless surveillance of a car with a GPS-tracking device was unconstitutional.[33] The outcome was striking not so much for the tally but for the three distinct opinions that each conveyed a different theory of how best to decide the case. Justice Scalia, writing for a five-member majority, grounded his view in a common-law trespass notion of the Fourth Amendment, much like Chief Justice Taft had in *Olmstead*. The difference of course was that the police had placed the GPS tracking device on the vehicle of the target, and that constituted the violation of the eighteenth-century text of the Constitution. Justice Scalia, who was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor, did not exactly reject the *Katz* reasonable expectation of privacy formulation. He simply said that "18th-century guarantee against unreasonable searches . . . must provide at a *minimum* the degree of protection it afforded when it was adopted."[34] Indeed, Justice Scalia went to some pains to leave *Katz* in place. "[U]nlike the concurrence, which would make *Katz* the exclusive test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis."[35]

But the concurrence in *Jones*, authored by Justice Alito, and joined by Justices Ginsburg, Breyer, and Kagan, did fully embrace *Katz*. As Justice Alito wrote at the time:

[33] United States v. Jones, 565 U.S. 400 (2012).
[34] *Id*. at 411 (emphasis in original).
[35] *Id*.

> This case requires us to apply the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st-century surveillance technique, the use of a Global Positioning System (GPS) device to monitor a vehicle's movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. . . .
>
> I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.[36]

In other words, according to the concurrence, *Katz* should control the outcome.

For those who are keepings score, it would appear that we have unanimity on the outcome, with five votes in favor of a property-based view of the Fourth Amendment and four votes for the *Katz* reasonable-expectation-of-privacy view. But this is where *Jones* gets interesting, because Justice Sotomayor cast two votes. Justice Sotomayor did not simply sign-on to Justice Scalia's opinion for the majority. She wrote a separate concurrence, in which she went further than team *Katz*. Siding with Justice Scalia, she explained, "*Katz*'s reasonable-expectation-of-privacy test augmented, but did not displace or diminish, the common-law trespassory test that preceded it."[37]

Justice Sotomayor also set up the key question that would be before the Court in *Carpenter* when she wrote in concurrence that it "may be necessary to reconsider the premise that an individual

[36] *Id*. at 419 (Alito, J., concurring).
[37] *Id*. at 414 (Sotomayor, J., concurring).

has no reasonable expectation of privacy in information voluntarily disclosed to third parties."[38] As she explained, the "approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[39] Perhaps anticipating a case such as *Carpenter*, Justice Sotomayor warned in *Jones*, "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[40] Justice Sotomayor quoted Justice Marshall's dissent in *Smith v. Maryland*: "Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."[41]

The four votes in the Alito concurrence and the Sotomayor concurrence together constituted five votes in favor of the view that *Katz* controlled the outcome in the GPS tracking case. But the majority opinion by Justice Scalia said otherwise. Hence the case resulted in a majority for the property-based view of the Fourth Amendment and a "shadow majority" for the *Katz* view.

III. The Cellphone as Extension of Human Anatomy

So, maybe it was an overstatement above to suggest that a 9-0 vote to grant a suppression motion by the Supreme Court in 2012 was not remarkable. But after a similar outcome in the 2014 case *Riley v. California*,[42] unanimous verdicts by the Court in digital privacy cases were becoming commonplace. In *Riley* the Court

[38] *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring).
[39] *Id*.
[40] *Id*. at 415.
[41] *Id*. at 418 (quoting Smith v. Maryland, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting)).
[42] Riley v. California, 134 S. Ct. 2473 (2014).

considered whether the search of a cell phone incident to an arrest required a warrant. In previous search-incident-to-arrest cases involving wallets and cigarettes packs, the Court had rejected the warrant requirement. But as just about every amici in *Riley* contended, cell phones are "different." Not only do they contain vast repositories of personal data, they also provide access to cloud-based service and even unlock homes and cars.[43] Can your cigarette pack do that?

The Court agreed that cell phones were different and also that they were everywhere. And to drive the point home, Chief Justice Roberts invoked the "proverbial visitor from Mars" to observe that cellphones could easily be viewed as an "important feature of human anatomy."[44] Justice Roberts described the far-reaching capabilities of cell phones and noted that "[h]istoric location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building."[45] And there was a big shout-out for *Boyd* watchers. "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.'"[46]

Justice Alito joined the majority in *Riley*, stating:

> we should not mechanically apply the rule used in the predigital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of

[43] *See*, Brief of *Amicus Curiae* Electronic Privacy Information Center (EPIC) and Twenty-four Legal Scholars and Technical Experts in Support of Petitioner, Riley v. California, 134 S. Ct. 2473 (2014) (No. 13-132).
[44] *Riley*, 134 S. Ct. at 2484.
[45] *Id*. at 2490.
[46] *Id*. at 2495 (quoting Boyd, 116 U.S. at 625).

> information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.[47]

But Justice Alito, who had warned in *Jones* that Congress may be better equipped to address the challenges of the digital age, also wrote in concurrence that,

> it would be very unfortunate if privacy protection in the 21st century was left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future.[48]

Siding with the Court but also looking to Congress, Justice Alito set out the view in *Riley* that many anticipated he would follow in *Carpenter*.

IV. Back to Carpenter

And so when the Supreme Court granted certiorari in *Carpenter* in January 2018, following the two 9-0 outcomes in *Jones* and *Riley*, the privacy world was abuzz. Would the Court overturn the third-party doctrine as Justice Sotomayor suggested in *Jones*? Would the Court maintain its unanimous voting record on emerging privacy issues, a remarkable outcome made clear in *Jones* and *Riley*? And would anyone know what the acronym "CSLI" stood for?

[47] *Id*. at 2496 (Alito, J., concurring).
[48] *Id*. at 2497-98.

Perhaps we should begin by noting that binary star systems are stable over time because celestial objects exert constant gravitational forces that tend toward an equilibrium. And so, it is possible for planets to orbit a binary star system even though there are multiple gravitational forces. Unfortunately, Supreme Court doctrine, even with the twin forces of *Katz* and trespass law, is not prone to equilibrium. And so, the hope that *Carpenter* would provide either a stable outcome or a grand synthesis for digital privacy was not to be.[49] The fissures in Jones opened up with significant consequence in *Carpenter*, suggesting that the contours of future privacy cases are far from clear.

A. The Majority – Get a Warrant

In *Carpenter*, the Supreme Court holds that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI."[50] As applied to the facts before the Court, a request for seven or more days of cell-site records triggers constitutional scrutiny. The search pursuant to § 2703(d) is unlawful and the evidence must be excluded.

