



SUPREME COURT REVIEW

2019–2020

Fourth Edition

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Editor's Note

Steven D. Schwinn*

We're thrilled to bring you the Fourth Edition of the *American Constitution Society Supreme Court Review*, covering the 2019-2020 Term. In these pages, you'll find incisive and trenchant analysis of the Court's most significant rulings by some of the nation's top constitutional scholars and practitioners. We are delighted that Professor Cheryl Harris graciously agreed to write our foreword this year. She provides an excellent overview of the Term and a preview of the articles.

Since the 2019 Term closed, we lost an icon on the Court, Justice Ruth Bader Ginsburg. Justice Ginsburg's life, work, and legacy are an inspiration to us all. We at the *Review* and in the ACS community acknowledge and deeply appreciate all that she contributed throughout her remarkable life. Like so many others, we continue to be inspired by her unflinching commitment to justice. We hope that the *Review* honors and advances this commitment, now and in the years to come, and we dedicate this volume to her.

Not all of the pieces in this volume specifically acknowledge her passing, however. Some of them were completed before her death and therefore read as though she were still on the Court.

As usual, this year's *Review* was a team effort. I'd like to thank our very talented and thoughtful authors and Professor Harris for their contributions. I'd like also to thank ACS leaderships, in particular ACS President Russ Feingold and Vice President of Policy and Program Kara Stein, for their ongoing support for this project. I'd like to thank Bridget Lawson, Law Fellow, for their outstanding editorial work. And most especially I'd like to express my deepest gratitude and thanks to Christopher Wright Durocher, Senior Director of Policy and Program, for his tireless efforts, unwavering faith, and constant support at every step of the process, from conception to completion of this volume.

I'm genuinely honored to share this year's *Review* with you. I hope you enjoy the articles as much as we enjoy bringing them to you.

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Foreword

The Preservation of Innocence: The 2019 Supreme Court Term

Cheryl I. Harris*

Every term of the Supreme Court includes decisions of great import. By design, the cases that the Court selects for consideration are deemed to be legally and socially significant.¹ This term, the Court decided on such high-stakes issues—abortion, immigration, health care, and executive power—all of which have preoccupied it before. As in the past, the Court’s rulings were implicated and issued in the context of pivotal social, political, and economic events. In this regard, one could say that the 2019 Term was not all that unusual. But that characterization would ignore what has been a remarkable season for the Court, both with regard to the societal context in which the term unfolded and, with few exceptions, the Court’s apparent disregard of the salience of that context. Instead, the general tack was to adhere tightly to text, to original meaning, even as the stakes and principles implicated could not have been more consequential. Legal formalism is certainly not unique to this Court, nor to this term, but in key decisions, the distance between the Court’s projection of the world and actual conditions is truly striking.

It is worth reviewing just some of the cataclysmic events that unfolded during the 2019 Term: There was the impeachment of the president; a tumultuous and contentious presidential campaign; a once-in-a-century deadly pandemic caused by a novel and highly contagious

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¹ The Court accepts cases, “if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value.” *Supreme Court Procedures*, U.S. COURTS (Dec. 15, 2020, 12:14 PM).

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virus; an ensuing economic crash and depression; and the recurring nightmare of Black people shot, beaten or choked to death by the police or their self-appointed fill-ins. The intersecting pandemics of COVID-19 and state-sanctioned, anti-Black violence underscored and exposed the entrenched and lethal character of racialized inequality, triggering the most sustained and far-reaching social mobilization in decades. Long ignored demands for a racial reckoning and fundamental transformation became ubiquitous and inescapable. There were multiple crises at the southern border, including the separation—in some instances, ongoing—of minor children from their parents,² and the exclusion and detention of thousands of desperate people.

The virus, however, defied all boundaries. In response, President Trump and his administration distorted, derided, and politicized public health measures as hospitals, health care workers, and mortuaries were overwhelmed. The election infrastructure was subject to a disinformation campaign, fueled by the president and abetted by a supporting cast of politicians and officials fearful of incurring his anger. A toxic social media ecosystem amplified and legitimated ever more unhinged claims and conspiracy theories that in turn spawned vigilante plots such as that concocted by an anti-lockdown group in Michigan to kidnap Michigan's Governor Whitmer. Trump administration officials authorized the deployment of tear gas on peaceful demonstrators near the White House so that President Trump could pose for a photo before a historic church. The Court itself became the center of controversy with the death of Justice Ruth Bader Ginsburg. Days after Justice Ginsburg's death and a little more than a month from the election, the president took the unprecedented step of naming her replacement. The White House Rose Garden celebration of the announcement became a COVID-19 superspreader event. To paraphrase the peerless James Baldwin, the 2019–2020 Term unfolded during the fire this time.³

² See Daniel Gonzalez, *628 Parents of Separated Children are Still Missing. Here's Why Immigrant Advocates Can't Find Them*, USA TODAY (Dec. 11, 2020). According to a report by the House Judiciary Committee, the family separation policy expanded the so-called zero-tolerance program after its initial implementation in the fall of 2017, knowing that it did not have the ability to track the children and the families and reunite them. *Id.*

³ JAMES BALDWIN, *THE FIRE NEXT TIME* (1963).

Yet, notwithstanding the raging fires in the real world, in the main, the Court's decisions seemed to issue from an imagined universe where there is not even a wisp of smoke. What explains the profound disjuncture between the Court's stance and the extraordinary facts on the ground?

In one of Baldwin's most acclaimed essays, *Letter to my Nephew on the One Hundredth Anniversary of the Emancipation*, he endeavors to expose and thereby pry open, if only marginally, the cage of racialized oppression into which this beloved child was born.⁴ Baldwin implores his namesake not to accept the premise upon which his life was structured—that to be black is to be less than human. Baldwin points out belief in white superiority is buttressed by systems of racial dispossession: The country “set you down in a ghetto in which, in fact, it intended that you should perish” and “spelled out with brutal clarity and in as many ways as possible that you were a worthless human being.”⁵ The terrible consequences Baldwin describes are visited on his nephew, his brother, his family, and on the many millions who comprise the “inferior” castes; but while the investment in whiteness produces value,⁶ it simultaneously induces malignancies, blind spots, and impasses. As Baldwin explains, many whites are “trapp[ed] in a history they do not understand.”⁷ Some who are aware cannot act, because to reject racial hierarchy places one in danger of being unmoored from the foundations of white identity, “attack[ing] one's sense of one's own reality.”⁸ The reaction is to retreat into denial and pursue an impossible quest for innocence:

[M]y country and my countrymen . . . have destroyed and are destroying hundreds of thousands of lives and do not know it and

⁴ James Baldwin, *Letter to My Nephew*, PROGRESSIVE, Dec. 1, 1962. The essay was re-published as *Letter to My Nephew on the One Hundredth Anniversary of the Emancipation* in the acclaimed collection, *The Fire Next Time*.

⁵ *Id.*

⁶ George Lipsitz's classic, *The Possessive Investment in Whiteness: How White People Profit from Identity Politics*, describes the interlocking public and private systems that together work to create an investment in whiteness that bestows valuable advantages on those at the top of the racial hierarchy. GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (2018).

⁷ BALDWIN, *supra* note 3, at 8.

⁸ *Id.* at 9

do not want to know it. . . . [B]ut it is not permissible that the authors of devastation should also be innocent. *It is the innocence which constitutes the crime.*”⁹

The crime of innocence is a thread that runs through many of this term’s decisions. The critical analysis offered in these essays on the cases provides compelling evidence that the investment in innocence is deep—deep enough to avoid or distort precedent, to disaggregate patterns into discrete, unconnected episodes, to overlook discrimination, and to cloak racial power and economic dominance with the presumption of fairness and neutrality. Ultimately, this investment does not yield absolution as the belief in innocence is, at its root a folly, a denial, and a trap.

This is not to overlook that this term included hard-fought cases in which some of the most egregious abuses of power were rejected. But as Cecilia Wang points out in her compelling essay on *DHS v. Regents of the University of California*¹⁰—the case involving Trump’s rescission of DACA—the victories are narrow exceptions that do not challenge the conceptual and institutional structures that ratify subjugation and produce vulnerability. Thus, in *DHS v. Regents*, the Court zeroed in on the administration’s failure to consider the reliance interest of DACA recipients, or to provide clear reasons for the decision to revoke the program. Wang notes that while the procedural violations were manifest, the ruling gave the president another bite at the apple.¹¹ Most crucially, Wang contends, the case was argued and the decision was issued within a framework that legitimated line-drawing between the (marginally) deserving dreamers and the undeserving remainder.¹² On this account, immigrants and asylum seekers are “aliens,” a category

⁹ *Id.* at 6 (emphasis added).

¹⁰ *Dept. Homeland Security v. Regents of the University of Cal.*, 140 S. Ct. 1891 (2020).

¹¹ Cecilia D. Wang, *Department of Homeland Security v. Regents of the University of California: A Dream Deferred*, 4 AM. CONST. SOC’Y SUP. CT. REV. ____ (2020).

¹² *Id.*

that presumptively is prone to deceit, fraud and violence.¹³ “Innocence” is an exception, defined in the most restrictive terms, available only to those who enter “through no fault of their own.” In contrast, those who fled their homes to save the lives of their children and escape death, starvation, and government-sanctioned criminal violence are not innocent.¹⁴ As Wang notes, the “binary trope” of the innocent, deserving immigrant in contrast to the culpable, undeserving interloper is further reinscribed in other immigration decisions from the term, where unlike *DHS v. Regents*, the scope of rights accorded persons at the border, or who have crossed it are further restricted, if not completely abrogated.¹⁵

It is worth noting that in contrast to the narrow and exacting standard of innocence applied to sort immigrants, the plurality’s opinion extended a broad mantle of innocence to President Trump that inoculated the rescission of DACA from an equal protection challenge based on racialized intent. Despite President Trump’s repeated racist

¹³ While the term “alien” is often justified as a legal description, it is not simply a neutral synonym for non-citizens. Journalist, essayist and playwright Jose Antonio Vargas, then an undocumented immigrant, explained the term “‘alien’ is nothing but alienating. And when coupled with ‘illegal,’ it’s especially toxic. The words seep into the psyche, sometimes to the point of paralysis. They’re dehumanizing.” Jose Antonio Vargas, *I Am Not an Alien*, L.A. TIMES (Aug. 13, 2015). This is not simply a matter of subjective reaction to the label. The term “alien” even absent the modifier “illegal” connotes criminality and authorizes use of coercion and force. As previously noted: [T]he line between citizen and noncitizen is mediated by and bears the racial imprint of a particular historical feature of U.S. immigration law—the government’s explicit employment of race as a proxy for citizenship. In the context of contemporary immigration boundary between citizen and noncitizen and further conflates noncitizenship and undocumented status. To make the point concrete, the simple “fact” of apparent Latino ancestry renders a person presumptively an undocumented noncitizen—or, to invoke the unfortunate quasi-term of art, an “illegal alien.” This does not mean that immigration officials and law enforcement personnel actually believe that most or all Latinos are undocumented. The point is that because Latino identity is deemed relevant to the question of whether a person is undocumented, all Latinos live under a condition of presumed illegality. They pose a danger not because their conduct is illegal but because of their purported status—they are illegal.

Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1546-47 (2011).

¹⁴ For example, the very presence of Latinx immigrants in the country is presented as a result of individual choice, rather than as a consequence of policies promulgated and supported by the United States. See LAURA GÓMEZ, *INVENTING LATINOS: A NEW STORY OF AMERICAN RACISM* 16 (2020) arguing that “due to U.S. imperialism, Latinos should be treated as ‘involuntarily present’”

¹⁵ See Jennifer M. Chacón, *Stranger Still: Thuraissigiam and the Shrinking Constitution*, 4 AM. CONST. SOC’Y SUP. CT. REV. ____ (2020); Andrew Kent, *Hernandez v. Mesa: Questions Answered and Questions Avoided*, 4 AM. CONST. SOC’Y SUP. CT. REV. ____ (2020).

denigration of Mexican immigrants both before and after his election,¹⁶ incredibly, the plurality treated the president’s explicit statements of racial animus as irrelevant, because it found the rescission decision was taken by the agency’s chief administrator, not President Trump.¹⁷ While President Trump’s anti-Mexican racist vitriol was factually sufficient to meet the initial threshold of establishing discriminatory intent, the plurality ruled that the evidence was inadequate to establish an equal protection claim. In effect, the Court rendered President Trump legally innocent by allocating decisional responsibility to agency officials. At the same time, since none of President Trump’s statements could be attributed to or were explicitly endorsed by the relevant actor(s)—the agency administrator(s)—they were innocent of bias as well.

Jennifer Chacón’s powerful essay on *DHS v. Thuraissigiam*¹⁸ further illuminates the Court’s commitment to circumvention in the face of a major assault on the rights of refugees and asylum seekers. As she notes, while much of the attention this term focused on the fate of DACA, *Thuraissigiam* potentially has greater significance as it concerned the operation, possible expansion, and further insulation of summary removal proceedings from review. By a five to four majority the Court held that notwithstanding *Thuraissigiam*’s assertion of a credible fear of persecution as a Tamil refugee from Sri Lanka, federal law precluded further review of his expedited removal, even pursuant to a writ of habeas corpus.¹⁹ In fact, as Chacón illustrates, while the Court concluded that the petitioner’s claim went beyond the historical parameters of

¹⁶ As Justice Sotomayor’s dissent noted, the comments were legion and were at the core of the policy decisions. They included declarations that Mexican immigrants are “people that have lots of problems,” “the bad ones,” and “criminals, drug dealers, [and] rapists” and comparing undocumented immigrants to “animals” responsible for “the drugs, the gangs, the cartels, the crisis of smuggling and trafficking, [and] MS13.” Dep’t. Homeland Security v. Regents of the University of Cal., 140 S. Ct. 1891, 1917 (2020) (Sotomayor, J., dissenting) (internal quotation marks omitted).

¹⁷ Specifically, the plurality found: “Respondents contend that President Trump made critical statements about Latinos that evince discriminatory intent. But even as interpreted by respondents, these statements—remote in time and made in unrelated contexts—do not qualify as “contemporary statements probative of the decision at issue.” *Regents*, 140 S. Ct. at 1916. Apparently, the plurality presumed that an agency secretary—a political appointee—would undertake such a monumental decision without direction from the White House. There was evidence that contradicted the plurality’s conclusion that the White House did not order this decision. See Wang, *supra* note 11.

¹⁸ Dep’t of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959 (2020).

¹⁹ *Id.* at 1983.

habeas relief, it was the Court that upended historical practice and precedent. It further ignored principles of constitutional avoidance: The majority reached beyond the jurisdictional issue—whether habeas corpus relief was available—to declare that “alien[s] . . . [have] no entitlement to procedural rights other than those afforded by statute.”²⁰ Expedited removal, greatly expanded under the Trump administration, potentially could be applied to any immigrant determined not to have been “admitted” pursuant to Congress’s definition and the executive’s interpretation of “admission.” Put another way, for asylum seekers like Thuragaissiam, the Court found there is no constitutional floor. As Chacón points out, as a consequence, any abuse was left unchecked.

In reaching its decision, the Court relied on not seeing abuse: It simply averted its attention. Justice Samuel Alito’s account embraced the premise that asylum seekers were abusing the system,²¹ while numerous media reports and investigations and a raft of litigation exposed policies that were riddled with rights violations as well as serial violations of federal law setting forth protections for asylum seekers.²² These practices were in concert with President Trump’s unrelenting vilification of immigrants, particularly those from so-called “shit hole” countries.²³ The Court’s detachment from this reality allowed it to conclude that excluding non-citizens from the protections of constitutional due process was deserved: These asylum seekers could not be considered “innocent.” At the same time, the majority effectively declared the administration innocent of a host of civil and human rights violations. By abdicating judicial responsibility and leaving the matter in the hands of Congress, the Court too maintained its innocence.

²⁰ *Id.* at 1964.

²¹ Alito’s opinion began with a description of a system that is overwhelmed with asylum claims most of which ultimately fail or are fraudulent. The system then is designed to “weed out” the meritless and fraudulent claims, which according to the Court, are the majority (noting that “the credible-fear process and abuses of it can increase the burdens currently “overwhelming our immigration system.” . . . [with] [t]he past decade [seeing] a 1,883% increase in credible-fear claims. . . . [t]he majority [of which] have proved to be meritless.” *Id.* at 1967.

²² See, e.g., Molly O’Toole, *Asylum Officers Rebel Against Trump Policies They Say Are Immoral and Illegal*, L.A. TIMES (Nov. 19, 2019); Ruthie Epstein & Shaw Drake, *Ban on Attorney Access for Asylum Proceedings in Inhumane CBP Jails Key to Trump’s Attack on Asylum*, ACLU (Feb. 26, 2020); Ruthie Epstein, *One Year of Forced Return to Mexico; Three Years of Trump Dismantling the Asylum System*, ACLU (Jan. 29, 2020).

²³ Ryan Teague Beckwith, *President Trump Called El Salvador, Haiti ‘Shithole Countries*, TIME (Jan. 11, 2018).

The third case implicating the border and immigration—*Hernandez v. Mesa (Hernandez II)*²⁴—did not involve a person crossing into the United States, but one who was killed in his own country, Mexico, at the southern border. Fifteen year-old Sergio Hernandez Guereca was shot on the Mexican side of the border at El Paso, Texas by a U.S. Border Patrol agent who asserted that Sergio was among a group throwing rocks as they tried to illegally cross into the U.S. Sergio’s family sued alleging due process violations and claims under *Bivens*, a judicially implied cause of action for constitutional violations committed by federal law enforcement officials.²⁵ On this second round of the litigation,²⁶ the Court declined to find any basis for granting a remedy: *Bivens* was deemed not to apply nor could the family assert due process claims. Andrew Kent’s intricate analysis of the efforts by the Hernandez family to navigate the increasingly narrow and tortuous paths towards accountability reveals the degree to which the Court is committed to conferring innocence, even for acts involving lethal force. While the case does pose complex questions regarding extraterritoriality and the constitutional rights of non-citizens, these did not justify waiving off the family’s basic due process claim. This is particularly so since, as Kent points out, the end result of the Court’s decision is that no court could consider whether this killing violated the Constitution. In absolving the agent, and the Border Patrol’s lethal practices, the ruling betrays the fundamental promise of the Constitution, as affirmed since *Marbury v. Madison*—that “for every right, there must be a remedy.”²⁷ Further, the majority’s decision obscures the high price of innocence. According to the Southern Border Communities Coalition, between 2010 when Sergio was killed and February 2020, six people have been killed by the Border Patrol in cross-border shootings.²⁸ There is little in the majority opinion to reflect this truth.

²⁴ *Hernandez v. Mesa*, 140 S. Ct. 735 (2020)

²⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁶ On the first round, the Court remanded the case for further consideration. *Hernandez v. Mesa*, (*Hernandez I*), 137 S. Ct. 2003 (2017).

²⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

²⁸ See *Cross-Border Shootings by Border Patrol Since 2010*, S. BORDER CMTYS. COALITION (last updated Feb. 26, 2020) Each of the accounts in the report bears an eerie and disturbing resemblance to facts in this case: The victims were on the Mexican side of the border, allegedly throwing rocks.

Kansas v. Glover,²⁹ like *Hernandez*, involved an analogous question of law enforcement accountability for constitutional violations. While the cases differed in important ways—the violence of the encounter, the victim and the shooter separated by an international border—the finding in *Glover* that law enforcement committed no cognizable violation cohered with the narrative of innocence in *Hernandez*. *Glover* affirmed the legality of a stop where the deputy ascertained through patrol car-based computer technology that the driver’s license of the registered owner had been revoked. In an 8–1 decision the Court affirmed the officer’s presumption that the driver was the owner and upheld the validity of the stop under *Terry v. Ohio*.³⁰ The matter was not so clear cut, however. As Sarah Seo’s insightful essay points out, the decision missed completely the troubling privacy implications of this technology which, not unlike GPS, can be used to identify targets rather than investigate crime.³¹ The Court also failed to consider the racially disproportionate patterns of stop-and-frisk law enforcement policies, as well as imposition of driver’s license sanctions such as revocation. Fundamentally, however, she argues the real issue is not whether the Court accurately assessed reasonable suspicion in this case: The problem is that the so-called “common sense” standard used to assess reasonable suspicion effectively insulates police encounters from meaningful review.³²

Indeed, *Glover* represents another step in the doctrinal facilitation of repeated police encounters, many which have become the predicate to seemingly endless incidents of what Devon Carbado has called “blue on black violence.”³³ For Seo, it further illustrates that under this doctrinal regime, the Fourth Amendment has been converted from a shield against government abuse to a tool of discretionary power for law enforcement, telling the police what they can do and how far they can

²⁹ *Kansas v. Glover*, 140 S. Ct. 1183 (2020).

³⁰ Sarah Seo, *The Originalist Road Not Taken in Kansas v. Glover*, 4 AM. CONST. SOC’Y SUP. CT. REV. _____ (2020).

³¹ *Id.*

³² As Seo astutely observes, Justice Kagan’s concurrence justified the search on the fact that Glover’s driver’s license had been revoked, ostensibly signaling more serious and dangerous driving infractions; however, Kagan overlooked the fact that revocations are often the result not of bad driving but of poverty. *Id.*

³³ See Devon W. Carbado, *Blue on Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479 (2016).

go.³⁴ She advances a bold argument for overruling *Terry* as inconsistent with originalist principles. This is not something that this Supreme Court will likely entertain. But Seo’s project is a challenge to the Court’s innocence and silence regarding the racially corrosive effects of *Terry*. By the summer of 2020, the whole world was watching. But was the Court?

Glover occluded racial reality, but, as Erwin Chemerinsky’s essay makes evident, the Court’s reasoning in *Comcast v. NAAOM*³⁵ especially depended on disavowal and the maintenance of this kind of innocence. In *Comcast*, the Court unanimously held that Section 1981 of the Civil Rights Act of 1866, prohibiting racial discrimination in contracting, required that a minority owned media company prove that race was the “but for” reason that it failed to secure a distribution contract with Comcast. There was evidence that Comcast repeatedly changed its requirements as the plaintiff met them, misrepresented that it had no capacity to carry the plaintiff’s products while entering into contracts with white-owned companies, as well as an explicit statement from a Comcast executive reflecting that the refusal was racially motivated. Yet, the Court found that the plaintiff could not make out a case under the statute as there was insufficient evidence that the denial was *because of race*. As Chemerinsky argues, the imposition of a “but-for” standard as distinct from proof that race was a motivating factor raises a near impossible bar for plaintiffs in Section 1981 cases, threatens to infect the proof standards in other civil rights statutes.³⁶ As he notes, given the history of racial discrimination generally and racial exclusion in the media in particular, the disconnect between the law, its purpose, and the Court’s interpretive stance in *Comcast* is particularly profound. The Court is also underwriting a claim of societal innocence.

³⁴ Carbado’s observations are in accord:

By prohibiting the government from engaging in unreasonable searches and seizures, the Fourth Amendment is supposed to impose constraints on the police. However, the Supreme Court has interpreted the Amendment in ways that empower, rather than constrain, the police. More precisely, the Court’s interpretation of the Fourth Amendment allows police officers to force engagement with African-Americans with little or no basis. To put the point more provocatively, the Supreme Court has interpreted the Fourth Amendment to protect police officers, not black people.

Id. at 24.

³⁵ *Comcast v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009 (2020).

³⁶ Erwin Chemerinsky, *A Major Step Backwards for Civil Rights: Comcast v. National Association of African American Owned Media*, 4 AM. CONST. SOC’Y SUP. CT. REV. ____ (2020).

Chemerinsky's restrained yet devastating take down of the Court's reasoning—that as a matter of history and statutory interpretation the Court got it dead wrong—raises the question of why the decision was unanimous. Considering this issue requires comparing Comcast to *Bostock v. Clayton County*,³⁷ the blockbuster case involving LGBTQ rights.

The Court's 6–3 decision in *Bostock* was an undeniable milestone. In holding that Title VII's prohibition on sex discrimination includes discrimination against gay or transgender persons, the Court appeared to depart from expectations that its strong conservative bent foreclosed any acceptance, let alone expansion of rights for marginalized sexual minorities. Perhaps *Bostock* should assuage concerns about the Supreme Court's hostility to claims of and accountability for discrimination. But celebration must be tempered here: The expansion of Title VII's protections occurred within a context where proof requirements for claims under other federal civil rights laws were made more onerous.³⁸ From this perspective, the juxtaposition of *Bostock* with *Comcast* is sobering. Despite different outcomes, the cases share a formalist analysis that underwrites the repudiation of history and the “fleeing from reality” decried in Baldwin's letter.³⁹ *Comcast* ignored the societal and specific context of racial discrimination; indeed Justice Neil Gorsuch's opinion in *Bostock* assiduously avoided any reference to the entrenched and ongoing discrimination and violence against LGBTQ persons. Instead, as Sachin Pandya and Maria McCormick contend, *Bostock* was based on a textualist analysis to ascertain the “ordinary public meaning” of Title VII. The Court found that Title VII's proscription of sex-based decisions includes those based on a person's “homosexual or transgender status,” notwithstanding the imagined scope of the original legislation.⁴⁰ Pandya and McCormick point out, however, the avoidance of social and historical context does not mean that future controversies over the reach of *Bostock* are not on the horizon: The text is not entirely unambiguous,

³⁷ *Bostock v. Clayton Cty. Bd. Of Comm'rs*, 140 S. Ct. 1731 (2020).

³⁸ Expanding LGBTQ rights while contracting rights and remedies for racial discrimination is not new. My colleagues and I argued previously that the endorsement of same sex marriage in *Windsor* and *Perry* in the 2012–13 term came in conjunction with the evisceration of the Voting Rights Act, and the further constriction of anti-discrimination law generally. Devon W. Carbado, Kimberlé Williams Crenshaw & Cheryl I. Harris, *Why We Can't Celebrate*, NATION (July 8, 2013).

³⁹ Baldwin, *supra* note 4.

⁴⁰ Sachin S. Pandya & Marcia McCormick, ‘Sex’ and Religion after *Bostock*, 4 AM. CONST. SOC'Y SUP. CT. REV. ____ (2020).

nor is it clear how *Bostock*'s logic applies beyond Title VII.⁴¹ The main questions concern the applicability and strength of *Bostock*'s protection against claims of religious based defenses that will be decided by a federal bench now populated with Trump appointees, some of whom have shown hostility to LGBTQ rights claims. Importantly, the logic underlying *Bostock*'s reasoning does not require the Court to grapple with the question of whether religious exercise will become the safe haven for continued discrimination.

June Medical Services LLC v. Russo,⁴² the subject of Michelle Goodwin's essay, repeats the pattern of extending rights to a group, while simultaneously constricting the force of those rights. Here, Chief Justice John Roberts joined the four liberal-centrist judges in rejecting a Louisiana law that restricted the facilities in which abortions could be performed and imposed an admitting privileges requirement on physicians performing the procedure. Relying on principles of stare decisis, the majority found that the law was identical to legislation invalidated by the Court in 2016 in *Whole Women's Health v. Hellerstedt*⁴³ on the grounds that the restrictions imposed did not protect maternal health. Goodwin's compelling treatment of *June Medical* situates the struggle over reproductive rights and women's health care in the context of the fight against women's subordination. She counsels that history is the necessary context for understanding how and why the state of Louisiana persisted in adopting a law that was fundamentally identical to a statute recently declared unconstitutional. Like the Texas law, Louisiana asserted that these barriers were measures to protect mothers, but as in *Whole Women's Health*, the evidence there proved the contrary—that the laws were a danger to women's health. Facts mattered.

But as Goodwin warns, Chief Justice Roberts's reasoning in *June Medical* provides cold comfort as he appeared to reject *Casey*'s mandate that courts consider whether the burden that the law imposes

⁴¹ Does *Bostock*'s protections apply only to individuals, or does it govern where the statutory standard appears to go beyond "but-for?" See *id.*

⁴² *June Medical Services, LLC v. Russo*, 140 S. Ct. 2103 (2020).

⁴³ *Whole Women's Health v. Hellerstedt*, 136 U.S. 2292 (2016).

on an abortion confers the benefits the law is designed to achieve.⁴⁴ She poignantly notes this was Justice Ginsburg’s last case involving reproductive rights.⁴⁵ Now Justice Ginsburg has been replaced by a committed anti-abortion ideologue.⁴⁶ What does all this portend for abortion rights, Goodwin asks, given the well-funded and highly organized campaign to undermine women’s reproductive choice in service of “traditional” (read evangelical Christian) values? This “anti-abortion playbook” as she describes it, bombards state legislatures with hundreds of bills, far outside the bounds of constitutional plausibility or moral decency, steadily generating more severe and equally unjustified restrictions. It is, she contends, a sociolegal context in which *Casey* has not served to protect women’s reproductive rights but has become a weapon against them,⁴⁷ as restrictions are justified as protection and burdens are increased, on the grounds that they are not “undue.” This point resonates with Seo’s analysis that current Fourth Amendment law is not a protection against governmental power, it is a handbook on how law enforcement can avoid constitutional constraint.

The Court is not a legislature, but it isn’t, or at least ought not be, impervious to reality nor to actual effects of law’s subordinating power. Preventing and in effect punishing women seeking to exercise their reproductive rights in the name of protection when the provisions actually have the opposite effect is ultimately a cynical exercise that seeks to conceal invidious intent in virtuous clothing. Innocence is not so easily manufactured.

If the denial of history and accountability entrenches the country in a fake reality, then Abbe Gluck’s sophisticated reading of *Maine*

⁴⁴ *Planned Parenthood of Se. Pa., v. Casey*, 505 U.S. 833 (1992) established the undue burden test that currently governs analysis of regulation of abortion. However, as Goodwin notes, Roberts’s opinion dismisses the assessment of the costs and benefits of the regulation as “not the Court’s job.” *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020) (Roberts, J. concurring). This, despite the fact that constitutional balancing tests often do precisely that, not as a first order inquiry, but in testing the legislative or executive rationale (ends) against its actual operation (means).

⁴⁵ Michele Goodwin, *Beyond June Medical and Roe v. Wade*, 4 AM. CONST. SOC’Y SUP. CT. REV. ____ (2020).

⁴⁶ Justice Ginsburg was replaced by Amy Coney Barrett by a 52–48 vote of the Senate on October 26, 2020. See Nicholas Fandos, *Amy Coney Barrett is Confirmed by Senate, Reshaping the Supreme Court*, N.Y. TIMES (Oct. 26, 2020). Justice Barrett is an avowed opponent of abortion. See Anna North, *What Amy Coney Barrett on the Supreme Court Means for Abortion Rights*, VOX (Oct. 26, 2020).

⁴⁷ Goodwin, *supra* note 45 (weaponizing *Planned Parenthood v. Casey*).

*Community Health Options v. United States*⁴⁸ may suggest that all is not entirely lost, as the Court’s consideration and ultimate rejection of the latest challenge to the Affordable Care Act (the “ACA”) was grounded in hard, cold facts. The ACA required everyone without insurance to get it (the much-maligned individual mandate previously invalidated), and required insurance companies to extend coverage, while compensating them for the risk for the first three years. As part of the crusade to wipe out the ACA, the Republican-led Congress, with the eventual support of President Trump, refused to make these cost-sharing reduction payments. Some insurers went out of business, others increased premiums, with the predictable result that people lost their coverage—over a million just from the collapse of non-profit coops. The Court held 8–1 that the insurers were entitled to compensation, as they relied on the government’s commitments structured into the legislation. Gluck notes that in contrast to the favored myopic focus on text, the Court’s opinion in *Maine Community* immersed itself in facts and materials that explained how the law was made, and how the ACA functions. She contends that *Maine Community* is an exercise in “reconciling textualism with realism,”⁴⁹ and may reflect a welcome step towards grounding interpretation in objective facts. In fact, in important respects, Gluck argues, even though the ACA has faced an unrelenting onslaught of litigation and repeal efforts, it has become entrenched, creating proverbial facts on the ground that the Court is increasingly compelled to confront.

The Court’s reasoning in *Maine Community* may reflect a shift toward facts and realism, but at the same time, it evinces continuing orientation away from human consequences apart from corporate interests. As Gluck notes, the case was largely framed as a breach of Congress’ promise to pay insurers for taking on more risk. The disastrous effects on those who lost their insurance, because either their insurer failed or they could no longer afford the increased premiums, was not central to the Court’s reasoning. The protection of the ACA through protecting the interests of insurers may reflect the recognition that while some

⁴⁸ Me. Cmty. Health Options v. United States, 140 S. Ct. 1308 (2020).

⁴⁹ Abbe Gluck, *Holding Congress to its Word: Statutory Realism, Second-Generation Textualism and ACA Entrenchment in Maine Community Health Options*, 4 AM. CONST. SOC’Y SUP. CT. REV. ____ (2020).

members of the Court are sympathetic to the principle of universal access to health care that Gluck argues undergirds the ACA, the Court's conservative majority is not and has not given serious attention to the concerns of those without access to affordable health care. Thus, the Court, while upholding the law as enforcement of a contractual promise, has yet to grapple with the pernicious effects of a confluence of factors, including the unrelenting efforts to whittle away any expansion of the health care safety net, and the proliferation of other policies designed to surveil and control the most private health care decisions of women.⁵⁰ Both *Maine Community* and *June Medical* count as “wins” for civil rights. Yet both proceed from a frame of exceptionalism, leaving very fragile ground for sustaining, let alone expanding their reach.

Still, an interesting question to consider is why *Maine Community* was able to garner a rare, near unanimous opinion. Nelson Tebbe and Micah Schwartzman's thought provoking reading on the scope of religious based exemptions and free exercise guarantees in three religion-based cases from this term—*Our Lady of Guadalupe School v. Morrissey Berru*,⁵¹ *Little Sisters of the Poor v. Pennsylvania*,⁵² and *Espinoza v. Montana Department of Revenue*⁵³—offers one plausible theory. Tebbe and Schwartzman analyze seemingly puzzling departures of centrist and liberal justices from prior principles to join the majority's readings of the Establishment and Free Exercise Clauses that provide organized religion greater rein in the public sphere. The authors contend that rather than mitigate the conservative position, the unilateral concessions given by the Court's liberal and centrist wings in these cases is a project of appeasement that has garnered little in return other than “the self-defeating effect of emboldening the other party to take more assertive action.”⁵⁴ Moreover, they argue that appeasement is a strategic failure as

⁵⁰ Of course, with another perennial challenge to the ACA argued before the Court in the 2020–2021 term, it remains to be seen if the catastrophic consequences of striking down the ACA in the middle of a pandemic play any role in the decision. See Jonathan Cohn, *Trump' Last, Desperate Attack on Obamacare Goes to the Supreme Court This Week*, HUFFPOST (Nov. 9, 2020) (reporting on the case *California v. Texas*).

⁵¹ *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

⁵² *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020).

⁵³ *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020).

⁵⁴ Nelson Tebbe & Micah Schwartzman, *Re-Upping Appeasement, Religious Freedom and Judicial Politics in the 2019 Term*, 4 AM. CONST. SOC'Y SUP. CT. REV. ____ (2020).

the conservative position claims greater legitimacy because it commands the support of more than a 5–4 majority.

Tebbe and Schwartzman acknowledge that the cases from this term do not offer clear-cut support for their thesis: In two cases, *Morrissey-Berru* and *Little Sisters of the Poor*, the liberal-centrist justices joined the majority to find in favor of expanded religious exemptions, from civil rights laws in the former decision, and in the latter, from provisions of the Affordable Care Act. But in a third case, *Espinoza v. Montana Department of Revenue*, the liberal justices declined to join the majority's opinion that required that state-funded school-choice programs include religious schools, despite a state constitutional ban. The dissenting liberal justices here arguably undercut the appeasement thesis. But Tebbe and Schwartzman read this case in the context of prior efforts at appeasement in a related case that had already failed. Nor did the authors find convincing the claim that the liberal votes in the religion cases won Chief Justice Roberts's votes in cases like *Bostock* or *June Medical*. As they note, there are other reasons that might motivate Chief Justice Roberts. Moreover, the scope of the rights affirmed in both "victories" is delimited precisely by the logic in the cases on religious exemption. What is given with one hand may be taken by another. Whether one concurs with the authors' appeasement thesis, or is convinced by their evidentiary assessment, their analysis illuminates that power, which currently resides with the conservative majority, is not placated by acceding to its exercise in some cases.⁵⁵

What do limits on power mean in this context where the Court's claim of neutrality appears to consistently align with a conservative political agenda?⁵⁶ This question was particularly pressing this term as the debates over executive authority intensified as a consequence of

⁵⁵ In the words of the great Frederick Douglass, "Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or with both." Frederick Douglass, *If There Is No Struggle, There Is No Progress* (Aug. 3, 1857) (address commemorating West Indian emancipation).