To reach the result, Chief Justice Roberts reconciles two lines of cases—the first concerns a person's expectation of privacy in their physical location, the second concerns the records that are maintained by so-called third parties. From *Jones* we establish that a person does have an expectation of privacy in their location data, but from *Smith* and *Miller* we are told that the expectation of privacy is extinguished when the records are held by third parties.

[49] I have suggested that Justice Kagan's concurrence in *Florida v. Jardines*, 569 U.S. 1 (2013), a case concerning the search of a home by a drug sniffing dog at the doorway, provided such a grand synthesis. Justice Kagan explained that the "Court treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to *Jardines'* privacy interests." *Id*. at 13 (Kagan, J., concurring). In other words, it is possible to view a search as simultaneously implicating both a property interest and a *Katz* expectation of privacy interest.

[50] Carpenter v. United States, 138 S. Ct. at 2206, 2217 (2018).

A simple way to understand the outcome in *Carpenter* is to say that there is now a location data exception to the third-party doctrine.

But much has also changed since *Smith* and *Miller* were decided. The Chief Justice, drawing on the *Jones* and *Riley* opinions, makes this clear:

> The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled . . . .
>
> . . . .
>
> . . . [W]hen *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.[51]

Chief Justice Roberts's opinion is remarkable not only for describing the vast change in scale and scope of data collection made possible by digital technology, but also recognizing the ability for law enforcement to "travel back in time to retrace a person's whereabouts," because time-stamped location records exist in multiple dimensions, placing people in particular places at particular times.[52] The Brandeis dissent in *Olmstead*, which contrasted the search of communications channels with the

[51] *Id*. at 2206, 2216-17.
[52] *Id*. at 2218.

search of a single physical object, first identified the unbounded character of cyber searches. But it was Chief Justice Roberts in *Riley* who recognizes that in the digital age, stored data also moves time backward.[53]

A second key insight is that a search through cell history data is boundless and requires no individual suspicion. As Chief Justice Roberts explains, "police need not even know in advance whether they want to follow a particular individual, or when. . . . Only the few without cell phones could escape this tireless and absolute surveillance."[54] And so, we see the outcome: "The Government's position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter's location but also everyone else's, not for a short period but for years and years."[55]

But Chief Justice Roberts stops short of overturning *Smith* and *Miller*, and it is not entirely clear why. Much of his opinion makes clear that in the digital world there is little sense in which individuals "voluntarily disclose" personal information to others in the way that Chief Justice Taft had described telephone calls as "broadcast" to the world. Many of these records are generated by the use of the service. Chief Justice Roberts also states that location data about where individuals travel "implicates basic Fourth Amendment concerns about arbitrary government power much more directly than corporate tax or payroll ledgers."[56]

B. The Dissents

There are four dissents in *Carpenter*, with several justices signing on to the dissents of others. Justice Kennedy expresses

[53] And with predictive analytics, this data may also move time forward.
[54] *Carpenter*, 138 S. Ct. at 2218.
[55] *Id*. at 2219.
[56] *Id*. at 2222.

concern about the impact of the Court's decision on police practice and also suggests that the privacy interest in cell-site location information in *Carpenter* is simply less than the GPS data in *Jones*.[57] But on the technology the chief gets the better of the argument—the Kennedy opinion does not reflect the reality that cell phones are pinged, i.e., location is established, routinely without any action by the users, as Justice Sotomayor had also observed in her *Jones* concurrence. To add a layer to the creepy factor, the mics and cameras on cell phones can also be remotely activated. While such real-time investigative technique should certainly be subject to constitutional review, it is not science fiction to recognize that the cell phone is more than a tracking device. It is also a remote listening device.

Justice Thomas lets loose on *Katz* and frankly makes a good argument.[58] The problems of the *Katz* doctrine are well known, and Justice Thomas marshals the forces. He also places understandable weight on the language of the phrase in the Fourth Amendment regarding their "persons, papers, and effects." For the textualist, the third-party doctrine is established long before *Miller*.

Justice Alito, who might have been expected to concur in the outcome but write separately, chose a different course.[59] In his view, the subpoena process is so well established that any effort to modify the third-party doctrine will lead to confusion and chaos. He writes, "We will be making repairs—or picking up the pieces—for a long time to come."[60] But Alito, as he did in *Jones* and *Riley*, also looks to Congress to solve these challenges: "legislation is much preferable to the development of an entirely new body

[57] *Id*. at 2223-35 (Kennedy, J., dissenting).
[58] *Id*. at 2235-46 (Thomas, J., dissenting).
[59] *Id*. at 2246-61 (Alito, J., dissenting).
[60] *Id*. at 2247 (Alito, J., dissenting).

of Fourth Amendment caselaw for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment's limited scope."[61] And he rightly notes that Congress can also reach the challenges from the use of personal data by the commercial sector:

> The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans.[62]

And in fact, federal wiretap law has often regulated the conduct of both the government and private actors.

C. The Gorsuch Concurring Dissent

Among the dissents, the most interesting is from Justice Gorsuch.[63] It is a concurrence in every way but the title. Not only does Justice Gorsuch believe the search of cell-site records was unlawful, he would go further than the Court and overturn the third-party doctrine as many had urged. Justice Gorsuch justifies the designation "dissent" because *Carpenter* failed to raise these arguments on appeal, but the message is clear. If there was a "shadow majority" in *Jones*, there were six votes in *Carpenter* for the proposition that the search was unlawful.

More interesting is Justice Gorsuch's efforts to imagine a world without *Smith* and *Miller*, cases that let "the government search

[61] *Id*. at 2261 (Alito, J., dissenting).
[62] *Id*. (Alito, J., dissenting).
[63] *Id*. at 2261-72 (Gorsuch, J., dissenting).

almost whatever it wants whenever it wants."[64] Justice Gorsuch, like Justice Thomas, is also not happy with *Katz* as the remaining foundation, but he is also not willing to ignore the growing impact of digital surveillance technologies on the rights of Americans. The question is what to put in its place. Justice Gorsuch provides an answer.[65]

First, the courts should recognize that when we turn over our personal possessions to others—the essence of the third-party doctrine—we do in fact have an interest in what happens next. Justice Gorsuch describes this as a bailment. In his *Olmstead* dissent, Justice Butler called it a contract. Others have called it a fiduciary obligation. Second, our interest in our personal data held by others need not be absolute to establish a legal interest. Third, we may be able to avoid the circularity of *Katz* by looking for concrete signs that society has in fact deemed certain activities as private. That is how a federal statute comes into play in this case about the scope of the Fourth Amendment. Section 222 establishes some control for the use of personal data held by the telephone company. For Justice Gorsuch that is enough to establish a privacy interest. Fourth, the inquiry into positive law is an upward ratchet. Just because the government engages in the conduct does not establish that the conduct is permissible. And this constitutional floor applies as well to subpoenas. And perhaps of greatest interest, Judge Gorsuch also signals an interest in a robust understanding of the Fifth Amendment as applied to digital data: "there is substantial evidence that the privilege against self-incrimination was also originally understood to protect a person from being forced to turn

[64] *Id*. at 2264.
[65] *Id*. at 2268-71.

over potentially incriminating evidence."[66] That was key to the Brandeis dissent in *Olmstead*, but disappeared in Katz, and could now reemerge after *Carpenter*.

D. The *Smith* and *Miller* Incantations

Both the majority and dissents restate *Smith* and *Miller* as settled law, which at the time of the decision was true but also incomplete. First, it bears noting that both decisions of the Supreme Court were followed by acts of Congress that did indeed establish privacy safeguards for records held by third parties. The Right to Financial Privacy Act of 1978[67] was the response of Congress to the *Miller* decision. The Stored Communications Act of 1986[68] was the response to *Smith*.

Perhaps it would surprise the dissenters to learn that those in possession of records of others would want clarity as to the circumstances when it is appropriate to release personal information to the government. Whether understood as a fiduciary obligation, a bailment, or simply fair play, the Court's conclusion that the Fourth Amendment does not extend to third parties has not, in practice, ended the discussion over the circumstances when third parties would disclose information in their possession to a government agent.[69] In fact, and remarkably, the American Telephone and Telegraph company filed an amicus brief in the *Olmstead* case, arguing for the warrant requirement. And many of the arguments put forward by AT&T back in the day were adopted by Justice Brandeis in his dissent.

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[66] *Id.* at 2271.
[67] *See* 12 U.S.C. § 3401 (2018).
[68] *See* 18 U.S.C. §§ 2701 – 2712 (2018).
[69] Even after enactment of the comprehensive federal Wiretap Act of 1968 it was not obvious to the phone companies that they should turn over information about their customers to the government without a warrant. It took a subsequent amendment to the Act to compel compliance.

So, the dissenters' assumption that third-party doctrine provides a bright-line rule tells only part of the story. In practice, those third parties still need legal rules to guide their conduct. And the dissents in *Smith* and *Miller* deserved more attention in *Carpenter*. As noted above, Justice Sotomayor's concurrence in *Jones* draws heavily on Justice Marshall's assumption of risk analysis in *Smith*, a point that was essentially made also by both Justice Gorsuch and Justice Alito in their dissents in *Carpenter*. The idea that individuals "voluntarily" disclose their personal data to third parties so that it can be used by others for unrelated purposes is more fiction than fact.

But there was a second dissent in *Smith* that also deserved more attention in *Carpenter* than it received. In *Smith*, Justice Stewart said that the protection for the content of a communication should extend also to the records associated with the communications.

> The numbers dialed from a private telephone—although certainly more prosaic than the conversation itself—are not without "content." Most private telephone subscribers may have their own numbers listed in a publicly distributed directory, but I doubt there are any who would be happy to have broadcast to the world a list of the local or long-distance numbers they have called. This is not because such a list might in some sense be incriminating, but because it easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life.[70]

Justice Stewart's analysis of the challenge in the digital age is relevant for at least two reasons. First, he makes clear that data, as

[70] Smith v. Maryland, 442 U.S. 735, 748 (1979) (Stewart, J., dissenting).

much as content, is significant. Second, he charts a path from *Katz* that side steps the third-party doctrine. It is less significant where the records are stored than where they originate: "The information captured by such surveillance emanates from private conduct within a person's home or office—locations that without question are entitled to Fourth and Fourteenth Amendment protection."[71]

E. What Would Scalia Do?

Justice Scalia's views of the Fourth Amendment loomed large in several of the dissents. Justice Thomas quoted Scalia opinions at length, as did Justice Gorsuch. But one has to ask: What would Justice Scalia do if he were still on the Court? It is not at all obvious he would have joined the dissenters. It was Justice Scalia writing for the Court in 2001 who held that thermal imaging devices required a warrant. "This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted," he wrote in *Kyllo*.[72] And it was Justice Scalia who famously dissented in *Maryland v. King*, the DNA search case, writing:

> Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the "identity" of the flying public), applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.[73]

[71] *Id*. at 747.
[72] Kyllo v. United States, 533 U.S. 27, 34 (2001).
[73] Maryland v. King, 569 U.S. 435, 482 (2013).

And in *Jones*, Justice Scalia did not argue that *Katz* was not good law. His point was that the property-based view provided a "minimum" standard for the Fourth Amendment and helped ensure that the reasonable-expectation-of-privacy analysis did not dip below this baseline.

So, it may be worth pushing against the premise in several of the dissents that Justice Scalia would have joined them in rejecting *Katz*. And it is most certainly worth noting that Justice Alito mischaracterized Justice Brandeis when he wrote in his dissent that "even Justice Brandeis—a stalwart proponent of construing the Fourth Amendment liberally—acknowledged that 'under any ordinary construction of language,' 'there is no "search" or "seizure" when a defendant is required to produce a document in the orderly process of a court's procedure."[74] Justice Brandeis made the opposite point in *Olmstead*. "Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it," Justice Brandeis explained. "No court which looked at the words of the Amendment, rather than at its underlying purpose, would hold, as this Court did in *Ex parte Jackson* . . . that its protection extended to letters in the mails."[75]

V. Next Steps

A. Congress

One immediate consequence of the Court's decision in *Carpenter* is that the "2703(d) order," the process for obtaining cell-site records from telephone companies, is no longer good law. That means that Congress will almost certainly be asked by the Department of Justice and the telephone companies to enact a new standard that follows

[74] Carpenter v. United States, 138 S. Ct. 2206, 2251 (2018) (Alito, J., dissenting) (quoting Olmstead v. Unites States, 277 U.S. 458, 476 (1928)).
[75] *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting).

Carpenter. The interesting question is whether Congress will do more. It would be a mistake to assume that the "*Carpenter* fix" is simply an adjustment to the Fourth Amendment setting in the Stored Communications Act.

The Electronic Communications Privacy Act of 1986,[76] which established the 2703(d) order, is in need a major upgrade.[77] The commercial use of communications data has increased in ways that could not have been imagined when e-mail first arrived on the scene. Law enforcement has many more ways to access private communications than in the past. And the absence of robust encryption leaves communications in the United States subject to attack by foreign adversaries. *Carpenter* should lead to public hearings that include a broad examination of the full range of new threats to online privacy.

Congress should also recognize that effective privacy law typically establishes multiple firewalls to ensure accountability. The federal Wiretap Act of 1968, for example, established a Fourth Amendment standard for the interception of electronic communications. But it also put in place limits on the duration of surveillance, established procedures for minimization, designated predicate crimes, required judicial determinations for extensions and target notification, and imposed substantial public reporting requirements.[78] These are the elements of modern privacy law, available to Congress, as it undertakes its review post-*Carpenter*.