⁵⁶ As Erwin Chemerinsky has noted previously, when conservative Justices like Scalia "profess[] that he follows the original meaning of the Constitution, but his are the views of the 2008 Republican platform, not of the Constitution's framers," ERWIN CHERMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010). While obviously Scalia is no longer deciding cases, the point Chemerinsky raises here obtains with some of the other conservative justices. Not all ascribe to the same form of originalism, but all seem to find readings of the constitution that align with a particular political agenda.

the Trump administration’s maximalist assertion that effectively there were no limits. The struggle over the scope of executive power this term yielded mixed results. Steven Schwinn’s lucid essay on *Trump v. Mazars*⁵⁷ and *Trump v. Vance*⁵⁸ contends that even as both decisions rejected the president’s claim that no investigation could obtain his financial records and tax returns, President Trump’s assertions that no other branch of government—either congressional committee or state criminal investigation—had authority to command their release created their own reality. In other words, Schwinn argues that while *Mazars* and *Vance* affirmed the power of other branches relative to the Executive, and checked President Trump’s brazen and unsupported claims, effectively Trump secured the result he desired by simply running out the clock until he can leave office. In principle now, pursuant to *Mazars*, no executive can ignore congressional investigations, nor based on *Vance*, is he categorically immune from state criminal prosecution. But the Court’s decision to remand the cases effectively gave the president the room to continue his belligerent non-compliance. As Schwinn points out, by repeatedly going far beyond the parameters of plausible constitutional interpretation, President Trump reset the balance of power inherent in separation of powers and inflicted damage to the structural framework of the Constitution. The formalist constraint imposed by the Court in both cases is undermined by the decision to remand and leaves President Trump free to delay, deny, and deflect. Beyond this case, the accretion of executive power is inversely related to accountability.

Peter Shane’s essay on *Seila Law LLC v Consumer Financial Protection Bureau*⁵⁹ illustrates what he calls the “high water mark” of a theory of presidential power—the unitary executive—that has been part and parcel of the conservative political agenda since the 1980s and the election of Ronald Reagan. The genealogy of the current justices on the Court appointed by Republican presidents runs through the Reagan and Bush administrations, such that a majority of them have been fully inculcated into this unitary executive theory.

⁵⁷ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

⁵⁸ *Trump v. Vance*, 140 S. Ct. 2412 (2020).

⁵⁹ *Seila Law LLC v. Consumer Finance Protection Bureau*, 140 S. Ct. 2183 (2020).

Based on this view, in this case, ostensibly, the president's removal power was violated by the creation of a consumer protection agency, headed by a single director, appointed by the president for a fixed term, subject only to dismissal for neglect or malfeasance. The illogic and ahistorical arguments advanced to support the claim that concentrated power in the Executive protects democratic liberty are more than fully dissected by Shane.

As Shane points out, the ascendancy of this framework has greater significance than the actual effect of this decision, which did not strike down the entire statute. The danger of the view that the executive is imbued with virtually unlimited authority is twofold: doctrinal osmosis eroding other aspects of the regulatory state as well as intensified polarization as a result of increasing the stakes of presidential elections.⁶⁰

It is telling that the Court's majority chose to endorse such a theory against the backdrop of the Trump presidency—when the occupant of the office demonstrated not only lack of awareness but complete disdain for any notion of institutional or structural constraints on his personal preferences. As the Trump presidency lurches to its final days, it is also ironic, tragic and dangerous that this "myth" has garnered the support of thousands who march against the Court for its supposed failure to intervene and "Stop the Steal." It is also abundantly clear that the cancer of Trumpism ensures that the incoming administration of President Elect Biden and Vice-President Harris will not enjoy the presumption of concentrated and virtually unlimited executive power. Indeed, what would have been uncontroversial previously may become the basis for increasingly strident claims and incendiary threats by Trump supporters against all those who do not concur. The Court has been an enabler in this morass. It cannot now claim innocence of its results.

The Court's task is to focus on facts and law in the cases before it, but the notion that ignoring social context is essential to fairness is both unrealistic and fundamentally untrue. Social context shapes and

⁶⁰ *Id.*

influences judicial interpretation; law shapes and influences social reality. Courts ought to strive for objectivity and not prejudice cases, but those commitments do not require judges to embrace the fiction that background social, economic, and political conditions are equal—that the baselines are neutral—when, in fact, they are not. Indeed, the presumption of neutrality is predicated on a particular perspective that disavows the relevance of certain social realities and of history itself. The central question then is not whether to take account of the social world, but how.

Eddie Glaude's essay on *The History that James Baldwin Wanted America to See*⁶¹ reminds us of other moments when Baldwin called for a reckoning with history: In another essay written in the wake of the Watts Rebellion, Baldwin said, "History, as nearly no one seems to know is not merely something to be read. And it does not refer merely, or even principally to the past. On the contrary, the great force of history comes from the fact that we carry it within us."⁶² The intimate relationship between history and the present requires shedding the myth of innocence.⁶³ Otherwise, as Baldwin's prescient voice reminds us, there is no way to rectify and disrupt the ongoing patterns of destruction.

⁶¹ Eddie Glaude, *The History that James Baldwin Wanted America to See*, NEW YORKER (June 19, 2020).

⁶² Quoted in *id.*

⁶³ As Glaude says, "Baldwin wanted to free us from the shackles of a particular national story, so that we might create ourselves anew. For this to happen, white America needed to shatter the myths that secured its innocence." *Id.*

Beyond *June Medical* and *Roe v. Wade*

Michele Goodwin*

In 2019, the United States Supreme Court decided to take up *June Medical Services v. Russo*, a case that contested the Court's 2016 ruling in *Whole Woman's Health*. *June Medical* involved a Louisiana admitting privileges law virtually identical to the Texas law the Supreme Court struck down as unconstitutional only a few years prior. In many ways, the case represented a challenge to the Court's authority and its commitment to the rule of law. It would be the last abortion case that Justice Ruth Bader Ginsburg would hear and cast a vote on before her death on September 18, 2020.

Preface: Remembrance of Justice Ruth Bader Ginsburg

This inquiry about abortion rights in the most recent Supreme Court term is all the more salient in the wake of Justice Ginsburg's recent passing on September 18, 2020. An indefatigable legal champion of women's equality, her jurisprudence will surely be the subject of sustained legal interpretation and analysis in the years to come. Of particular note, she powerfully articulated what the threat to reproductive independence means in the lives of women, especially vulnerable women, including limiting their full participation in society. She understood that by constraining women's abilities to be full in their personhood, lawmakers chipped away at their humanity. Denying women control over their reproductive health—whether to maintain a pregnancy or terminate it—infringed not only on legal rights, but also on their human dignity.

Justice Ginsburg was also deeply aware of the violence situated alongside the call for reproductive autonomy and independence—both state and private violence. She recognized the

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violence and inhumanity in the state imposing conditions that constrain women’s reproductive health decisions. In *Whole Woman’s Health*, she wrote in concurrence, “[w]hen a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety.”¹ Meanwhile, she was mindful of the private threats that could be (and too frequently are) visited upon women by boyfriends, husbands, employers, and in the contexts of reproductive health, anti-abortion activists.

As I penned the closing chapters of *Policing The Womb: Invisible Women and the Criminalization of Motherhood*² in 2019, the Supreme Court prepared for its next term—one that would include *June Medical Services v. Russo*.³ As the book came to its end, I grew exhausted by the many examples of both state and private violence inflicted on women over time: *marital rape; permissive beatings; infringements on contraceptive access; provisions undermining the abortion right; and much more*. These impediments to women’s full equality were reflected in legislation and court decisions. Sadly, women’s inequality has most often been secured and maintained with the force of law. Justice Ruth Bader Ginsburg knew this.

Justice Ginsburg took seriously the human dignity of women and girls, and her jurisprudence represented that. She understood the myriad ways in which state violence—*physical, economic, and psychological*—undercuts women’s potential and undermines their safety, liberty, equality, autonomy, and privacy. She believed that women’s reproductive liberty was central to their full personhood. And she valued the need for law in dismantling the vestiges of centuries of oppressive common law, legislation, and more that constrained the foundational aspirations of the Constitution in women’s lives. Justice Ruth Bader Ginsburg used the power within her reach to elevate women’s equality. An indefatigable warrior on behalf of all peoples, but fearlessly on the side of women, has passed.

¹ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring).

² MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* (2020).

³ *June Med. Servs., LLC v. Russo*, 140 S. Ct. 2103 (2020).

Introduction

This Essay addresses the recent United States Supreme Court 5–4 decision in *June Medical Services v. Russo*. In this case, Louisiana’s Unsafe Abortions Protection Act required doctors who perform abortions to have admitting privileges at nearby hospitals. On their face, such laws appear to be content neutral and have as their goal furthering the safety of the procedure—and not eliminating the abortion right. However, the spate of such laws in the last decade raises quantitative and qualitative questions related to their scope, scale, the number of abortion clinics that have shuttered in their wake, the significant delays caused to patients who seek abortions, whether they serve the purpose of burdening abortion rights, and even whether such laws ultimately contribute to increases in unwanted childbirths and maternal mortality.

June Medical reflects the ongoing challenge to abortion rights generally, and specifically those that are masked by legislation that purports to protect pregnant women. Since 1992, states have enacted hundreds of laws that claim to reasonably relate to the protection of pregnant women, including mandatory ultrasounds, waiting periods, and compulsory counseling, as well as laws that relate to facilities and impose strict requirements and restrictions on doctors. Particularly worrisome are the mandated counseling requirements, which force doctors to provide misleading information to their pregnant patient, including disproved information that abortion causes mental illness, cancer, and infertility. Even while medical organizations refute such claims, the Supreme Court has not struck down a mandatory counseling law.

The stakes were high in *June Medical* and remain so, especially as the anti-abortion strategy has shifted to include intensifying regulations targeting abortion providers, including nurses, doctors, and clinics. In recent years, hundreds of targeted regulations of abortion providers (TRAP laws) and other provisions have been introduced and enacted by state legislatures, imposing numerous constraints on the providers rather than directly on the pregnant person. These laws impose conditions related to the facility (size, location, equipment), mandated board certifications, required transfer agreements with local hospitals, require that abortions be performed in hospitals, and more. As a tactical matter in the effort to eliminate abortion rights, this strategy avoids

the claim that the abortion provision targets the pregnant person and undermines her abortion right. Thus, the strategy also avoids triggering the protections accorded in *Roe v. Wade*⁴ and *Planned Parenthood v. Casey*.⁵ Finally, when such laws have been challenged by doctors, including in *June Medical*, opponents claim they lack standing.

This Essay proceeds in three parts. Part I addresses abortion rights, social norms, and the status of women. It begins by briefly making the argument that review of *June Medical*, and the Court's legacy in addressing abortion rights, should first begin by centering the historical legislative and judicial treatment of women generally. In other words, a proper foreground to a discussion on abortion rights requires understanding law's role in subordinating women and legitimizing violence against them. Part II turns to the anti-abortion playbook. It argues that one of the lessons learned from *June Medical Services* is the power of the anti-abortion playbook. The anti-abortion playbook's key features includes drafting model laws for enactment in legislatures across the country. As in *June Medical*, this causes the repeat play of legislation already determined unconstitutional by the Supreme Court. Part III then briefly considers the future of abortion rights.

I. Abortion, Social Norms, and the Status of Women

The battle over reproductive rights, women's autonomy, and reproductive healthcare and decision-making has always been about much more than simply women's health and safety. Instead, historically, male authority, power, and dominion over women's reproduction served political purposes that framed women's capacities and the span of their rights almost exclusively as service to men: *as a good wife to a husband*;⁶ as

⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁶ See, e.g., *Hyde v. Scysson*, 79 Eng. Rep. 462 (1619); *Ohio & Miss. Ry. v. Cosby*, 107 Ind. 32, 34–35 (1886); *Birmingham S. Ry. Co. v. Lintner*, 141 Ala. 420, 427–28 (1904). Historically, loss of consortium litigation provided economic remedies only for husbands. See generally Jo-Anne M. Baio, *Loss of Consortium: A Derivative Injury Giving Rise to a Separate Cause of Action*, 50 *FORDHAM L. REV.* 1344 (1982).

mother and caregiver to a man's children;⁷ as a conduit to male reproduction;⁸ as a whipping post;⁹ and as sexual chattel.¹⁰

For example, tort law carved out specific remedies for husbands who suffered the loss of their wives' servitude and sex under the *loss of consortium* cause of action. The law derives from the legal premise that the husband is the master of the wife. Thus, when wives suffered a physical injury, husbands could file suit against third parties for the "loss" of their wives' servitude, companionship, and sex. Courts permitted marital rape under spousal immunity doctrine and upheld state legislation barring criminal punishment for marital rape. American courts interpreted domestic violence under the notion of "gentle restraint," thereby permitting men to exercise aggression on their wives, including beatings with whips and other materials so long as they were generally not wider than his thumb. Ergo the *rule of thumb*.

Notably, even after constitutional evaluation of American personhood through ratification of the Thirteenth and Fourteenth Amendments, legislatures insisted that many women were unfit for full social inclusion. Legislatures denied women suffrage based on the fiction that women lacked the complexity of mind, reason, and judgment to cast a vote.¹¹ Legislatures debated whether a woman's vote would essentially impute to her husband.¹² The Supreme Court

⁷ See, e.g., *Bradwell v. State*, 83 U.S. 130, 141 (1872) (affirming an Illinois statute that denied female law graduates admission to the bar because "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres of destinies of man and woman. . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life").

⁸ See DOROTHY ROBERTS, *KILLING THE BLACK BODY* 29–31 (1997).

⁹ *State v. Oliver*, 70 N.C. 60, 62 (1874); *Abbott v. Abbott*, 67 Me. 304, 305 (1877).

¹⁰ See, e.g., Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373 (2000); Michele Goodwin, *Marital Rape: The Long Arch of Sexual Violence Against Women and Girls*, 109 AM. J. INT'L L. 326, 328 (2016). Moreover, states typically vindicated the legitimacy of marital rape, and courts followed suit. See, e.g., *State v. Paoletta*, 554 A.2d 702 (Conn. 1989) (finding that Conn. Gen. Stat. § 53a-70(a) and 53a-70a(a) exonerates married men from the crime of rape if the victim is his wife); see also Michael G. Walsh, *Criminal Responsibility of Husband for Rape, or Assault to Commit Rape, on Wife*, 24 A.L.R. 4th 105 (1983).

¹¹ *Minor v. Happersett*, 53 Mo. 58, 64–65 (1873); Eleanor Barkhorn, *Vote No on Women's Suffrage: Bizarre Reasons For Not Letting Women Vote*, ATLANTIC (Nov. 6, 2012) ("The stated reasons to 'vote no' include, because 80% of the women eligible to vote are married and can only double or annul their husband's votes.").

¹² Barkhorn, *supra* note 11.

deferred to state legislatures on this sophistry and solidified women's political subordination by ruling in *Minor v. Happersett* that although the Constitution granted women citizenship, it did not confer upon them a right to vote.¹³

Finally, while the fraught path to securing abortion rights is addressed by prior works,¹⁴ it bears briefly acknowledging the pre-*Roe* landscape. In her landmark work, *When Abortion Was a Crime*, author Leslie J. Reagan copiously details the deaths and infections that overwhelmed hospitals in New York and Chicago in the years prior to *Roe*. Reagan writes that by the "early 1960s, [illegal] abortion-related deaths accounted for nearly half, or 42.1 percent, of the total maternal mortality in New York City."¹⁵ She explains that in Chicago, "[p]hysicians and nurses at Cook County Hospital," one of the busiest hospitals in the nation, "saw nearly one hundred women come in every week for emergency treatment following their abortions." Sadly,¹⁶ "[s]ome barely survived the bleeding, injuries, and burns; others did not."¹⁷

In the years before *Roe*, hospital emergency wards in major cities across the nation were so completely overwhelmed by girls and women who sought care for "abortion related complications" that they created special secret wards in which to treat them for the burns, infections, uterine tears, poisonings, and the myriad near-death conditions resulting from trying to end a pregnancy. These back-alley abortion complications, including deaths, were not isolated. Rather, they affected "[t]ens of thousands of women every year."¹⁸ Deaths were particularly acute among women of color. Sadly, nearly all the deaths, infections, and complications were preventable, because legal abortions are far safer than even childbirth. The World Health Organization (WHO) compares the safety of legal abortions to penicillin shots.¹⁹ The reproductive health conditions for women who sought abortions dramatically improved after the Supreme Court's 7–2 decision in *Roe v. Wade*.

¹³ *Happersett*, 53 Mo. at 64–65.

¹⁴ GOODWIN, *supra* note 2; Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781 (2014).

¹⁵ LESLIE REAGAN, *WHEN ABORTION WAS A CRIME* 214 (1996).

¹⁶ *Id.* at 210.

¹⁷ *Id.*

¹⁸ *Id.* at 210–11.

¹⁹ WORLD HEALTH ORG., *SAFE ABORTION: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS* 49 (2d ed. 2012).

A. Whole Woman's Health

This aforementioned legacy calls to mind the importance of historiography in review and evaluation of the Supreme Court's decision-making in contemporary abortion cases, including *Whole Woman's Health v. Hellerstedt* and *June Medical v. Russo*. As Julie A. Matthei's important work, *An Economic History of Women in America*, underscores, "the key to understanding woman's present and future position . . . lies in history."²⁰ This Essay takes that call to history seriously, including in the immediate past, foregrounding the Court's decisions in its most recent abortion cases.

In 2013, after heated debate and an ambitious but unsuccessful filibuster, the Texas Legislature enacted House Bill 2 (H.B. 2). The law contained two provisions at issue in the 2016 U.S. Supreme Court case, *Whole Woman's Health v. Hellerstedt*:²¹ mandating doctors who perform abortions to obtain hospital admitting privileges and requiring abortion clinics to meet Ambulatory Surgical Center (ASC) Standards. The legislation represented another tool in the anti-abortion arsenal built and primarily cultivated by male lawmakers. Ironically, Texas lawmakers claimed H.B. 2 and similar laws *protected women, preserved their health, and enhanced patient safety*. Governor Rick Perry signed the legislation, heralding it as part of the "culture of Texas," that would make abortion "a thing of the past," revealing that the true nature of the Texas law was to end abortion access in that state.²²

In 2016, in a 5–3 decision, the Supreme Court struck down both provisions under review in *Whole Woman's Health*: the hospital admitting privileges provision as well as the ASC mandate. In striking down the laws, the Court held that neither law conferred medical benefits that would justify the harms imposed on pregnant women seeking to exercise a constitutional right to terminate a pregnancy. The Court found that the Texas provisions imposed unconstitutional, undue burdens not sufficiently related to the justifications put forth by the state. Further, the Court took special note that the evidence presented before the district

²⁰ JULIE A. MATTHAEI, *AN ECONOMIC HISTORY OF WOMEN IN AMERICA* 3 (1982).

²¹ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

²² See e.g., Manny Fernandez, *Abortion Restrictions Become Law in Texas, But Opponents Will Press Fight*, N.Y. TIMES (July 18, 2013).

court revealed admitting privileges did not advance the state's interest in protecting women's health but did place a substantial burden in the path of a woman seeking an abortion by forcing about half of the state's abortion clinics to close. This additional layer of regulation provided no further protections than those already in place.

For example, the Court found "there was no significant health-related problem that the [admitting privileges] law helped to cure." In fact, when asked at oral argument "whether Texas knew of a single instance in which the new requirement would have helped even one woman obtain better treatment," Texas admitted there was not one case. This finding mirrored that evidenced in other states.

Writing for the Court, Justice Stephen Breyer took specific note of a particular doctor's experience. Dr. Sherwood Lynn practiced at the McAllen clinic in Texas. He delivered 15,000 babies during thirty-eight years in practice and "was unable to get admitting privileges at any of the seven hospitals within 30 miles of his clinic." Justice Breyer observed that these denials of admitting privileges were "not based on clinical competence considerations." Rather, hospitals typically allow admitting privileges only if the doctors will generate a sustained clientele to the hospital. Given that abortions are as safe as penicillin shots, on average less than one percent of doctors' patients would be admitted to the hospitals.

Based on the above evidence, complemented by a robust empirical record, the Court concluded that the two Texas abortion provisions conferred no medical benefits sufficient to justify the burdens imposed on women in Texas. The Court found that the admitting-privileges requirement led to the closures of "half of Texas' [abortion] clinics" In other words, protecting women's health was a duplicitous proxy or pretext for denying women the constitutional right to terminate a pregnancy. The same was true in the case of virtually identical legislation enacted recently in Louisiana at issue in *June Medical*.

The Court's *Whole Woman's Health* decision was notable for its serious turn to the empirical record. As such, the Court held that judicial review of such statutes need not be wholly deferential to the legislative fact-finding, particularly when the factual record before the district court contradicted it. Relevantly, it was the factual record amassed by the district court on which the majority Supreme Court relied. Indeed, based on the empirical record evaluated at the district court level, the Court

concluded the laws were so tangential in relation to pregnant patients' health and safety as to be "nearly arbitrary."

Finally, in her concurrence, Justice Ginsburg agreed that "inevitably" if permitted to stand, laws such as the Texas abortion provisions "will reduce the number of clinics and doctors allowed to provide abortion services" even though "many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to the ambulatory-surgical-center or hospital admitting-privileges requirement."²³ The justice wrote, "[w]hen a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety."²⁴ According to Justice Ginsburg, abortion provisions, such as those at issue in *Whole Woman's Health* "that do little or nothing for health, but rather strew impediments to abortion, cannot survive judicial inspection."²⁵

B. June Medical Services v. Russo

In what could be interpreted as defiance of the Court and indifference to *Whole Woman's Health*, Louisiana's legislature did not repeal the "Unsafe Abortion Protection Act" or Act 620—its version of the Texas law, which requires "a physician performing or inducing an abortion" to "[h]ave active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services." To place in context the Louisiana legislature's bold and unusual disregard of *stare decisis*, imagine that state enacted a *separate but equal* public school segregation law based on race, in the wake of *Brown v. Board of Education's* holding striking down such legislation—based on the dubious notion that the Court's decision only reached Kansas and not Louisiana.

In *June Medical*, not surprisingly, both doctors and clinics challenged Louisiana's abortion provision, securing a permanent injunction at the district court level, which the U.S. Court of Appeals for the Fifth Circuit vacated in *June Medical Services v. Gee*.²⁶ Unconvinced that the facts

²³ *Whole Woman's Health*, 136 S. Ct. at 2321–21.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *June Med. Servs. v. Gee*, 905 F.3d 787 (2018).

undergirding *Whole Woman's Health* applied in Louisiana, the Fifth Circuit lifted the injunction. In doing so, the court brushed aside that more than half the clinics in Texas closed due to the Texas admitting privileges law going into effect, precisely because doctors could not obtain such privileges. The closure of clinics meant that in some cases women traveled hundreds of miles in order to terminate a pregnancy or simply lost access altogether. As the Supreme Court made clear, the Texas admitting privileges bore no relation to physician competency or protecting women's health, because abortions are safe procedures that nearly never require any form of hospitalization. *Given this, what then, was the purpose of the Louisiana law?*

In *June Medical*, the Fifth Circuit engaged in a heightened level of casuistry. The court conjectured that if the Louisiana law went into effect, unlike in Texas, it would not result in the closure of abortion clinics, that driving distances to reach clinics would not increase, and "the cessation of one doctor's practice will affect, at most only 30% of women, and even then not substantially." By analogy, imagine a federal court of appeals claiming that a school segregation law affecting *only* thirty percent of Black students did not contravene *Brown* nor interfere with the constitutional rights of the students involved. Placing the ruling in the context of race exposes the glaring sophistry in the Fifth Circuit's analysis, which is not explained by Supreme Court precedent, the factual record, or regard for the health and safety of the women in Louisiana.

However, one need not study either the lengthy taxonomy of separate-but-equal laws creating and enforcing race-based second class citizenship or my hypothetical (comparing Louisiana's post *Whole Woman's Health* procedural posture to rejecting *Brown*) nor relitigate the shameful horrors of Jim Crow in Louisiana and throughout the American South to recognize the harms it would inflict on Black students in Louisiana if the state were to have challenged school segregation. The vestiges and badges of slavery would be apparent. Indeed, any claims by Louisiana that its version of *separate but equal* was so factually different such that *Brown* has no application or relevance would be farcical. The distinctions are irrelevant when the very principle violates the Constitution. *Brown* did not apply only in Topeka, Kansas.

Thus, Louisiana's abortion provision and its assertion that the Court's findings and ruling in *Whole Woman's Health* did not apply to its

state must be understood not only within its legal contexts (as a rejection of constitutional law and *stare decisis*), but also for its cruel and unusual application. As empirical research shows, a woman is fourteen times more likely to die in childbirth than by having an abortion.²⁷ Sadly, given that “women in Louisiana die more often from pregnancy than in other states,”²⁸ such cruel laws can amount to a death sentence, especially for the women most affected, who happen, in Louisiana, to be poor women, especially women of color. Most notably, the maternal mortality rate in Louisiana is twice the national average.²⁹

Importantly then, during the summer of 2020, the Supreme Court, in a 5–4 decision, voted to overturn the Fifth Circuit’s decision with Chief Justice Roberts casting the key vote in a concurrence with the Court’s four liberal justices. At first glance, *June Medical* appears to be a victory for abortion rights advocates. After all, the case reaffirmed *Whole Woman’s Health*. Furthermore, the case also extended the precedential value in what remains of *Roe v. Wade*’s holding as well as the jurisprudence of *Planned Parenthood v. Casey*. *June Medical* preserves the constitutional right to terminate a pregnancy. The Court’s ruling effectively struck down *all* admitting privileges laws, very likely for good or so long as the Court’s current composition holds.

C. Chief Justice Roberts and the Swing Vote

In *June Medical*, for the first time since joining the Supreme Court, Chief Justice John Roberts voted to uphold an abortion law. He previously cast a dissenting vote in *Whole Woman’s Health*. He aligned with the majority in *NIFLA v. Bacerra*,³⁰ a case striking down a California notification law, requiring among other measures that crisis pregnancy centers (CPC) post information related to state-provided healthcare, including contraception, abortion, and sexually transmitted infection (STI) screenings for poor Californians. He sided with the majority in *Burwell v. Hobby Lobby*,³¹ a case that allowed companies to deny their

²⁷ See, e.g., Elizabeth G. Raymond et. al., *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 *OBSTETRICS & GYNECOLOGY* 215 (2012).

²⁸ See, e.g., Della Hasselle, *Tulane Researcher to Study Why Women in Louisiana Die More Often From Pregnancy Than In Other States*, NOLA.COM (Nov. 6, 2018).

²⁹ Betsy Shepherd, *Homicide is the Leading Cause of Pregnancy Deaths in Louisiana*, WWNO (Feb. 4, 2020).

³⁰ Nat’l Inst. of Family and Life Advocates v. Bacerra, 138 S. Ct. 2361 (2018).

³¹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

employees health-care coverage of contraception based on religious objections of the owners.

However, Chief Justice Roberts took a decidedly different turn in *June Medical*, joining with the Court's four liberal justices, striking down the Louisiana admitting privileges requirement. In addition to his concurrence in *June Medical*, during the 2019 Term Chief Justice Roberts cast decisive votes in *Bostock v. Clayton County*,³² expanding employment protections for LGBT employees; *Calvary Chapel Dayton Valley v. Steve Sisolak Governor of Nevada*,³³ denying an application for injunctive relief to a Nevada church seeking to hold worship services of more than fifty people during the pandemic; and *Department of Homeland Security v. Regents of the University of California*, overturning the Trump administration's rescission of deferred action for childhood arrivals (DACA).³⁴

In the face of these decisions, Chief Justice Roberts drew the ire of conservatives, including Vice President Michael Pence, who claimed that Chief Justice Roberts is "a disappointment to conservatives."³⁵ Specifically singling out the ruling in *June Medical*, Vice President Pence stated the Chief Justice's vote should be understood as a "wake-up call for pro-life voters around the country who understand, in a very real sense, the destiny of the Supreme Court is on the ballot in 2020."³⁶ Senator Ted Cruz accused the Chief Justice of abandoning his "oath."³⁷ Former Arkansas Governor Michael Huckabee wrote on Twitter, "[t]oo bad Chief In-Justice John Roberts is so swamp-infected that he protects casinos & punishes places of worship."³⁸ He urged the Chief Justice to "repent."³⁹ Charlie Kirk, founder of Turning Point USA, claimed the Chief Justice forgot his conservative values and has become a

³² *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

³³ *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (mem.).

³⁴ *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020).

³⁵ Tucker Higgins, *Pence Says Supreme Court Chief Justice Roberts Has Been 'A Disappointment to Conservatives'*, CNBC (Aug. 6, 2020).

³⁶ *Id.*

³⁷ Daniel Politi, *Conservatives Slam "Swamp-Infected" John Roberts After Nevada Church Ruling: "National Disgrace"*, SLATE (July 25, 2020).

³⁸ Michael Huckabee (@GovMikeHuckabee), Twitter (July 25, 2020, 3:11 AM).

³⁹ *Id.*

“national disgrace.”⁴⁰ Other attacks included calls for retirement and impeachment.⁴¹

For all of the vitriol and finger wagging, in the wake of *June Medical*, asserting that Chief Justice Roberts has abandoned his conservative leanings and assertions by liberals that he is the new swing vote on the Court, such speculations on both sides should be tempered given both his judicial record and analysis in the case.

Let me explain: In clarifying his vote, Chief Justice Roberts wrote, “I joined the dissent in *Whole Woman’s Health* and continue to believe that the case was wrongly decided.”⁴² For him, the question before the Court was “not whether *Whole Woman’s Health* was right or wrong, but whether to adhere to it in deciding the present case.”⁴³ Through this lens, Chief Justice Roberts reasoned that a commitment to precedent or “stare decisis [requires the Court], absent special circumstances, to treat like cases alike.”⁴⁴

Because the “Louisiana law impose[d] a burden on access to abortion just as severe as that imposed by the Texas law [and] for the same reasons . . . the Louisiana’s law cannot stand” under the Court’s precedents. Chief Justice Roberts was speaking to a fidelity to precedent. Stated differently, the Chief Justice also wrote, “[u]nder those same principles, I would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation.”⁴⁵ Even more troubling for abortion advocates is this latter point made by the Chief Justice. Given that the Court has never explicitly identified what constitutes a substantial obstacle, it is quite possible that existing or future TRAP laws not yet vetted by the Court, but that are as burdensome or more so than those struck down, could be permissible under Chief Justice Roberts’s approach. In future cases, what district courts, based on a factual record, and what Justices Breyer, Kagan, and Sotomayor find substantially burdensome to the abortion right, may not be to Chief Justice Roberts.

⁴⁰ Politi, *supra* note 37.

⁴¹ *Id.*

⁴² *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Roberts, C.J., concurring).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

Thus, to frame *June Medical* and Chief Justice Roberts's concurrence as advancing the preservation of abortion rights would be a mistake. For example, Chief Justice Roberts dismisses *Whole Woman's Health's* balancing rule. Writing for the majority in *Whole Woman's Health*, Justice Breyer asserted, "[t]he rule announced in *Casey* . . . requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer."⁴⁶ In announcing this rule, the Court recognized a key strategy associated with many existing TRAP Laws: They claim to help pregnant women even while their intention is to undermine abortion access. In other words, states might enact laws with the intention of burdening the abortion right but claim that the legislation intends to help women. By engaging the balancing test articulated in *Whole Woman's Health*, a court would be better informed.

However, citing Justice Antonin Scalia, Chief Justice Roberts stated "[u]nder such tests, 'equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.'"⁴⁷ Simply put, according to Chief Justice Roberts, "nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts."⁴⁸ Troublingly, citing *Gonzales v. Carhart*, Chief Justice Roberts intimated abortion being bound with "medical uncertainty" and as such "state and federal legislatures [have] wide discretion to pass legislation" in such areas.⁴⁹

Moreover, even while Chief Justice Roberts's concurrence clearly articulates the value of precedent, it also discounts or dismisses the value of facts and robust scientific and social-scientific inquiry in balancing future cases. The Chief Justice concluded:

Stare decisis instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law, according to factual findings that are not clearly erroneous. For that reason, I concur in the judgment of the Court that the Louisiana law is unconstitutional.⁵⁰

⁴⁶ *Id.* (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016)).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Finally, four justices issued dissents in *June Medical*: Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh. Each justice articulated grounds to reject the Court's holding and uphold the Louisiana law that substantially impedes abortion rights. Justice Thomas argued that the doctors who brought the suit on behalf of their patients were not injured parties and thus lacked standing and that the Court lacked the authority to strike down "duly enacted law."⁵¹ To this latter point, Justice Thomas's dissent stands in stark contrast with his opinion in *NIFLA v. Becerra*, striking down a "duly enacted" California law that required crisis pregnancy centers to identify their medical licensure status and post information that the state underwrites reproductive health care for poor persons.

Justice Alito also filed a dissenting opinion, in which all dissenters joined in part, claiming that his fellow justices in the majority misused the "doctrine of stare decisis, invoking inapplicable standards of appellate review." Justice Alito claimed that the majority "distorts the record" and abandoned the rule established in *Planned Parenthood v. Casey*. Similarly, Justice Gorsuch argued that the Court exceeded its authority, and Justice Kavanaugh, in his dissent, argued that the Court's review was premature. Accordingly, he would have remanded the case for additional fact-finding.

II. The Anti-Abortion Playbook: Weaponizing *Planned Parenthood v. Casey*

That states have enacted hundreds of anti-abortion laws even in the last two years is not by accident, but rather strategic organizing and lobbying by anti-abortion advocates. Their efforts include drafting model legislation to ban abortion or abortion-related procedures. The recent spate of so-called "heartbeat" legislation is an example.⁵² In 2019, an investigative report revealed that fetal heartbeat legislation "was the outcome of nearly 10 years of calculated effort, starting with a sample bill written in Ohio that was then copied over and over . . . and proposed 26 times before it finally gained traction."⁵³

⁵¹ *Id.* (Thomas, J., dissenting)

⁵² Anne Ryman & Matt Wynn, *For Anti-Abortion Activists, Success of 'Heartbeat' Bills Was 10 Years in the Making*, AZCENTRAL (Dec. 2, 2019).

⁵³ *Id.*

Reporters found that “more than 400 abortion-related bills that were introduced in forty-one states were substantially copied from model bills written by special-interest groups.”⁵⁴ Included among this spate of legislation were bills requiring “women to receive ultrasounds before an abortion procedure, impos[ing] stricter licensing requirements on abortion clinics, and establish[ing] a waiting period before abortions can be performed.”⁵⁵

Thus, one important lesson from *June Medical* is the powerful and strategic deployment of the anti-abortion playbook. This playbook provides a blueprint for legislatures across the country to enact laws that chip away at the abortion right. This results in the repeat play of legislation, creating uniformity among certain states. Legislatures engage the playbook even with legislation already determined unconstitutional by the Supreme Court. (Minnesota legislators proposed an ambulatory-surgical-standards law, which I testified against—also after *Whole Woman’s Health*.) Even while the Court struck down both the Texas and Louisiana laws, placing these laws in social and legal contexts is both necessary and important. A brief discussion related to how these laws emerged (given that *Roe v. Wade* did not impose such conditions and provisions) follows.

The goal of the anti-abortion playbook is to hobble abortion access. One powerful means of doing so is to surreptitiously drive doctors out of their practices, thereby forcing clinics to close, leaving women with virtually no options for safe termination of unintended or unsafe pregnancies. What is clear in *June Medical*, as with the other anti-abortion measures making their way through the courts, is that these TRAP laws have nothing to do with protecting women or their health. Instead they seek preserve the old Jane Crow way of being, which denies women equal opportunity, citizenship, and independence.

The anti-abortion playbook is not that far different than the segregationist playbook. During Jim Crow, sympathetic white business owners were threatened with physical and financial violence for providing Black residents competitive contracts⁵⁶ and wages or renting

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive*, 51 U. CHI. L. REV. 1161 (1984).

them housing.⁵⁷ This was a powerful disincentive for the rare, white business owners interested in contracting with Blacks. In Louisiana, the legislature went so far as to threaten the closures of “racially mixed schools” four years after *Brown*, ultimately to keep Blacks in their place: disenfranchised and second-class citizens.⁵⁸

A. Weaponizing *Planned Parenthood v. Casey*

Both *Whole Woman’s Health* and *June v. Russo* represent a vibrant anti-abortion strategy in the United States that weaponizes the Court’s holding in *Planned Parenthood v. Casey*⁵⁹ against pregnant women. In *Planned Parenthood v. Casey*, the Court considered whether a state can require women who want an abortion to obtain informed consent; wait twenty-four hours; if married, notify their husbands; and, if minors, obtain parental consent, without violating their right to abortion as guaranteed by *Roe v. Wade*.

In a 5–4 decision, the Court in *Planned Parenthood v. Casey* reaffirmed *Roe v. Wade*. However, the Court also upheld most of the Pennsylvania provisions. For example, the justices imposed a new standard to determine the validity of laws restricting abortions. The new standard queries whether the state’s abortion regulation serves the purpose or has the effect of imposing an “undue burden” on a pregnant woman. The Court loosely defined undue burden as a “substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”

The sole provision to fail the *Planned Parenthood v. Casey* undue-burden test was the spousal notification requirement.⁶⁰ With regard to this abortion provision, Justice Sandra Day O’Connor specifically noted domestic violence and marital rape as material matters that could impede a woman’s access to abortion if she were required to notify her husband as a condition of terminating her pregnancy. In consideration of these realistic hindrances on abortion rights, the Court stated, “The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make

⁵⁷ Keeanga-Yamahtta Taylor, *How Real Estate Segregated America*, DISSENT (Fall 2018).