[76] *See* 18 U.S.C. § 2510 (2018).

[77] *See, e.g.*, Electronic Privacy Information Center, EPIC *Urges Congress to Reform ECPA, Safeguard Locational Data* (June 23, 2010), https://epic.org/2010/06/epic-urges-congress-to-reform.html. *See also* "ECPA Reform and the Revolution in Location Based Technologies and Services" *Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of the Electronic Privacy Information Center).

[78] *See* 18 U.S.C. § 2510 (2018).

B. The Courts

Justice Alito was almost certainly correct when he said that the decision will cause confusion among lower courts. The third-party doctrine, right or wrong, provided a bright line that made easy the application of Fourth Amendment challenges to records held by third parties. The Court has moved the line with *Carpenter*, and the settling point is not clear. Many records include location data of the type found in cell site records.[79] It appears likely that *Carpenter II* is in the Court's near future.

Justice Gorsuch has helpfully provided guideposts that may give more clarity for the *Katz* test when that case returns to the Court. I would not ignore his bailment theory that follows from the Butler dissent in *Olmstead*. And I would point to the interest in positive law—objective indicators that we as a society value privacy—to help clarify our contemporary understanding of privacy.[80] It is likely that we will uncover acts of Congress responding to invitations from the courts to establish new protections in the digital age that then help the courts see the objective expectation of privacy in our modern society.

But if the aim is to further the project of Progressive Constitutionalism, we should go back to *Olmstead* and imagine a doctrine that reflects less of the circularity of *Katz* and more of the interpretive guidance of Justice Brandeis, incorporating the opinions in *Boyd* and *Ex parte Jackson*. This is the recovered history now made relevant with *Katz* teetering on the brink.

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[79] Consider for example the records of vessel location routinely recorded by the U.S. Coast Guard on behalf of the Department of Homeland Security. *See* Ralph Naranjo, *Is AIS Chipping Away at Our Freedoms?*, Practical Sailor (Feb. 2011), https://www.practical-sailor.com/issues/37_2/features/Is_AIS_Chipping_Away_at_Our_Freedoms_10135-1.html.

[80] The discussion in Carpenter of § 222 of the Communications Act which provides some rights for consumer in the "Customer Proprietary Network Information" suggests how this might play out. Unfortunately, there was disagreement even among the dissenters of the significance of this instance of positive law.

Surveillance unbounded from space and time is different from a physical search that exists at a moment in time. But that does not diminish the constitutional claim. It amplifies it. And perhaps the right of the people should inhere in their persons. It has always seemed odd to me that the Fourth Amendment, alone among the amendments, ascribes personal rights to property interests. Perhaps this was the Framers' best understanding of one's persona in the eighteenth century. We are those things we keep in homes, those papers we choose to possess, the daily activities we record in our journals and our business records. And as against the government, to be secure in our private lives, we must ensure oversight. But in the twenty-first century, we are now also the places we visit, the texts we send, the people we are with, the things we seek—the ephemeral now made permanent in our digital age. Although it is correct that the cell-cite location information concerning Mr. Carpenter resided with third parties, those records could not exist but for the activities of Mr. Carpenter that caused the records to be created. And that is true for all cell-phone users in the United States. Those records exist because of us; and if companies choose to retain them, we should have some say over how they are used and when they are disclosed to others.

I doubt the framers would disagree.

VI. Concluding Thought: Data Retention, Positive Law, and the Future of Privacy

Finally, there is no necessary reason for telephone companies to retain cell-cite location information. For many years, including the year when *Smith v. Maryland* was decided, telephone services were billed as a flat-rate utility and call set-up information was not generated or retained. The cell tower location information generated by the network today is necessary in the moment to

connect the device to the cell network and to provide the user with information about location. The data may also be useful to evaluate a service's quality and decide where to place additional cell towers. But almost all other uses of the data, generated solely by the users' private activities, raise troubling privacy concerns. Should telephone companies make use of this data to target services at the consumers, making every act subject to scrutiny? When the telephone companies transfer aggregate phone data to retailers trying to measure population density, is the technique for deidentification robust? How secure are the detailed records of those 396 million cellphone account holders from criminal hackers and foreign governments? Under what circumstances may the telephone companies disclose this data to law enforcement? The Court answered that last question in *Carpenter*, but it is likely not the only constitutional concern present.

Digital technologies have created a vast data retention dynamic. This dynamic requires some legal scrutiny. In the European Union, an initial effort to harmonize the data-retention laws of member states eventually settled on two years for telephone record information. That conclusion was subject to fierce political opposition in the European Parliament and legal judgements by courts across Europe that found the routine retention of data about private life unnecessary and disproportionate. Eventually, the Court of Justice of the European Union took up the matter and concluded that the retention of phone records, of the type at issue in the *Carpenter* case, was a violation of fundamental rights.[81] In other words, today telephone companies

[81] Court of Justice of the European Union, *The Court of Justice Declares the Data Retention Directive to Be Invalid* (Apr. 8, 2014) ("Digital Rights Ireland"), https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf.

in Europe are simply not permitted to keep five years of cell-cite information because of constitutional limitations in EU law.

Data retention was not before the U.S. Supreme Court in *Carpenter*, but perhaps it should have been. There is an inversion taking place in the realm of law enforcement. Increasingly digital data is building new mountains of evidence that will provide the basis for millions of searches, arrests, and convictions of Americans. Chief Justice Roberts recognized that danger with cell-site information and concluded that a warrant should be required for location data. But the challenges ahead will be still more complex. The mere collection of data will implicate constitutional freedoms.

Justice O'Connor once wrote, "With the benefits of more efficient law enforcement mechanisms comes the burden of corresponding constitutional responsibilities."[82] Or as Chief Justice Roberts recently remarked at a graduation speech for his daughter's high school, "What is very interesting can become very creepy, very fast."[83]

[82] Arizona v. Evans, 514 U.S. 1, 18 (1995) (O'Connor, J., concurring).

[83] Richard Wolf, *Chief Justice John Roberts to High School Graduates (and His Daughter): 'Beware the Robots,'* USA Today (June 7, 2018, 4:20 PM), https://www.usatoday.com/story/news/politics/2018/06/07/beware-robots-chief-justice-john-roberts-commencement-warning/681626002/.

Lucia v. SEC and the Attack on the Administrative State

Steven D. Schwinn*

In a Term with so many blockbusters, it's easy to overlook a case like *Lucia v. SEC*.[1] In that case, the Court held that Securities and Exchange Commission (SEC) administrative law judges (ALJs) were "officers" under the U.S. Constitution's Appointments Clause, and therefore required appointment by the president or the SEC itself (and not, as they had been appointed, by SEC staff). The Court reversed the decision of an improperly-appointed ALJ and sent the case back to the SEC for a new hearing, with a different, properly-appointed ALJ.