⁵⁸ See K. McKenzie, *The Desegregation of New Orleans Public and Roman Catholic Schools in New Orleans, 1950–1962* 266 (May 2009) (Master’s Thesis, La. State Univ.).

⁵⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁶⁰ *Id.* at 894–95.

abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle.”⁶¹ The Court cautioned, “[w]e must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.”⁶²

Three decades later, the abortion provisions at issue in *Whole Woman’s Health* and *June Medical* reflect the corrosive application of the Court’s plurality decision in *Planned Parenthood v. Casey*, which permitted states to enact laws to regulate abortion *to protect women’s health*, so long as those laws did not impose an undue burden to the right to terminate a pregnancy. As a result, states have expanded the provisions permitted by the Court in 1992 such that in some states waiting periods are now seventy-two hours rather than twenty-four. Doctors in some states must present patently false information to patients prior to performing an abortion procedure, including stating that abortions may cause cancer, infertility, or damage mental health. Some states require that women receive an invasive, medically unnecessary vaginal ultrasound, facilitated by a large wand shaped instrument inserted through the vagina into the uterus prior to an abortion procedure. Some states ban telemedicine to fulfill the counseling or prescribing of medication abortions.

Thus, on the one hand, the Louisiana and Texas laws could be counted among the hundreds of anti-abortion laws proposed and enacted since 2010, when the Tea Party, an ultra-conservative wing of the Republican Party with strong evangelical membership, swept into office. The Tea Party campaigned on a platform that perceived the Republican Party as too moderate on reproductive rights, immigration, and voting. The Tea Party⁶³ coalesced in direct rejection of Obama administration

⁶¹ *Id.*

⁶² *Id.* at 894.

⁶³ Clarence E. Walker, “We’re Losing Our Country”: *Barack Obama, Race & the Tea Party*, 140 DAEDALUS 125 (2011) (“[T]he Tea Party, then, is an extreme right-wing or conservative outgrowth of the Republican Party. Not all conservatives are Tea Partiers, but Tea Partiers are radical conservatives.”).

policies, including the Patient Protection and Affordable Care Act (ACA or *Obamacare*), and its reproductive healthcare mandates.⁶⁴

For example, during debate on the ACA, one of the rising stars in the Tea Party movement, former Minnesota Congresswoman and presidential candidate, Michelle Bachmann, questioned whether provisions making reproductive healthcare more affordable under the law would “mean that someone’s 13-year-old daughter could walk into a sex clinic, have a pregnancy test done, be taken away to the local Planned Parenthood abortion clinic, have their abortion, be back and go home on the school bus?”⁶⁵ Even though Representative Bachmann’s inflammatory claims that with the ACA, “parents will never know what kind of counsel and treatment that their children are receiving,” were clearly erroneous, they resonated with religious fundamentalists and evangelicals who play an increasing, visible role in state and federal politics within the Republican Party.⁶⁶

Anti-abortion laws are not about protecting the health or safety of women and girls or people who can become pregnant. Safety serves as an expedient, duplicitous proxy in these instances. For the most part, male legislators—who dominate the seats in U.S. legislatures—control women’s reproductive healthcare access. In the context of abortion, some cling to their power over women’s bodies with an ironclad grip. Overwhelmingly, these policymakers have no history of providing medical care and no experience in the sciences. State Senator Clyde Chambliss, one of the leaders behind Alabama’s abortion ban informed colleagues, “I’m not trained medically so I don’t know the proper medical terminology and timelines.”⁶⁷ Senator Chambliss’s admitted lack of medical knowledge did not stop him from lobbying for his legislation

⁶⁴ See e.g., Jeremy W. Peters, *The Tea Party Didn’t Get What It Wanted, But It Did Unleash the Politics of Anger*, N.Y. TIMES (Aug. 30, 2019); see also, Angie Maxwell, *How Southern Racism Found A Home in the Tea Party*, VOX (July 7, 2016).

⁶⁵ Cynthia Dizikes, *Bachmann Warns of ‘Sex Clinics’ and Abortions in Schools*, MINNPOST (Oct. 1, 2009), (“[I]n a speech on the House floor yesterday, Rep. Michele Bachmann, R-Minn., claimed that that health-care reform bills would establish school “sex clinics,” which would exclude parents from their children’s health decisions, including abortion.”).

⁶⁶ See e.g. Walker, *supra* note 63.

⁶⁷ Arwa Mahdawi, ‘Consensual Rape’ and ‘Re-implantation’: The Times Lawmakers ‘Misspoke’ on Abortion, GUARDIAN (May 18, 2019).

based on the belief that women have the ability to end their pregnancies on their own, before they are aware of pregnancy.⁶⁸

In recent years, conservative male policymakers have legislated against reproductive health with an outsized authority relative to their knowledge and in ways that are both condescending to women and dangerous. As Missouri enacted a spate of “extreme abortion restrictions” in 2019, including an abortion law that made no exceptions for rape or incest, Republican State Representative Barry Hovis informed lawmakers that most rapes are “he-said-she-said” that are mostly “consensual.”⁶⁹ Some in this cohort champion legislation that denies abortion even in cases of rape and incest.⁷⁰ An Oklahoma lawmaker “defends pregnancy from rape and incest as ‘beauty from ashes.’”⁷¹ Even saving or preserving the life of the pregnant woman does not matter. A representative from Ohio, John Becker, introduced legislation that provided for the reimplantation of an embryo or fetus after ectopic pregnancy even though such a procedure does not exist.⁷² Women’s health and safety are only incidental to what really matters: preserving power.

Brie Shea spells out how their power was strategically executed in 2019 to hollow out abortion rights.⁷³ Nearly four hundred anti-abortion laws were proposed in the first half of 2019 and more than a dozen states debated legislation that would confer constitutional rights to fetuses.⁷⁴ Those same laws would prioritize the “rights” of fetuses over pregnant women. State legislatures introduced a spree of laws criminalizing abortion during the first and second trimesters, claiming to protect fetuses after a heartbeat is detected, notwithstanding the fact that those early pulsations they legislate about have nothing to do with a developed, beating heart.

⁶⁸ Lisa Ryan, *These Statements from Alabama’s Abortion Voice Are Infuriating*, CUT (May 15, 2019).

⁶⁹ Mahdawi, *supra* note 67.

⁷⁰ Emily Wax-Thibodeaux, *In Alabama-Where Lawmakers Banned Abortion for Rape Victims-Rapists’ Parental Rights Are Protected*, WASH. POST (June 9, 2019).

⁷¹ Kristine Phillips, *Oklahoma Lawmaker Defends Pregnancy from Rape and Incest as “Beauty from Ashes,”* WASH. POST (Mar. 25, 2017).

⁷² Kayla Epstein, *A Sponsor of An Ohio Abortion Bill Thinks You Can Reimplant Ectopic Pregnancies. You Can’t*, WASH. POST (May 10, 2019).

⁷³ Brie Shea, *Legislative Low-Lights: Abortion Restrictions Sweep Through GOP-Held Legislatures*, NATION OF CHANGE (Feb. 27, 2019).

⁷⁴ Ryman, *supra* note 52.

Nevertheless, sixteen states introduced legislation seeking to ban abortion after the so-called detection of a fetal “heartbeat.” Mississippi’s governor signed a law banning abortion after six weeks.⁷⁵ The Arkansas legislature enacted the “Cherish Act,” which makes it a felony to perform an abortion after eighteen weeks of fetal gestation,⁷⁶ violation of which could result in six years imprisonment.⁷⁷ Lawmakers in Utah enacted a similar law.⁷⁸ Ohio’s governor signed anti-abortion legislation that provides no exception for rape or incest.⁷⁹ Beyond a doubt, the ability to terminate a pregnancy is under serious threat, and the future of abortion rights secured under *Roe*, *Planned Parenthood v. Casey*, and *Whole Woman’s Health* rests with a deeply divided, partisan, and politicized Supreme Court.

B. Brief Consideration of the Future of Abortion Rights

Roe’s legacy remains uncertain. Sadly, the fragility of reproductive health rights is tied to the composition of the U.S. Supreme Court. And the Court’s current composition of 5 conservative, anti-abortion justices—all of whom are men—exposes the vulnerability of abortion rights specifically and reproductive healthcare generally. In short, serious challenges remain ahead.

However, the vulnerability of reproductive rights is not solely defined by abortion. Sex education is under attack. Affordable contraceptive access is out of reach for millions of Americans. Maternal mortality rates in the U.S. exceed that of dozens of nations, contributing to the high risks of death associated with pregnancy. States have turned to policing women’s pregnancies and criminalizing a range of conduct. Given these fraught conditions, any considerations related to the future of abortion rights should take into account the larger political and social landscape.

In 2018, the Trump administration announced that it would enact new rules barring U.S. medical providers that receive Title X funding

⁷⁵ Elizabeth Nash, *A Surge in Bans on Abortion as Early as Six Weeks, Before Most People Know They Are Pregnant*, GUTTMACHER INST. (Mar. 22, 2019).

⁷⁶ *Legislative Tracker, Arkansas ‘Cherish Act’ (HB 1439)*, REWIRE NEWS GROUP (Nov. 7, 2019).

⁷⁷ *Id.*

⁷⁸ Associated Press, *Utah Passes New Abortion Rules, Could Mean Felony Charges for Doctors and Women*, NBC NEWS (Mar. 13, 2020).

⁷⁹ *Ohio Governor Signs Ban on Abortion After 1st Heartbeat*, AP NEWS (Apr. 11, 2019).

from counselling their patients on abortion or making referrals for the medical treatment. Following through on his policy, the new rule now impacts 1.6 million poor women who receive reproductive health services under the Title X program. In essence, the administration has imposed a gag rule on American doctors, much like that imposed on foreign providers.⁸⁰ With this action, “the Trump administration’s domestic ‘gag rule’ has slashed the Title X national family planning network’s patient capacity in half.”⁸¹ Nearly one thousand clinics providing reproductive health care services such as breast and cervical care screenings, STI testing, and contraception delivery, “approximately one-quarter of all sites that received Title X funding as of June 2019—likely left the Title X network because of the gag rule.”⁸²

Campaigns to undo the hard-fought rights gained by women to govern their bodies and reproductive health now result in the closing of clinics that perform not only abortion but also a plethora of women’s reproductive-health services. Millions of poor women are trapped, living in states where only one abortion clinic remains—such as Missouri, Mississippi, North Dakota, South Dakota, and Wyoming—forced to drive hours, even in the case of life-threatening pregnancies, to arrive at the nearest clinic. Despite the promise of *Whole Woman’s Health v. Hellerstedt*, states continue to erect serious barriers to women’s reproductive autonomy by enacting TRAP laws and other provisions that purport to protect and promote women’s health. Empirically, however, such laws do not promote women’s health. In the United States, even while abortion is safer than pregnancy—a person is fourteen times more likely to die in pregnancy or childbirth than during an abortion—these facts are obscured by anti-abortion legislation.⁸³

For example, in 2017, only months after the Supreme Court struck down ambulatory surgical center requirements as a condition for a clinic’s licensure to provide abortions, Minnesota state legislators sponsored an almost identical bill before that state’s legislature.⁸⁴ However, in Minnesota, according to data from the Minnesota

⁸⁰ Ruth Dawson, *Trump Administration’s Domestic Gag Rule Has Slashed the Title X Network’s Capacity by Half*, GUTTMACHER INST. (Feb. 5, 2020).

⁸¹ *Id.*

⁸² *Id.*

⁸³ Geneva Pittman, *Abortion Safer than Giving Birth: Study*, REUTERS (Jan. 23, 2012).

⁸⁴ S.F. 704, 90th Sess. (Minn. 2017).

Department of Health, complications associated with an abortion are less than 0.01%.⁸⁵ In my written and public testimony before the Minnesota State Legislature Committee on Judiciary and Public Safety Finance and Policy, I emphasized this. A woman in Minnesota is more likely to die from gun death, domestic violence, drug poisoning, homicide, and childbirth than from an abortion. Predictable deaths in Minnesota will not be from an abortion, but rather domestic violence and traumatic injuries from firearms. Firearms are the second leading cause of brain injury deaths in Minnesota.⁸⁶ A woman is more likely to die from a urinary tract infection during pregnancy than an abortion.⁸⁷

Not surprisingly, the rhetoric used to justify the enactment of far-reaching anti-abortion (and increasingly anti-contraception) laws domestically and abroad ignores science, history, sociology, and women's lived lives. When and if the Supreme Court undertakes its next abortion provision challenge, if precedent is not at issue, will they have a vote from Chief Justice Roberts? Will the Chief Justice's vote matter if another conservative justice joins the Court?

That said, there are signs for hope. Members of Congress, in the House of Representatives and Senate have introduced the Women's Health Protection Act. The law was first introduced in 2013 by Representative Judy Chu and Senator Richard Blumenthal. In each subsequent year since the bill was introduced, the legislation has gain support among representatives and senators. The legislation seeks to invalidate TRAP laws and other anti-abortion provisions that do not protect a pregnant person's health. It would ban restrictions on the right to receive abortion services and to deliver abortion services. The legislation would ban laws that force health providers to offer medically inaccurate information; prohibit states from banning abortion prior to viability; repeal laws that require healthcare providers to perform medically unnecessary tests or procedures as part of abortion services; and reject laws that require patients to make medically unnecessary in-person visits in association with abortion.⁸⁸

⁸⁵ MINN. DEP'T OF HEALTH, INDUCED ABORTIONS IN MINNESOTA JANUARY - DECEMBER 2019: REPORT TO THE LEGISLATURE (2020).

⁸⁶ Jeff Hargarten, *Tallying Gun Deaths: One Minnesotan Killed Every Day by Firearms*, MINNPOST (Jan. 8, 2013).

⁸⁷ Pittman, *supra* note 83.

⁸⁸ Women's Health Protection Act of 2019, S. 1645, 116th Cong. (2019).

The Women’s Health Protection Act is promising in that it would restore abortion rights to much of the *Roe* framework. However, critics suggest that the legislation does not go far enough, in that it does not address Hyde Amendment related harms.

Also promising is legislation to repeal the Helms Amendment, introduced by Representative Jan Schakowsky shortly after the Supreme Court announced its opinion in *June Medical*. The Helms Amendment, named for its author the late Senator Jesse Helms, restricts family planning services internationally. Enacted the same year as *Roe*, the Amendment “prohibits the use of U.S. foreign assistance funds to pay for ‘abortion as a method of family planning.’”⁸⁹ Repeal of the Helms Amendment would help millions of girls and women around the world hurt by the legislation that bears the name of a self-proclaimed bigot.⁹⁰

Reproductive health advocates suggest that “[a]lthough Helms should allow for the provision of abortion counselling and referrals, post-abortion care and abortion in cases of rape, incest, and if a woman’s life is in danger, the lack of clarity surrounding the restrictions has led to overinterpretation of the policy as a total ban on abortion-related services and information.”⁹¹ With repeal of the Helms Amendment, advocates hope that the twenty-five million women and girls who have unsafe, illegal abortions each year might be able to receive safe, accessible, reproductive health services.

June Medical v. Russo is an important legal decision in that it reaffirmed *Whole Woman’s Health* and *Planned Parenthood v. Casey*. The case did not expand abortion rights, such as to bring the procedure into greater reach for poor women. However, the case did not further chip away at abortion rights. And for this, many advocates interpret it as a mild victory.

⁸⁹ Press Release, Ipas, Repeal the Helms Amendment. It Will Save Women’s Lives (Dec. 17, 2019).

⁹⁰ Al Kamen, *Helms on Nominee: ‘She’s A Damn Lesbian,’* N.Y. TIMES (May 7, 1993).

⁹¹ Repeal the Helms Amendment, *supra* note 89.

'Sex' and Religion after *Bostock*[†]

Sachin S. Pandya* and Marcia McCormick**

This paper reviews the U.S. Supreme Court's opinion in *Bostock v. Clayton County*.¹ There, the Court held that by barring employer discrimination against any individual "because of such individual's . . . sex," Title VII of the Civil Rights Act of 1964 also bars employment discrimination because an individual is gay or transgender. The paper then speculates about how much *Bostock* will affect how likely lower court judges will read other "sex" discrimination prohibitions in the U.S. Code in the same way, in part based on a canvass of the text of about 150 of those prohibitions. The paper also discusses the religion-based defenses that defendants may raise in response under Title VII itself, the Religious Freedom Restoration Act, and the First Amendment of the U.S. Constitution. And the paper suggests how *Bostock*'s effect will likely vary with the influence of Trump-appointed federal judges.

I. The Opinion

Bostock involved three lawsuits, all of which raised the question of whether Title VII's prohibition on employer sex discrimination covers discrimination against gay or transgender individuals. In *Bostock*, Gerald Bostock worked for Clayton County, Georgia, as a child welfare advocate. When he joined a gay softball league, he was fired. In *Zarda v. Altitude Express*, Donald Zarda worked for Altitude Express as a skydiving instructor in New York City. Days after Zarda mentioned to a female customer that he was gay, he was fired. In *EEOC v. R.G. & G.R. Harris Funeral Homes*, Aimee Stephens, a transgender woman, worked for R.G. & G.R. Harris Funeral Homes in Michigan as a funeral director. Stephens, assigned the male sex at birth and then-presenting as a man, was fired when she told her boss that, after returning

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¹ *Bostock v. Clayton Cty. Bd. of Comm'rs*, 140 S. Ct. 1731 (2020).

from vacation, she would be Aimee and would present as a woman. Bostock and Zarda had sued their former employers, alleging, among other claims, that they had been fired for being gay in violation of Title VII's prohibition on employer sex discrimination. In Stephens's case, the Equal Employment Opportunity Commission (EEOC) sued, alleging that by firing Stephens, Harris Funeral Homes had violated Title VII's prohibition on employer sex discrimination.²

The Supreme Court, in a 6–3 majority opinion by Justice Neil Gorsuch, ruled that by barring employer discrimination against any individual “because of such individual’s . . . sex,” section 703(a)(1) of Title VII also bars employment discrimination because an individual is gay or transgender.³ Justices Samuel Alito and Brett Kavanaugh opined in dissent.⁴

The Court in Bostock described its task as determining “the ordinary public meaning” of section 703(a)(1) when Congress enacted Title VII in 1964.⁵ Both then and now, section 703(a)(1) declares it unlawful for an employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”⁶ Bostock started by assuming *arguendo* that the term “sex” refers “only to biological distinctions between male and female.”⁷ Then, Bostock relied on two other features of section 703(a)(1)'s text.

First, the phrase “because of” denoted “the ‘simple’ and ‘traditional’ standard of but-for causation.”⁸ That test, together with the term “discriminate” (already read to require an intentional difference in treatment) implies that “an employer who intentionally treats a

² Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018); E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

³ Bostock, 140 S. Ct. 1731 (2020)

⁴ *Id.* at 1754 (Alito, J., with whom Thomas, J., joins, dissenting); *id.* at 1822 (Kavanaugh, J., dissenting).

⁵ *Id.* at 1738.

⁶ 42 U.S.C. § 2000e-2(a)(1); Civil Rights Act of 1964, Pub. L. No. 88–352, § 703(a)(1), 78 Stat. 241, 255.

⁷ Bostock, 140 S. Ct. at 1739 (so assuming “because nothing in our approach to these cases turns on the outcome of the parties’ debate [on this issue], and because the employees concede the point for argument’s sake”).

⁸ *Id.*

person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII.”⁹

Second, *Bostock* relied on the references to the “individual” in section 703(a)(1)’s text. On its own, *Bostock* observed, the term “discriminate” might be read to refer to “the employer’s treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole. . . . So how can we tell which sense, individual or group, ‘discriminate’ carries in Title VII?” *Bostock*’s answer: “The statute . . . tells us three times . . . that our focus should be on individuals, not groups: Employers may not ‘fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual*’s . . . sex.’ § 2000e–2(a)(1) (emphasis added).”¹⁰

From this “ordinary public meaning” of section 703(a)(1)’s text, *Bostock* inferred that an employer “violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn’t matter if other factors besides the plaintiff’s sex contributed to the decision. And it doesn’t matter if the employer treated women as a group the same when compared to men as a group.”¹¹

In turn, this meant that section 703(a)(1) required employers to treat “[a]n individual’s homosexuality or transgender status [as] not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹² To show this, *Bostock* ran through many hypotheticals. For example, suppose an employer has two employees, one male and the other female. Both are attracted to men and are otherwise identical. If the employer fires the male employee because he is attracted to men, the employer discriminates against him for traits or conduct it accepts from the female employee. Similarly, if an employer has two employees who are female, but fires one because she was identified as male at birth, but keeps the

⁹ *Id.* at 1740.

¹⁰ *Id.*

¹¹ *Id.* at 1741.

¹² *Id.*

other who was identified as female at birth, the fired “employee’s sex plays an unmistakable and impermissible role in the decision.”¹³ Where “sex” is a but-for cause, it does not matter that other factors may also have played a role in the decision.¹⁴ *Bostock* also stressed that because the ordinary public meaning of section 703(a)(1)’s text was unambiguous, it did not matter that, because of that text’s breadth, Congress in 1964 may not have foreseen that it would apply to protect gay and transgender individuals.¹⁵

II. The *Bostock* Effect

How much will *Bostock* affect what the lower courts do? Justice Alito, for one, wrote that he was “virtually certain” that *Bostock* would have “far-reaching consequences,” citing the “over 100 federal statutes [that] prohibit discrimination because of sex.”¹⁶ We also believe that *Bostock* will make lower courts more likely to read other sex discrimination bans in the U.S. Code to protect gay and transgender individuals. But unlike Justice Alito, we have less confidence and more caveats about *how much* more likely.

Bostock’s core premise is that if a statute focuses on the individual and prohibits sex discrimination as section 703(a)(1) of Title VII does, it necessarily prohibits discrimination against anyone for being gay or transgender. This premise readily extends to bisexual, heterosexual, and cisgender individuals, among others, because discriminating against any such individual on that basis also necessarily makes relevant whether that individual is taken to be a man or a woman.

Yet, *Bostock* depends on concluding that, for any particular U.S. Code ban on sex discrimination, its text, like section 703(a)(1), points to (1) a focus on the individual, not the group, and (2) a relationship between the discrimination and “sex” must satisfy no more than the traditional but-for cause standard. That means that *Bostock* has escape hatches: Find instead that the statutory text indicates a focus on the group and *not* the

¹³ *Id.* at 1741–42.

¹⁴ *Id.* at 1742. On this point, *Bostock* argued that its reasoning was consistent with Title VII precedent. *Id.* at 1743–44 (discussing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702 (1978); and *Oncale v. Sundowner Offshore Servs., Inc.* 523 U.S. 75 (1998)).

¹⁵ *Bostock*, 140 S. Ct. at 1749–52.

¹⁶ *Id.* at 1778 (Alito, J., dissenting).

individual or find instead that the statutory text indicates something more stringent than but-for cause.

Alternatively, a judge could find that the text's "ordinary public meaning" is ambiguous on these two issues, and then turn to extra-textual considerations, such as substantive canons of construction, deference doctrines, or arguments about statutory purpose, to reach a different conclusion.¹⁷ Suppose judges can plausibly disagree (with negligible risk of professional embarrassment) about whether a sex discrimination ban's text is ambiguous on these two issues. A judge may sincerely think the text is ambiguous in this way. A judge may deliberately call it ambiguous as a pretext to get *Bostock* out of the way to rule according to that judge's ideological or other preferences. Or a judge, though trying to set aside those preferences, may unwittingly tend to take that text as ambiguous in cases where doing so lines up with those preferences. In any case, there is no accepted objective way to test whether a judge has erred in declaring the text ambiguous enough,¹⁸ apart from at least five Supreme Court justices saying so.

Accordingly, we expect *Bostock's* effect to vary in part with how hard it is for lower court judges to write an opinion concluding that the statute's text unambiguously focuses on the individual or the group *and* requires no more than but-for cause. Sometimes, the text plausibly cuts only one way. For example, consider the Title VII sex discrimination provisions not at issue in *Bostock*. Much as they denote a focus on the individual in section 703(a)(1), the terms "any individual" and "such individual's" function in the same way in section 703(a)(2),¹⁹ as do similar uses of "any individual" and close variants under section 703's

¹⁷ Compare *Bostock*, 140 S. Ct. at 1749 (Title VII's legislative history, though relevant for reading "ambiguous statutory language," has "no bearing" here, because "no ambiguity exists about how Title VII's terms apply to the facts before us") with *id.* at 1763 (Alito, J., dissenting) ("The Court's excuse for ignoring everything other than the bare statutory text is that the text is unambiguous and therefore no one can reasonably interpret the text in any way other than the Court does. . . . [T]o say that the Court's interpretation is the only possible reading is indefensible.").

¹⁸ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134–2144 (2016); Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. OF LEGAL ANALYSIS 257 (2010).

¹⁹ 42 U.S.C. § 2000e-2(a)(2).

parallel provisions for employment agencies,²⁰ labor organizations,²¹ training programs,²² among others.²³ What’s more, textualism lets judges rely on semantic canons of construction, including the one that says that the same terms within the same Act should be read to carry the same meaning.²⁴ Thus, because *Bostock* reads section 703(a) (1) to focus on the individual, lower courts are likely to read the similar provisions in the rest of section 703 in the same way. After all, in the few instances in section 703 when it intended to refer to groups, Congress used the term “group.”²⁵

III. Applying *Bostock* outside Title VII

What about *Bostock*’s effect on “sex” discrimination provisions elsewhere in the U.S. Code?²⁶ To roughly sketch that effect, we started with Appendix C of Justice Alito’s dissent in *Bostock*. There, Justice Alito purported to list the “over 100 federal statutes [that] prohibit discrimination because of sex” to support his view that “[w]hat the Court has done today—interpreting discrimination because of ‘sex’ to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences.”²⁷

Unfortunately, because Appendix C does not indicate how Justice Alito or his staff identified the statutory provisions he listed, we could not reproduce it independently. For convenience, instead of taking our own census of the U.S. Code’s sex discrimination provisions, we relied on Appendix C anyway. But we focused on the statutory subsection, not the statutory section, as the unit of analysis. Thus, where Appendix C cited a provision that contained a sex discrimination prohibition

²⁰ See *id.* § 2000e-2(b).

²¹ *Id.* § 2000e-2(c)(1) (“any individual”); *id.* § 2000e-2(c)(2) (“any individual”, “such individual’s”); *id.* § 2000e-2(c)(3) (“an individual”).

²² *E.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

²³ *E.g.*, *id.* § 2000e-2(f) (exemption for actions “with respect to an individual who is a member of the Communist Party of the United States”).

²⁴ *E.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995).

²⁵ 42 U.S.C. § 2000e-2(j) (not requiring employer to grant “preferential treatment to any individual or to any group”); *id.* § 2000e-2(n)(2)(B) (“members of a group”).

²⁶ *E.g.*, *Adams ex. rel. Kasper v. School Board*, 968 F.3d 1286, 1305 (11th Cir. 2020) (applying *Bostock* to Title IX of the Civil Rights Act, 20 U.S.C. § 1681(a)).

²⁷ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting); see *id.* at 1791–1796 (Appendix C).

in more than one of its subsections, we treated each subsection as a separate observation. Then, we further identified (1) the text denoting the requisite relationship between the discriminatory conduct and sex (e.g., “because of . . . sex,” “on the basis of . . . sex”); and (2) the text denoting who it protected from illegal discrimination (e.g., “individual,” “employee”).

The resulting dataset initially consisted of 187 observations. We dropped provisions that Justice Alito had cited in Appendix C that used the term “gender” rather than “sex.” We screened out provisions that, on their own, were statutory congressional findings, or statements of policy or principles, on the premise that, though useful for interpretation, they alone carry no independent force of law. We also dropped provisions that simply incorporated by reference another sex discrimination provision in the U.S. Code, in state law, or more generally referred to other laws that prohibited sex discrimination. We also excluded Title VII, section 703. The resulting final dataset had 151 observations.

Table 1 summarizes how the text in these provisions denote the relationship between discriminatory conduct and sex.

Table 1

| <u>Text Type</u> | <u>Frequency</u> |
|---|------------------|
| on the basis of . . . sex | 57 |
| on the ground of . . . sex | 19 |
| because of . . . sex | 18 |
| based on . . . sex | 8 |
| on account of . . . sex | 8 |
| on the grounds of . . . sex | 7 |
| without regard to . . . sex | 6 |
| on the basis of race, sex, or ethnic groups | 4 |
| based upon . . . sex | 3 |
| because of the borrower’s sex | 3 |
| by reason of . . . sex | 2 |
| of a particular . . . sex | 2 |
| because of the person’s sex | 1 |
| entirely neutral as to the . . . sex . . . of | 1 |
| made or based upon difference in . . . sex | 1 |
| not solely be based on the . . . sex . . . of | 1 |

| | |
|--|---|
| of a specified . . . sex | 1 |
| on account of his or her . . . sex | 1 |
| on account of the . . . sex . . . of | 1 |
| on the basis of . . . sex . . . of | 1 |
| on the basis of . . . sex, opposite sex | 1 |
| on the basis of that person’s . . . sex | 1 |
| shall not consider the . . . sex . . . of | 1 |
| take into account . . . the . . . sex . . . of | 1 |
| take sex into account | 1 |
| without distinction as to . . . sex | 1 |

As Table 1 suggests, most of the sex discrimination provisions in the U.S. Code use language similar to “because of . . . sex” in section 703(a)(1) of Title VII. In turn, *Bostock* treats “because of” in section 703(a)(1) to mean “by reason of” or “on account of,” all equivalent ways in which Congress can denote the traditional but-for cause standard. *Bostock* itself also described its holding in a way that suggests that “because of such individual’s . . . sex” and “on the basis of . . . sex” are interchangeable.²⁸ Thus, *Bostock* makes it more likely that lower courts will read the text of the other sex discrimination statutes in the same way that *Bostock* read section 703(a)(1) of Title VII.

Bostock, however, also pointed to how different statutory language might have led the Court to infer differently. For example, Congress might have added the word “solely” to “indicate that actions taken ‘because of’ the confluence of multiple factors do not violate the law” or used the phrase “‘primarily because of’ to indicate that the prohibited factor had to be the main cause of the defendant’s challenged employment decision.”²⁹

This part of *Bostock* makes it easier for judges reading other sex discrimination statutes with these features to distinguish *Bostock* away. For example, when Congress immunized owners of ammonium nitrate facilities from civil liability for refusing to sell ammonium nitrate to

²⁸ *Bostock*, 140 S. Ct. at 1753 (“today’s holding—that employers are prohibited from firing employees *on the basis of* homosexuality or transgender status”) (emphasis added).

²⁹ *Id.* at 1739 (citations omitted).

“any person” based on a good-faith “reasonable belief” that the person wants to use it “to create an explosive device to be employed in an act of terrorism,” Congress added that the required “reasonable belief . . . may not *solely* be based on the . . . sex . . . of that person.”³⁰ Because of the word “solely” in this provision, a lower court is now more likely to find the requisite “reasonable belief” even though the owner in part refused to sell because the person was gay or transgender.³¹

Bostock also turned on section 703(a)(1)'s focus on the individual, not the group. Accordingly, Table 2 summarizes how the text of the other sex discrimination provisions in the U.S. Code denote the type of actors to be protected from sex discrimination.

Table 2

| <u>Type Protected</u> | <u>Frequency</u> |
|---------------------------|------------------|
| Person | 49 |
| Unspecified | 20 |
| Membership | 11 |
| Director, Officer | 7 |
| Individual | 7 |
| Students | 4 |
| Borrower | 3 |
| Children | 3 |
| Citizen | 3 |
| Persons | 3 |
| Applicant | 2 |
| Borrower, Applicant | 2 |
| Employee | 2 |
| Employees | 2 |
| Individuals | 2 |
| member, participant | 2 |
| Members | 2 |
| Office in the Corporation | 2 |
| Officer, Employee | 2 |

³⁰ 6 U.S.C. § 488f (emphasis added).

³¹ For a provision with text cutting the other way, see 28 U.S.C § 994(d) (US Sentencing Commission “shall assure that the guidelines and policy statements are entirely neutral as to the . . . sex . . . of offenders”) (emphasis added).

| | |
|---|---|
| Amateur Athletes, Coaches, Trainers, Managers, Administrators, and Officials | 1 |
| Applicant Households | 1 |
| Child, Family of the Child | 1 |
| Citizens | 1 |
| Defendant, Victim | 1 |
| Employees, Applicants | 1 |
| Employees, Students | 1 |
| Individual, Position Held by Individual | 1 |
| Individual, Officer, Employee, Agent, Director | 1 |
| Individual, Person | 1 |
| Offenders | 1 |
| Officer, Employee, Applicant | 1 |
| People | 1 |
| Person, Persons | 1 |
| Person, Small Business Concern | 1 |
| Person, Class of Persons | 1 |
| Person; Owner, Officer, Director, or Employee of Such Person | 1 |
| Personnel | 1 |
| Refugees | 1 |
| Residents | 1 |
| Sources of Qualified Applicants | 1 |
| Staff Position | 1 |
| Visa Refusals | 1 |

As Table 2 suggests, these sex discrimination provisions in the U.S. Code vary more in the way the text identifies who is protected than that text denotes the causation standard.

First, some provisions protect an “individual” from sex discrimination, either as a direct object (discriminating against “any individual”) or as the subject of the sentence (no “individual” shall be discriminated against). *Bostock* stressed section 703(a)(1)’s uses of the word “individual” as “tell[ing] us . . . that our focus should be on

individuals, not groups."³² And *Bostock* suggested how different statutory text might have led the Court to infer otherwise.³³

But not every textual difference matters. For example, we bet that lower courts will read *Bostock* as coming out no differently even if section 703(a)(1) had used the plural "individuals" instead of the singular "individual." The reason: The Dictionary Act provides that, for any "Act of Congress," unless "context" indicates otherwise, "words importing the singular include and apply to several persons, parties, or things" and "words importing the plural include the singular."³⁴ In turn, the term "context" in the Dictionary Act has been read to mean "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts."³⁵ As a result, when *Bostock* reasoned that section 703(a)(1) focused on the individual, not the group, it would not have taken the plural form "individuals" as indicating a focus on the group over the individual. Besides, the context—here, the other words in section 703—cut the other way. In section 703, when Congress wanted to refer to the group, it used the word "group."³⁶

Second, most of the sex discrimination provisions in the U.S. Code protect any "person" from sex discrimination, either as a direct object (discriminating against "any person") or as the subject of the sentence ("No person" shall be discriminated against). In the U.S. Code, the default reading of "person" requires focusing on the individual *and* on some kinds of non-corporeal entities that law treats, in some measure, as if they act in the world as an individual could. Again, the reason is the Dictionary Act, which provides that, for any "Act of Congress, unless context indicates otherwise," the word "'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."³⁷ Missing from this list: the term "group," which Congress has used when defining "person"

³² *Bostock*, 140 S. Ct. at 1740.

³³ *Id.* at 1740–41.

³⁴ 1 U.S.C. § 1.

³⁵ *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993).

³⁶ See *supra* note 25.

³⁷ 1 U.S.C. § 1.

elsewhere in the U.S. Code.³⁸ Here, in the context of sex discrimination, the word “person” squarely focuses on the individual, not the group, absent more textual cues to the contrary.³⁹

Third, in a few subsections in Title 12 of the U.S. Code, sex discrimination provisions exist that use the word “groups.” For example, in disposing of assets as an appointed conservator or receiver, the Federal Deposit Insurance Corporation (FDIC) must act in a manner that “prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers.”⁴⁰

Does this provision focus on the group and not the individual? If “race,” “sex,” and “ethnic” are adjectives that all modify “groups,” then perhaps the statute focuses on groups alone. If so read, a lawyer could wield *Bostock* to make it less likely that this sex discrimination provision covers gay or transgender individuals, because it covers sex groups, and thus can be read to let the FDIC treat actual and prospective offerers comparably as groups of men and women. As writers of the English language, we are skeptical of this reading. It implies that “race” here is an adjective, while ordinary English usage prefers “racial” (adjective) to “race” (noun) when describing a group (“racial group” over “race group”). Besides, we can’t find the phrase “sex groups” in the current U.S. Code or, for that matter, in any volume of the Statutes at Large.⁴¹ On the other hand, if only “ethnic” modifies “groups” (“ethnic groups,” a phrase Congress has used elsewhere⁴²), then the subsection’s text alone

³⁸ E.g., 7 U.S.C. § 2702(b); 12 U.S.C. § 3752(7); 15 U.S.C. § 8702(15); 22 U.S.C. § 2797c(a)(8)(A); 22 U.S.C. § 8531(4)(a); 42 U.S.C. § 2014(s); 52 U.S.C. § 30101(11).

³⁹ While whomever can disfavor someone because of the sex assigned to that human being, in ordinary English-language writing, no one typically assigns companies and corporations a sex. Apple, Inc. and ExxonMobil are neither male nor female. Still, Congress sometimes writes sex discrimination provisions also to protect a non-corporeal entity, as well as human beings related to a non-corporeal entity, in some way. E.g., 50 U.S.C. § 4842(a)(1)(B) (requiring regulations prohibiting any “United States person” who, intending to support a foreign country’s boycott against any country “friendly” to the U.S., discriminates “against any United States person on the basis of . . . sex . . . of that person or of any owner, officer, director, or employee of such person”); 15 U.S.C. § 633(b)(1) (Small Business Administration “shall not discriminate on the basis of sex . . . against any person or small business concern applying for or receiving assistance from the Small Business Administration”).

⁴⁰ 12 U.S.C. § 1821(d)(13)(E)(iv).

⁴¹ We searched the Westlaw database of the current U.S. Code Annotated (“TE(‘sex groups’)”) and the Hein Online database of all the volumes of the U.S. Statutes at Large (“sex groups”). Both searches yielded zero results.

⁴² E.g., 42 U.S.C. § 247b-4(c)(2) (“racial and ethnic groups”).

leaves it unclear whether to focus on the individual only, the group only, or both depending on case context or statutory purpose.

Fourth, what about provisions that identify the direct object of the illegal sex discrimination by a more particular category, such as “employee,” “applicant,” “member” or seeker of “membership,” “students,” or “citizen”? Again, context matters a lot. For example, in Title 36 of the U.S. Code, Congress created some national organizations for military veterans and, in so doing, often provided that the requirements for “membership” in, or to serve as “director” or “officer” of, such an organization “may not discriminate on the basis of . . . sex.”⁴³ Writers of English would typically use those words to refer to how an organization treats someone who wanted to join it, or to serve as one of its directors or officers—a focus on the individual. Accordingly, a lawyer wielding *Bostock* can credibly argue that a court must read “the basis of . . . sex” to cover otherwise eligible gay and transgender individuals who want to join, say, the Air Force Sergeants Association. If other textual cues indicate that this sex discrimination provision focuses on the group, however, then a judge is more likely to distinguish *Bostock* and read the statute to let the Association disfavor any particular individual who wants to join for being gay or transgender, so long as that Association treats men and woman comparably as groups when deciding who gets in.⁴⁴

Finally, what about a provision that does not identify who it protects against sex discrimination (labeled in Table 2 as “unspecified”)? *Bostock*’s effect on these provisions is simply uncertain. We expect that lawyers who want to wield *Bostock* will search for words surrounding the provisions—be they in the same section, related sections, or in provisions of different yet related Acts of Congress—to present as a basis for inferring a focus on the individual, not the group alone. In turn, *Bostock*’s effect depends not only on those surrounding words, but also how likely a court is inclined to declare the statutory text ambiguous nonetheless,

⁴³ *E.g.*, 36 U.S.C. §§ 20204(b), 20205(c) (Air Force Sergeants Association).

⁴⁴ *Cf.* 36 U.S.C. § 220522(a)(9) (an amateur sports organization is eligible to be recognized as the national governing body only if governing board “members are selected without regard to . . . sex, except that, in sports where there are separate male and female programs, it provides for reasonable representation of both males and females on the board of directors or other governing board”).

and if so, all the other statutory interpretation arguments to which a court may then resort, either on its own or at a lawyer’s urging. Still, if a court concludes, for whatever reason, that the provision focuses on the individual, then, thanks to *Bostock*, a court is more likely to read that sex discrimination provision to also cover gay and transgender individuals.

IV. Religion Defenses after *Bostock*

After *Bostock*, some employers are more likely to raise religion-based defenses to Title VII liability for discriminating against gay or transgender individuals. In dicta, *Bostock* pointed to three legal sources for such defenses: Title VII itself, the Religious Freedom Restoration Act, and the First Amendment.⁴⁵ Let’s consider each in turn.

A. Title VII: Religion Organization Exemptions

Title VII affords several exemptions from liability, two of which cover employers who are religious organizations. Under section 702(a), Title VII does not apply to any “religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with” that organization’s activities.⁴⁶ And under section 703(e), Title VII does not declare it illegal for an educational institution “to hire and employ employees of a particular religion” if it is at least substantially “owned, supported, controlled, or managed by a particular religion” or a particular religious organization, or if the educational institution’s “curriculum . . . is directed toward the propagation of a particular religion.”⁴⁷ In other words, religious organizations, and the schools close enough to them, need not fear Title VII liability for discriminating against an individual because that individual is of a different religion.⁴⁸

After *Bostock*, if a gay or transgender individual brings an otherwise winning Title VII sex discrimination claim, how likely is an employer to escape Title VII liability with one of these exemptions? In his *Bostock*

⁴⁵ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

⁴⁶ 42 U.S.C. § 2000e-1(a).

⁴⁷ *Id.* § 2000e-2(e)(2).

⁴⁸ Section 703(e) of Title VII also exempts any employer, religious organization or not, that discriminates “on the basis of . . . religion . . . in those certain instances where religion . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.” *Id.* § 2000e-2(e)(1).

dissent, Justice Alito worried that these exemptions, as read by the lower courts, “provide only narrow protection.”⁴⁹

A lot initially depends on whether the defendant-employer qualifies as “a religious corporation, association, educational institution, or society” or as a school closely affiliated with one. To decide this, lower courts have pointed to, among other factors, whether the employer is a non-profit or for-profit entity.⁵⁰ If an employer does qualify as a religious organization, then the exemptions are expansive, because Title VII defines “religion” to include “all aspects of religious observance and practice, as well as belief,”⁵¹ and because section 702(a) applies even if the employee performed only secular activities.⁵² For example, courts have held that Title VII exempts a religious organization that fires an employee for becoming pregnant after extramarital sex, provided that organization prove that it fired her because extramarital sex is inconsistent with its “particular religion.”⁵³ Thus, religious employers are likely to invoke these exemptions to defeat Title VII sex discrimination liability, arguing that the employer’s “particular religion” requires conforming gender expression to the sex assigned at birth or limiting sexual intimacy to the opposite sex, and thus discriminating against a gay and transgender individual because of religion.

B. Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA) may provide another defense in some cases. Under RFRA, the federal government “shall not substantially burden a person’s exercise of religion” unless the

⁴⁹ *Bostock*, 140 S. Ct. at 1781 (footnote omitted).

⁵⁰ *E.g.*, *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n*, 503 F.3d 217, 226 (3d Cir. 2007); *see also* EEOC Compliance Manual § 12-II(C)(1)(2020).

⁵¹ 42 U.S.C. § 2000e(j).

⁵² Compare Civil Rights Act of 1964, Pub. L. No. 88–352, § 702, 78 Stat. 241, 255 (“of its religious activities”) with Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, § 3, 86 Stat. 103, 103–04 (amending section 702: “of its activities”).

⁵³ *See generally* Darian B. Taylor, *Validity, Construction, and Application of Civil Rights Act of 1964* (42 U.S.C.A. §§ 2000e-1(a), 2000e-2(e)(2)) *Exempting Activities of Religious Organizations from Operation of Title VII Equal Employment Opportunity Provisions*, 6 A.L.R. Fed. 3d Art. 6, §§ 19–20 (2015 & Supp. 2020) (compiling cases).

government shows that applying “the burden to the person” furthers a “compelling governmental interest” and is the “least restrictive means” to further that interest.⁵⁴ The term “person” in RFRA includes a closely-held for-profit corporation.⁵⁵

In *Bostock*, the Court noted in dicta that because RFRA “displac[es] the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases.”⁵⁶ After *Bostock*, suppose a gay or transgender individual brings an otherwise winning Title VII sex discrimination claim. In response, the defendant-employer, a corporation, raises a RFRA defense, arguing that Title VII “substantially burden[s]” its exercise of “religion” by imposing civil liability for acting consistent with a religious motivation not to employ anyone who is gay or transgender. How likely is that RFRA defense to prevail?

In federal court, such a RFRA defense is unavailable where the federal appellate court has concluded that RFRA does not apply unless the government is a party to the litigation.⁵⁷ RFRA, by its terms, only applies where “[g]overnment” substantially burdens religious exercise.⁵⁸ RFRA makes the “government” bear the burdens of “going forward with the evidence and of persuasion” in showing that the challenged burden on religious exercise is the least restrictive means of furthering a compelling governmental interest,⁵⁹ which the government cannot do if it is not a party to the lawsuit.⁶⁰ Moreover, Congress enacted RFRA to restore a Free Exercise Clause doctrine that had only applied to burdens

⁵⁴ 42 U.S.C. § 2000bb-1(a), (b).

⁵⁵ *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 719 (2014).

⁵⁶ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (citing 42 U.S.C. § 2000bb-3). The *Bostock* and *Zarda* defendants had not raised RFRA, and the defendant in *Harris Funeral Homes* had not sought review of the Sixth Circuit’s ruling on its RFRA defense. *See id.*

⁵⁷ *Listecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 736–37 (7th Cir. 2015); *General Conference Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010). *But see* *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006) (RFRA defense available in ADEA lawsuit brought by private plaintiff, because ADEA was also “enforceable” by EEOC); *id.* at 114–15 (Sotomayor, J., dissenting); and *Rweyemamu v. Cote*, 520 F.3d 198, 204 n.2 (2d Cir. 2008) (dicta disfavoring RFRA analysis in *Hankins*).

⁵⁸ 42 U.S.C. § 2000bb-1(a).

⁵⁹ *Id.* §§ 2000bb-1(b), 2000bb-2(3).

⁶⁰ *Hankins*, 441 F.3d at 114–15 (Sotomayor, J., dissenting).

on religious exercise imposed by the government.⁶¹

What then did *Bostock* mean by noting in dicta that RFRA “might supersede Title VII’s commands in appropriate cases” (citing 42 U.S.C. § 2000bb-3)? Perhaps *Bostock* was referring to *Harris Funeral Homes*, where the defendant had litigated a RFRA defense that it could raise because a federal government agency (the EEOC) had initiated the Title VII lawsuit against it.⁶² If so, the citation to 42 U.S.C. § 2000bb-3 simply reminds the reader that RFRA “applies to all Federal law, and the implementation of that law, whether statutory or otherwise,”⁶³ including federal government enforcement of Title VII by the EEOC.⁶⁴

Alternatively, perhaps Justice Gorsuch cited to 42 U.S.C. § 2000bb-3 to encourage lawyers to argue in future cases that, because RFRA applies to the “implementation” of “all Federal law,” a RFRA defense is available even in a Title VII lawsuit with only private parties.⁶⁵ This reading, however, raises many puzzles, including whether such a RFRA defense exists if that Title VII lawsuit is in state court⁶⁶ and why RFRA defines

⁶¹ See 42 U.S.C. § 2000bb(b) (RFRA’s purposes: “(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened *by government*”) (emphasis added).

⁶² *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 584 (6th Cir. 2018) (“[I]f Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit.”).

⁶³ 42 USC § 2000bb-3(a); see *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (42 U.S.C. § 2000bb-3(a) covers “regulations implementing the [Affordable Care Act] contraceptive mandate”).

⁶⁴ *Hankins*, 441 F.3d at 115 (Sotomayor, J., dissenting) (“Read in conjunction with the rest of the statute, [42 U.S.C. § 2000bb-3] simply requires courts to apply RFRA ‘to all Federal law’ in any lawsuit to which the government is a party.”).

⁶⁵ Shrutti Chaganti, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 357 (2013) (reasoning that government action includes the imposition of legal rules “to be enforced by private plaintiffs,” citing, for example, *New York Times v. Sullivan*, 376 U.S. 254 (1964); that RFRA applies to the “implementation” of federal law; and therefore that “private plaintiffs suing over defendants’ exercises of religion are enforcing, or ‘implement[ing],’ a government-imposed burden on religion”) (footnote omitted).

⁶⁶ See *City of Boerne v. Flores*, 521 U.S. 507 (1997) (declaring RFRA unconstitutional as applied to States); Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, § 7(a)(1), (b) 114 Stat. 803, 806 (amending RFRA by striking “a State, or a subdivision of a State” in definition of “government” and striking “and State” in 42 U.S.C. § 2000bb-3(a)).

“government” to include a “person” only if that person is “acting under color of law.”⁶⁷

Assuming a Title VII defendant can raise a RFRA defense, it must show that Title VII or its implementation “substantially burdens” the defendant’s conduct; that conduct is an “exercise of religion”; and the religious motivation for that conduct is sincerely held. How a RFRA defense to Title VII would fare on the merits is unclear. Past RFRA litigation tells us little. From July 2014 up through 2018, the federal district courts decided 115 RFRA claims on the merits, but only seven of those were employment cases (about six percent, with plaintiffs winning in four and losing in three).⁶⁸ Still, RFRA’s definition of “religion” is broad, providing that religious “exercise” need not be “compelled by, or central to, a system of religious belief.”⁶⁹ Accordingly, we expect the lower courts to accept most assertions that the conduct at issue is an exercise of “religion.” In contrast, taking the case law as a guide, we expect more disputes among litigants over RFRA’s “substantial burden” and whether imposing it is the “least restrictive means” to advance a “compelling” government interest.

To illustrate, consider the fate of the RFRA defense in *Harris Funeral Homes*.⁷⁰ The defendant funeral home was a for-profit corporation that Thomas Rost owned and operated. In the Sixth Circuit, the funeral home argued that Title VII, as applied to prohibit it from firing Ms. Stephens, was a “substantial burden” on Rost’s religious exercise of running the funeral home to serve grieving people.⁷¹ The Sixth Circuit considered and rejected two alleged substantial burdens.

First, Rost did not suffer a “substantial burden” on the ground that letting Stephens wear a skirt-suit to work would distract grieving families and thereby obstruct Rost’s ability to serve them. This assumed that customers would perceive Stephens as a man in woman’s attire and be disturbed by a transgender funeral director. It was, however, at least a “material question of fact as to whether [Rost’s] clients would actually

⁶⁷ See 42 U.S.C. § 2000bb-2(1),(2) (“any branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States” or the District of Columbia, Puerto Rico, and the federal territories and possessions).

⁶⁸ Meredith Abrams, *Empirical Analysis of Religious Freedom Restoration Act Cases in the Federal District Courts Since Hobby Lobby*, 4 COLUM. HUM. RTS. L. REV. ONLINE 55, 71–72 tbl. 1–2 (2019).

⁶⁹ See 42 U.S.C. § 2000bb-2(4).

⁷⁰ *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 585–597 (6th Cir. 2018).

⁷¹ *Id.* at 585. No party disputed that Rost’s religious motivation was sincere. *Id.*

be distracted.”⁷² More importantly, as a matter of law, “a religious claimant cannot rely on customers’ presumed biases” to establish a RFRA substantial burden.⁷³

Second, Rost did not suffer a “substantial burden” on the ground that Rost had to either provide female attire to Stephens or let her wear female attire to work—which he believed to be religiously forbidden—or go out of business. Although Rost “currently provides his male employees with suits and his female employees with stipends to pay for clothing,” no law or religious motivation required Rost to provide that benefit, and the record did not show that benefit was “necessary to attract workers.”⁷⁴ Moreover, the court accepted as sincere Rost’s belief that he would “violate God’s commands” by letting Stephens “represent herself as a woman,” “because it would make him ‘directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.’” Nonetheless, the court found no RFRA “substantial burden” as a result, because as a matter of law, “bare compliance with Title VII—without actually assisting or facilitating Stephens’s transition efforts—does not amount to an endorsement of Stephens’s views.”⁷⁵

Finally, the Sixth Circuit held that, in any case, the EEOC showed that any such “substantial burden” furthers a “compelling governmental interest” and is the “least restrictive means” to further that interest. If the EEOC could not enforce Title VII against the funeral home for firing Stephens, it could not advance its compelling interest of combating workplace discrimination.⁷⁶ And Title VII liability was the least restrictive means to enforce that compelling interest here. For example, neither a gender-neutral dress code, nor an “equally-burdensome” sex-specific dress code, sufficed as lesser restrictive alternatives, because Rost’s

⁷² *Id.*

⁷³ *Id.* at 586–87. Cf. 29 CFR § 1604.2(a)(1)(iii), (2) (EEOC guideline that, unless necessary for “authenticity or genuineness . . . e.g., an actor or actress,” Title VII’s “bona fide occupational qualification” exception for “sex” discrimination does not apply to “refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers”).

⁷⁴ *Harris Funeral Homes*, 884 F.3d at 587–88.

⁷⁵ *Id.* at 590 (citation omitted).

⁷⁶ *Id.* at 591–93.

sex-stereotyping applied not just to what Stephens wanted to wear, but Stephens’s appearance and behavior more generally.⁷⁷

C. The First Amendment and the Ministerial Exception

The Religion Clauses of the First Amendment bar applying employment discrimination statutes “to claims concerning the employment relationship between a religious institution and its ministers.”⁷⁸ After *Bostock*, suppose a gay or transgender individual brings an otherwise winning Title VII sex discrimination claim, and the defendant-employer raises this “ministerial exception” defense to defeat Title VII liability. How likely is that defense to prevail?

In short, because the Court has adopted a case-by-case approach to the issue of who counts as a “minister,” a lot depends on how easily lawyers and judges can analogize to the case characteristics of prior rulings on the ministerial exception defense. Relevant factors include whether the entity and the potential minister considered the person a minister, whether that person had a distinct role within that entity related to its religious mission, how much religious training the role required, and whether the person’s job duties included conveying the entity’s religious message or carrying out its religious mission. The title “minister” and its equivalents, and the associated formal religious training, are not dispositive. For example, in *Our Lady of Guadalupe School v. Morrissey-Berru*, the U.S. Supreme Court wrote that the ministerial exception applied to “employment disputes involving teachers at religious schools who are entrusted with the responsibility of instructing their students in the faith,” thus apparently increasing that defense’s scope.⁷⁹

V. The Trump Judges

Bostock’s effect depends not only how lower court judges read *Bostock* and the text of sex discrimination statutes, but also on those judges’ ideological and personal preferences about gender, sexuality,

⁷⁷ *Id.* at 593–94.

⁷⁸ *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U. S. 171, 188 (2012).

⁷⁹ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

and religion. As best as can be measured, judge ideology matters to case outcomes, though it is often hard to disentangle how much it matters relative to other motivations or influences.⁸⁰

In recent years, federal judges have been more openly appointed based on their apparent ideological preferences, on the premise that those preferences will substantially affect how those judges will rule. As of September 2020, President Trump had appointed over 200 judges to serve on the main Article III federal courts (the U.S. Supreme Court, the thirteen U.S. Courts of Appeal, and the federal district courts), or about a quarter of the active federal judges on those courts.⁸¹ Most Trump appointees to the federal appellate courts had ties to the Federalist Society and were chosen as part of a process that weighted heavily their conservative bona fides.⁸²

If those lower court judges' ideological preferences include disapproval of individuals who depart from heterosexual or cisgender norms, how much will that affect what those judges do with *Bostock*?⁸³

To illustrate, consider Stuart Kyle Duncan, appointed in 2018 by President Trump to the federal court of appeals for the Fifth Circuit. In *United States v. Varner*,⁸⁴ a pre-*Bostock* case, Judge Duncan, writing a majority opinion (for himself and Judge Jerry E. Smith, a Reagan appointee), ruled that a district court could not consider a transgender woman prisoner's request to change the name on that prisoner's judgment of confinement from "Norman Varner" to "Kathrine Nicole Jett." In the appeal, the prisoner-appellant, proceeding pro se, had filed a two-sentence motion (titled "Motion to Use Female Pronouns When Addressing Appellant"): "I am a woman and not referring to me as

⁸⁰ See Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. OF POL. SCI. 241 (2019); Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. OF POL. SCI. 11 (2013).

⁸¹ Biographical Directory of Article III Federal Judges, 1789-Present, FED. JUD. CTR.

⁸² Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020).

⁸³ E.g., Letter of Am. Bar Ass'n to U.S. Senate Judiciary Comm. re: Nomination of Lawrence J.C. VanDyke to the U.S. Court of Appeals for the Ninth Circuit (Oct. 29, 2019) ("Some interviewees raised concerns about whether Mr. VanDyke would be fair to persons who are gay, lesbian, or otherwise part of the LGBTQ community. Mr. VanDyke would not say affirmatively that he would be fair to any litigant before him, notably members of the LGBTQ community.") The Senate confirmed VanDyke's appointment to the Ninth Circuit on December 11, 2019.

⁸⁴ *United States v. Varner*, 948 F.3d 250 (5th Cir. 2020).

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such leads me to feel that I am being discriminated against based on my gender identity. I am a woman—can I not be referred to as one?”⁸⁵ Denying her request, Judge Duncan wrote that the law did not require anyone to refer to “gender-dysphoric litigants with pronouns matching their subjective gender identity”; if a court were to so require, it “may unintentionally convey its tacit approval of the litigant’s underlying legal position”; and it would be “quixotic” for federal judges to order use of “a litigant’s preferred pronouns,” given the complexity of “such neologisms” in other possible cases.⁸⁶

Suppose we infer from *Varner*’s content and tone that Judge Duncan tends to prefer cisgender over transgender individuals, all else equal, for whatever reason. If so, we might expect that, as a result, Judge Duncan, either deliberately or unwittingly, is more likely to distinguish *Bostock* away in cases where transgender individuals bring claims of sex discrimination under federal law or more likely to accept religion-based defenses to those cases, all else equal. And the more other Trump appointees share this tendency, the more likely that they too will rule, vote, and write opinions accordingly.

Yet, this effect on *Bostock* will also likely vary with how Trump appointees comprise particular federal appellate courts. For example, President Trump has appointed six of the twelve active judges on Eleventh Circuit, six of the seventeen active judges on the Fifth Circuit, three of the fifteen active judges on the Fourth Circuit, but none of the active judges on the First Circuit.⁸⁷ In any particular appeal, the odds of a Trump-appointee majority on a three-judge panel vary accordingly, and with that, what that panel will do with *Bostock*.

⁸⁵ *Id.* at 259 (Dennis, J., dissenting).

⁸⁶ *Id.* at 254–58 (footnote omitted). In dissent, Judge James L. Dennis, a Clinton appointee, stated that he would have granted the request, noting, as the majority opinion had, that “though no law compels granting or denying such a request, many courts and judges adhere to such requests out of respect for the litigant’s dignity.” *Id.* at 260 (citations omitted).

⁸⁷ FED. JUD. CTR., *supra* note 81.

In this essay, we speculated about *Bostock*'s effect by pointing to the text of other sex-discrimination bans in the U.S. Code, the contours of possible religion-based defenses, and Trump appointees to the federal judiciary. Despite Justice Ginsburg's recent death, five of the six justices in the *Bostock* majority remain on the Court. As a result, *Bostock* will likely persist as precedent, even if Justice Ginsburg's successor prefers Justice Alito's *Bostock* dissent (or disfavors *Bostock* on other grounds) and does not feel bound to *Bostock* by stare decisis. Nor do we suspect that such a successor, if appointed, would affect how hard lawyers work to distinguish *Bostock* away based on textual differences or work to make it easier for religion-based defenses to prevail. With Justice Ginsburg still alive, those lawyers would likely have made such arguments anyway. But, if her successor would readily accept such arguments, those lawyers are more likely to succeed, if only because they would have to convince Justice Gorsuch *or* Justice Roberts, not both, when the issue ultimately comes before the Court.

Holding Congress to its Word: Statutory Realism, Second-Generation Textualism, and ACA Entrenchment in *Maine Community Health Options*

Abbe R. Gluck*

“The stakes of the risk corridor cases underscore the ACA’s outsized impact. The Supreme Court decides many of the most contentious and significant issues facing the nation, but even the Supreme Court does not get many \$12 billion cases.”

- Former U.S. Solicitor General Paul Clement, who opposed the ACA in the Supreme Court twice before defending it in 2020¹

No statute in modern American history has been challenged as much as the Affordable Care Act (ACA). Few, if any, other statutes are as long or as complex in design. No statute has been as politically wounded: Congress tried unsuccessfully to repeal the ACA more than seventy times and then worked instead, sometimes with the White House, to undermine it. The ACA has been to the Supreme Court a stunning six times in the past eight years, with a seventh case on the docket for 2020, and has been the subject of more than a thousand cases in the lower courts.

Given this history, it is no surprise that the ACA has become a testing ground for some of the most important debates in modern statutory interpretation and implementation. The ACA’s complex structure

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¹ Paul Clement, *The ACA and the Courts: Two Perspectives, Part Two*, in *THE TRILLION DOLLAR REVOLUTION: HOW THE AFFORDABLE CARE ACT TRANSFORMED POLITICS, LAW, AND HEALTH CARE IN AMERICA* 179 (Ezekiel J. Emanuel & Abbe R. Gluck eds., 2020).

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puts front and center a dizzying array of state and private statutory implementers whose relationships with the federal government remain largely doctrinally undefined, even as Congress relies on them for the law to function. The cases that come into court—often worth billions of dollars—put the ACA’s two thousand pages in front of a federal bench still grappling with Justice Antonin Scalia’s textualist legacy and still deciding for itself how to interpret statutes in the modern era. These cases continuously raise questions about reconciling textualism with realism about Congress, how Congress designs statutes today, and the implementers Congress uses.

In *Maine Community Health Options v. United States*, more than one hundred health insurance companies charged Congress with \$12 billion in political sabotage.² Only in the context of the ACA would a \$12 billion case—the Court’s fifth ACA case³—be viewed as a relatively sleepy dispute. *Maine Community* got far less attention than earlier ACA blockbuster cases, but do not be fooled. The opinion takes advantage of its low political salience to start plowing an important path toward a modern theory of Congress: how it acts; how it should act; how it drafts and designs statutes, and the materials it relies on. *Maine Community* is also an opinion about the entrenchment of the most resilient statute in modern American history.

At the most basic level, the Court decisively held, in an 8–1 opinion, that Congress had to keep its promise, written into the text of the ACA, to compensate insurers for taking on risk during the first three transitional years of the law.⁴ Congress had tried to cut those payments with appropriations riders,⁵ leaving insurers with an unexpected \$12 billion shortfall.⁶

² Two of the fifty-eight cases that were pending when the case was decided are class actions. *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020). The sixth Affordable Care Act (ACA) case—*Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020)—was decided in July 2020, also in the 2019 Term.

⁴ *Me. Cmty Health Options*, 140 S. Ct. at 1318.

⁵ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, § 227, 128 Stat. 2130, 2491 (“None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act to the ‘Centers for Medicare and Medicaid Services—Program Management’ account, may be used for payments under section 1342(b)(1) of Public Law 111–148 [i.e., 42 U.S.C. 18062(b)(1)] (relating to risk corridors).”); see Consolidated Appropriations Act, 2017, Pub. L. No. 115–31, § 223, 131 Stat. 135, 543; Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 225, 129 Stat. 2242, 2624.

⁶ *Me. Cmty Health Options*, 140 S. Ct. at 1318.

But at a level of much deeper significance, the decision is refreshingly modern and realist, even as it is resoundingly textualist. And it has as much significance for the ACA as it does for statutory interpretation. As to the ACA, *Maine Community* is the first time the Court has reviewed a congressional attempt at ACA political sabotage; the ruling already has had repercussions for different sabotage-related cases pending in the lower courts. The case also profoundly highlights the way in which the ACA, like many other modern statutes, relies deeply on private industry to carry out its mission, and the implications of such reliance for keeping Congress to its word. Moreover, it is the first time that former prominent ACA opponents *defended* the law's promises in the Supreme Court, and the first 8–1 opinion decisively upholding the ACA—two signs of the ACA's entrenchment and resilience after a decade of unprecedented challenge. The first existential challenge to the law was brought within moments of the ACA's enactment in 2010; *Maine Community* was decided shortly after the law's tenth anniversary.

As to statutory interpretation, the case is also another example of Justice Scalia's textualism on display through the pen of a notably liberal justice, this time Justice Sonia Sotomayor, who wrote the opinion. At the same time, *Maine Community* evinces a Court eager to utilize internal congressional materials—including the U.S. Government Accountability Office (GAO) handbook and the Congressional Budget Office (CBO) estimates—to aid in its own text-based interpretation of a federal statute. In so doing, the Court may be taking a side in brewing academic and judicial debates in statutory interpretation about the relevance to courts of such materials and of knowledge about how Congress works. Enticingly, these developments, together with similar moves in the earlier ACA case, *King v. Burwell*, also suggest that the Court may be pushing textualism into a second generation—one that is more respectful of Congress, and is more connected to the Legal Process approach of the pre-textualist era. That's a lot to pack into a relatively under-the-radar dispute.

I. Overview: Risk Corridors and the ACA's Reliance on the Private Insurance Industry

One of the most interesting things about the ACA, as I have written

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elsewhere,⁷ is how the law has been able to fundamentally transform the healthcare system even as it was structured as a path-dependent, incremental, political compromise. The ACA itself does not work a wholesale government takeover of the healthcare system; instead, it builds on what came before, including the nation's heavy reliance on the private-insurance industry as the primary vehicle for getting most of the population insured. Insurance is the core of the ACA: The law aims to get everyone covered to give everyone access to health care. The ACA largely does this by retaining the fragmented public-private insurance system that preexisted the law but making it much more generous and accessible across every dimension. Understanding the ACA's reliance on the private insurance industry is critical to the significance of *Maine Community* for both the ACA and other laws with similar statutory design.

The ACA retains the preexisting private-insurance system, employer-based and individual, which accounted for more than fifty percent of Americans' insurance at the time the ACA was drafted and continued to do so ten years later.⁸ (The rest of the insured population obtains health insurance through government programs like Medicare and Medicaid or, before the ACA, had no insurance at all.) The ACA's compromises satisfied few: Some health-policy experts wished the ACA had nationalized insurance under government control,⁹ others found the ACA's heavy-handed approach to the still-private insurance industry—the ACA requires insurers to change their business model in very significant ways¹⁰—an unacceptable overreach.

⁷ See Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 503–14 (2020).

⁸ See EDWARD R. BERCHICK, JESSICA C. BARNETT & RACHEL D. UPTON, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2018 3 tbl.1 (2019) (finding that 55.1% of Americans received insurance through an employment-based plan in 2018, and that 67.3% did through any private plan); Jonathan Gruber, *The Tax Exclusion for Employer-Sponsored Health Insurance* 25 tbl.1 (Nat'l Bureau of Econ. Research, Working Paper No. 15,766, 2010) (finding that 67.5% of non-elderly Americans in 2008 received insurance through the private insurance system).

⁹ See, e.g., JOHN E. McDONOUGH, INSIDE NATIONAL HEALTH REFORM 287 (2011) (noting that “[t]here was a better national health reform law to be written than the Affordable Care Act,” but concluding that it was the best reform that could have been achieved at the time).

¹⁰ See Gluck & Scott-Railton, *supra* note 7, at 513.

The ACA imposes major new restrictions on how insurers do business. Among other new requirements, insurers can no longer “medically underwrite”—reject or rescind coverage due to preexisting conditions or health status.¹¹ The ACA also makes insurance more affordable and transparent by eliminating lifetime and annual caps and co-pays for certain preventive services.¹² It requires all plans on the law’s new insurance exchanges to meet minimum quality standards and cover ten essential health benefits.¹³

Here is where the issue in *Maine Community* comes in. To make the new requirements more affordable for insurers, the ACA both increased the customer pool (with the so-called insurance purchase mandate, which requires almost everyone in the population to obtain insurance) and provided three critical funding streams, known as the “three Rs”: risk corridors,¹⁴ risk adjustment,¹⁵ and reinsurance.¹⁶ The three Rs are financial mechanisms designed to stabilize the insurance markets during the transition to the new regime and encourage plans to serve high-cost patients. These programs involve redistribution from plans that on average have fewer high-cost patients to plans that cover more people with chronic conditions and other higher-cost medical needs. The philosophy underlying them is that plans that serve higher-cost patients should be rewarded for doing so while plans that serve lower-cost patients should give up a portion of the money they are saving by paying less expensive claims. The ACA also attempts to make coverage affordable for relatively low-income people by requiring insurers to reduce “cost sharing” (for example, deductibles and copays) charged to individuals; the law encourages insurers to enroll those low-income patients by reimbursing plans for those reductions.¹⁷ These so-called “cost-sharing reduction” payments (CSRs) were intended to be another important funding stream in addition to the three Rs.

¹¹ Patient Protection and Affordable Care Act, Pub. L. No. 111–148, §§ 1001(5), 1201(2)(A), 124 Stat. 119, 131, 154 (2010) (codified at 42 U.S.C. §§ 300gg-3, -12).

¹² *Id.* § 1001(5) (codified at 42 U.S.C. §§ 300gg-11, -13).

¹³ *Id.* § 1302 (codified at 42 U.S.C. § 18022).

¹⁴ *Id.* § 1342 (codified at 42 U.S.C. § 18062) (in effect for plan years 2014, 2015, and 2016).

¹⁵ *Id.* § 1343 (codified at 42 U.S.C. § 18063).

¹⁶ *Id.* § 1341 (codified at 42 U.S.C. § 18061).

¹⁷ *Id.* § 1402 (codified at 42 U.S.C. § 18071).

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Recognizing the importance of all of these payments to ACA implementation, opponents targeted several of them for attack. More than one hundred insurance companies have sued based on those attacks, including in *Maine Community*.¹⁸

II. Congressional Opposition, the Insurance “Bailout,” and the Appropriations Rider

In 2012, after a majority of the Supreme Court rejected the first major constitutional challenge to the ACA in *National Federation of Independent Businesses v. Sebelius (NFIB)*,¹⁹ opponents turned their efforts to the political arena, even as other litigation efforts continued.²⁰ Repeated efforts at “repeal and replace” began almost immediately.²¹ In 2013, Congress refused to appropriate other funding required for the Department of Health and Human Services (HHS) to satisfy its outreach obligations under the law—including funds used to inform individuals of their coverage options, a task that was necessary to draw more people into the insurance markets.²² Later that year, Republicans in the House triggered a government shutdown by refusing to pass a continuing resolution to fund the government unless Democrats acceded to their ACA-related demands.²³ Shortly thereafter, the House filed a lawsuit,

¹⁸ See Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act’s Litigation Decade*, 108 GEO. L.J. 1471, 1494 n.142 (2020). The risk corridor cases started with the class action, *Health Republic Insurance Co. v. United States*, No. 1:16-cv-259 (Fed. Cl. filed Feb. 24, 2016). See *Risk Corridors and Risk Adjustment*, AFFORDABLE CARE ACT LITIG. The cases are in the Court of Federal Claims because under the Tucker Act, that is where cases claiming money from the federal government are supposed to be filed.

¹⁹ Specifically, four justices sustained the mandate as a valid exercise of the commerce power and Chief Justice Roberts provided a fifth vote for the mandate’s constitutionality by finding it authorized under the taxing power. Seven justices struck down the mandatory Medicaid expansion as coercive on the states, effectively rendering Medicaid expansion optional. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 561, 574, 575–86, 589 (2012).

²⁰ See, e.g., *King v. Burwell*, 576 U.S. 473 (2015) (filed following the loss in *NFIB* and challenging the ACA’s subsidy structure).

²¹ JANET KINZER & ANNIE L. MACH, CONG. RESEARCH SERV., RL45244, LEGISLATIVE ACTIONS TO MODIFY THE AFFORDABLE CARE ACT IN THE 111TH-115TH CONGRESSES 20 (2018).

²² See Kathleen Sebelius & Nancy-Ann DeParle, *Present at the Creation: Implementation of the Affordable Care Act, 2010 to 2014*, in *THE TRILLION DOLLAR REVOLUTION*, *supra* note 1; Jason Millman, *Following Sebelius Phone Call, Foundation Donated \$13M to Obamacare Outreach Group, Report Says*, WASH. POST (Apr. 21, 2014); Sarah Kliff, *Budget Request Denied, Sebelius Turns to Health Executives to Finance Obamacare*, WASH. POST (May 10, 2013).

²³ See Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N.Y. TIMES (Sept. 30, 2013).

under the Appropriations Clause of the federal Constitution, challenging the Obama administration's effort to make the CSR payments after Congress refused to make a specific appropriation.²⁴ President Trump ultimately suspended the CSRs entirely and the parties settled.²⁵ But more than fifty insurance companies then sued in federal court for the money—more than \$2 billion—owed to them.²⁶ In August 2020, as further discussed below, the Federal Circuit issued two decisions in favor of the insurers relying heavily on *Maine Community*.²⁷

Maine Community stems from another aspect of this undermining effort: Congress's attempts to stop the risk corridor payments. By statute, the risk corridors program was a three-year program, covering plan

²⁴ The CSRs, which are in section 1402 of the ACA, are programmatically linked to the premium tax credits (the subsidies that lower premiums for marketplace coverage), which are found in section 1401. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, § 1401, 124 Stat. 119, 213 (2010) (codified at 26 U.S.C. § 36B (2018)). Premium tax credits, however, are paid from a Treasury fund whose governing statute expressly mentions them but does not mention CSRs. 31 U.S.C. § 1324(b)(2) (2018). In 2014, the Obama administration made a request for a specific appropriation, Congress refused, and the administration made the payment from the Treasury fund. Doug Badger, *Panic Prompted ObamaCare Lawlessness*, HILL (July 15, 2016). The House sued, claiming that disbursing CSRs absent a specific appropriation violated the Appropriations Clause. Complaint at 2, U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016) (“Defendants . . . have violated, and are continuing to violate, the Constitution by directing, paying, and continuing to pay, public funds to certain insurance companies to implement a program authorized by the ACA, but for which *no funds* have been appropriated.”). A lower federal court ruled that the House had standing to pursue an Appropriations Clause claim—a ruling that broke new ground given the Supreme Court’s historically narrow approach to the question of legislator standing. U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 58 (D.D.C. 2015). In a subsequent order, the district court found that there was no express appropriation supporting the CSR payments and enjoined further payments from being made, but stayed the order pending appeal. *Burwell*, 185 F. Supp. 3d at 168.