On this level, *Lucia* is easy to overlook. For one thing, the case deals with only a technical and position-specific question under a relatively clear textual provision, the Appointments Clause.[2] For another, the Court could resolve the issue, and did resolve it, by applying a single, narrow precedent—and avoiding any grand statements about the Appointments Clause, presidential authority, or the separation of powers. And finally, the practical response to the ruling was straightforward and uncontroversial: the SEC simply reappointed its ALJs itself and thus solved the Appointments Clause problem. On its surface, then, *Lucia* appears unexceptional.

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[1] Lucia v. SEC, 138 S. Ct. 2044 (2018).

[2] U.S. Const. art. II, § 2, cl. 2.

But scratching just a little beneath the surface, we see that *Lucia* has significant implications for presidential authority and the separation of powers. It will likely lead to challenges to the appointments of ALJs across the executive branch, and to functional separation-of-powers challenges to ALJs within independent agencies. It will also likely lead to Appointments Clause challenges to a much broader range of positions within the executive branch. Most significantly, it has already led to a presidential order extinguishing merit-based selection for ALJs, with a line of reasoning that could curtail all statutory appointment restrictions within the executive branch.

Individually, each of these implications represents a significant attack on independent, expert actors within the executive branch. Each puts more control over previously independent and expert ALJs in the hands of the president and agency heads. And by extension, each threatens to put more control over *all* independent and expert executive actors in those same hands. These mark a substantial attack on independent and expert positions within the agencies, and, at the extreme, threaten to turn them into mere political pawns.

But there's more. *Lucia* comes amid a much broader, coordinated movement against the administrative state. This movement includes challenges to judicial deference to agency rulemaking under the *Chevron* doctrine.[3] It also includes increasingly viable separation-of-powers challenges to statutory removal protections for executive positions. And it even includes a current challenge to the nondelegation doctrine. Taken together, these could substantially upend our constitutional understanding

[3] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (noting that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

of the administrative state. It's important to see *Lucia* as part of this movement.

So while *Lucia* appears unremarkable, especially among this Term's bigger cases, we ought to pay careful attention. This sleeper-of-a-case is in fact a key part of a larger, coordinated effort to undermine and even dismantle the modern administrative state. This movement is afoot, and unless we heed cases like *Lucia*, it will succeed.

I start with the background of the case, then move to the decision, and finally discuss the implications.

I. Background

In 2012, the SEC charged Raymond J. Lucia with violating the antifraud provisions of the Investment Advisers Act[4] and SEC rules. The SEC alleged that Lucia, an investment professional, misled potential investors in nearly forty free retirement-planning seminars by touting his "Buckets-of-Money" investment strategy. Under the strategy, investors would spread their investments across several types of assets, with different degrees of risk and liquidity. According to Lucia, the strategy would allow prospective clients to "live comfortably off of their investment income while also leaving a large inheritance."[5]

In demonstrating the "Buckets-of-Money" strategy, Lucia used a slideshow to demonstrate how the strategy *would have* performed in the past (as opposed to how it *might perform* in the future). Using this "backtesting" analysis, Lucia compared how his strategy would have performed as compared to others for a fictional couple retiring in historical times of economic downturn. "Each example

[4] 15 U.S.C. § 80b-1 *et seq*.
[5] Raymond J. Lucia Cos., Inc. v. SEC, 832 F.3d 277, 290 (D.C. Cir. 2016).

showed that a couple using the 'Buckets-of-Money' strategy would have increased the value of their investments despite the market downturns and would have done much better than those utilizing other investment strategies."[6]

There was just one problem: the SEC alleged that Lucia misled potential investors by misrepresenting key information in his analysis. In particular, the SEC claimed that Lucia made faulty and unstated assumptions about the economy and the way his strategy worked. The SEC charged Lucia under the Investment Advisors Act and assigned the case to ALJ Cameron Elliot.

ALJ Elliot was one of five ALJs at the SEC, all of whom were appointed by Commission staff (and not the Commission itself).[7] SEC ALJs have authority to preside over administrative hearings and to make recommendations to the full SEC. In so doing, they also have "authority to do all things necessary and appropriate to discharge [these] duties" and to ensure a "fair and orderly" administrative proceeding.[8] Their particular powers include supervising discovery, issuing subpoenas, ruling on motions, ruling on evidence, and examining witnesses, among others. SEC ALJs even have authority to issue sanctions for "[c]ontemptuous conduct" or violations of procedural requirements.[9] In short, "an SEC ALJ exercises authority 'comparable to' that of a federal district judge conducting a bench trial."[10] After a hearing, SEC ALJs have authority to issue an "initial decision," setting out findings of fact and conclusions of law and specifying an appropriate sanction or relief.[11] The full SEC can review an ALJ's

[6] *Id*.
[7] Lucia v. SEC, 138 S. Ct. 2044, 2049-50 (2018). The following discussion of the ALJs' powers comes from the Court's ruling, which, in turn cites the relevant regulations. *Id*.
[8] *Id*. at 2046 (citation omitted).
[9] *Id*. at 2049 (citation omitted).
[10] *Id*. (quoting Butz v. Economou, 438 U.S. 478, 513 (1978)).
[11] *Id*. at 2046 (citation omitted).

decision on its own or upon request; or, if it declines to review the decision, it can "issue[] an order that the decision has become final," and thus becomes the final "action of the Commission."[12]

ALJ Elliot heard nine days of testimony and argument in the *Lucia* matter. He issued an initial decision concluding that Lucia had violated the Act and recommending $300,000 in civil penalties and a lifetime bar from the investment industry. After remand from the SEC, ALJ Elliot later made additional findings and issued a revised initial decision but imposed the same sanctions.[13]

Lucia appealed to the SEC, arguing that ALJ Elliot's decision was wrong on the merits, and that in any event the proceeding was invalid, because ALJ Elliott was appointed in violation of the Appointments Clause. As to the latter claim, Lucia contended that SEC ALJs are "Officers of the United States" under the Appointments Clause, and that they can only be appointed by the president, "Courts of Law," or "Heads of Departments."[14] Lucia argued that SEC ALJs, including ALJ Elliot, were appointed merely by SEC staff, and not the actors specified in the Appointments Clause. As a result, Lucia contended that ALJ Elliot was invalidly appointed and lacked authority to convene a hearing, much less to issue a decision, in his case.

The SEC rejected this argument. It held that its ALJs were not "Officers of the United States," but instead were "mere employees," not subject to the Appointments Clause. According

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[12] *Id.*

[13] *Id.* at 2050.