²⁵ See Notice at 1–2, U.S. House of Representatives v. Hargan, No. 16–5202 (D.C. Cir. Oct. 13, 2017); Settlement Agreement at 2, U.S. House of Representatives v. Hargan, No. 1:14-cv-01967-RMC (D.D.C. Dec. 15, 2017); see also Timothy Jost, *Administration’s Ending of Cost-Sharing Reduction Payments Likely to Roil Individual Markets*, HEALTH AFF. BLOG (Oct. 13, 2017) (recording that, on October 12, 2017, “the White House press office announced that the administration will no longer be reimbursing insurers for the cost-sharing reductions they are legally required to make for low-income individuals”).

²⁶ Katie Keith, *Insurers Ask for More than \$2 Billion in Unpaid CSRs*, HEALTH AFF. BLOG (Mar. 6, 2019).

²⁷ Sanford Health Plan v. United States, No. 2019–1290, 2020 WL 4723703 (Fed. Cir. Aug. 14, 2020); see Cmty. Health Choice, Inc. v. United States, No. 2019–1633, 2020 WL 4723757 (Fed. Cir. Aug. 14, 2020); Katie Keith, *Federal Circuit: Insurers Owed Unpaid Cost-Sharing Reductions, Reduced by Higher Premium Tax Credits from Silver Loading*, HEALTH AFF. BLOG (Aug. 17, 2020).

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years 2014 through 2016.²⁸ The statutory formula called for HHS to make the payments to plans whose costs were three percent higher than a target amount, and for HHS to collect from plans whose costs were three percent lower.²⁹ The idea behind them was to incentivize insurers to offer products in the new ACA marketplaces by providing some protection against unexpected losses. As it turned out, many insurers had unanticipated losses—in part because many did not set premiums for 2014 aware of what would be the Obama administration’s decision to permit “grandmother plans”—allowing people to renew or extend their non-compliant current plans rather than enroll in an ACA plan (President Obama’s famous “[i]f you like your health care plan, you’ll be able to keep your health care plan”³⁰ promise).³¹ HHS, therefore, concluded that the risk corridor payments would not be budget neutral—it would be paying more to higher-cost plans that exceeded the amounts than it would be collecting from lower-cost plans.³²

ACA opponents seized on the announcement, with Senator Marco Rubio labeling the payments a “taxpayer-funded bailout for insurance companies.”³³ Senator Rubio proposed an appropriations rider to block the payments, which—after two years of trying to get it through Congress—was enacted at the end of 2014 as part of the 2015 appropriations bill and then re-enacted for the two subsequent years. The rider provided: “None of the funds made available by this Act . . . or transferred from other accounts funded by this Act to the ‘Centers for Medicare and Medicaid Services Program Management’ account, may be

²⁸ Patient Protection and Affordable Care Act § 1342(a).

²⁹ *Id.* § 1342(b)(1)(A)–(b)(2)(A).

³⁰ President Barack Obama, Remarks in Town Hall Meeting on Health Care in Green Bay, Wisconsin (June 11, 2009).

³¹ Gary Cohen, *Letter to State Insurance Commissioners*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Nov. 14, 2013).

³² *See* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410 (Mar. 11, 2013) (codified at 45 C.F.R. pts. 153, 155, 156–58).

³³ *See, e.g.,* Robert Pear, *Marco Rubio Quietly Undermines Affordable Care Act*, N.Y. TIMES (Dec. 9, 2015).

used for payments under Section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).³⁴

Because under the formula, HHS had paid more than it took in, HHS did not have enough money and had to prorate the payments. It ultimately only paid 12.6% of the money the insurers expected.

Insurers had already set their premiums for 2014 and 2015 relying on the risk corridor formula and sued. They argued that they had an entitlement written into the ACA in the statutory formula of payments promised, and that a rider could not effectively repeal that promise.³⁵ The government responded that “[t]he ACA did not impose an obligation, enforceable through private actions for damages, to make risk-corridor payments in excess of appropriations.”³⁶ In 2018, after mixed results in the Court of Federal Claims, the Federal Circuit Court of Appeals held that the ACA did give insurers the right to the risk corridor payments, but that the right was indeed revoked by the appropriations rider.³⁷

Some insurers went out of business due to Congress’s actions and many more increased premiums. By one count, eighteen insurers who had participated in the exchange discontinued operations.³⁸ Experts point to the rider as a contributing factor in the demise of sixteen of the twenty-three nonprofit Consumer Oriented and Operated Plans (CO-

³⁴ See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113–235, § 227, 128 Stat. 2130, 2491 (“None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act to the ‘Centers for Medicare and Medicaid Services—Program Management’ account, may be used for payments under section 1342(b)(1) of Public Law 111–148 [i.e., 42 U.S.C. 18062(b)(1)] (relating to risk corridors).”).

³⁵ See Brief for Petitioners at 27–30, *Moda Health Plan, Inc. v. United States*, No. 18–1028 (Aug. 30, 2019), 2019 WL 4235524.

³⁶ See Brief for Respondent at 19, *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020) (No. 18–1023); see also *id.* at 51 n.10 (elaborating on the argument and responding to petitioners’ contentions).

³⁷ See *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1320, 1324–29 (Fed. Cir. 2018), *cert. granted*, 139 S. Ct. 2743 (2019) (mem.), *argued*, No. 18–1028 (Dec. 10, 2019); see also *Land of Lincoln Mut. Health Ins. Co. v. United States*, 892 F.3d 1184 (Fed. Cir. 2018), *cert. granted*, 139 S. Ct. 2744 (2019) (mem.), *argued*, No. 18–1038 (Dec. 10, 2019).

³⁸ See Brief for Amicus Curiae Blue Cross Blue Shield Association in Support of Petitioners at 18, *Me. Cmty. Health Options*, 140 S. Ct. 1308 (Nos. 18–1023); see also Cynthia Cox & Ashley Semanskee, *Preliminary Data on Insurer Exits and Entrants in 2017 Affordable Care Act Marketplaces*, KAISER FAMILY FOUND. (Aug. 28, 2016) (estimating that in 2017 only sixty-two percent of exchange customers would be able to choose from among three or more insurers, down from eighty-five percent the year before.).

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OPs) created by the ACA by the summer of 2016.³⁹ Estimates suggest that nearly one million individuals lost coverage as a result, some mid-year.⁴⁰ Economists have also estimated that the failed risk corridors could account for up to eighty-six percent of the growth in premiums from 2015 to 2017, estimated at roughly a nine percent increase from 2015 to 2016 and a twenty-five percent increase the following year.⁴¹

In June 2019, the Supreme Court granted certiorari in three consolidated cases. The question on which the Court granted certiorari implicated much more than the ACA: “Whether Congress can evade its unambiguous statutory promise to pay health insurers for losses already incurred simply by enacting appropriations riders restricting the sources of funds available to satisfy the government’s obligation.”⁴² In April 2020, the Court held that the ACA created a statutory obligation to pay, that insurers had a right to sue for the payments under the Tucker Act, and that the insurers could recover the money owed from the Judgment Fund.⁴³

III. Statutory Entrenchment and the ACA

The Affordable Care Act is an extraordinary example of statutory entrenchment and transformation. In other work, I have illustrated how the law—originally viewed by many as an unsatisfying compromise that did not go far enough—transformed through and in fact *because of*

³⁹ See Nicholas Bagley, *Trouble on the Exchanges—Does the United States Owe Billions to Health Insurers?*, 375 NEW ENG. J. MED. 2017, 2018 (2016) (“The inability to make full risk-corridor payments devastated some insurers. Hit particularly hard were the new cooperative health plans, which were established with the support of generous ACA loans. By the end of summer 2016, just 7 of 23 co-ops were still in business.”).

⁴⁰ See *id.* (“As the co-ops collapsed, almost a million people were forced to look elsewhere for coverage.”); Sally Pipes, *Obamacare’s Co-Op Disaster: Only 7 Remain*, FORBES (July 25, 2016); see also Brief of 24 States and the District of Columbia as Amici Curiae Supporting Petitioners at 14, *Me. Cmty. Health Options*, 140 S. Ct. 1308 (Nos. 18–1023) (“When Land of Lincoln was liquidated, nearly 50,000 Illinois residents lost their health insurance in the middle of the 2016 plan year.”).

⁴¹ See Daniel W. Sacks, Khoa Vu, Tsan-Yao Huang & Pinar Karaca-Mandic, *How Do Insurance Firms Respond to Financial Risk Sharing Regulations? Evidence from the Affordable Care Act 4–5* (Nat’l Bureau of Econ. Research, Working Paper No. 24129, 2017) (finding the evidence to imply that “ending the [Risk Corridor] program account[ed] for 86 percent of all premium growth between 2015 and 2017,” and finding that “[i]n 2016 . . . premiums rose by 9 percent” and “[i]n 2017, premiums rose a further 25 percent”).

⁴² Petition for Writ of Certiorari at i, *Moda Health Plan, Inc. v. United States*, No. 18–1028 (Feb. 4, 2019).

⁴³ See *Me. Cmty. Health Options*, 140 S. Ct. at 1318 n.3 (“The Judgment Fund is a permanent and indefinite appropriation for ‘[n]ecessary amounts . . . to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when . . . payment is not otherwise provided for.’” (citing 31 U.S.C. §1304(a)(1))).

persistent conflict into a statute now widely viewed as standing for the much stronger principle of universal access to health care for all.

Statutory design choices made out of political necessity—including leaving much of the ACA implementation to the states and private industry—were originally viewed by many as pathologies. But they turned out to be some of the statute’s greatest tools of resistance, pulling control of the law away from the new hostile administration and giving the statute enormous flexibility to adapt.⁴⁴ In large part because of the high-salience conflicts over the ACA, the United States has been engaged in a national conversation about healthcare for the past decade. The ACA puts many choices to states and industry—choices that induce industry reliance and business adaptation and engage state governments and citizenries. All of these conversations, changes, and decisions have further entrenched the law and the norms it has come to stand for.

Maine Community is more proof of that resilience. It was the first ACA case to reach the Court that did not draw political attention, light up the blog-o-sphere, or divide lawyers ideologically. Former U.S. Solicitor General Paul Clement—who argued the two major challenges against the ACA in the Court in 2012 and 2015—represented the insurers, this time to enforce the law’s promises. This was all the more significant because the case stemmed from the political effort in Congress to strangle the law.

For other statutes, this might not be news. But for the ACA, opposition to the statute has been a Republican Party loyalty litmus test since the ACA was enacted. Red states fought in Congress during the ACA’s drafting to maintain control of their insurance exchanges only to decline that option once the statute passed out of fear of doing anything to cooperate with the law.⁴⁵ Twenty-six states sued to strike down the statute as soon as it was enacted.⁴⁶ The Tea Party movement came to power because of the ACA and scored enormous victories in 2010,⁴⁷ ultimately provoking a government shutdown in 2013.⁴⁸ In 2014, after more GOP electoral victories, Senator Chuck Schumer said: “Democrats blew the

⁴⁴ See Gluck & Scott-Railton, *supra* note 7, at 572–78.

⁴⁵ Many then secretly cooperated with the Obama administration behind the scenes. See Abbe R. Gluck & Nicole Huberfeld, *What is Federalism in Healthcare For?*, 70 *STAN. L. REV.* 1689, 1770–72 (2018).

⁴⁶ Gluck, Regan & Turret, *supra* note 18, at 1478. Fourteen states sued on the day of enactment.

⁴⁷ See Kate Zernike, *Tea Party Set to Win Enough Races for Wide Influence*, *N.Y. TIMES* (Oct. 14, 2010).

⁴⁸ See Weisman & Peters, *supra* note 23.

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opportunity the American people gave them. We took their mandate and put all of our focus on the wrong problem—health-care reform.”⁴⁹

But by 2016, things had changed. Candidate Trump ran on replacing the ACA with “something better,” but radically, something that embodied the same universal coverage philosophy as the ACA itself. As he stated: “I am going to take care of everybody” and “[t]he government’s gonna pay for it.”⁵⁰ In 2017, swing Republicans saved the ACA from repeal largely because of fear of coverage losses, especially to the Medicaid population. By the ACA’s tenth anniversary, prominent Republicans, including former House Majority Leader Eric Cantor, were saying that the ACA had fundamentally changed the policy baseline for an acceptable Republican replacement—“the [new] test for an alternative was a comparison of coverage numbers”⁵¹—only a statute with the substantially same coverage would be politically palatable.

These changes are also evident at the Court itself. The first major constitutional challenge to the ACA, *NFIB*, was a resounding rejection of Congress’s own policy justifications for the law. Five justices refused to accept Congress’s conclusions about the effects of inadequate health care on the national market or to trust the mechanisms that Congress put in place to address the problem. Justice Scalia famously said at oral argument in *NFIB* that it would be cruel and unusual punishment—in violation of the “Eighth Amendment”—to make anyone “go through these 2,700 pages,” giving rise to the view that the statute was too complex, or even too irrational, for anyone to understand, much less read.⁵²

But by 2015, when the second major existential challenge, *King v. Burwell*, reached the Court, things looked different. In *King*, the Court was confronted with sloppy drafting in the section of the ACA concerning insurance subsidies—language that, read hyperliterally and out of context, could have dramatically undermined, even destroyed,

⁴⁹ Sean Sullivan, *Schumer: Democrats “Blew” Opportunity by Focusing on “Wrong Problem” – Health Care*, WASH. POST (Nov. 25, 2014).

⁵⁰ Scott Pelley, *Trump Gets Down to Business on 60 Minutes*, CBS NEWS (Sept. 27, 2015).

⁵¹ Eric Cantor, *The ACA and the Republican Alternative*, in THE TRILLION DOLLAR REVOLUTION, *supra* note 1, at 139.

⁵² See Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 71 (2015); see also Transcript of Oral Argument at 38, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (No. 11–393) (“JUSTICE SCALIA: [W]hat happened to the Eighth Amendment? You really want us to go through these 2,700 pages? . . . [D]o you really expect the Court to do that? Or do you expect us to give this function to our law clerks?”).

the new insurance markets in more than half the states. But unlike in *NFIB*, the Court (this time by a definitive 6–3 majority) showed off its understanding of how the law works in pages of description at the start of the opinion, and then emphasized that its role was to “respect” Congress;⁵³ that Congress had a “plan” and that the Court must “do [its] best”⁵⁴ and accord that plan “[a] fair reading.”⁵⁵ Whereas the Court in *NFIB* surprised states implementing the ACA by rendering the Medicaid expansion optional, the Court in *King* refused to do what challengers asked—pull the rug out from under states that had opted not to operate their own exchanges by denying them expected subsidies.

Maine Community continues on this path. Justice Sotomayor’s opinion for the Court displays a deft understanding of how the risk corridor program works and why it was enacted. The entire opinion turns on the promises the ACA makes to those who implement it and why the ACA needs to make those promises. Even Justice Alito’s lone dissent assumes for the purposes of his argument that “the Court is correct in holding that § 1342 of the Affordable Care Act created an obligation that was not rescinded by subsequent appropriations riders.”⁵⁶

It would be an overstatement to say that *Maine Community* sets the stage for the next big ACA case on the docket, but it certainly lays groundwork. *California v. Texas* is another existential challenge to the whole ACA and will be heard in November 2020. There, opponents argue that Congress’s reduction of the insurance-mandate’s tax penalty to zero renders the mandate invalid as a tax and thus, per *NFIB*, without constitutional justification. More importantly, they argue that the *entire* law cannot operate without the mandate and so is inseverable from it: void in *toto*. I have detailed elsewhere the stunning weakness of this argument and how unmoored it is from settled severability doctrine.⁵⁷ But in terms of ACA entrenchment, *California* has been marked by

⁵³ *King v. Burwell*, 576 U.S. 473, 498 (2015) (citations omitted).

⁵⁴ *Id.* at 475 (citations omitted).

⁵⁵ *Id.* at 498.

⁵⁶ *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1332 (2020) (Alito., J., dissenting).

⁵⁷ See Brief for Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck & Ilya Somin as Amici Curiae Supporting Petitioners at 5, *California v. Texas*, 140 S. Ct. 1262 (2020) (Nos. 19–840, 19–1019); Abbe R. Gluck, *Reading the Findings: Textualism, Severability and the ACA’s Return to the Court*, 130 YALE L.J.F. (forthcoming 2020) (on file with author).

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the most extraordinary political line-crossing yet in ACA litigation. Prominent lawyers criticizing the challenge include two of the architects of *King*, two Republican attorneys general, and the *Wall Street Journal* editorial page, which began a piece criticizing the suit with the line “No one opposes Obamacare more than we do.”⁵⁸

Both cases resist attempts to sabotage the law. After *NFIB*, ACA opponents were publicly urged at strategy meetings to use any technical weaknesses or loopholes in the law to “kill” it “any which way . . . whether [in] some court, some place, or the United States Congress.”⁵⁹ The litigation that gave rise to *King* followed directly from that strategy, and *Texas* is just like *King*—an attempt to pull loose a single statutory thread to unravel the whole thing. The political attempts at financial strangulation were part of that “kill it” strategy too, and those attempts are what lead to *Maine Community*. *Maine Community*’s matter-of-fact and undramatic rejection of that effort is an important part of the ACA’s story of entrenchment, gradual depoliticization, and resilience.

IV. Reliance on Private Implementers in the ACA and Beyond

The ACA is like a lot of other statutes—it’s just bigger. For that reason, it has tended to tee up new questions in court about modern statutory implementation that have purview for many other laws, as the Court itself recognized in phrasing its grant of certiorari in *Maine Community* broadly rather than as ACA specific. For example, the ACA has offered a buffet of cases about administrative waivers and the Administrative Procedure Act (APA).⁶⁰ But the ACA, like other statutes, relies on a host of actors outside the federal government, too. States and private industry—insurers most importantly but also providers like

⁵⁸ Brief for Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck & Ilya Somin, *supra* note 57; see Brief of States of Ohio and Montana as Amicus Curiae Supporting Neither Party, *California*, 140 S. Ct. 1262 (Nos. 19–840, 19–1019) (brief from two Republican state attorneys general arguing that the mandate is severable from the rest of the Affordable Care Act); Michael F. Cannon, *Obamacare’s Enemy No. 1 Says This Is the Wrong Way to Kill It*, CATO INST. (Mar. 28, 2019); Editorial, *Texas ObamaCare Blunder*, WALL ST. J. (Dec. 16, 2018) (opposing the challenge even though “[n]o one opposes ObamaCare more than we do”).

⁵⁹ Gluck, Regan & Turret, *supra* note 18, at 1485, 1485 n.84; Am. Enter. Inst., *Who’s in Charge? More Legal Challenges to the Patient Protection and Affordable Care Act* at 1:30:55–1:31:15, YouTube (Mar. 11, 2014) (remarks of Michael Greve at a Dec. 7, 2010 panel).

⁶⁰ See, e.g., *Gresham v. Azar*, 950 F.3d 93 (D.C. Cir. 2020); *New York v. U.S. Dep’t of Labor*, No. 19–5125 (D.C. Cir. argued Nov. 14, 2019); *Stewart v. Azar*, 313 F. Supp. 3d 237 (D.D.C. 2018).

hospitals—are key implementers of the law. The last major challenge to the law, *King*, was about state implementation of the ACA (via the new insurance exchanges). The first major challenge, *NFIB*, was about both state implementation (the Medicaid expansion) and also the ACA’s intrusions into the private market with the insurance-purchase mandate.

The legal standards that apply to state and private implementation of federal law are largely unresolved, despite the fact that the ACA is far from the first law to utilize them. Administrative-deference doctrines have largely eschewed the questions about deference to such implementers—although there have been some interesting lower court cases taking a stab⁶¹—and questions concerning how and when the government commits to those implementers still largely remain unanswered. Even in *NFIB*, the Court was unwilling to announce a clear doctrinal rule for when spending conditions are unconstitutionally coercive. Instead, it adopted a “we know it when we see it” approach and held, in the context of the ACA’s original Medicaid expansion, that it had seen it.⁶²

Maine Community takes a step forward. It is a realist opinion in its recognition of the importance for Congress to be able to rely on these private implementers. At oral argument, several justices emphasized the trust that the insurance industry had placed in Congress’s word in restructuring their operations to fulfill their ACA implementation role. Justice Elena Kagan asked: “So this is one where the ‘shall pay in’ is obligatory but the ‘shall pay out’ on the part of the government is not obligatory? . . . You pay in, that’s obligatory. We commit ourselves to paying out. It turns out, if we feel like it. What—what kind of—what kind of a statute is that?”⁶³ From Justice Stephen Breyer: “So why does the government not have to pay its contracts, just like anybody else?”

⁶¹ Abbe R. Gluck, *Our [National] Federalism*, 123 *YALE L.J.* 1996, 2025–26 (2014) (compiling conflicting case law from the lower courts); see also Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 610–12 (also cataloguing cases).

⁶² *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012) (“We have no need to fix a line [here]. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply ‘conscript state [agencies] into the national bureaucratic army,’ and that is what it is attempting to do with the Medicaid expansion.” (citations omitted)).

⁶³ Transcript of Oral Argument at 58, *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308 (2020) (No. 18–1023).

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... Why isn't it either a contract or close enough? It says, 'shall pay.' If you climb the pole, we'll pay. They climbed the pole. Pay."⁶⁴ From Chief Justice John Roberts: "[Y]ou don't question that these insurance companies would not have participated in the risk corridor program but for the government's promise to pay? ... [I]t's a good business opportunity for them because the government promised to pay."⁶⁵

The opinion clarifies for the first time that Congress can create obligations by *statute* alone; an appropriation is not required. (The Court did not take up the alternative question whether the obligations instead might be viewed as an implied-in-fact contract.⁶⁶) The opinion concludes: "The Government should honor its obligations. . . . Alexander Hamilton stressed this insight as a cornerstone of fiscal policy. 'States,' he wrote, 'who observe their engagements . . . are respected and trusted: while the reverse is the fate of those . . . who pursue an opposite conduct.'"⁶⁷

The Court also recognized that not all statutes are the same—a mundane point, perhaps, but not really mundane in the Court's jurisprudential universe. This Court generally does not treat omnibus laws differently from single-subject laws, or long statutes differently from short ones and so on. Instead, it generally prefers "one-size-fits-all" rules of textual interpretation. But Congress does not draft uniformly, and it does deploy different conventions across different statutes.⁶⁸ In *Maine Community*, Justice Sotomayor recognizes this with respect to how Congress creates obligations:

Creating and satisfying a Government obligation, therefore, typically involves four steps: (1) Congress passes an organic statute (like the Affordable Care Act) that creates a program, agency, or function; (2) Congress passes an Act authorizing appropriations; (3) Congress

⁶⁴ *Id.* at 32–33.

⁶⁵ *Id.* at 37–38, 53–54.

⁶⁶ *Me. Cmty. Health Options*, 140 S. Ct. at 1331 n.15.

⁶⁷ *Id.* at 1331 (quoting Alexander Hamilton, *Report Relative to a Provision for the Support of Public Credit* (Jan. 9, 1790), in 6 PAPERS OF ALEXANDER HAMILTON 68 (H. Syrett & J. Cooke eds., 1962)).

⁶⁸ Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 908, 937 n.109 (2013) [hereinafter Gluck & Bressman, *Part I*]; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 760–63 (2014) [hereinafter Gluck & Bressman, *Part II*].

enacts the appropriation, granting “budget authority” to incur obligations and make payments, and designating the funds to be drawn; and (4) the relevant Government entity begins incurring the obligation. *But Congress can deviate from this pattern.* It may, for instance, authorize agencies to enter into contracts and “incur obligations in advance of appropriations.” . . . Congress can also create an obligation directly by statute, without also providing details about how it must be satisfied.⁶⁹

This holding was clear enough to have an almost immediate impact on the ACA cases involving the cost-sharing reduction payments that had been pending in the Federal Circuit. The Federal Circuit requested supplemental briefing after *Maine Community*.⁷⁰ The Court’s opinion in *Maine Community* was sufficient writing on the wall for the government to drop its claim that, without an appropriation, the ACA did not create an obligation to pay the CSRs. In August, the Federal Circuit then followed *Maine Community* and held recovery is available pursuant to the Tucker Act; the question of the amount of damages remains pending.⁷¹ Commentators opined that *Maine Community* lent momentum to the other cases, including the CSR cases, that had been filed challenging the Trump administration’s efforts to undermine the ACA.

Professor David Super has argued that the decision also gives new clarity to open questions about government shutdowns, making evident that “statutory beneficiaries have clear, immediate recourse” even if the government withholds appropriations temporarily.⁷² Super writes that, until now, “advocates had been haunted by the worry that the Court might somehow refuse to honor the terms of appropriated entitlement statutes.”⁷³

The Court concluded the insurers could sue under the Tucker Act which allows “claim[s] against the United States founded either upon the

⁶⁹ *Me. Cmty. Health Options*, 140 S. Ct. at 1320 (citations omitted) (emphasis added).

⁷⁰ For an excellent summary of all these cases and their procedural postures, see Katie Keith, *Federal Circuit Hears Oral Argument Over Unpaid CSRs*, HEALTH AFF. BLOG (Jan. 15, 2020).

⁷¹ *Sanford Health Plan v. United States*, No. 2019–1290, 2020 WL 4723703, at *1 (Fed. Cir. Aug. 14, 2020); see *Cmty. Health Choice, Inc. v. United States*, No. 2019–1633, 2020 WL 4723757, at *1 (Fed. Cir. Aug. 14, 2020).

⁷² David Super, *The Court Acts to Tame Government Shutdown*, BALKINIZATION (Apr. 28, 2020, 12:46 AM).

⁷³ *Id.*

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Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”⁷⁴ The Court applied the “fair interpretation” test—which holds that a “statute creates a ‘right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained’”⁷⁵—and held that the risk corridor payments satisfied the test⁷⁶ and did not fall into the exceptions the Court has developed.⁷⁷

This question of the relationship between private implementers and a federal government that relies on their help in effectuating major statutory schemes is no small potatoes. It is worth noting that the vast majority of ACA litigation has, on some level, been about this very question. The last decade’s worth of litigation challenges have run the gamut from cases about the ACA’s new nondiscrimination provisions,⁷⁸ to its strong-arming of individuals into its markets,⁷⁹ to its requirements on employers (for example, three of the Court’s ACA cases featured employers who opposed the ACA’s “contraception mandate” for their insurance plans⁸⁰). All of these cases, to some extent, address how far the ACA reaches into private markets to require or induce or encourage

⁷⁴ *Me. Cmty. Health Options*, 140 S. Ct. at 1327 (citing 28 U.S.C. § 1491(a)(1)).

⁷⁵ *Id.* at 1328.

⁷⁶ *Id.*

⁷⁷ The Court detailed two exceptions which it held did not apply here: where the Administrative Procedure Act (APA) provides relief or where the statute itself provides its own remedies. *Id.*

⁷⁸ See, e.g., *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 956 (D. Minn. 2018); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 998 (W.D. Wis. 2018); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 670 (N.D. Tex. 2016). Section 1557 cases challenging discrimination against transgender people include: *Flack v. Wisconsin Department of Health Services*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019) (concerning the failure by the Medicaid program to provide appropriate treatment for gender dysphoria); *Edmo v. Idaho Department of Correction*, 358 F. Supp. 3d 1103 (D. Idaho 2018) (concerning an inmate seeking gender confirmation surgery), *aff’d in part, rev’d in part sub nom.*; *Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019); *Prescott v. Rady Children’s Hospital*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (concerning the failure by a hospital to provide appropriate treatment for gender dysphoria); and *Rumble v. Fairview Health Services*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015).

⁷⁹ See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

⁸⁰ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

individuals, employers, and insurers to participate in its new system. The *NFIB* struggle over the Commerce Clause was, at bottom, about the same point.

All of these cases will have an impact on how government programs are structured in the future. Philosophical and legal opposition to the use of private implementers, or decisions allowing the government to stick them with unpaid bills, could chill future efforts to embed reforms in private implementers (like insurers and employers), or the states, and favor instead more direct national regulation, which would be harder to challenge. But it would be an ironic legacy for a law that began as a market-oriented compromise, and then was challenged as governmental overreach, to pave the way toward more nationalization. *Maine Community* offers some assurances to the nonfederal actors who Congress anoints as critical implementers of major statutory schemes. In so doing, it may have an important role in maintaining the utility of that kind of statutory design going forward.

V. Statutory Realism, Second Generation Textualism, and the Return of Legal Process

Finally, there is a lot in *Maine Community* for statutory interpretation aficionados. At the most basic level, the case is a near re-run of one of the most famous statutory interpretation chestnuts, *Tennessee Valley Authority v. Hill (TVA)*, decided forty-two years ago.⁸¹ In *TVA*, the Court refused to allow an appropriation for the Tellico Dam in Tennessee to implicitly override an earlier enacted provision in the Endangered Species Act that would have prevented the construction of the dam because it destroyed the habitat of the endangered snail darter fish. The Court applied the “cardinal rule that repeals by implication are not favored,”⁸² the same presumption it repeated in *Maine Community*.⁸³

At a broader level, in exemplifying sophisticated textualism, the opinion provides further evidence of Justice Scalia’s enduring influence on

⁸¹ *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

⁸² *Id.* at 189 (internal ellipses omitted) (quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974)).

⁸³ *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020).

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the Court, even with the most liberal justices. But it also pries open a crack for new debates, especially new debates about respecting Congress and statutory interpretation in the shadow of how Congress actually drafts.

For the textualists, Justice Sotomayor's analysis begins by emphasizing the mandatory words "shall pay" as the strongest evidence of Congress's "plain command"⁸⁴ and creation of an obligation.⁸⁵ She relies on a canon of interpretation (the no-repeals-by-implication canon, one of Justice Scalia's "approved" canons⁸⁶) rather than legislative history.⁸⁷ She also relies on textualist evidence elsewhere in the U.S. Code, specifically the fact that where Congress elsewhere has conditioned obligations subject to appropriations, it has expressly said so.⁸⁸ Justice Sotomayor—herself the Court's most prominent proponent of legislative history use⁸⁹—deftly cabins her discussion of legislative history to the final part of the opinion, thereby allowing Justices Clarence Thomas and Neil Gorsuch to join all but the final part.⁹⁰ This has become a typical line to walk for even the Court's more methodologically liberal justices when writing opinions.

Justice Samuel Alito's lone dissent is highly textualist, too. Justice Alito assumed for purposes of his argument that the ACA created an obligation to pay, but took issue with the idea that there was an implied right of action for the insurers to sue for it.⁹¹ In support of his argument, he picked up a theme sounded by Justice Scalia in later years, aligning the rise of textualism with new, narrower approaches to implied rights of action. Justice Alito argued that the Court has "basically gotten out of the business of recognizing private rights of action not expressly created

⁸⁴ *Id.* at 1321 ("Thus, without 'any indication' that § 1342 allows the Government to lessen its obligation, we must 'give effect to [Section 1342's] plain command.'" (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998))).

⁸⁵ *Id.* at 1320 ("[S]hall' typically 'creates an obligation impervious to . . . discretion.' . . . Section 1342 uses the command three times" (citing *Lexecon*, 523 U.S. at 35)).

⁸⁶ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 327 (2012).

⁸⁷ *Me. Cmty. Health Options*, 140 S. Ct. at 1323–25.

⁸⁸ *Id.* at 1322 n.7, 1323 ("This Court generally presumes that 'when Congress includes particular language in one section of a statute but omits it in another,' Congress 'intended a difference in meaning.' . . . The 'subject to appropriations' and payment-capping language in other sections of the Affordable Care Act would be meaningless had § 1342 simultaneously achieved the same end with silence." (citations omitted)).

⁸⁹ *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 782–83 (2018) (Sotomayor, J., concurring).

⁹⁰ *Me. Cmty. Health Options*, 140 S. Ct. at 1331.

⁹¹ *Id.* at 1331–35 (Alito, J., dissenting).

by Congress,⁹² and would have requested supplemental briefing on that question.

But Justice Sotomayor also pushed beyond text to look at Congress's own internal materials. Specifically, she looked to the GAO handbook, known as the Red Book, for the propositions that Congress can "incur obligations in advance of appropriations," that the "GAO shares [the] view" adopted by the Court that "Congress can create an obligation directly by statute,"⁹³ that Congress "has at its disposal several blueprints for conditioning and limiting obligations,"⁹⁴ and in support of the presumption against implied repeals.⁹⁵ She also cited to the CBO's understanding of the statute as not requiring the risk corridor program to be neutral.⁹⁶

This textualist Court has not frequently consulted internal congressional materials. Doing so has become a subject of emerging academic debate in the field of legislation. Here, again, the ACA becomes a testing ground for developing legal concepts. *King* was, in fact, the first major statute in modern American history for which the Court openly acknowledged that the specifics of a statute's unorthodox drafting process might merit some interpretive slack.⁹⁷ There, my own commentary in the weeks leading up to oral argument suggested that the CBO score was a highly relevant indicium of congressional meaning and that the ACA's CBO score relied on a reading of the statute completely at odds with the challengers' reading in *King*.⁹⁸ I proposed a new "CBO canon"—interpreting ambiguities in a statute consistent with the assumptions underlying the CBO score, especially when the

⁹² *Id.* at 1331.

⁹³ *Id.* at 1319–20.

⁹⁴ *Id.* at 1329.

⁹⁵ *Id.* at 1323–24.

⁹⁶ *Id.* at 1316 (citing CONGRESSIONAL BUDGET OFFICE, *THE BUDGET AND ECONOMIC OUTLOOK: 2014 TO 2024* 59 (2014)).

⁹⁷ *King v. Burwell*, 576 U.S. 473, 491–92 (2015) ("The Affordable Care Act contains more than a few examples of inartful drafting. . . . Congress wrote key parts of the Act behind closed doors, rather than through 'the traditional legislative process.' . . . Anyway, we 'must do our best . . .'" (internal citations omitted); Gluck, *supra* note 52, at 96–97.

⁹⁸ Abbe Gluck, *The "CBO Canon" and the Debate Over Tax Credits on Federally Operated Health Insurance Exchanges*, BALKINIZATION (July 12, 2012).

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scoring process was as highly salient as the ACA's.⁹⁹ Scholars since then have argued for other canons based on the internal workings of Congress, especially the work of Congress's nonpartisan actors, like the revenue estimates produced by the Joint Committee on Taxation and the procedural rulings of the parliamentarians.¹⁰⁰ The Court's approach in *King* was sufficiently avant-garde that it prompted Justice Scalia to dissent: "[N]ormal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved. . . . Today's opinion changes the usual rules of statutory interpretation for the sake of the Affordable Care Act."¹⁰¹

My own earlier empirical work with Professor Lisa Bressman,¹⁰² and my more recent work on the "congressional bureaucracy" with Professor Jesse Cross¹⁰³ deepens the argument for reliance on Congress's own materials—especially when faced with a choice between those materials and the Court's interpretive presumptions about congressional drafting that, it turns out, Congress often either does not know or rejects as

⁹⁹ *Id.*

¹⁰⁰ See, e.g., Jonathan S. Gould, *Law Within Congress*, 129 *YALE L.J.* 1946, 2021–20 (2020) (arguing for a Parliamentarian's canon); Clint Wallace, *Congressional Control of Tax Rulemaking*, 70 *TAX L. REV.* 179, 183–84 (2017) (arguing for a Joint Committee on Taxation canon); Daniel Listwa, Comment, *Uncovering the Codifier's Canon: How Codification Informs Interpretation*, 127 *YALE L.J.* 464, 465–66 (2017) (arguing for a codifier's canon).

¹⁰¹ *King*, 576 U.S. at 500, 517 (Scalia, J., dissenting). Ironically, it was actually in the *NFIB* joint dissent that members of the Court (including Justice Scalia) for the first time argued that different interpretive rules might apply to different types of statutory vehicles. Specifically, the joint dissent proposed special severability rules for omnibus laws. The joint dissent wrote:

The Court has not previously had occasion to consider severability in the context of an omnibus enactment like the ACA, which includes not only many provisions that are ancillary to its central provisions but also many that are entirely unrelated—hitched on because it was a quick way to get them passed despite opposition, or because their proponents could exact their enactment as the quid pro quo for their needed support. When we are confronted with such a so-called "Christmas tree," a law to which many nongermane ornaments have been attached, we think the proper rule must be that when the tree no longer exists the ornaments are superfluous.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 705 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). Although I admire the attempt to think about different types of statutes, this particular new-rule formulation is not well-grounded in the empirics of Congress's operations, nor does it rely on Congress's own materials.

¹⁰² Gluck & Bressman, *Part I*, *supra* note 68; Gluck & Bressman, *Part II*, *supra* note 68.

¹⁰³ Abbe R. Gluck & Jesse M. Cross, *The Congressional Bureaucracy*, 168 *U. PA. L. REV.* (forthcoming).

inaccurate.¹⁰⁴ Congress relies on its own materials and the assumptions underlying them in drafting and understanding legislation. These materials are objective, typically nonpartisan, outputs authorized *ex ante* by Congress as a collective body through formal action (usually rules or statutes establishing the offices and their duties), and so might be acceptable even to judges who generally object to legislative history. For instance, the CBO score is statutorily required by Congress *ex ante*, calculated by a nonpartisan office based on a transparent methodology and published. Statutory language is iteratively adjusted in reaction to scoring,¹⁰⁵ the same goes for revenue estimates issued by the Joint Committee on Taxation.¹⁰⁶ Parliamentary rulings are based on Congress's internal precedents; the words of legislation are "sliced" and "diced" pursuant to these procedures to come within the jurisdiction of certain congressional committees.¹⁰⁷

Some academics have opposed this broadening of the interpretive lens.¹⁰⁸ They argue that Congress is fundamentally inscrutable and cannot operate collectively. Indeed, that cynicism about Congress, and the perception of it as an irrational body that courts can never hope to understand, is what gave rise to textualism in the first place.¹⁰⁹

But even some textualist justices have started to cite Congress's materials. The GAO Red Book was cited only one other time in the past decade before *Maine Community*;¹¹⁰ CBO has been referenced just five times, two of them in the context of the ACA.¹¹¹ Justice Anthony Kennedy

¹⁰⁴ While these arguments are beyond the scope of this piece, the Court consistently justifies the canons on the ground they are tethered to Congress—not as freestanding rules of federal common law—so it is on that ground that they should be judged.

¹⁰⁵ See Gluck & Bressman, *Part II, supra* note 68, at 763–64.

¹⁰⁶ Gluck & Cross, *supra* note 103.

¹⁰⁷ *Id.*; see Gould, *supra* note 100, at 1969–71 (discussing the importance of the Parliamentarian in making committee referrals for bills).

¹⁰⁸ See Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 985–86 (2017); John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1918–19 (2015).

¹⁰⁹ Gluck, *supra* note 52, at 80, 82–84.

¹¹⁰ See *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012)(citing GAO in both majority and dissent).

¹¹¹ In addition to *NFIB, Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 (2014), referenced the Congressional Budget Office (CBO), as did *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1966 n.9 (2020), *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484 (2018), and *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 629 & 629 n.2 (2011).

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and Justice Alito have cited Congress's own drafting manuals,¹¹² and Justice Brett Kavanaugh has relied on empirical studies about the realities of congressional drafting.¹¹³ It seems notable that, although Justice Sotomayor in *Maine Community* had reason to separate out the legislative history section of the opinion to allow Justices Thomas and Gorsuch to easily opt-out of that part of the opinion, she did not need to separate out the citation of the GAO Red Book or CBO assumptions to keep the Court's textualists in the majority.

Even *Maine Community's* use of the no-repeals-by-implication canon is legislatively realist. The Court agreed with the insurers that the presumption has special weight in the context of appropriations.¹¹⁴ The Court emphasized Congress's own internal rules (something it rarely does) prohibiting substantive legislating through appropriations and agreed with the impracticability of requiring members of Congress "to review exhaustively the background of every authorization before voting on an appropriation."¹¹⁵ It agreed with petitioners that:

[U]nlike substantive provisions in authorizing legislation, appropriations measures have the limited and specific purpose of providing funds for authorized programs. As such, lawmakers voting

¹¹² See *Carr v. United States*, 560 U.S. 438, 463 (2010) (Alito, J., dissenting); *United States v. O'Brien*, 560 U.S. 218, 233–34 (2010).

¹¹³ *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020) ("[R]edundancies are common in statutory drafting—sometimes in a congressional effort to be doubly sure, sometimes because of congressional inadvertence or lack of foresight, or sometimes simply because of the shortcomings of human communication."). Here, Justice Kavanaugh is building on his reliance on empirical studies in *Loving v. IRS*, 742 F.3d 1013, 1019 (D.C. Cir. 2014) ("And more broadly, lawmakers, like Shakespeare characters, sometimes employ overlap or redundancy so as to remove any doubt and make doubly sure." (citing Gluck & Bressman, *Part I, supra* note 68, at 934–35)).

¹¹⁴ *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020); see Brief for Petitioners at 22–23, 41–43, *Me. Cmty. Health Options*, 140 S. Ct. 1308 (No. 18–1023), 2019 WL 4167073; Petition for Writ of Certiorari at 17–18, 22, 26–27, 34, *Me. Cmty. Health Options*, 140 S. Ct. 1308 (No. 18–1023), 2019 WL 48127455.

¹¹⁵ Brief for Petitioner Land of Lincoln at 36, *Me. Cmty. Health Options*, 140 S. Ct. 1308 (No. 18–1023), 2019 WL 4235523; see also Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 9, *Moda Health Plan, Inc. v. United States*, 140 S. Ct. 1308 (2020) (No. 18–1028), 2019 WL 4273836 ("[C]ongress[s] operating rules dictate that appropriations bills may not change existing law." ((citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190–91 (1978) ((citing House Rule XXI(2); Rule 16.4 of the Standing Rules of the Senate))).

on them are entitled to operate under the assumption that they will be interpreted as addressing how to pay for authorized programs, rather than reopening or revisiting the underlying authorization itself. . . . Without that limiting principle, authorizing committees and appropriations committees would be in constant battle.¹¹⁶

It also agreed with amici that: “Appropriations measures are massive documents that must be passed on a regular basis; it would be absurd if Members of Congress had to review exhaustively the background of every authorization before voting on an appropriation, to make sure it does not implicitly change preexisting law.”¹¹⁷

Even so, the Court did leave the door open to limited situations in which an express revocation of the obligation or the imposition of a new formula incompatible with the obligation might be sufficient.¹¹⁸

I would like to think the opinion reveals the Court to be signaling a possible second-generation of textualism—one hinted at in *King* and now built upon in *Maine Community*. A textualist approach that is more realist about how Congress works is one that is more respectful of Congress and more consistent with an enterprise—statutory interpretation—grounded in legislative supremacy. Whispers of the pre-textualist Legal Process school grow louder: The legislature is reasonable and can be understood, and the Court’s role is to cooperate, not erect obstacles. It does not seem to be a coincidence that Chief Justice Roberts in *King* cited Legal Process titan Justice Felix Frankfurter twice, in pledging the Court would “do [its] best” to “respect” “the legislative plan.”¹¹⁹ That these whispers have grown louder thanks to the questions pressed by the ACA—a once-in-a-generation transformational statute—makes them all the more exciting.

¹¹⁶ Brief for Petitioners at 28–29, *Moda Health Plan Inc.*, 140 S. Ct. 1308 (No. 18–1028), 2019 WL 4235524 (internal quotation marks and citations omitted).

¹¹⁷ Brief of the Association for Community Affiliated Plans as Amicus Curiae Supporting Petitioners and Reversal at 5–6, *Me. Cmty. Health Options*, 140 S. Ct. 1308 (Nos. 18–1023) (internal quotation marks and citations omitted).

¹¹⁸ *Me. Cmty. Health Options*, 140 S. Ct. at 1325–26.

¹¹⁹ *King v. Burwell*, 576 U.S. 473, 475, 498 (2015) (citations omitted).

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A modern interpretive approach might meet Justices Scalia and Frankfurter somewhere in the middle. Only time will tell. *Maine Community* is, of course, about a lot more than statutory interpretation. It's the sleeper case that really isn't. It importantly clarifies Congress's obligations to private implementers. It resists ACA sabotage and so furthers ACA depoliticization and entrenchment. It models an interpretive approach that is still textualist but also realist, and better suited to the complexity of today's statutes. And it puts on full display how, even after a decade, the ACA continues to offer a buffet of new legal questions and continues to push the courts for new answers.

***Seila Law LLC v. CFPB* and the Persistent Myths of Presidentialism**

Peter M. Shane*

*Seila Law LLC v. Consumer Financial Protection Bureau*¹ represents the high-water mark so far in the Roberts Court’s campaign to vindicate a theory of presidential power based more on myth than on constitutional text, structure, or history. The 5–4 majority misreads the Constitution as concentrating vast administrative control irrevocably in a single individual in what would certainly amount to a counterintuitive eighteenth-century strategy for protecting liberty. A future Court can and should adopt Justice Elena Kagan’s devastating dissent—a move that can be accomplished by limiting *Seila Law* to its facts.

At issue in *Seila Law* was the structural constitutionality of the Consumer Finance Protection Bureau (CFPB). Under the Dodd-Frank Act, Congress designed the CFPB to be led by a single director—appointed by the president for a five-year term with the advice and consent of the Senate—who could then be removed only for “inefficiency, neglect of duty, or malfeasance in office.”² Such protection from at-will presidential removability is routine among the dozens of independent agencies, although this particular agency’s independence is reinforced by other statutory features—most importantly, a funding mechanism

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¹ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

² 12 U.S.C. § 5491.

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that does not depend on direct appropriations from Congress.³ Yet the majority focused solely on the constitutionality of according tenure-protected status to a principal officer in a single-headed agency, rather than a multi-member commission.⁴

I. The Rise of Unitary Executive Theory

In an opinion by Chief Justice John Roberts, the majority found tenure protection unconstitutional for a “principal officer[] who, acting alone, wield[s] significant executive power.”⁵ The majority thus vindicates a fundamental tenet of what has come to be known as “unitary executive theory”: “[A]s a general matter, the Constitution gives the President ‘the authority to remove those who assist him in carrying out his duties.’”⁶ Such removal power is entailed in a presidential authority to “supervise those who wield executive power on [the President’s] behalf.”⁷ In deference to precedent, the majority acknowledges two exceptions to this putative power—exceptions that sit uneasily with the principles underlying the majority’s reasoning. The exceptions are the principal officers of multi-headed independent

³ 12 U.S.C. § 5497.

⁴ *Seila Law, LLC*, the petitioner, had been the target of a CFPB investigation to determine whether the firm had “engag[ed] in unlawful acts or practices in the advertising, marketing, or sale of debt relief services.” *Seila Law LLC*, 140 S. Ct. at 2194. It raised the asserted unconstitutionality of the CFPB in response to a civil investigative demand that the firm produce information and documents relevant to the investigation. Although there was no obvious link between the CFPB’s decision to issue the demand and the tenure-protected status of the Director, the Court adhered to the view that “a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government’s course of conduct would have been different in a ‘counterfactual world’ in which the Government had acted with constitutional authority.” *Id.* at 2196. This view of standing thus aligns the case with standing decisions in the affirmative action area where the Court has found allegations of injury sufficient despite a litigant’s failure to show a specific link between affirmative action and a government decision actually rendered, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“[I]n the context of a challenge to a set-aside program, the ‘injury in fact’ is the inability to compete on an equal footing in the bidding process, not the loss of a contract.”), and in arguable contrast with decisions requiring that “a threatened injury must be certainly impending” to support standing. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 133 S. Ct. 1138, 1141 (2013).

⁵ *Seila Law LLC*, 140 S. Ct. at 2211.

⁶ *Id.* at 2191 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 413–514 (2010)).

⁷ *Id.*

agencies “that do not wield substantial executive power”⁸ and inferior executive branch officers with limited duties.

Stated in such breadth, unitary executive theory has been a mainstay of chiefly conservative constitutional theorizing since the 1980s. Looking back to the Reagan administration, it should be not surprising that, for conservatives in 1981, a theory of unlimited presidential control of the bureaucracy would be appealing. Although the Watergate scandal and President Gerald Ford’s subsequent pardon of Richard Nixon had laid the groundwork for a Democratic presidential victory in 1976, the White House remained the likeliest point of leverage to move the country in a more right-wing direction. Watergate and the Ford pardon would fade from political salience. Richard Nixon’s electoral strategy of 1968 had not lost its promise. The election of 1980 produced a victory for Ronald Reagan, the dominant right-wing politician of his age.

In returning the presidency to GOP control, Reagan’s win over Jimmy Carter seemed to vindicate the title of a much-discussed 1969 volume, *The Emerging Republican Majority*.⁹ In that influential work, political strategist Kevin Phillips had provided a rigorous basis for optimism (among Republicans, at least) regarding near-term Republican dominance of presidential politics. By way of contrast, even though the 1980 election had returned the Senate to GOP control for the first time since 1955, the House of Representatives remained in Democratic hands with no obvious prospect for an imminent Republican takeover. Senate filibuster rules, combined with Democratic control of the House, would mean that any conservative shifts in policy direction initiated by Congress could come only with Democratic support, which would

⁸ *Id.* at 2199–2200. The implications of this qualification for the constitutionality of other independent agencies are unclear. At one point, the majority suggests that the Court’s 1935 characterization of the FTC as exercising “no part of the executive power” was wrong, even in 1935. *Id.* at 2198 n. 2 (“The Court’s conclusion that the FTC did not exercise executive power has not withstood the test of time.”). This might suggest that were an agency like the FTC to be assessed today by the *Seila Law* majority, that agency would be found unconstitutional without regard to its multimember status. On the other hand, in defending the Court’s severance of the Director’s tenure protection from the Dodd-Frank Act, the majority also says that Congress, if dissatisfied, could re-create the CFPB as a multimember independent agency. *Id.* at 2211 (“Our severability analysis does not foreclose Congress from . . . converting the CFPB into a multimember agency.”) It would seem odd to invite Congress to redesign the CFPB as an entity the Court would now deem unconstitutional.

⁹ KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969).

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hardly be reliable. As a result, anything truly revolutionary that Republican presidents might be able to accomplish in terms of reversing the country's moderate-to-liberal national politics would have to be accomplished within the domain of presidential authority.

This is not to say that either the government lawyers or legal scholars arguing for unitary executive theory in the 1980s were the first to promote some version of such an idea or that they were self-consciously arguing in a partisan way. But between 1981 and 1993, the Reagan and then the Bush Justice Department became the crucible for honing a supposedly originalist case for the theory,¹⁰ which had theretofore previously found little support in Supreme Court jurisprudence, with the notable exception of Chief Justice (and former President) William Howard Taft's dicta in *Myers v. United States*.¹¹

Among the early modern champions of unitary executive theory are two current Supreme Court justices, Chief Justice Roberts and Justice Samuel Alito, whose views continue to reflect the presidentialist ideology of the Reagan administration. From 1981 through early 1982, Chief Justice Roberts worked as a special assistant to President Reagan's first attorney general, William French Smith. From 1982 to 1986, the future chief justice served as associate White House counsel.¹² Justice Alito, for his part, spent the first Reagan administration as an assistant to Solicitor General Rex Lee, the lawyer in President Reagan's Justice Department with primary responsibility for shaping the administration's constitutional arguments to the U.S. Supreme Court. From 1985 to 1987, Justice Alito served as a deputy assistant attorney general in the Office of Legal Counsel under Assistant Attorney General Charles J. Cooper, also a devotee of unitary executive theory.¹³

¹⁰ Ganesh Sitaraman, *The Political Economy of the Removal Power*, HARV. L. REV. (forthcoming 2020) (manuscript on file with the author); Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197 (2011); JEREMY D. BAILEY, *THE IDEA OF PRESIDENTIAL REPRESENTATION: AN INTELLECTUAL AND POLITICAL HISTORY 173–176* (2019).

¹¹ *Myers v. United States*, 272 U.S. 252 (1926).

¹² *Current Members*, SUPREME COURT OF THE UNITED STATES, (providing a biography of Chief Justice Roberts).

¹³ *Id.* (providing a biography of Justice Alito).

Although the Clinton administration did not trumpet its recent predecessors' philosophical commitment to the theory, President Clinton was arguably just as aggressive in the actual use of presidential power and perhaps even more so in claiming presidential "ownership" of the bureaucracy.¹⁴ In contrast, the George W. Bush administration championed unitary executive theory aggressively, especially in a series of presidential signing statements complaining about supposed congressional incursions into presidential prerogative.¹⁵ Such was the political environment that shaped two additional Supreme Court justices. Before his appointment to the U.S. Court of Appeals for the Tenth Circuit, now-Justice Neil M. Gorsuch was principal deputy associate attorney general in President Bush's Department of Justice.¹⁶ Justice Brett Kavanaugh, prior to his D.C. Circuit appointment, served as an associate White House counsel under Alberto Gonzales and, from 2003 to 2006, as assistant to the president and White House staff secretary.¹⁷ While on the D.C. Circuit, then-Judge Kavanaugh appeared actively to campaign for unitary executive theory, finding occasions to espouse the doctrine in cases for which such theorizing was technically unnecessary.¹⁸ Joined by Justice Clarence Thomas, it is fair to say that the *Seila Law* majority is the most executive-indulgent coalition of justices to have served on the Supreme Court since World War II.

II. The *Seila* Majority's Incoherent Argument for Unitary Executive Theory

Both the details and the merits of the majority's reasoning in *Seila Law* deserve careful scrutiny, but its theoretical incoherence and misreading of history can be easily spotted by attending to a few key points. The majority properly recognizes that the Framers' core strategy for protecting liberty was the diffusion of power: "To prevent

¹⁴ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹⁵ Neil J. Kinkopf & Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001–2009* (Ohio St. P. L. Working Paper No. 118, 2009).

¹⁶ *Current Members*, *supra* note 12 (providing a biography of Justice Gorsuch).

¹⁷ *Id.* (providing a biography of Justice Kavanaugh).

¹⁸ Peter M. Shane, *Brett Kavanaugh and the Executive-Indulgent Court*, 44 ADMIN. & REG. L. NEWS 5 (2018).

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the ‘gradual concentration’ of power in the same hands, they enabled ‘[a]mbition . . . to counteract ambition’ at every turn.”¹⁹ As recounted by the majority, the particular target of founding vigilance was Congress, because “[t]he Framers viewed the legislative power as a special threat to individual liberty.”²⁰

By way of contrast, the founding generation’s fear of concentrated power supposedly vaporized with regard to the presidency: “The Executive Branch is a stark departure from all this division. . . . By contrast [with Congress], the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities.”²¹ The majority recognizes, of course, that the Framers must have had in mind some institutional scheme for checking possible executive abuses, and here is where the majority slips unmistakably into myth:

To justify and check that authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation.²²

In other words, Americans’ protection against concentrated legislative power was bicameralism, but Americans’ protection against concentrated executive power was democracy.

The Framers would have been mystified by this account of their strategy. Presidential selection was manifestly to be accomplished through a process only tenuously connected to electoral accountability. Presidents, that is, were to be elected by groups of putatively elite electors chosen within each state. These electors were themselves to be chosen not directly by voters, but rather through whatever methods the people’s elected representatives in state legislatures might design. By way of contrast, it was the House of Representatives, to be selected through a franchise in each state as broad as the franchise for that state’s more numerous legislative chamber, which was the most democratic of

¹⁹ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020).

²⁰ *Id.* at 2203.

²¹ *Id.*

²² *Id.*

the new federal institutions. Senators, chosen by elected state legislators, would have some democratic accountability, but accountability mediated through indirect selection. Presidential accountability to the people would be unique in its double insulation from the people. Presidents would be chosen neither by the people, nor by the people's chosen representatives, but by electors themselves selected by the people's representatives. *Seila Law* thus turns the Founders' actual accommodations for democracy upside down. The idea that presidential power might draw legitimacy from democratic accountability to the public is a theory that emerged after, not before the ratification of the Constitution.²³

What makes the majority's account of the presidency not just inaccurate, but incoherent is its explicit notion that concentrated executive power is yet more liberty- protective because Congress has so greatly enhanced the authorities of the executive branch since 1789:

While “[n]o one doubts Congress’s power to create a vast and varied federal bureaucracy,” the expansion of that bureaucracy into new territories the Framers could scarcely have imagined only sharpens our duty to ensure that the Executive Branch is overseen by a President accountable to the people.²⁴

According to the majority, the Constitution envisions a uniquely powerful executive to protect liberty against the “special threat” posed by a liberty-endangering legislature. But now that the liberty-endangering legislature has paradoxically vested unprecedented statutory authority in the executive, its transfer of power to the executive makes it yet more important for courts to make sure that presidential control of such power is undiluted. This quite literally makes no sense. The idea that we need undiluted presidential power to resist Congress's self-abnegating trend towards increasing executive authority is self-

²³ BAILEY, *supra* note 10, at 43.

²⁴ *Seila Law LLC*, 140 S. Ct. at 2207.

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contradictory.²⁵ As the libertarian legal scholar Ilya Somin has argued, today's vastly more sprawling federal administration points in the opposite direction: "In many cases, it might be more in the spirit of the Founding Fathers to divide this overgrown authority than to give it all to the President. After all, the Founders repeatedly warned against excessive concentration of power in the hands of any one person."²⁶

III. Justice Kagan's Dissent: Dissecting the Unitary Executive Myth

The majority's argument for unitary executive theory rests on four legs. One is what the justices take to be the implication of Article II's Vesting Clause that the president must have comprehensive power to remove subordinates because the president singly shoulders the responsibility to take care that the laws be faithfully executed.²⁷ The second is the supposed ratification of this interpretation by the First Congress, which made what is known to separation-of-powers aficionados as the "Decision of 1789." This was a decision to word the organic act for a new Department of Foreign Affairs so as to acknowledge a removal power in the president that would not depend on congressional acquiescence.²⁸ The third comprises Chief Justice Taft's dicta—largely based also on the Decision of 1789—in *Myers v. United*

²⁵ The majority's putatively originalist argument is thus different from a pragmatic modern theory that all administrative agencies should be accountable to the president lest they become wholly unaccountable to the people. The premise of that argument is not that America needs a strong president to stand up to a usurpatious Congress, but rather that a self-abnegating Congress has passed too much power to agencies that, so empowered, threaten to lose all political accountability unless subject to presidential discipline. That theory is not logically inconsistent, but rests on highly contestable assumptions about the democracy-enhancing nature of presidential intervention in agency policy making. PETER M. SHANE, *MADISON'S NIGHTMARE: EXECUTIVE POWER AND THE THREAT TO AMERICAN DEMOCRACY* 160–163 (2009). It also ignores the complex political dynamics that shape agency decision making, in which the removability of the agency head is likely to play a fairly small role. *Seila Law LLC*, 140 S. Ct. at 2237 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) ("A given agency's independence (or lack of it) depends on a wealth of features, relating not just to removal standards, but also to appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships. It is hard to pinpoint how those factors work individually, much less in concert, to influence the distance between an agency and a President."); see also Jerry L. Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHICAGO L. REV. ONLINE (Aug. 27, 2020).

²⁶ Ilya Somin, *Rethinking the Unitary Executive*, REASON: VOLOKH CONSPIRACY (May 3, 2018).

²⁷ *Seila Law LLC*, 140 S. Ct. at 2197.

²⁸ *Id.*

States.²⁹ *Myers* was a 6–3 opinion over the dissents of Justices James Clark McReynolds, Louis Brandeis, and Oliver Wendell Holmes, holding it unconstitutional to require Senate consent to the president’s removal of a first-class postmaster. The fourth was the relative novelty of the CFPB’s structure; only a few other examples exist of single-headed independent agencies or administrative offices: “‘Perhaps the most telling indication of [a] severe constitutional problem’ with an executive entity ‘is [a] lack of historical precedent’ to support it.”³⁰

Justice Kagan’s dissent dissects each of these points. Her prose is laden with signs of actual impatience with the majority,³¹ perhaps because the weakness of the arguments had already been so thoroughly laid out. Beginning with the text, Justice Kagan’s starting point is the straightforward observation that the Constitution simply says nothing explicit whatsoever about presidential removal authority. The idea that the vesting of “executive power” and the Take Care Clause would have implied such a power to eighteenth century readers is belied by numerous sources, including other provisions of the Constitution. Clauses that enable the legislative branch to participate in executive functions belie the idea that presidents have “all” the executive power. Article I’s Necessary and Proper Clause leaves to Congress, not the president, responsibility for designing the executive branch. The majority’s reading of the Vesting Clause makes the Opinions Clause an enigma:

For those in the majority’s camp, that Clause presents a puzzle: If the President must always have the direct supervisory control they posit, including by threat of removal, why would he ever need a constitutional warrant to demand agency heads’ opinions? The Clause becomes at least redundant—though really, inexplicable—under the majority’s idea of executive power.³²

²⁹ *Id.* at 2197–2198.

³⁰ *Id.* at 2201.

³¹ *E.g., id.* at 2240 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (“I’m tempted at this point just to say: No. All I’ve explained about constitutional text, history, and precedent invalidates the majority’s thesis. But I’ll set out here some more targeted points, taking step by step the majority’s reasoning. First, as I’m afraid you’ve heard before, the majority’s ‘exceptions’ (like its general rule) are made up.”)

³² *Id.* at 2227.

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Moreover, 1789 readers of Article II would have been unlikely to associate “executive power” with unlimited removability because Parliament often restricted the king’s removal power,³³ and roughly contemporaneous state constitutions mixed executive power vesting clauses with limits on the removal powers of governors.³⁴ Justice Kagan cites scholarship pointing to the likelihood that the Take Care Clause was more likely intended as a font of obligation, not power.³⁵

Nor does the history confirm the majority’s supposedly originalist view. Both Alexander Hamilton and James Madison wrote in the *Federalist* that Congress would control the tenure of civil officers.³⁶ The Decision of 1789, properly investigated, reveals absolutely no consensus regarding an unlimited presidential power to remove executive officials.³⁷ The only view of the matter “definitively rejected” was Hamilton’s representation—later cited with apparent approval by Joseph Story³⁸—that Senate consent would be necessary to effect removal. Justice Kagan cites Professor Saikrishna Prakash, himself a strong proponent of presidential removal authority, for the proposition that “Congress never ‘endorse[d] the view that [it] lacked authority to modify’ the President’s removal authority when it wished to.”³⁹ As for the dicta in *Myers* relying on the Decision of 1789, Justice Kagan was dismissive: “Taft’s historical research has held up even worse than *Myers*’ holding (which was mostly reversed).”⁴⁰

³³ *Id.* at 2228.

³⁴ *Id.* (citing Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 334–344 (2016)).

³⁵ *Id.* citing Andrew Kent, Ethan Leib & Jed Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2121–2178 (2019).

³⁶ FEDERALIST NO. 39 (James Madison) (“The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions.”); FEDERALIST NO. 77 (Alexander Hamilton) (“It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint.”).

³⁷ John Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1965 (2011).

³⁸ JOSEPH L. STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1531–1538 (1833).

³⁹ *Seila Law LLC*, 140 S. Ct. at 2230 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (citing Saikrishna Bangalore Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1073 (2006)).

⁴⁰ *Id.*

Perhaps exhausted by her own demolition of the majority, Justice Kagan actually omits another telling example from the First Congress that amicus had raised in its brief. One agency well illustrating Congress's intent to insulate financial administration from complete presidential control was the Sinking Fund Commission, "proposed by Alexander Hamilton, passed by the First Congress, and signed into law by President George Washington."⁴¹ In the Sinking Fund Act of Aug. 12, 1790, "Congress authorized open market purchases of debt, in the form of U.S. securities, 'under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General.'"⁴² As one amicus brief pointed out, two of the five Commission members—the president of the Senate (that is, the vice president) and the chief justice—were not removable by the president at all. Prior to ratification of the Twelfth Amendment in 1804, "there was no guarantee that the Vice President would even be of the same party as the President or of the three cabinet members serving ex officio."⁴³ The Act required presidential agreement to such purchases of U.S. debt as the Commission might approve, but gave the president no power to initiate the purchase of debt except at the Commission's initiative.⁴⁴ It is impossible to reconcile the structure and function of the Sinking Fund Commission with the theory that the First Congress thought the president entitled to complete control, via the removal power, over all executive branch administration.

With regard to the majority's anti-novelty stance, Justice Kagan objects both on law and facts. She views the breadth of the Necessary and Proper Clause as both intentional and a source of the Constitution's durability:

Still more important, novelty is not the test of constitutionality when it comes to structuring agencies. See *Mistretta v. United States*, 488 U.S. 361, 385 (1989) ("[M]ere anomaly or innovation" does not violate the separation of powers). Congress regulates in that sphere under

⁴¹ Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, NOTRE DAME L. REV. (forthcoming) (manuscript at 3).

⁴² *Id.* (quoting the Sinking Fund Act of Aug. 12, 1790, ch. 47, 1 Stat. 186, 186).

⁴³ Brief of Harold H. Bruff et al. as Amicus Curiae Supporting Court-Appointed Amicus Curiae at 16, *Seila Law LLC*, 140 S. Ct. 2183 (2020) (No. 19–7).

⁴⁴ Chabot, *supra* note 41, at 4.

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the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat Clause. The Framers understood that new times would often require new measures, and exigencies often demand innovation. In line with that belief, the history of the administrative sphere—its rules, its practices, its institutions—is replete with experiment and change.⁴⁵

Justice Kagan reviews a handful of examples of single-headed independent administrative offices to demonstrate that precedents for the CFPB exist.⁴⁶ In the prior Supreme Court opinions favoring the constitutionality of agency independence, she finds nothing that turns on the number of agency heads. As a result, she regards the entire history of independent agencies as relevant institutional precedent in support of the CFPB.⁴⁷

The cases that support most critically Congress's authority to create independent agencies are *Humphrey's Executor v. United States*⁴⁸ and *Morrison v. Olson*.⁴⁹ Although the *Seila Law* majority declines to "revisit" those decisions,⁵⁰ its account of their reasoning and how they are most cogently synthesized differs dramatically from Justice Kagan's more faithful account.

The majority takes *Myers* as having established as law the thesis of Chief Justice Taft's extensive dicta, namely, that Article II "'grants to the President' the 'general administrative control of those executing the laws, including the power of appointment and removal of executive officers.'"⁵¹ The Court's unanimous decision less than a decade later to uphold the independence of the Federal Trade Commission (FTC) is thus cast as an "exception" to the rule in *Myers*. The supposed exception, in this account, depended upon specific features of the FTC.⁵² Structurally, it was composed of five members and designed to be "non-partisan" and to "act with entire impartiality." The FTC's duties were "neither political

⁴⁵ *Seila Law LLC*, 140 S. Ct. at 2241 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

⁴⁶ *Id.* ("Maybe four prior agencies is in the eye of the beholder, but it's hardly nothing.")

⁴⁷ *Id.* at 2233.

⁴⁸ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

⁴⁹ *Morrison v. Olson*, 487 U.S. 654 (1988).

⁵⁰ *Seila Law LLC*, 140 S. Ct. at 2192.

⁵¹ *Id.* at 2197–98.

⁵² *Id.* at 2198–99.

nor executive,” but instead called for “the trained judgment of a body of experts” “informed by experience.” In separation-of-powers terms, the *Humphrey’s Executor* Court viewed the FTC, however dubiously, as a quasi-legislative and quasi-judicial agency, which “occupies no place in the executive department.”⁵³ In contrast to the postmaster, whose office was the subject of *Myers*, a member of the FTC was not a “purely executive officer.”⁵⁴ Rather, “[t]o the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, [the FTC] does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.”⁵⁵

The 1935 labeling of the FTC, however, cannot explain *Morrison v. Olson*, which upheld the independent counsel provisions of the Ethics in Government Act. Although historical inquiry shows criminal prosecution to have been as much a judicial as an executive power in the late eighteenth century,⁵⁶ the Supreme Court has long treated it as a core executive function. For the majority, *Morrison* is best explained as another exception to the rule of *Myers*. Alexa Morrison may not have headed a multi-member agency, and she may have been “purely executive” in the sense of *Myers*. But she was also “an inferior officer with limited duties and no policymaking or administrative authority.”⁵⁷ Her independence is thus again cast as but a limited exception to *Myers*.

As Justice Kagan points out, however, the majority’s cabining of both *Humphrey’s Executor* and *Morrison* takes the reasoning of neither case seriously. A puzzling feature of the *Humphrey’s Executor* opinion is, indeed, the suggestion that the FTC was not part of the “executive department.” The Court’s reasoning is entirely comprehensible, however, if one differentiates, as that Court did, between authority vested in the president by Article II, i.e., “executive power in the constitutional sense,” from those “executive function(s)” entailed in discharging powers delegated to an agency entirely by statute.⁵⁸ The Court’s conclusion was that the president was entitled to comprehensive

⁵³ *Humphrey’s Ex’r*, 295 U.S. at 628.

⁵⁴ *Id.* at 632.

⁵⁵ *Id.* at 628.

⁵⁶ Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241 (2019).

⁵⁷ *Seila Law LLC*, 140 S. Ct. at 2200.

⁵⁸ *Humphrey’s Ex’r*, 295 U.S. at 628.

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removal authority over only officials exercising the former category of powers, not the latter. The sensible implication is that Congress, not having been constitutionally required to create regulatory agencies, was likewise not required to leave their direction in the hands of presidentially controlled administrators. It is not clear why the 1935 Court deemed Postmaster Myers to be “purely executive.”⁵⁹ But the decision to carve out space for *Myers*, rather than overrule it, might have been an act of respect to the recently deceased Chief Justice Taft. Or the Court might simply have agreed that, limited to its facts, the *Myers* prohibition on involving the Senate in presidential removal decisions was the proper resolution to that somewhat different question.

Morrison, a 7–1 decision, explicitly jettisoned the labeling of functions as a way of determining the reach of the president’s removal powers:

At the other end of the spectrum from *Myers*, the characterization of the agencies in *Humphrey’s Executor* . . . as “quasi-legislative” or “quasi-judicial” in large part reflected our judgment that it was not essential to the President’s proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light.⁶⁰

In other words, the question entailed in the president’s removal power would not be whether the functions of the official in question did or did not resemble functions that could be performed by the other branches of government. The question, as *Humphrey’s Executor* also implied, was whether that official was helping the president to implement “executive power in the constitutional sense,” or rather

⁵⁹ Intriguingly, the U.S. Postal Service is now directed by an independent Board of Governors, which is responsible for appointing the Postmaster General, whom the Board may also remove. 39 U.S.C. § 202.

⁶⁰ *Morrison v. Olson*, 487 U.S. 654, 690–91 (1988).

performing “executive function(s)” entailed in discharging powers delegated to an agency entirely by statute.⁶¹ Seen in this light, which Justice Kagan does, *Humphrey’s Executor* and *Morrison* do not exemplify limited exceptions to the rule of *Myers*; it is *Myers* that stands as the exceptional case.

The essence of the majority’s response to Justice Kagan’s analysis is that the Court had heard similar arguments and rejected them a decade before when the Court decided *Free Enterprise Fund v. Public Company Accounting Oversight Board*.⁶² The majority in that 5–4 case comprised three members of the *Seila Law* majority, Chief Justice Roberts and Justices Thomas and Alito. They were joined by Justices Scalia and Kennedy. The five held it impermissible to protect from at-will removability those inferior officers who were themselves appointed by heads of agencies whom the president could not remove at-will. Following what it took to be the logic of unitary executive theory, the majority held that “dual for-cause limitations on . . . removal . . . contravene the Constitution’s separation of powers.”⁶³

There is, of course, nothing surprising in the current conservative bloc’s adherence to the *Free Enterprise Fund* view. What is discomfiting in an opinion that purports to rest on original understanding is the unwillingness to engage with a decade of scholarship published since *Free Enterprise Fund* demonstrating beyond peradventure that the Court’s earlier historical accounts were woefully incomplete. It is one thing, in principle, to restrict Congress’s discretion in the design of government based on a plausible historical consensus as to constitutional meaning. It is another to intensify a restriction on legislative power embodied in

⁶¹ *Humphrey’s Ex’r*, 295 U.S. at 628.

⁶² *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

⁶³ *Id.* at 492. Among the puzzles of *Free Enterprise Fund* is whether the remedy actually strengthened the presidency. Because the power to remove PCAOB members would still belong to the independent Securities and Exchange Commission, a president seeking the removal of a PCAOB member without good cause would be better off only if the SEC were willing to implement the president’s wish that it exercise its newly granted at-will dismissal power. *Id.* at 509 (“Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will . . .”) Of course, if the president’s communication of such a wish would suffice to induce the SEC’s compliance, it is difficult to see in what respect the president is threatened by the existence of independent agencies in the first place.

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one century-old case based on a fabricated founding consensus that legal historians have demonstrated did not exist.

What accounts for the persistence of unitary executive theory is not its veracity as an historical account, but its success as myth. The legal historian Jonathan Gienapp has written brilliantly about the constitutional myth of “enumerationism,” the idea that the Constitution limited national power to the enumeration found in Article I, Section 8 plus any appropriate means necessary to carry those powers into execution. What makes enumerationism a myth is that it utterly elides the leap made from recognizing that “national powers are enumerated in the Constitution” to “the separate, optional conclusion that the powers of the national government are distinctly limited to and by that enumeration.”⁶⁴ “This latter commitment,” he writes, “moves well beyond the initial observation, venturing toward a distinctive depiction of the Constitution itself—one in which it is imagined as an exclusive written text whose language is the sole creator of its content.”⁶⁵ In the mythic view, the history of actual interpretation disappears.