[14] U.S. Const. art. II, § 2, cl. 2. Under the Appointments Clause, the President, shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

Id.

to the Commission, that was because its ALJs do not "exercise significant authority independent of [its own] supervision."[15]

A three-judge panel of the United States Court of Appeals for the D.C. Circuit affirmed,[16] and an equally divided (5-5) *en banc* court denied Lucia's claim.[17] The ruling created a split with the United States Court of Appeals for the Tenth Circuit,[18] and the Supreme Court granted certiorari.[19] The government switched its previous position (supporting the ALJs' appointments) and argued in favor of Lucia. The Court appointed an amicus to defend ALJ Elliot's appointment.

II. The Case

The parties and amici framed their arguments around two principal issues. First, the parties and amici took up the formal Question Presented—whether SEC ALJs are officers of the United States within the meaning of the Appointments Clause—and wrangled over what it means to be an "officer" (as opposed to a mere "employee," which is not subject to the Appointments Clause).[20] This is a significant and largely unresolved question. Up to now, the Court has defined these categories in only the vaguest of terms. Thus, in one early case, the Court held that doctors hired to perform various physical exams were mere employees, because their duties were "occasional or temporary," not "continuing and permanent."[21] In another, more recent case, the Court held that members of the Federal Elections Commission were officers,

[15] *Lucia*, 138 S. Ct. at 2050 (citation omitted).
[16] Lucia v. SEC, 832 F.3d 277 (2016).
[17] Lucia v. SEC, 868 F.3d 1021 (2017).
[18] Bandimere v. SEC, 844 F.3d 1168 (10th Cir. 2016).
[19] Lucia v. SEC, 138 S. Ct. 736 (2018) (mem.).
[20] Importantly, the case did not involve the difference between a principal "Officer" and an "inferior Officer."
[21] United States v. Germaine, 99 U.S. 508, 511-12 (1879).

because they "exercis[ed] significant authority pursuant to the laws of the United States."[22] But the Court never defined the phrases "occasional or temporary," "continuing and permanent," or "significant authority" with any determinacy. As a result, these rulings left Congress and the president partially in the dark about which executive branch positions were "officers" that are subject to Appointments Clause requirements and which are "employees" that are not.

Next, the government and some amici argued that the Court should limit or strike the SEC ALJs' statutory removal protection as a violation of the separation of powers. SEC ALJs can only be removed from office by the SEC "for good cause established and determined by the Merit Systems Protection Board."[23] Members of the SEC, in turn, can only be removed from office by the president for "inefficiency, neglect of duty, or malfeasance in office."[24] The government argued that the Court should narrowly construe the ALJs' removal protection and the role of the MSPB in order to avoid the "serious constitutional concern[]" that the protection would impermissibly restrict the president's authority to supervise officials in the executive branch.[25]

[22] Buckley v. Valeo, 424 U.S. 1, 126 (1976).

[23] 5 U.S.C. § 7521(a).

[24] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010) (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935).

[25] Brief for Respondent Supporting Petitioners at 45-55, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1251862. The government argued that statutory removal protections categorically raise serious constitutional concerns, and that "[t]hese constitutional concerns are heightened in the context of independent agencies whose heads are themselves protected from removal by the President." *Id*. at 48. The former argument challenged the Court's consistent and long-running line of cases upholding similar removal protections against separation-of-powers challenges. *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 693-96 (1988) (holding that the statutory for-cause removal protection for the independent counsel did not violate the separation of powers). The latter argument challenged the double-for cause protection under *Free Enterprise Fund*, 561 U.S. at 495-98 (holding that the PCAOB's double for-cause protection violates the separation of powers).

While the parties and amici framed their entire arguments around these issues, the Court managed to dodge them entirely. Instead, the Court ruled narrowly, based on a single precedent, that SEC ALJs were "officers" and that therefore their appointment by SEC staff was invalid.

Justice Kagan wrote the majority opinion, joined by Chief Justice Roberts and Justices Kenndy, Thomas, Alito, and Gorsuch. The Court held that the outcome was dictated by *Freytag v. Commissioner*.[26] In that case, the Court held that Tax Court special trial judges (STJs), which had authority to conduct a trial and draft a proposed decision for a regular Tax Court judge, were "officers" under the Appointments Clause.[27] The *Freytag* Court noted that STJs held a continuing office and that they had authority and "significant discretion" to conduct a full adversarial hearing.[28] In particular, the Court noted that STJs had the powers to administer oaths, to take testimony, to rule on motions and the admissibility of evidence, and even to punish all "[c]ontemptuous conduct," including violations of orders. The Court applied the continuing-office standard and "the unadorned 'significant authority' test" and ruled that STJs were "officers."[29]

Justice Kagan wrote simply that *Freytag* "necessarily decides this case."[30] As an initial matter, she wrote that SEC ALJs, like Tax Court STJs "hold a continuing office established by law."[31] "Far from serving temporarily or episodically, SEC ALJs 'receive[] a career appointment.' And that appointment is to a position created by statute, down to its 'duties, salary, and means of appointment.'"[32]

[26] *Lucia*, 138 S. Ct. at 2052 (citing Freytag v. Comm'r, 501 U.S. 868 (1991)).
[27] *Id*.
[28] *Id*.
[29] *Id*. at 2052.
[30] *Id*
[31] *Id*. at 2053.
[32] *Id*. (quoting 5 C.F.R. § 930.204(a) (2018) and Freytag v. Comm'r, 501 U.S. 868, 878 (1991)).

Moreover, Justice Kagan wrote that "the Commission's ALJs exercise the same 'significant discretion' when carrying out the same 'important functions' as STJs do."[33] She noted that SEC ALJs have all the powers (described above) that STJs have.[34] Indeed, she wrote that SEC ALJs have potentially *even more* autonomous authority after a hearing:

> As the *Freytag* Court recounted, STJs "prepare proposed findings and an opinion" adjudicating charges and assessing tax liabilities. Similarly, the Commission's ALJs issue decisions containing factual findings, legal conclusions, and appropriate remedies. And what happens next reveals that the ALJ can play the more autonomous role. In a major case like *Freytag*, a regular Tax Court judge must always review an STJ's opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ's decision itself "becomes final" and is "deemed the action of the Commission."[35]

This made the case *a fortiori*: "If the Tax Court's STJs are officers, as *Freytag* held, then the Commission's ALJs must be too."[36] And because ALJ Elliot was appointed by an SEC employee (and not the president, the courts, or the SEC itself), his appointment violated the Appointments Clause, and his decision in the *Lucia* case was invalid.

[33] *Id*. (quoting *Freytag*, 501 U.S. at 878).
[34] *Id*.
[35] *Id*. at 2053-54 (citations omitted).
[36] *Id*. at 2054.