What Gienapp says of “enumeration” is equally true of the separation of powers and certainly of unitary executive theory. The theory “smuggles a robust image of the Constitution into the mind through depiction of its putative, matter-of-fact features”—namely, the vesting of powers into three branches of government—“without leaving a trail of the distance traveled in between” noticing those features and confusing them with a complete description of the Constitution as a whole.⁶⁶ Here is Justice Kagan’s version of much the same insight:

The majority offers the civics class version of separation of powers—call it the Schoolhouse Rock definition of the phrase. The Constitution’s first three articles, the majority recounts, “split the atom of sovereignty” among Congress, the President, and the courts. And by that mechanism, the Framers provided a “simple” fix “to governmental power and its perils.”

There is nothing wrong with that as a beginning (except the adjective

⁶⁴ Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. 183, 184 (2020).

⁶⁵ *Id.*

⁶⁶ *Id.* at 184.

“simple”). . . . The problem lies in treating the beginning as an ending too—in failing to recognize that the separation of powers is, by design, neither rigid nor complete.⁶⁷

Just as Justice Kagan goes on to bemoan the majority’s cavalier treatment of evidence contradicting its historical view, Gienapp points to the work of legal historians that contradicts enumerationism. But enumerationists make little concession to the evidence:

No matter the power of this evidence, ardent defenders of enumerationism—constitutional originalists most of all—are not likely to awaken from their dogmatic slumber. They are more liable to dismiss such findings through recitation of their familiar incantations of the unique character and virtues of public meaning. Perhaps several Founders rejected enumerationism, yet—orthodox originalists are sure to say—the Constitution that was ratified did not.⁶⁸

If we substitute “unitary executive theory” for “enumerationism” in Gienapp’s paragraph, it is remarkable how perfectly he has captured the jurisprudence of the Seila Law majority.

IV. *Seila’s Effect and Legacy*

The consequences of *Seila Law* for the CFPB may prove to be minimal. Over the frustrated objection of Justice Thomas, the *Seila Law* majority, just like the *Free Enterprise Fund* majority, simply severs from the statute in question what the Court takes to be the constitutionally offensive administrative tenure protection.⁶⁹ The *Seila Law* firm is no more likely to escape the CFPB’s civil investigative demand than the *Free Enterprise Fund* was able to evade the Public Company Accounting Oversight Board’s investigation of its auditing procedures. For that reason, it may seem puzzling why the suit was brought at all.⁷⁰

⁶⁷ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2226 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

⁶⁸ Gienapp, *supra* note 64, at 186.

⁶⁹ *Seila Law LLC*, 140 S. Ct. at 2209.

⁷⁰ Sitaraman, *supra* note 10, at 3.

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Yet the holding of *Seila Law* and the theory it embodies remain triply dangerous. First, the *Seila Law* version of separation of powers may well yet be deployed to destabilize other longstanding features of the regulatory state—features that have enabled the federal government to accomplish much good for the American people. Another likely target is the very breadth of authority delegated by Congress to administrative agencies—a form of delegation supposedly at odds with a vision of the Constitution that has divided the federal government into three separate branches exercising distinct and well-defined powers.⁷¹ Some scholars have already poked notable holes in the originalist claim that the Court’s near-universal deference to Congress’s delegation authority is somehow at odds with the original meaning of Article I.⁷² But as Gienapp suggests, the power of evidence may not move “ardent defenders” of the myth “from their dogmatic slumber.”

The second worry is that the majority’s logic only raises the stakes of presidential elections yet higher when the nation is already experiencing a dangerous moment of polarization. Elections are supposed to matter, of course, but it can hardly advance the cause of domestic tranquility if nearly half of all voting adults perceive the loss of their preferred candidate as the overthrow of their every policy preference. Yet that is the view of democracy that the *Seila Law* majority enables. By insisting on a president’s constitutional entitlement to bend all of administrative government to his or her whim, the majority is enabling a form of government that can too easily become—if it has not already—more authoritarian than democratic.⁷³

The third danger is closely related to the second. As I have argued elsewhere and at length, unitary executive theory feeds a psychology of constitutional entitlement within the executive branch that is perilous for democratic norms and the rule of law. Entrenching a constitutional entitlement to fire at will any principal officer who carries out any of the executive branch’s legal responsibilities will all but inevitably nurture a president’s excessive belief in his or her entitlement to unilateral action: “[T]he ideological prism of presidentialism bends the

⁷¹ *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

⁷² Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021).

⁷³ Matthew J. Steilen, *Presidential Whim*, 46 OHIO N.U. L. REV. 485 (2020).

light of the law so that nothing is seen other than the prerogatives of the sitting chief executive."⁷⁴

In a world in which better reason prevails, Justice Kagan's view of the Constitution will move from dissent to majority status. *Seila Law* might be overruled or limited to its unusual facts—a single-headed agency not dependent on annual appropriations from Congress and the director of which serves longer than a presidential term. The Court should approach the question without any conviction—just as I have none—as to whether single- or multi-headed agencies serve the nation better. It should merely ratify that the choice of agency structure poses a decision for Congress, not for the Court. Justice Kagan puts the point simply. Each time Congress has created an independent agency:

Congress thought that formal job protection for policymaking would produce regulatory outcomes in greater accord with the long-term public interest. Congress may have been right; or it may have been wrong; or maybe it was some of both. No matter—the branches accountable to the people have decided how the people should be governed.⁷⁵

That the *Seila Law* majority regards such decisions as threats to liberty says more about contemporary ideology and the persistence of constitutional myth than it does about the pluralist and experimental outlook of the Founding generation.

⁷⁴ Shane, *supra* note 25, at 82.

⁷⁵ *Seila Law LLC*, 140 S. Ct. at 2245 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

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Re-Upping Appeasement: Religious Freedom and Judicial Politics in the 2019 Term

Nelson Tebbe* and Micah Schwartzman**

What strategy should the more liberal justices on the U.S. Supreme Court adopt, now that they are faced with a conservative majority intent on remaking the law of religious freedom? In a series of decisions over the last few years, the Roberts Court has been slowly but radically weakening the Establishment Clause while strengthening the Free Exercise Clause. That program has presented the Supreme Court's more liberal members with the difficult question of how to respond. Of course, one possible answer is that they should adopt no strategy at all; they should instead simply vote according to their principled interpretations of constitutional law. To the degree that they behave strategically, however, they will have to choose among competing options. How might they adjust to the reality of a Roberts Court with a transformative vision—in sum, virtually nonexistent limitations on establishment combined with powerful protections for free exercise—and with the votes to realize that vision?

In recent work, we posed this question, and we warned against one possible strategy, which we described as Establishment Clause appeasement.¹ We defined appeasement as “a sustained strategy of offering unilateral concessions for the purpose of avoiding further conflict, but with the self-defeating effect of emboldening the other party

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¹Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 Sup. Ct. REV. 271.

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to take more assertive actions.”² Although we could not be completely certain, we presented evidence that liberals had engaged in appeasement in a series of religious freedom cases that the Court had decided seven to two. Specifically, we noted that some of the liberal justices had joined conservative majorities or otherwise declined to dissent.

We then warned that this strategy carried serious risks, chiefly that it could speed rather than slow the Roberts Court’s revolution in the constitutional doctrine governing religious freedom. In short, declining to dissent could embolden conservative majorities by giving them incentives to pursue more aggressive positions and by bolstering the legitimacy of their rulings. For instance, Professor Michael McConnell reasonably has pointed to the Court’s lopsided votes to bolster the conclusion that its recent decisions do not reflect partisan sentiment but instead are faithfully following the law where it leads. “One indication,” he recently wrote, “is that most of these decisions broke 7–2 or 6–3, instead of along the predictable 5–4 conservative/liberal split.”³ That pattern not only legitimizes the majority, but it also isolates the remaining dissenters, who can be portrayed as outliers. In this way, appeasement shifts the range of acceptable constitutional arguments to the right.⁴

At first glance, the 2019 Term presented mixed evidence for our descriptive claim that some justices are engaged in appeasement. On one hand, the Court extended the pattern of 7–2 decisions in favor of religious actors in two important cases, *Our Lady of Guadalupe School v. Morrissey-Berru*, exempting religious schools from civil rights laws protecting certain teachers,⁵ and *Little Sisters of the Poor v. Pennsylvania*, upholding religious and moral exemptions from contraceptive coverage requirements under the Affordable Care Act.⁶ In both cases, two liberal justices joined a conservative majority, leaving just two others to dissent. On the other hand, the Court broke the pattern in another landmark decision, *Espinoza v. Montana Department of Revenue*, which required

² *Id.* at 272.

³ Michael McConnell, *On Religion, the Supreme Court Protects the Right to Be Different*, N.Y. TIMES (July 9, 2020).

⁴ Schwartzman & Tebbe, *supra* note 1, at 302–03.

⁵ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

⁶ *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246 (2020).

school choice programs to include religious schools.⁷ There, the liberal justices dissented together. On this account, the 2019 Term seemed to weaken our descriptive claim that appeasement was afoot.

Moreover, our normative warning that appeasement is counterproductive also appeared to have been undermined. In cases outside the area of religious freedom, Chief Justice John Roberts joined the liberal justices to deliver important decisions on religion-inflected issues, namely LGBTQ rights⁸ and reproductive freedom for women.⁹ So perhaps a strategy of compromising with the Chief on religion cases, or co-opting him there, succeeded in winning his votes in other areas of law.

But on closer inspection, the story of the term may do more to support than to weaken our appeasement thesis. Consider *Espinoza* more closely. In 2017, some liberal justices joined a conservative majority in a religious funding case called *Trinity Lutheran*, perhaps hoping to head off an adverse ruling on school choice programs.¹⁰ If so, that gambit failed in *Espinoza*, decisively and devastatingly. The Court issued an opinion that not only *allowed* government funding of religious instruction but actually *required* that funding in any program that benefits private schools. Considering only cases concerning the Religion Clauses, then, our descriptive claim about appeasement may well hold.

In what follows, we first reprise our appeasement argument. Then, in Part II, we present the case that *Espinoza* actually strengthens that analysis, and we briefly examine the two cases that more obviously support it, though we acknowledge the limitations of the evidence and the possibility of alternative accounts.¹¹ In Part III, we consider the term's decisions outside the context of religious freedom, and we respond to the objection that efforts to coopt Chief Justice Roberts have proven successful, if not in cases immediately involving religion, then in the related areas of LGBTQ rights and reproductive freedom.

⁷ *Id.*

⁸ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

⁹ *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

¹⁰ *Trinity Lutheran Church of Colum. v. Comer*, 137 S. Ct. 2012 (2017); see Schwartzman & Tebbe, *supra* note 1, at 288–95.

¹¹ One alternative we consider below is that these liberal justices agreed to join conservative outcomes or opinions in order to influence the reasoning of the opinions. A narrower version is that they did not vote differently from how they otherwise would have, but they accepted reasoning that they otherwise would have resisted in order to shape the majority's opinions. Both of these accounts attribute strategic reasoning to the justices, but they identify the strategy as one of compromise rather than appeasement.

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I. Appeasement and Its Alternatives

Appeasement is a strategy in which one party offers a series of unilateral concessions to a powerful counterparty, for the purpose of mollification but with the effect of further emboldening aggression. Although we recognize the charge of appeasement gains force from its association with the infamous Munich agreement that precipitated World War II, we disclaim any moral comparison to that episode or any other moment in history. We would prefer some other term that carries no such connotation. But no available substitute conveys the same combination of strategic purpose and counterproductive effect. We try to guard against the unwanted association by offering a careful definition of the concept and by distinguishing other decision-making strategies.¹²

While some elements of our definition are commonplace, others are less familiar. One conventional aspect is the normative assessment that appeasement leads to results that are counterproductive or self-defeating. A less common feature of our definition is that, for us, appeasement also depends on an actor's intent or motivation. Appeasement cannot be undertaken entirely by mistake; instead, it requires a deliberate course of conduct. Of course, no one intentionally pursues a futile plan, but the part that must be purposeful is the aim to mollify an aggressor, not the failure of that effort.

Two other strategies are close cousins of appeasement. *Compromise* is agreement to a result that both parties consider to be nonideal but that they accept because of the fact of disagreement. Both parties recognize that something is better than nothing, and they decide to accept partial progress. Compromise can resemble appeasement insofar as it is second-best and because it often serves the purpose of peacemaking. Yet there is a crucial difference: compromise involves mutual concession, whereas appeasement is unilateral (or at least highly disproportionate). This difference may account for compromise's positive connotation: the willingness to compromise is usually seen as a virtue.

Cooptation, the other related concept, describes an effort by one party to win over another by building longer-term relationships of trust and allegiance. The idea is that the coopted party will be persuaded to join

¹² This part draws on Schwartzman & Tebbe, *supra* note 1, at 273–76, 304–11.

a coalition in particular situations, and perhaps even permanently. Like appeasement, cooptation is sustained over a period of time, and it can involve asymmetric concessions at any particular moment. Cooptation can also devolve into appeasement if its practitioners are not sufficiently attentive to its prospects for success—if they stop expecting something in return for their concessions and if instead they attempt only to contain damage that might be caused by the party they are trying to coopt.

In previous work, we presented evidence that certain liberal justices were engaged in appeasement. In a series of religious freedom cases, Justices Stephen Breyer and Elena Kagan have joined conservative majorities, leaving only Justices Ruth Bader Ginsburg and Sonya Sotomayor to dissent. We described this trend in three major areas of Religion Clause doctrine: public funding, government religious symbols, and religious exemptions.¹³

Especially relevant here is the Court's 2017 decision in *Trinity Lutheran*.¹⁴ In an opinion by Chief Justice Roberts, the Court ruled that a church could not be excluded from a state program to resurface school playgrounds.¹⁵ Missouri had a provision in its state constitution that strictly prohibited public money from flowing to religious organizations, and consequently it barred religious schools from the playground resurfacing program.¹⁶ The Court applied strict scrutiny to that exclusion and found that the state's desire for a particularly strict separation of church and state was not a compelling interest.¹⁷

Seven justices supported that result, with only Justices Ginsburg and Sotomayor dissenting.¹⁸ Of particular interest for us, Justice Kagan joined the majority opinion in full.¹⁹ Justice Breyer concurred in the judgment.²⁰ Chief Justice Roberts's opinion therefore commanded six votes, except as to footnote 3, in which he wrote:

¹³ *Id.* at 276–301.

¹⁴ *Trinity Lutheran*, 137 S. Ct. 2012.

¹⁵ *Id.* at 2025.

¹⁶ *Id.* at 2017.

¹⁷ *Id.* at 2021, 2024.

¹⁸ *Id.* at 2016.

¹⁹ *Id.*

²⁰ *Id.* at 2026–27.

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This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.²¹

That crucial footnote was impossible to miss because two justices specifically refused to join it, meaning it was supported by only four votes and did not represent the opinion of the Court.²² Justice Neil Gorsuch, joined by Justice Clarence Thomas, wrote separately to object that the status/use distinction could not be maintained.²³ That left only Justice Kagan, along with Justices Kennedy and Alito, in support of the Chief’s decision to reserve questions about funding “religious uses.”²⁴

Given the lineup of votes, it is quite possible that Justice Kagan insisted on footnote 3 as a condition of joining the majority in *Trinity Lutheran*. She may have sought to include the footnote in order to forestall a future ruling that would require states to include religious schools in voucher programs or other school choice initiatives. Justice Kagan might have hoped that states would be permitted to exclude religious schools from such programs not on the basis of the schools’ religious status, but because the schools would use public funds to support religious uses. And, in fact, that was how commentators understood footnote 3—as an attempt to preserve voucher programs that did not include religious schools.²⁵

The sense that Justice Kagan was engaged in strategic action is supported by her decision in an earlier case concerning taxpayer standing.²⁶ There, Justice Kagan dissented from the Court’s decision to reject taxpayer standing in an Establishment Clause challenge to a school choice program.²⁷ Beyond the standing issue, she seemed to articulate a vision of nonestablishment as a structural protection against government support for religion using public funds. Assuming her views had not changed, that position would have given her reason to

²¹ *Id.* at 2024 n.3.

²² *Id.* at 2017.

²³ *See id.* at 2025–26 (Gorsuch, J., concurring).

²⁴ *Id.* at 2016.

²⁵ *See, e.g.,* Frank Ravitch, *Symposium: Trinity Lutheran and Zelman—Saved by Footnote 3 or a Dream Come True for Voucher Advocates?*, SCOTUSBLOG (June 26, 2017).

²⁶ *See* Schwartzman & Tebbe, *supra* note 1, at 292 (discussing *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011)).

²⁷ *See Winn*, 563 U.S. at 148 (Kagan, J., dissenting).

oppose *Trinity Lutheran*, which approved direct tax funding of a church, albeit not for religious uses. And that, in turn, suggests that she may have acted strategically in *Trinity Lutheran*, conditioning her vote on the inclusion of footnote 3 in an attempt to avoid implications for school choice programs.

Justice Breyer, for his part, began his opinion with the proposition that the Establishment Clause must permit the government to include religious schools in basic social services like police and fire protection, and he reasoned that the playground resurfacing program was analogous insofar as its aid was universal and neutral in content.²⁸ That may well be his principled view. But he may instead have believed that a refusal to join the majority, combined with a narrow rationale, would slow the Court's drive to require that school choice programs include religious schools. And we know that Justice Breyer has deep constitutional concerns about vouchers because he dissented passionately from *Zelman v. Simmons-Harris*, the decision that permitted voucher programs even when they overwhelmingly support parochial schools that engage in core religious practices.²⁹ Given that dissent, Justice Breyer might have concurred in *Trinity Lutheran* in an effort to disarm the majority by persuading its members that funding of religious organizations ought to be confined to programs involving basic services that are analogous to police and fire protection.

Appeasement strategies like these—if that is what they were—carry several interrelated risks, as we have explained.³⁰ First, they can have detrimental effects on *outcomes*. Not only are such strategies futile or ineffective, but they actually can be counterproductive, because they incentivize the other party to pursue its program more aggressively.³¹

In the Court's religion cases, we cannot be certain whether the pattern of agreement by two liberal justices has affected outcomes. After all, the Roberts Court already has five votes for, broadly speaking, the combination of a weakened Establishment Clause and a strengthened approach to religious exemptions. But it is quite possible that the pattern

²⁸ *Trinity Lutheran*, 137 S. Ct. at 2026 (Breyer, J., concurring in the judgment).

²⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting).

³⁰ See Schwartzman & Tebbe, *supra* note 1, at 301–04.

³¹ *Id.* at 302.

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that McConnell has noticed—where religious interests have prevailed in nearly all recent Supreme Court decisions—has been encouraged and supported by the other pattern he observes, namely that many of these cases have been decided seven to two.³²

And beyond worsening outcomes, appeasement may also enhance the Court's *legitimacy*. A decision that comes down seven to two carries greater authority than one that is decided by a bare majority of five. And in fact, supporters of *Trinity Lutheran* have not hesitated to highlight its lopsided vote.³³ Recall Professor McConnell's claim that the Roberts Court is not partisan, which he supported by noting that its decisions are drawing more than five votes. He pointed to the pattern we are tracing as evidence of legitimacy when he wrote that "[i]n the last [twelve] cases involving religion, the religious side prevailed, sometimes by lopsided majorities."³⁴ Even more powerfully, perhaps, McConnell acknowledged that "[t]he court may be political," but he insisted that "its politics is of the middle."³⁵ If some of the liberal justices are engaged in appeasement, however, then this description is inaccurate. The Court is politically polarized,³⁶ like the rest of the country, and its liberals are struggling to adjust to that reality.

Conversely, lopsided voting isolates any remaining dissenters, who are then vulnerable to being depicted as outliers or even radicals. For example, Justice Sotomayor wrote a powerful, ringing dissent in *Trinity Lutheran* that lost force when it was joined by only one of her colleagues, Justice Ginsburg.³⁷

Relatedly, appeasement can affect the so-called "Overton Window" of accepted constitutional positions.³⁸ Liberal decisions to

³² McConnell, *supra* note 3.

³³ See, e.g., Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of Trinity Lutheran*, 2016–2017 CATO SUP. CT. REV. 105, 121 (2017) ("[I]t is striking and significant that a seven-justice majority, in a roiling political environment and a case that is at least adjacent to the culture-war arena, ruled that the Constitution requires the disbursal of funds to a church for its school.").

³⁴ McConnell, *supra* note 3.

³⁵ *Id.*

³⁶ See Schwartzman & Tebbe, *supra* note 1, at 271 n.1 (collecting sources).

³⁷ See *Trinity Lutheran Church of Colum. v. Comer*, 137 S. Ct. 2012, 2041 (2017) (Sotomayor, J., dissenting).

³⁸ In Jack Balkin's memorable terms, appeasement can influence which interpretations are considered "off the wall" rather than "on the wall." Jack Balkin, *From Off the Wall to On the Wall: How the Mandate Went Mainstream*, ATLANTIC (June 4, 2012).

join conservative majorities, even for strategic reasons, can facilitate a rightward shift in the set of politically or legally feasible options, while a decision to dissent forcefully as a group can work to anchor that set or at least signal that conservatives are attempting to move the window. On a court that is as polarized as the current one, much of the struggle among the justices is over the range of what are considered plausible constitutional positions. Today's outcomes are dictated by the five conservatives, but tomorrow's outcomes will be affected by the scope of constitutional arguments that carry weight.

Because we build intentions into the definition of appeasement, we cannot know for sure whether Justices Breyer or Kagan followed this strategy in *Trinity Lutheran*. It is possible that they were simply voting their consciences and acting solely on the basis of constitutional principle and precedent, according to their own interpretations. Yet we have offered some evidence that they were engaged in strategic behavior, based on what we know about their principled positions on matters of free exercise and nonestablishment. Justice Kagan dissented in *Winn*, the taxpayer standing case, and Justice Breyer dissented in *Zelman*, the school voucher case. Along the way, they gave us indications of their views on nonestablishment in the area of government funding. Keeping those views in mind, it becomes harder to believe that they would have ruled against the state if they had commanded the necessary votes. To test the intuition, imagine that there had been a majority in favor of the state in *Trinity Lutheran*. Would these two have dissented?

Even if Justices Breyer and Kagan were acting strategically in *Trinity Lutheran*, they might have been pursuing a strategy other than appeasement. Perhaps Justice Kagan believed she was compromising by offering the majority something it valued—her vote—in exchange for something she valued—footnote 3 and the chance to cabin the rule of the case. A narrower account is that she compromised not by voting differently from how she would have otherwise, but by accepting reasoning that she opposed in exchange for a chance to press for a less sweeping majority opinion—one that included footnote 3. And perhaps Justice Breyer similarly believed that he was giving up some of what he wanted, the chance to dissent, in order to gain something else, namely influence over how the holding of *Trinity Lutheran* might be understood in the future. McConnell encouraged this view when he suggested that

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“the court seems to reach results that very likely would carry the day in Congress on many of these issues, if Republicans and Democrats were inclined to talk to one another and compromise.”³⁹

The compromise he seemed to have in mind was something like the Fairness for All bill, a piece of federal legislation introduced by Republicans that would have extended civil rights protection to LGBT citizens alongside exemptions for religious objectors.⁴⁰ But this so-called compromise garnered no real support among either Republicans or Democrats.⁴¹ Though compromise is often admirable, it is difficult to reach in a polarized political climate.

If Justice Kagan was practicing compromise, she might have been disappointed when footnote 3 failed to draw majority support. Yet she might nevertheless have hoped that the distinction between status and use could delay or derail any attempt to extend the rule of *Trinity Lutheran* to school choice programs.⁴²

Another possibility is that these justices were instead pursuing a strategy of cooptation, supporting the result in order to build up personal and political capital that they could spend in future cases, particularly by drawing Chief Justice Roberts away from the conservatives. After all, the Chief wrote the majority opinion in *Trinity Lutheran*. It is not outrageous to think that Justices Breyer and Kagan saw that decision as a chance to convince him of their reasonableness without giving up anything of

³⁹ McConnell, *supra* note 3.

⁴⁰ Fairness for All Act, H.R. 5331, 116th Cong. (2019).

⁴¹ See Micah Schwartzman, *Judicial Compromise and Political Uncertainty (or, What If You're Not Sugar Ray Robinson?)*, BALKINIZATION (July 22, 2020); Kelsey Dallas, *Five Years Ago, Utah Passed Landmark Legislation on LGBTQ and Religious Rights. Why Didn't Other States Follow Its Lead?*, DESERET NEWS (Mar. 11, 2020).

⁴² A related possibility is that liberal justices have restrained their votes or reasoning in order to preserve collegiality amongst the justices or to promote the Court's institutional legitimacy. Insofar as these moves are designed to build capital that the justices can spend later, or in other cases, they may fall into our categories of compromise or cooptation. But insofar as they attend to these institutional concerns without careful attention to success in achieving better reasoning or better outcomes, their decision-making strategies may shade from compromise or cooptation into appeasement, which is often defined in terms of seeking conflict avoidance and aiming to mollify other parties. And to the extent justices vote in ways that they otherwise would not, or join opinions with reasoning that they would otherwise reject, they may also violate role-based duties of sincerity and candor, which are integral to the normative legitimacy of adjudication. See Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1022–24 (2008) (criticizing claims that promoting collegiality and legitimacy can justify insincere judicial decisions).

comparable importance, given that he already had a majority without their votes.

In our earlier work, we took the possibility of cooptation seriously, but we questioned whether it was really happening, considering Chief Justice Roberts's demonstrated conservatism, not least on issues of religious freedom. His constitutional politics are very different from those of justices who may have been successfully influenced by liberals in the past, such as Justices Sandra Day O'Connor, Anthony Kennedy, or David Souter. Chief Justice Roberts is the median justice, but he does not sit at the center of the Court's political distribution, which is asymmetrically skewed to the right. In other words, he does not sit halfway between the two extremes, even though there are four justices to his right and four to his left. And the fact that someone as conservative as Chief Justice Roberts, as compared to Justice Kennedy, is now the "swing" vote signals the overall shift of the Court rightward. The prospects of cooptation are also diminished by current levels of political polarization, which are unlike anything seen during the tenures of any of those three justices (save perhaps Justice Kennedy during his final years on the Court).

Cooptation is a realistic strategy when the distribution of political positions on the Court looks like a bell curve, with most of the justices crowded near the middle and one or two on the tails. Then it is conceivable that someone on the center-left could slowly convince someone on the center-right. But when the distribution of political positions looks like a barbell—as it does on the current Roberts Court, with strong conservatives facing off against moderate liberals—then the cooptation strategy seems more ambitious, far riskier, and thus less plausible as an explanation for the decisions of the more centrist liberal justices.

The Court's 2019 Term offers additional evidence that can help us assess these claims, albeit not definitively. Looking at what the justices have done since 2017 can help us determine whether the liberals have used strategic behavior and, if so, whether that behavior yielded any gains. That evidence seems particularly pertinent to the cooptation story not only because Chief Justice Roberts joined the liberals in several salient cases but also because he wrote the majority opinion in *Espinoza*. Can the term's decisions help us determine which strategy was in play—

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appeasement, compromise, cooptation, or none at all—and whether any such approach was successful?

II. Evidence from the 2019 Term

A. State Funding of Religion

You might think that subsequent events should be irrelevant to an assessment of appeasement. What matters is whether the actor adopted a program of unilateral concession with the hope of mollifying a powerful counterparty. And that can be determined at the time of decision. Appeasement therefore should be identifiable *ex ante*, even if failure is part of its definition.

Still, subsequent events can give us insight into what happened by providing additional evidence of intentions, purposes, and motivations. One factor that we take into account when determining purpose, after all, is subsequent effect.⁴³ So a diagnosis may only become possible in retrospect, and that is true even if our main concern is how things looked in the first instance.⁴⁴

Keeping that in mind, what does *Espinoza* tell us about whether appeasement occurred in *Trinity Lutheran*? The comparison is apt because Chief Justice Roberts relied heavily on his earlier opinion in *Trinity Lutheran* when he was finally faced with the school choice issue that the justices had been anticipating.

Espinoza involved a challenge to a program enacted by Montana’s legislature that allowed taxpayers to receive a dollar-for-dollar tax credit of up to \$150 per year for contributions to a “student scholarship organization.”⁴⁵ The scholarship organization then awarded grants to students, which they could use to offset tuition at private schools. Students and their families chose the schools, which then received the grants directly from the scholarship organizations.⁴⁶ The program was designed to benefit all private schools, but it mostly aided religious schools, which outnumbered secular schools in the state.⁴⁷

⁴³ See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (setting out factors, including the effects of official actions, for determining their intent or purpose).

⁴⁴ See, e.g., Paul Kennedy, *A Time to Appear*, 108 NAT’L INT. 7, 13 (2010) (“Certainty about such matters only comes, I suspect, with hindsight; and there we are wise, because we know what happened.”).

⁴⁵ *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2251 (2020).

⁴⁶ *Id.*

⁴⁷ *Espinoza v. Mont. Dep’t of Revenue*, 435 P.3d 603, 607 (Mont. 2018) (“[M]ost [institutions that grantees attended] were religiously-affiliated private schools.”).

When it created the program, the legislature had directed that it be implemented in a manner consistent with Montana’s “no-aid” provision in its state constitution.⁴⁸ Like the state constitutional provision at issue in *Trinity Lutheran*, and like the similar provisions that exist in some forty other states, Montana’s clause required stricter separation between church and state than was required by the federal Establishment Clause. Specifically, it provided:

Aid prohibited to sectarian schools. . . . The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.⁴⁹

Interpreting this provision, the Montana Department of Revenue promulgated Rule 1, which prohibited the use of these grants at religious schools.⁵⁰ After Karen Espinoza and other parents sued the department, the Montana Supreme Court issued a decision confirming the conflict between the state constitution and the school choice program.⁵¹ But the state court also held that the department lacked authority to promulgate Rule 1 and it therefore invalidated the program altogether, as to both secular and religious schools.⁵²

Chief Justice Roberts wrote an opinion reversing and remanding. He relied on *Trinity Lutheran* for the rule that “disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character’ imposes ‘a penalty on the free exercise of religion that triggers the most exacting scrutiny.’”⁵³ He found that the Montana no-aid provision implicated that rule because it excluded religious schools from the program on the basis of their religious status. And Montana

⁴⁸ *Espinoza*, 140 S. Ct. at 2252.

⁴⁹ MONT. CONST. ART. X, § 6(1).

⁵⁰ *Espinoza*, 140 S. Ct. at 2252.

⁵¹ See *Espinoza*, 435 P.3d at 612.

⁵² *Id.* at 614.

⁵³ *Espinoza*, 140 S. Ct. at 2255 (quoting *Trinity Lutheran Church of Colum. v. Comer*, 137 S. Ct. 2012, 2021 (2017)).

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could not overcome the presumption of unconstitutionality because its interest in pursuing a stricter vision of church-state separation was not compelling. Here too, Chief Justice Roberts relied on *Trinity Lutheran*.⁵⁴ Finally, he rejected the argument that religious students and schools were not being discriminated against because Montana eliminated the program entirely. The Chief explained that the state court first invalidated the program based on a state constitutional provision that “expressly discriminates on the basis of religious status” and only then decided to eliminate the program as a way of effectuating its ruling.⁵⁵

With respect to the distinction between status and use, the majority rejected the view that excluding religious schools was tantamount to defunding religious uses, such as teaching theology, praying, and holding worship services. Chief Justice Roberts responded that even if the purpose or effect of the exclusion was to defund religious use, it actually turned on the religious status of the schools.⁵⁶ Moreover, he made it clear that he was not embracing the view that “some lesser degree of strict scrutiny applies to discrimination against religious uses of government aid.”⁵⁷ He noted that Justices Gorsuch and Thomas had questioned the stability of the status/use distinction and, without disagreeing, he explained that there was no need to examine that argument because Montana had engaged in discrimination on the basis of status.

Justice Breyer dissented and made two points, only the first of which drew Justice Kagan’s vote. First, he argued that Montana should be understood to have excluded only religious uses and not to have discriminated on the basis of religious status. “There is no dispute,” he noted, “that religious schools seek generally to inspire religious faith and values in their students.”⁵⁸ Montana’s decision not to fund them was the only practicable way for it to prevent tax dollars from flowing to core religious uses like instruction, prayer, and worship. States should have latitude—“play in the joints” between the Religion Clauses—to avoid the “religiously inspired political conflict and division” that so often accompanies government support for religion.⁵⁹

⁵⁴ *Id.* at 2260.

⁵⁵ *Id.* at 2262.

⁵⁶ *Id.* at 2257.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2285 (Breyer, J., dissenting).

⁵⁹ *Id.* at 2287.

Second, and writing now only for himself, Justice Breyer reiterated his view that interpreting and applying the Religion Clauses is a complex endeavor that is ineluctably fact-sensitive and irreducible to legal rules.⁶⁰ In cases concerning the tension between free exercise and nonestablishment, in particular, “there is no test-related substitute for the exercise of legal judgment.”⁶¹ Instead, judges must consider the values animating the clauses and seek to vindicate them in particular contexts.

Justice Kagan also signed the dissent from Justice Ginsburg, who argued that the Montana court’s decision to eliminate the program altogether could not have entailed any discrimination on the basis of religion.⁶² Justice Ginsburg rejected as “imaginary” the majority’s view that the state court had first invalidated the program based on a religious classification and only then eliminated the program.⁶³ Instead, the Montana court simply struck a program that violated the state constitution.

What are we to make of these votes by Justices Breyer and Kagan? Justice Breyer may have thought that *Trinity Lutheran* was different because it involved a public benefit akin to police and fire protection, whereas *Espinoza* was about school aid, a traditional concern of the Establishment Clause. But from what he actually said, it seems that both he and Justice Kagan had pinned their hopes on *Trinity Lutheran* footnote 3 and its distinction between religious status and use. If that is the case, and if they thought that Justice Kagan’s agreement to join the majority was part of a symmetrical compromise that had yielded something of value in an attempt to forestall the foreseeable school choice decision, then they were seriously mistaken.

Espinoza came only three years after *Trinity Lutheran*. And when it came, the Court flattened the status/use distinction, preserving it only as a technicality. In so doing, the majority effectively invalidated the no-aid provision in Montana and strongly signaled that similar provisions in dozens of other states are unconstitutional.

Stepping back, then, it appears that Justice Kagan may have spent capital in *Trinity Lutheran* in exchange for a footnote that did little to

⁶⁰ *Id.* at 2289–92.

⁶¹ *Id.* at 2291 (quoting *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., dissenting)).

⁶² *Id.* at 2278 (Ginsburg, J., dissenting).

⁶³ *Id.* at 2280.

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avoid or even meaningfully slow an adverse decision on school choice programs. To the extent that Justice Breyer hoped that footnote 3 would avoid a ruling that school choice programs must include religious schools, as his later decision suggested, he too gained nothing by giving ground in the earlier case. Together, they helped to legitimate *Trinity Lutheran* in asymmetric fashion, without impeding the Roberts Court's march toward not only allowing but requiring state funding of religious schools.

Again, we cannot be certain of any of this, given the importance of intentions and motivations to assessments of instrumental decisionmaking. But these justices' opinions and votes in *Espinoza* do provide some evidence that they had been relying on the unstable distinction between religious status and use to head off such a result. Maybe they made their decisions in both cases on the basis of pure legal principle. And, technically, the Court has not yet held that a state cannot prohibit its school choice program from funding religious uses. So it could be argued that Justice Kagan's gambit in *Trinity Lutheran* has at least delayed a holding along those lines. As long as governments define religious uses without reference to the religious identity of the school, they can still argue for excluding such uses from school choice programs.⁶⁴

But the evidence also supports the alternative view that they were attempting to manage the Roberts Court majority—and that they failed. As Justice Breyer wrote, with the agreement of Justice Kagan, Montana's exclusion was tantamount to an exclusion of religious uses. They seem to have recognized that the game was up. When *Espinoza* arrived, they could only object on narrow, unsatisfying grounds. The time for ringing dissents and declarations of principle had passed.

B. Religious Exemptions

If *Espinoza* challenged our thesis, the Court's other two religion opinions appeared to support it. Both *Our Lady of Guadalupe* and *Little Sisters* were decided by the lineup of seven justices that had become familiar in religious freedom cases. Did these decisions bolster the claim of appeasement?

⁶⁴ See, e.g., Carson v. Makin, 401 F. Supp. 3d 207, 211 (D. Maine 2019) (upholding Maine's school choice program even though it excludes "sectarian schools" and relying on *Trinity Lutheran* footnote 3).