Justice Kagan concluded with the remedy. She wrote that Lucia was entitled to a new hearing before a different, and constitutionally appointed, ALJ:

> That official cannot be Judge Elliot, even if he has received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia's case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.[37]

Justice Thomas, joined by Justice Gorsuch, concurred. He argued that the "original public meaning" of "Officers of the United States" swept much more broadly than the Court acknowledged. He wrote that "[t]he Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty."[38] According to Justice Thomas, that means that "officers" includes all executive actors whose duty is established by statute, "even if they perform[] only ministerial statutory duties."[39] These could even include "recordkeepers, clerks, and tidewaiters (individuals who watched goods land at a customhouse)."[40] Justice Thomas argued that this sweep accorded with "early congressional practice . . . . Congress required all federal officials with ongoing statutory duties to be appointed in compliance with the Appointments Clause."[41]

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[37] *Id*. at 2055.
[38] *Id*. at 2056 (Thomas, J., concurring).
[39] *Id*. at 2057.
[40] *Id*.
[41] *Id*.

Justice Breyer, writing only for himself, concurred in part. Justice Breyer argued that the Court should have resolved the case under the Administrative Procedure Act (APA).[42] He noted that the APA provides for the appointment of ALJs across the executive branch, and that it authorizes "[e]ach agency" to appoint "as many administrative law judges as are necessary for" hearings under the APA.[43] He argued that the APA does not authorize the SEC to delegate appointment of its ALJs to SEC staff—that under the APA the SEC must appoint its ALJs itself.[44] He wrote that because the SEC delegated ALJ Elliot's appointment to SEC staff, the appointment violated the APA.[45]

Justice Breyer argued that his statutory approach to the case would allow the Court to avoid creating a larger constitutional problem, that is, that the SEC ALJ's statutory double for-cause removal protection *might* impermissibly intrude on the president's Article II powers and therefore violate the separation of powers under *Free Enterprise Fund*. Justice Breyer noted that the Court struck a double for-cause removal protection in *Free Enterprise Fund* because it impermissibly intruded on the president's authority to supervise actors in the executive branch.[46] Even though he dissented in that ruling,[47] he argued that a faithful application of it *could* mean that the SEC ALJs' double for-cause removal

[42] *Id*. at 2057-59 (Breyer, J., concurring).
[43] *Id*. at 2058 (citing 5 U.S.C. § 3105).
[44] *Id*.
[45] *Id*. at 2058-59.
[46] *Id*. at 2059 ("The Court held in that case that the Executive Vesting Clause of the Constitution . . . forbade Congress from providing members of the Board with 'multilevel protection from removal' by the President.")
[47] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 514-588 (2010) (Breyer, J., dissenting).

protection similarly violates the separation of powers.[48] If so, the better course would be to hold that SEC ALJs are not "officers," because such a holding would respect congressional intent under the APA to provide ALJs with removal protection while avoiding the constitutional problem. He explained:

> I would not answer the question whether the Securities and Exchange Commission's administrative law judges are constitutional "Officers" without first deciding the pre-existing *Free Enterprise Fund* question—namely, what effect that holding would have on the statutory "for cause" removal protections that Congress provided for administrative law judges. If, for example, *Free Enterprise Fund* means that saying administrative law judges are "inferior Officers" will cause them to lose their "for cause" removal protections, then I would likely hold that the administrative law judges are not "Officers," for to say otherwise would be to contradict Congress' enactment of those protections in the Administrative Procedure Act. In contrast, if *Free Enterprise Fund* does not mean that an administrative law judge (if an "Office[r] of the United States") would lose "for cause" protections, then it is more likely that interpreting the Administrative Procedure Act as conferring such status would not run contrary to Congress' intent. In such a case, I would more likely hold that, given the other features of the Administrative Procedure Act, Congress did not intend to make administrative law judges inferior "Officers of the United States."[49]

[48] *Lucia*, 138 S. Ct. at 2060 (Breyer, J., dissenting) ("*If* the *Free Enterprise Fund* Court's holding applies equally to the administrative law judges—and I stress the 'if'—then to hold that the administrative law judges are 'Officers of the United States' is, *perhaps*, to hold that their removal protections are unconstitutional.").

[49] *Id*. at 2063-64.

For these reasons, Justice Breyer argued that the Court should have ruled ALJ Elliot's appointment invalid under the APA alone.

Justice Breyer also dissented in part, joined by Justices Ginsburg and Sotomayor. He argued that the Court ought not to have required the SEC to grant Lucia a new hearing with a different ALJ.

> The Securities and Exchange Commission has now itself appointed the Administrative Law Judge in question, and I see no reason why he could not rehear the case. After all, when a judge is reversed on appeal and a new trial ordered, typically the judge who rehears the case is the same judge who heard it the first time.[50]

Finally, Justice Sotomayor, joined by Justice Ginsburg, dissented. Justice Sotomayor argued that SEC ALJs were not "officers," because they lacked final agency decision-making authority. She noted that the ALJs issue only initial decisions, and that those decisions only become final upon the action of the SEC.[51] She argued that because they cannot issue final and binding agency decisions, SEC ALJs do not exercise significant authority. Justice Sotomayor distinguished *Freytag* by arguing that the part of that decision relating to STJs' authorities with regard to hearings "was unnecessary to the result" in that case.[52]

[50] *Id*. at 2064.
[51] *Id*. at 2066 (Sotomayor, J., dissenting) ("[T]he initial decision only becomes final when the Commission enters a finality order. And by operation of law, every action taken by an ALJ 'shall, for all purposes . . . be deemed the action of the *Commission*.'") (quoting 15 U.S.C. § 78d-1(c)).
[52] *Id*. at 2067.

III. Implications

At first glance, *Lucia* appears to be a narrow ruling, with little, if any, application or relevance outside of like cases. That's because the holding hangs on just one precedent, *Freytag*, which itself is relatively narrow and particularized. By aligning *Lucia* with *Freytag*, the Court dodged the bigger issues in the case—a more precise definition of "officer," and the separation-of-powers implications of the ALJs' statutory for-cause removal protection. It's also because the SEC and other agencies with ALJs can solve (and now have solved) the Appointments Clause problem in *Lucia* by simply reappointing ALJs by the agency head. After the agencies and the courts remand and rehear any remaining cases where a litigant argued that an improperly appointed ALJ rendered a decision, there should be no more *Lucia* problems, at least not with ALJs.

But at the same time, *Lucia* is fast becoming a much more important case—one with significant implications for the separation of powers, particularly given the increasingly aggressive attacks on the modern administrative state. In particular, *Lucia* will almost certainly inspire a flurry of separation-of-powers challenges to ALJs across the executive branch. It will also encourage a new round of Appointments Clause challenges to many executive positions, especially those in the grey area between "officer" and "employee." Finally, *Lucia* gave President Trump constitutional window dressing for his executive order removing ALJs from the merit system service[53]—a move that could politicize the ALJ corps and, by extension, other politically independent and expert executive positions that are subject to merit-based appointments.

[53] Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018).

All this comes against the backdrop of a larger assault on the administrative state. In addition to the *Lucia* fallout, other attacks include ongoing, and increasingly viable, challenges to the *Chevron* doctrine and judicial deference to agency rulemaking; ongoing and increasingly viable challenges to executive office independence through statutory for-cause removal protections; and even a current challenge to the nondelegation doctrine. Individually, each of these fronts is alarming to defenders of expert, independent agency decision-making in its own way. Taken together, and with the *Lucia* implications, these could lead to a hyper-politicization of the previously independent and expert bureaucracy, especially under a president that seems bent on politicizing nearly everything.

That said, let's take a look at what could happen—and what is happening—in the wake of *Lucia*.

First, the ruling will almost certainly draw a flurry of challenges to ALJs and their decisions across the executive branch. Most obviously, SEC ALJs' decisions will be subject to challenge, at least in those cases where a litigant raised an Appointments Clause claim when the case was pending. Although the SEC itself has now reappointed its ALJs in compliance with the Appointments Clause and *Lucia*, there may still be some decisions rendered by an invalidly appointed ALJ that are in the pipeline. When litigants challenge these decisions, the courts will apply the *Lucia* remedy: remand the case for a new hearing before a different ALJ.

ALJs' decisions outside of the SEC will be subject to challenge, too. There are currently nearly 1,900 ALJs in various federal agencies; most of these serve in the Social Security Administration. Depending on these ALJs' authorities—that is, if they have authority like the SEC ALJs and the Tax Court STJs—many of their decisions could be subject to an Appointments

Clause challenge under *Lucia*. Even if agencies reappoint their ALJs to comply with *Lucia*, there may be older cases still in the pipeline that are subject to remand and a new hearing.

These *Lucia*-type challenges to ALJs and their decisions could be more or less disruptive to the organization of federal agencies and the work and role of their ALJs. This will depend on how many viable challenges remain (given that agencies have now reappointed ALJs in light of *Lucia*) and how the courts rule in those cases (which depends, in turn, on the authorities of ALJs outside of the SEC). But the mere fact that *Lucia* required agencies to reappoint their ALJs means that the case had an impact on the way agencies operate.

More importantly, *Lucia* threatens the independence of any ALJ who serves in an independent agency, like the SEC, in which the agency head or heads themselves enjoy for-cause removal protection. As Justice Breyer reminded us in his concurrence in *Lucia*, ALJs enjoy statutory for-cause removal protection. If they serve in an independent agency, their two-tiered for-cause protection could violate the separation of powers under *Free Enterprise Fund*. As Justice Breyer argued, this two-tiered removal protection wouldn't *necessarily* violate *Free Enterprise Fund*; and in any event there may be a statutory way to preserve their removal protection. But Justice Breyer wrote only for himself on these points. And given the current make-up on the Court, it seems highly likely, or even certain, that *Lucia* teed up the Court's next separation-of-powers ruling—that independent ALJs within independent agencies violate the separation of powers. If so, *Lucia* is a key stepping-stone to a ruling that would eradicate the independence of ALJs.

Second, Lucia invites Appointments Clause challenges to many executive actors, especially those in the grey area between

"officer" and "employee," and their actions. The Court in *Lucia* signaled its willingness to strike an appointment as violating the Appointments Clause when Congress misjudges the (employee) status of a position. Yet at the same time, the Court did nothing to clarify the murky distinction between "officer" and "employee." Moreover, at least two justices, Justices Thomas and Gorsuch, opined that all, or nearly all, executive positions are "offices" under the Appointments Clause. (It's not clear whether other justices hold this view, too. Remember that this argument was not a part of the case and was not necessary to the holding, so others may agree, even if they didn't sign on.) Taken together, the Court's ruling, the remaining ambiguity between "officer" and "employee," and Justice Thomas's concurrence encourage Appointments Clause challenges to many executive "employees" and to their actions. If the Court adopts a more expansive definition of "officer," more executive actors would have to be appointed by the president or an agency head. This could strike a significant blow to the traditional political independence of line executive actors and the administrative agencies they serve.

Finally, Lucia gave President Trump a functional separation-of-powers excuse (independent of the Appointments Clause) to take aim at ALJ independence and expertise *from the appointment side*. This move opens up a new line of attack against executive independence—a separation-of-powers attack on executive office *appointment* restrictions (in addition to the more familiar attacks on *removal* restrictions)—so that opponents of executive independence and expertise can now attack executive positions from both the front end (against statutory *appointments* restrictions) and the more familiar back end (against statutory *removal* restrictions). This attack on the bureaucracy could easily

result in a hyper-politicization of previously independent and expert positions within the executive branch.

President Trump started down this road by enacting an executive order that exempted ALJs from the competitive service.[54] Before the order, ALJs were selected competitively, based on objective qualifications, and independent of politics. But after the order, agency heads (both independent and conventional) can now appoint anyone they like as an ALJ, not just those from a pre-screened and competitively selected pool. This means that agency heads must now appoint ALJs directly, without going through a competitive process. It thus gives agency heads (whether independent or politically appointed) exclusive power to appoint whomever they like.

President Trump justified his order based, in part, on his claim that "*Lucia* may also raise questions about the method of appointing ALJs."[55] He didn't further explain his constitutional reasoning, and nothing in *Lucia* or the Appointments Clause compels, or even suggests, his conclusion. But one reasonable inference may be that President Trump is reopening an old, but now settled, debate as to whether competitive appointment within the executive branch violates the president's Article II authority to execute the law and the separation of powers. According to this argument, any statutory restriction on the president's ability *to appoint* executive actors infringes on the president's authority, much like any statutory restriction on the president's ability *to remove* executive actors (or so the argument goes).

If President Trump's order is based on this kind of constitutional reasoning, he has (re)opened a second line of

[54] *Id.*
[55] *Id*

attack on politically independent and expert positions within the executive branch—a functional separation-of-powers attack on the *appointment* side, in addition to the more familiar attack on the *removal* side. This move has a direct impact on ALJs: it means that agency heads can now appoint whomever they like. Moreover, it also has that same potential impact on all executive actors who are subject to any kind of appointment qualification or restriction. In other words, this reasoning, if accepted, could wipe out the competitive service and any other statutory hiring restrictions of any executive actor. Taken to its extreme, it could mean the complete politicization of the executive branch.

* * *

Lucia is a case that's easy to overlook. On its surface, it appears to be a narrow ruling about a very specific position, with an easy administrative fix. But on a deeper level, the case opens up at least three lines of significant attack against independent and expert positions in the executive branch. And moreover, it's a key part of a larger, coordinated effort to undermine the bureaucracy.

Lucia is, indeed, easy to overlook. But if we're interested in preserving the modern administrative state, we ought to pay heed. This sleeper-of-a-case just might help dismantle it.

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