Little Sisters concerned regulations promulgated by the Trump administration that exempted employers who objected on religious or moral grounds to contraceptive coverage requirements adopted pursuant to the Affordable Care Act (ACA). The Department of Health and Human Services had required all employers that provided health insurance for their workers to include cost-free coverage for all approved forms of female contraception. Religious employers complained that providing such coverage violated their beliefs. Initially, for-profit corporations raised objections under the Religious Freedom Restoration Act (RFRA), and the Court granted them exemptions in *Burwell v. Hobby Lobby Stores, Inc.*⁶⁵ Nonprofit employers then complained that the regulatory accommodation given to them, which required that they certify their objection to providing coverage, still imposed a substantial burden by triggering contraception coverage and thereby making them complicit.⁶⁶ Before that dispute could be resolved, President Trump was elected. His administration promulgated new rules that created sweeping and categorical exemptions for employers, whether for-profit or non-profit, who objected on religious or moral grounds to covering contraception.⁶⁷ Not only that, but women affected by the exemptions were not to be compensated in any way.⁶⁸ According to agency estimates, between 70,500 and 126,400 women were expected to lose contraception coverage as a result of the religious and moral exemptions.⁶⁹ State governments challenged the new rules and won a nationwide injunction from the lower courts.⁷⁰

Justice Thomas, writing for a five-justice majority, held that the federal agencies responsible for creating the religious and moral exemptions at issue had exercised authority given to them by Congress under the ACA and that they had satisfied the procedural requirements of the Administrative Procedure Act.⁷¹ He also held that the agencies acted properly in considering the demands of RFRA, although the

⁶⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 692–93 (2014).

⁶⁶ *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (per curiam).

⁶⁷ *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2377–78 (2020).

⁶⁸ *Id.* at 2403 (Ginsburg, J., dissenting).

⁶⁹ *Id.* at 2401.

⁷⁰ *Id.* at 2378–79 (majority opinion).

⁷¹ *Id.* at 2386.

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Court did not reach the merits of religious freedom claims raised under that statute.⁷² Ultimately, the Court reversed the court of appeals and remanded for further consideration. Notably, the Court also dissolved the nationwide injunction that had prevented the religious and moral exemptions from going into effect.⁷³

Justice Kagan, joined by Justice Breyer, concurred in the judgment. She disagreed with the majority that the ACA authorized the rule in express terms, but she also disagreed with the dissent that the statute obviously did not authorize the action. Faced with ambiguity, she concluded that the Court ought to have deferred to the agencies' interpretation of their own authorizing statutes.⁷⁴

Yet Justice Kagan also expressed doubts about whether the regulations should stand. Although the circuit court had struck the regulations because they were procedurally invalid, it had not considered whether they were substantively invalid insofar as they were "arbitrary" or "capricious" under the APA.⁷⁵ Justice Kagan therefore encouraged the lower courts to consider that question, and she suggested that the rules may well be irrational, both because the agencies exempted employers who did not object on religious grounds to the existing accommodation for nonprofits, and because the rules exempted publicly traded corporations that might not have rights under existing interpretations of RFRA.⁷⁶

It is difficult to believe that Justices Breyer and Kagan accepted the legality of the new rules as a matter of ideal interpretation. After all, each joined Justice Ginsburg's powerful dissent in *Hobby Lobby*, where she concluded that the business corporation did not have a right under RFRA to an exemption from the contraception mandate.⁷⁷ And that was in a case where the Court presumed—correctly, as it turned

⁷² *Id.* at 2382–83.

⁷³ *Id.* at 2373.

⁷⁴ *Id.* at 2397 (Kagan, J., concurring in the judgment) ("*Chevron* deference was built for cases like these.") (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).

⁷⁵ *Id.* at 2398 (quoting 5 U.S.C. § 706(2)(A)).

⁷⁶ *Id.* at 2398–99. The Court's decision in *Hobby Lobby* only gives *closely-held* business corporations protection under RFRA, bracketing whether publicly traded businesses might also be shielded by the statute. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 (2014).

⁷⁷ *Hobby Lobby*, 573 U.S. at 739–40 (Ginsburg, J., dissenting).

out—that women would receive alternate coverage when the Obama administration extended the nonprofit accommodation to companies like Hobby Lobby. But under the Trump administration’s rules, as Justice Kagan expressly acknowledged in her opinion, the situation was markedly *worse*—employees would lose contraception coverage altogether, causing harm to tens of thousands of women.⁷⁸ Moreover, in *Hobby Lobby*, Justice Kagan, joined by Justice Breyer, wrote separately to bracket the question of whether business corporations were covered by RFRA, meaning that their reasoning in that case depended solely on the substantive application of the statute and not on the simple proposition that for-profit entities were not covered by RFRA.⁷⁹ Given all of the above, it is difficult to understand their opinion in *Little Sisters* except as guided by strategic considerations.⁸⁰

In *Our Lady of Guadalupe*, the Court significantly expanded the scope of the ministerial exception, which it had constitutionalized several years earlier in *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*⁸¹ The question in *Our Lady of Guadalupe* was whether two lay teachers working at Catholic elementary schools counted as “ministers” for the purpose of triggering the exception.⁸² Both teachers had won their civil rights cases in the Ninth Circuit,⁸³ but the Supreme Court reversed. In an opinion by Justice Alito, the Court held that the teachers were “ministers” for purposes of the Constitution, even though they were not ordained (as women cannot be in the Catholic church) and even though they primarily taught secular subjects.⁸⁴

Kristen Biel instructed fifth graders in all their academic subjects, including a religion curriculum that she taught from a workbook chosen by the school administration for thirty minutes per day, four days a week. She was present for prayers twice a day, but did not lead them;

⁷⁸ *Little Sisters of the Poor*, 140 S. Ct. at 2399 (Kagan, J., concurring in the judgment) (“[T]he rule’s overbreadth causes serious harm, by the Departments’ own lights.”).

⁷⁹ *Hobby Lobby*, 573 U.S. at 772 (Kagan, J., dissenting).

⁸⁰ Cf. Noah Feldman, *Why Supreme Court Liberals Joined Conservatives on Religion*, BLOOMBERG (July 8, 2020).

⁸¹ *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 190 (2012).

⁸² *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020).

⁸³ *Id.* at 2058–59.

⁸⁴ *Id.* at 2066.

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likewise, she took her students to a monthly mass for the entire school but she had no role in the worship service.⁸⁵ Agnes Morrissey-Berru, the other plaintiff, taught fifth or sixth grade, including all academic subjects. Like Biel, she taught religion from a prescribed textbook and escorted her students to worship services. She did lead her students in prayer, planned a monthly service, and produced an Easter performance by her students each year.⁸⁶ Yet neither teacher was trained as a clergy member, neither had a liturgical title, and neither held herself out as clergy.⁸⁷ Both were fired for reasons that they said were discriminatory—one on the basis of age, the other on the basis of disability.⁸⁸

Justice Alito ruled that the schools had a constitutional right to terminate the teachers, even if they actually discriminated and even though the Catholic faith does not claim that discrimination on the basis of age or disability is theologically required. He reasoned that the ministerial exception protected the church's ability to make employment decisions concerning "those holding certain important positions with churches and other religious institutions."⁸⁹ Though Justice Alito was not completely clear on why the Constitution required this extraordinary latitude, his opinion emphasized the importance of "independence in matters of faith and doctrine and in closely linked matters of internal government."⁹⁰

In determining who counted as a minister for these purposes, Justice Alito said that "[w]hat matters, at bottom, is what an employee does."⁹¹ And because "[r]eligious education is vital to many faiths,"⁹² performing that function is a critical factor in determining whether an employee is covered under the ministerial exception and therefore is deprived of civil rights protections. In the cases of Biel and Morrissey-Berru, there was "abundant record evidence that they both performed vital religious duties," including instructing their students in the faith, praying with them, attending services with them, and preparing them for "other religious activities."⁹³

⁸⁵ *Id.* at 2058–59.

⁸⁶ *Id.* at 2056–57.

⁸⁷ *Id.* 2058–59.

⁸⁸ *Id.*

⁸⁹ *Id.* at 2060.

⁹⁰ *Id.* at 2061.

⁹¹ *Id.* at 2064.

⁹² *Id.* at 2064.

⁹³ *Id.* at 2066.

Justices Breyer and Kagan signed the majority opinion, once again leaving Justices Sotomayor and Ginsburg as the only two dissenters.⁹⁴ But neither Justice Breyer nor Justice Kagan wrote to explain their votes. Perhaps that was because they agreed fully with Justice Alito's reasoning; after all, Justice Kagan had joined Justice Alito's concurrence in the Court's previous ministerial decision case.⁹⁵ So perhaps they were with him as a matter of legal principle.

But their decision to sign the majority opinion in *Our Lady of Guadalupe* has left commentators puzzled because the decision greatly expands a constitutional exception from important civil rights laws, and it does so even though religious actors are not supposed to be able to claim exemptions from general laws under the Court's governing free exercise rule.⁹⁶ That Justices Breyer and Kagan joined the majority in *Hosanna-Tabor* has long been a mystery, and that they joined this decision raises even more questions.⁹⁷ For instance, Professor Noah Feldman observes that:

It's remarkable that the two pragmatist liberal justices, Justices Stephen Breyer and Elena Kagan, joined that opinion. For Breyer and Kagan to take this step suggests that they may have been trying to show that they're willing to cross traditional liberal lines to avoid a 5–4 decision—hence protecting the court from the perception of deep ideological division.⁹⁸

Feldman points out that Justice Alito's "church autonomy doctrine could be extremely far-reaching," and he credits Justice Sotomayor's argument in dissent that religious employers will be incentivized to

⁹⁴ *Id.* at 2051.

⁹⁵ See *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 198 (2020) (Alito, J., concurring).

⁹⁶ See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

⁹⁷ Ira C. Lupu & Robert W. Tuttle, *The Mystery of Unanimity in Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 20 LEWIS & CLARK L. REV. 1265 (2017). Lupu and Tuttle resolve the mystery by arguing that the justices share a commitment to avoiding ecclesiastical questions, and that *Hosanna-Tabor's* ministerial exception is grounded in that commitment. They therefore would argue that the liberal members of the Court support the ministerial exception for reasons that are principled, not strategic.

⁹⁸ Feldman, *supra* note 80.

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define their missions broadly in order to avoid employment laws. That, in turn, will “allow religious institutions to make [hiring] decisions on the basis of a prohibited animus that had nothing to do with their religious beliefs.”⁹⁹ Knowing all this, why would Justices Breyer and Kagan join Justice Alito’s opinion and give it added legitimacy?

One possibility, which Feldman implicitly recognizes, is that they were acting tactically. They knew that Justice Alito had the votes to rule in favor of the schools even without them. So perhaps they joined his decision so they could help to shape it. After all, Justice Alito’s decision was not as radical as it might have been. He recognized that his ruling “does not mean that religious institutions enjoy a general immunity from secular laws.”¹⁰⁰ Language like that might have been the product of an agreement. Moreover, the majority did not go as far as Justices Thomas and Gorsuch, who wrote separately to argue that courts must defer to religious organizations’ claims of who counts as a minister. As Professors Ira Lupu and Robert Tuttle rightly point out, the majority’s refusal to accept an even more expansive view was significant.¹⁰¹ Perhaps this result was a consequence of negotiations with Justices Breyer and Kagan.

But if Justices Breyer and Kagan influenced the majority opinion in this way, it may not have been worth the tradeoff. After all, Justice Alito ended the sentence quoted above by saying that the exception “does protect [religious institutions’] autonomy with respect to internal management decisions that are essential to the institution’s central mission.”¹⁰² There is little in *Our Lady of Guadalupe* to restrain the Roberts Court from going further, for example, by exempting Catholic universities from labor laws that protect the ability of faculty or graduate students to unionize, to use Feldman’s hypothetical.¹⁰³ So the strategy, if there was one, raised risks similar to those that materialized in *Espinoza*. The liberal

⁹⁹ *Id.*

¹⁰⁰ *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

¹⁰¹ See Ira C. Lupu & Robert W. Tuttle, Commentary, *The 2020 Ministerial Exception Cases: A Clarification, Not a Revolution*, TAKE CARE BLOG (July 8, 2020) (“That the Court majority did not follow the Thomas-Gorsuch path is of profound consequence to the future of Religion Clause principles. Their broad view of the autonomy of religious institutions would give such institutions grounds for ignoring a wide variety of legal norms.”).

¹⁰² *Our Lady of Guadalupe*, 140 S. Ct. at 2060 (emphasis added).

¹⁰³ Feldman, *supra* note 80; see also Richard Schragger & Micah Schwartzman, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 946 (arguing that “there is no centrally defined core institutional mission of the church on which to build a *limited* account of institutional autonomy”).

justices may have given up their votes to stave off worse outcomes, only to suffer further and more significant losses in future cases.

III. Appeasement or Compromise?

Perhaps the benefits of strategic action by center-left justices were gained not in religious freedom cases, but in other areas of law. If so, their decisions would not have been futile or counterproductive after all. Professor Feldman suggests that Justices Breyer and Kagan engaged in productive compromise, if only in a loose way, and that they won an important victory in the term's decision concerning LGBTQ rights.¹⁰⁴ In *Bostock*, after all, Justice Gorsuch and Chief Justice Roberts joined the liberals to extend Title VII, the main federal employment discrimination law, to cover LGBTQ employees.¹⁰⁵ That was a landmark ruling with potentially far-reaching implications for civil rights and antidiscrimination law.

We would add that Chief Justice Roberts also joined the liberal justices in *June Medical Services v. Russo*, the decision striking down a Louisiana law that would have eliminated nearly all the abortion providers in that state.¹⁰⁶ Both *Bostock* and *June Medical* were “religion inflected,” since they pitted core civil rights protections against political and legal views that were generally, if not invariably, grounded in traditional religious beliefs. Perhaps, then, Justices Breyer and Kagan understood the “gravitational effects that the different cases decided in a given term have on one another,” as Professor Feldman puts it.¹⁰⁷ If so, they were engaged in forging a judicial compromise that yielded significant benefits for those with liberal commitments.

This account might well be correct—again, we cannot be certain without knowing more about the justices' purposes or intentions. The most we can say is that there is some evidence to support it. But there also are alternative explanations for that evidence. The Chief and Justice Gorsuch, who joined the liberals in *Bostock*, must have known that

¹⁰⁴ Feldman, *supra* note 80 (“[I]t could be argued that, by joining the conservatives [in *Our Lady of Guadalupe*], Breyer and Kagan helped bring about the result in the LBTQ [sic] case.”).

¹⁰⁵ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

¹⁰⁶ *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

¹⁰⁷ Feldman, *supra* note 80.

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American public opinion favored extending civil rights protections to LGBTQ people.¹⁰⁸ Sooner or later, federal lawmakers would enact legislation to make the necessary changes to antidiscrimination law. By anticipating and preempting that development, the Roberts Court bolstered its legitimacy, strengthening the case that it is an apolitical body that simply follows the law. That was precisely the message that Justice Gorsuch's "textual" opinion was designed to convey.

It is unlikely that Justice Gorsuch was engaged in any kind of deal-making, however atmospheric. And it is plausible to interpret Chief Justice Roberts as acting to promote the Court's institutional legitimacy by bringing its jurisprudence into line with the clear trajectory of American public opinion.¹⁰⁹ His was also the sixth vote, once Justice Gorsuch had made up his mind. On this alternate account, then, the Court ruled the way it did in *Bostock* for its own independent reasons, not because of how Justices Breyer or Kagan had voted in religious freedom cases. And that supports the view that the liberal justices were not seeing the benefits of compromise or cooptation.

Combined with its decisions in the religion cases, again, the Court seems to be adopting something like the Fairness for All bill that has stalled in Congress.¹¹⁰ The gist of that proposed legislation is civil rights protections for LGBTQ citizens combined with exemptions for religious believers. Crucially, the bill does not protect its carefully calibrated provisions from RFRA claims. This is not a formula that any Democratic lawmakers have endorsed, and for good reason, because it grants religious exemptions from civil rights laws protecting LGBTQ citizens that are stronger than exemptions that currently exist in civil rights laws

¹⁰⁸ Justin McCarthy, *Slim Majority in U.S. Favors New LGBT Civil Rights Laws*, GALLUP (June 13, 2019).

¹⁰⁹ See Kent Greenfield & Adam Winkler, *Did John Roberts Doom Supreme Court Reform with His Decisions?*, HILL (July 8, 2020). It is also possible that Chief Justice Roberts voted with the majority, once he knew how Justice Gorsuch was voting, so that he could have the power to assign the opinion to Justice Gorsuch. (The senior justice in the majority has the power to assign the opinion.) On that theory as well, Chief Justice Roberts voted with the majority for his own reasons, independent of whatever Justices Breyer or Kagan had done in the past.

¹¹⁰ See Andrew Koppelman, *Supreme Court Rulings Make the World Safer for Both LGBT People and Religious Freedom*, USA TODAY (July 21, 2020); Mark Movsesian, *The Roberts Court Attempts a Compromise*, FIRST THINGS (July 15, 2020); David French, *The Supreme Court Tries to Settle the Religious Liberty Culture War*, TIME (July 14, 2020).

protecting any other vulnerable group.¹¹¹ Nor would Democrats embrace a bill that allows a balance between civil rights and religious freedom to be upended by RFRA. It is possible that Justices Breyer and Kagan have agreed to a compromise along these lines, but it seems more likely that the conservative majority of the Roberts Court is independently crafting a doctrine that reflects its own institutional interests and jurisprudential commitments.¹¹²

What about *June Medical*, where Chief Justice Roberts joined the four liberals, instead of cutting back on abortion rights?¹¹³ The Chief concurred in the judgment, even though he had dissented in *Whole Woman's Health*, a 2016 decision invalidating a nearly identical regulation in Texas.¹¹⁴ He explained that although he continued to think that *Whole Woman's Health* was wrongly decided, that decision was binding precedent and had to be followed.¹¹⁵

But, of course, the Supreme Court could have overturned its own precedent, and it appeared that Chief Justice Roberts had the votes to do so, after Justice Kavanaugh had replaced Justice Kennedy. Moreover, as a practical matter, precedents are not rigidly followed by the justices, to put it mildly.¹¹⁶ It is true that the Chief in particular is more inclined to weaken than overrule cases he believes to be wrong.¹¹⁷ But *Whole Woman's Health* was a relatively recent decision that pertained to unusual

¹¹¹ See NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* 152–57 (2017); Schwartzman, *supra* note 42.

¹¹² To be fair, the Fairness for All bill has also been opposed from the right, but that does not mean that the Roberts Court majority is not pursuing a similar settlement. See Ryan T. Anderson, “Fairness for All” Is Well Intentioned But Inadequate and Misguided, HERITAGE FOUND. (Dec. 7, 2019).

¹¹³ *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

¹¹⁴ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

¹¹⁵ *June Medical*, 140 S. Ct. at 2133.

¹¹⁶ See Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 131.

¹¹⁷ See Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014). This pattern seems to have held in *June Medical*. Chief Justice Roberts affirmed the holding of *Whole Woman's Health*, but rejected its reasoning and, in the process, may have laid the groundwork for further narrowing of reproductive rights. See Melissa Murray, *The Symbiosis of Abortion and Precedent*, 134 HARV L. REV. (forthcoming 2020); Melissa Murray, *The Supreme Court's Abortion Decision Seems Pulled From The 'Casey' Playbook*, WASH. POST (June 29, 2020) (“In this way, Roberts’s decision in *June Medical Services* does to *Whole Woman's Health* what *Casey* did to *Roe*. It preserves the outer shell of the earlier decision while gutting its substance.”); Leah Litman, *June Medical as the New Casey*, TAKE CARE BLOG (June 26, 2020).

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facts. Even Chief Justice Roberts could have voted to overrule it without much trouble. Could something else explain his decision?

It is possible that the Chief was responding to overtures that Justices Breyer and Kagan had been making carefully in other cases, particularly but not only during the 2019 Term. Perhaps their votes on the ministerial exception and the contraception mandate succeeded in building goodwill that Chief Justice Roberts repaid in *June Medical*. That would be a story of successful cooptation, or compromise,¹¹⁸ or “gravitational effects,”¹¹⁹ and it has some plausibility.

Yet it is also plausible to think that Chief Justice Roberts had institutional reasons for voting as he did. The Fifth Circuit had flouted *Whole Woman’s Health* in its ruling in *June Medical*.¹²⁰ Not for the first time, the Fifth Circuit had ruled according to what it thought the law ought to be in the area of reproductive freedom, rather than what it was.¹²¹ Or so the Chief, as the official head of the judicial branch of the federal government, might well have thought. On this account, Chief Justice Roberts was policing lower courts—sending them a clear message that precedent binds lower courts and must be followed by them, regardless of its hold on the Supreme Court itself.

Overall, then, there is reason to doubt that the liberal justices’ concessions in religion cases yielded gains in other areas of law. *Bostock* and *June Medical* can be explained in other ways. If liberal justices engaged in appeasement, or in strategic action of another type, it is far from obvious that they have anything to show for it, and there are countervailing reasons for concern that their concessions have contributed to real setbacks in the law governing religious freedom.

Political positions are now distributed on the Court in much the same way they are in ordinary politics—they are polarized. That

¹¹⁸ McConnell, *supra* note 3.

¹¹⁹ Feldman, *supra* note 80.

¹²⁰ *June Med. Servs. L.L.C. v. Gee*, 905 F.3d 787 (5th Cir. 2018) *cert. granted*, 140 S. Ct. 35, 204 L. Ed. 2d 1193 (2019), *and cert. granted*, 140 S. Ct. 35, 204 L. Ed. 2d 1193 (2019), *and rev’d sub nom.* *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

¹²¹ *Whole Woman’s Health* itself was another example.

distribution is regrettable, because it exacerbates conflict and inhibits cooperative self-government. It is also asymmetric, as many have noted, with conservatives taking positions that are more extreme than those of their liberal counterparts. Asymmetric polarization characterizes the Court, as it does constitutional discourse more generally, outside of courts.¹²²

Given this situation, what are liberal and progressive constitutional actors to do? One option is simply to vote their conscience—interpret the Constitution in the manner that is most justified and that best fits existing traditions. But they may reasonably believe that doing so consistently will only exacerbate polarization, while yielding no gains, especially now that the Roberts Court has five reliable conservatives. So liberal justices may be inclined to engage in some degree of strategic behavior. They could compromise in a loose manner without engaging in actual horse-trading, they could attempt to coopt likely allies by slowly building relationships of trust, or they could appease in the hope of forestalling worse outcomes.

Although we cannot prove that the liberal justices have engaged in appeasement, we have presented evidence from the Court's most recent religious freedom cases that is consistent with such a strategy. And we have warned against the dangers of selecting that option. No one likes polarization, perhaps least of all in constitutional politics, which concern fundamental democratic principles, including those governing the relationship between government and religion. But unilateral concessions may do more to exacerbate than to ameliorate our divisions, while risking the legitimation of decisions that might otherwise have warranted principled dissents.

¹²² See Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018); Rick L. Hasen, *Polarization and the Judiciary*, 22 ANN. REV. POL. SCI. 261 (2019).

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The Originalist Road Not Taken in *Kansas v. Glover*

Sarah A. Seo*

At first glance, it may be puzzling that the U.S. Supreme Court granted certiorari in *Kansas v. Glover*.¹ At issue was whether a sheriff's deputy had reasonable suspicion for an investigative stop as required under the Fourth Amendment, a well-established doctrine going back to the 1968 case *Terry v. Ohio*.² The reasonable-suspicion standard requires the sort of fact-intensive inquiry that lower courts, not the nation's highest court, usually conduct. Also curious is that, despite the longstanding mandate that the totality of the circumstances must be taken into account, the issue in the case rested on only these stipulated facts:

1. Deputy Mark Mehrer is a certified law enforcement officer employed by the Douglas County Kansas Sheriff's Office.
2. On April 28, 2016, Deputy Mehrer was on routine patrol in Douglas County when he observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ.
3. Deputy Mehrer ran Kansas plate 295ATJ through the Kansas Department of Revenue's file service. The registration came back to a 1995 Chevrolet 1500 pickup truck.
4. Kansas Department of Revenue files indicated the truck was registered to Charles Glover Jr. The files also indicated that Mr. Glover had a revoked driver's license in the State of Kansas.
5. Deputy Mehrer assumed the registered owner of the truck was also the driver, Charles Glover Jr.
6. Deputy Mehrer did not observe any traffic infractions, and did not attempt to identify the driver [of] the truck. Based

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¹ *Kansas v. Glover*, 140 S. Ct. 1183 (2020).

² *Terry v. Ohio*, 392 U.S. 1 (1968).

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solely on the information that the registered owner of the truck was revoked, Deputy Mehrer initiated a traffic stop.

7. The driver of the truck was identified as the defendant, Charles Glover Jr.³

Kansas argued that the information that Deputy Mehrer obtained through his patrol car's mobile data terminal (MDT), which is basically a laptop or tablet mounted on the dashboard, was sufficient to give him reasonable suspicion that the registered owner was the one driving the Chevy truck. The petitioner countered that relying solely on the stipulated facts to support reasonable suspicion amounted to a bright-line rule allowing the police to stop any car registered to an unlicensed owner. He further argued that Deputy Mehrer should have gathered more facts to corroborate his suspicion, like making sure that the registered owner's sex matched the person driving the car. In short, the pared-down stipulations in *Glover* narrowed the issue to a dispute about law enforcement's reliance on surveillance technology in an increasingly digital world. To put this differently, the doctrinal question about the quantum of suspicion required to satisfy the reasonableness standard can also be framed as a socio-legal question about officers' use of information retrieved from electronic databases.

From the socio-legal perspective, *Glover* falls in a line of Supreme Court cases about the constitutional regulation of technology used in police work. In fact, several amici in *Glover* warned of similar privacy concerns that had been raised in *Carpenter v. United States*⁴ about collecting cellphone records and in *United States v. Jones*⁵ about attaching GPS devices to cars.⁶ Although Deputy Mehrer manually entered Glover's license plate number into his MDT, automated license-plate readers (ALPRs) do the same thing but automatically, as the name indicates, with cameras. The potential of ALPR data nearly reaches the investigatory insights gleaned from cellphone and GPS data. In requiring a warrant in *Carpenter*, the Supreme Court explained—by quoting Justice Sonia Sotomayor's concurrence in *Jones*—that “mapping a cell phone's

³ *Glover*, 140 S. Ct. at 1187.

⁴ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

⁵ *United States v. Jones*, 565 U.S. 400 (2012).

⁶ See Brief of Fines and Fees Justice Center et al. as Amici Curiae in Support of Respondent, *Glover*, 140 S. Ct. 1183 (No. 18–556); Brief of Electronic Privacy Information Center et al. as Amici Curiae in Support of Respondent, *Glover*, 140 S. Ct. 1183 (No. 18–556).

location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'"⁷ The same can be accomplished with ALPRs, which can be installed just about anywhere, such as on streetlights and police squad cars, and can capture up to 1,800 license plates a minute.⁸ Once the images are uploaded into a searchable database, police can then piece together the location history of specific cars, determine an individual's driving patterns, and identify where someone has been and when.⁹ Clearly, the future is automation. According to a 2011 survey, seventy-one percent of police departments used ALPRs, with more surely having adopted the technology in the nine years since.¹⁰

The Supreme Court, however, did not recognize *Glover's* similarities with other recent Fourth Amendment technology cases, presumably because ALPR data consists of government-issued license plate numbers taken from public streets, which do not receive constitutional protection like personal information obtained from privately-owned smartphones and cars.¹¹ So rather than approaching *Glover* as a case about access to digital information as in *Carpenter* or *Jones*, the Court analyzed *Glover* as a warrantless, on-the-street police encounter governed by *Terry v. Ohio*. Regardless, *Glover* raises concerns about technology's impact on privacy, especially for the poor, a demographic that in this country overlaps significantly with racial minorities. Police use ALPRs and MDTs not just to investigate crime but also to identify unlicensed motorists. Many licenses are suspended or revoked not on public safety grounds but for a whole host of reasons that mainly have to do with poverty:

⁷ *Carpenter*, 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

⁸ Kaveh Waddel, *How License-Plate Readers Have Helped Police and Lenders Target the Poor*, ATLANTIC (Apr. 22, 2016).

⁹ See, e.g., Brief of Electronic Frontier Foundation et al. as Amici Curiae in Support of Appellant at 12–19, *United States v. Yang*, 958 F.3d 851 (9th Cir. 2020) (No. 18–10341); *Street-Level Surveillance*, ELECTR. FRONTIER FOUND. (last updated August 28, 2018).

¹⁰ Waddel, *supra* note 8.

¹¹ Given that ALPR-collected data, as public property, do not fall within the Fourth Amendment's purview, privacy scholars and advocates have argued for sub-constitutional regulations on the use of ALPRs, and several states have enacted such legislation. See *Automated License Plate Readers: State Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated June 23, 2020); ELECTR. FRONTIER FOUND., *supra* note 9.

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failure to pay parking tickets, court fees and fines, or child support.¹² Suspending licenses for non-driving reasons has become a common revenue-raising strategy and, as a result, has increased the likelihood of a police encounter for impoverished drivers or friends and family borrowing their cars.¹³ It has probably also increased demographic profiling, since officers are necessarily guessing about license status as they pick and choose which plate numbers to check. (The stipulated facts suspiciously omitted Deputy Mehrer’s reasons for targeting Glover’s truck.) Once pulled over, motorists are then subject to the police’s considerable authority; they can be ordered out of the car, questioned in an intimidating way, and, in the same intimidating manner, asked to “consent” to a search of their car.

Notwithstanding the difficult privacy issues that technological changes pose, the question presented made *Glover* an easy case for the state to win before the Supreme Court, which it did in an 8–1 decision. In other words, what makes *Glover* a hard case and an easy case is that the Court’s reasonable suspicion jurisprudence makes it nearly impossible to address the social justice implications of technology-aided policing. In fact, the *Terry* line of cases has only exacerbated the problem of discriminatory and unequal policing. The rest of this essay will provide a review of the majority opinion, concurrence, and dissent; explain why Justice Elena Kagan’s and Justice Sotomayor’s proposals, both rooted in doctrine, will prove ineffective in ameliorating the social issues (aside from the fact that they did not have the votes); and propose an alternative, radical solution that would provide a more realistic way to place limits on the police’s use of technology.

I. The *Glover* Opinions

A. Justice Thomas’s Opinion for the Court

The majority opinion, written by Justice Clarence Thomas, begins with a recitation of Fourth Amendment precedents affirming that reasonable

¹² See, e.g., William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver’s License Suspension in North Carolina*, 69 DUKE L.J. 1585 (2020) (finding that license suspensions are not associated with traffic volume but with poverty and race).

¹³ See, e.g., Allison P. Harris, Elliott Ash & Jeffrey A. Fagan, *Fiscal Pressures and Discriminatory Policing: Evidence from Traffic Stops in Missouri*, COLUM. PUB. L. RES. PAPER NO. 14–591 (2018); Jade Chowning, Erin Keith & Geoffrey Leonard, *Highway Robbery: How Metro Detroit Cops and Courts Steer Segregation and Drive Incarceration*, DET. JUST. CTR. (Mar. 2020).

suspicion is a much lower standard than preponderance of the evidence and permits officers to make “commonsense judgments and inferences about human behavior” based on the totality of the circumstances.¹⁴ It then points out that Deputy Mehrer saw an individual driving a Chevy truck with the Kansas plate 295ATJ, that the registered owner of the truck had a revoked license, and that the model of the truck as noted in the registration database matched the observed vehicle. “From these three facts,” the opinion concludes, “Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop.”¹⁵

There were at least two moments during oral argument that foreshadowed the Court’s decision. The first occurred when Chief Justice John Roberts asked respondent’s counsel whether “it’s totally random who the driver is? In other words, it’s registered to Fred Jones, but it could be anybody in the world?”¹⁶ After several exchanges, the chief justice remarked that “even you are willing to agree that [there’s] at least ten percent” chance that the driver is Fred Jones.¹⁷ In the second moment, Justice Stephen Breyer acknowledged that while counsel would say that Deputy Mehrer’s suspicion was wrong, “it’s pretty tough for me to say that that person’s wrong, unreasonable.”¹⁸ Indeed, the *Glover* opinion emphasizes that because reasonable suspicion “falls considerably short of 51% accuracy,” the possibility that the registered owner is not always the driver didn’t negate the reasonableness of Deputy Mehrer’s inference.¹⁹

B. Justice Kagan’s Concurrence

Justice Kagan joined the majority but wrote a separate concurrence to add one more fact to the “totality of the circumstances” analysis that, for her, made all the difference: Deputy Mehrer also knew that

¹⁴ *Kansas v. Glover*, 140 S. Ct. 1183, 1188 (2020) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000)).

¹⁵ *Id.*

¹⁶ Transcript of Oral Argument at 42, *Glover*, 140 S. Ct. 1183 (No. 18–556).

¹⁷ *Id.* at 44.

¹⁸ *Id.* at 50.

¹⁹ *Glover*, 140 S. Ct. at 1188. According to a 1981 survey of all federal judges, they ascribed, on average, a forty-five percent certainty to probable cause and a thirty-one percent certainty to reasonable suspicion. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?* 35 VAND. L. REV. 1293, 1327–28 (1982).

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the registered owner had a “proclivity for breaking driving laws” because Kansas “almost never revokes a license except for serious or repeated driving offenses.”²⁰ Justice Thomas’s opinion also mentioned the seriousness of license revocation, but did so merely to “reinforce[]” the officer’s commonsense inference.²¹ For Justice Kagan, however, this additional fact provided crucial support for the inference that the registered owner would commit the offense of driving as a habitual violator. The case would have been different for Justice Kagan if the registered owner’s license was instead suspended, a regulatory consequence that often does not relate to driving and road safety but to being poor. Accordingly, the inference that an individual with a suspended license would break the law by continuing to drive seemed “hardly self-evident” to Justice Kagan, who doubted that “our collective common sense could do the necessary work” to transform a “mere hunch” to the requisite reasonable suspicion.²²

But it is not farfetched that poor people with suspended licenses would keep driving. A 2015 *New York Times* article noted that “many drivers who have lost their licenses in Tennessee, too poor to pay what they owe and living in places with limited public transportation, . . . have driven anyway, resulting in courts so clogged with ‘driving while suspended’ cases that some judges dispatch them 10 at a time.”²³ The article went on to maintain that “Tennessee is not alone in the practice.”²⁴ According to a 2015 report published by the Brennan Center for Justice, forty-three states authorized or mandated license suspension for failure to pay court fees and fines.²⁵ For the poor, the legal inability to drive has rippling consequences in a car-dependent society. Most people drive to work. When their licenses are suspended, poor people often find themselves in a bind: They need to hold down a job to pay off their criminal-justice debts so that they can reinstate their licenses, but without a license, they cannot hold down a job. Making matters worse,

²⁰ *Glover*, 140 S. Ct. at 1192 (Kagan, J., concurring).

²¹ *Id.* at 1188.

²² *Id.* at 1192 (Kagan, J., concurring).

²³ Shaila Dewan, *Driver’s License Suspensions Create Cycle of Debt*, N.Y. Times (Apr. 14, 2015) (emphasis added).

²⁴ *Id.*

²⁵ MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUST., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES, 20, 28 (Nov. 21, 2019).

poor people tend to live farther away from job-rich metropolitan areas and must commute from lower-income suburbs.²⁶ And it's not just about going to and from work. Outside New York City, American life—from the mundane like buying groceries or taking children to school, to the vital like getting medical care or attending religious services—practically requires driving a car. Some can depend on friends and family for rides, but many others have no choice but to keep driving. It's not that they are demonstrating “a willingness to flout driving restrictions,” which was the focus of Justice Kagan's reasonable-suspicion analysis.²⁷ Rather, they are taking care of life's essentials first.²⁸ In either case of incorrigibility or necessity, an officer surely has more than a “mere hunch” that a registered owner with a suspended license for being too poor to pay court fees or fines might still be behind the wheel.

By differentiating license revocations and suspensions, Justice Kagan tried to stake a compromise position, assenting to the Court's reasonable-suspicion jurisprudence under the Fourth Amendment on the one hand and recognizing the dilemma that many poor Americans face on the other. Regardless of the concurrence's qualms about the demographic impact of investigating license suspensions, there is no getting around the fact that the Fourth Amendment does not scrutinize legislatures' policy choices. So long as there is reasonable suspicion that a motorist may be driving without a license, an officer can conduct a brief investigatory stop. This may be why the Brennan Center's recommendations focus not on doctrinal changes but on legislative reforms, like the elimination of license suspension for nonpayment of fees and fines.

C. Justice Sotomayor's Dissent

Justice Sotomayor, in her dissent, took a different tack. Instead of distinguishing revocations from suspensions, she maintained that “settled doctrine” and “key foundations of [the Court's] reasonable-suspicion jurisprudence” did not permit vehicle stops based solely on

²⁶ See, e.g., Gillian B. White, *Long Commutes Are Awful, Especially for the Poor*, ATLANTIC (June 10, 2015).

²⁷ *Glover*, 140 S. Ct. at 1192 (Kagan, J., concurring).

²⁸ See, e.g., Meghan Keneally, *'It's Not America': 11 Million Go Without a License Because of Unpaid Fines*, ABC NEWS (Oct. 25, 2019).

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the fact that the car was owned by someone with a revoked license.²⁹ Her doctrinal argument focused on the officer's common sense, which, in her view, the reasonableness inquiry requires. She argued that because Deputy Mehrer provided no basis for the key inference, the Court erroneously relied on its own conclusions about the average person's intuitions. "It is the reasonable officer's assessment," she insisted, "not the ordinary person's—or judge's—judgment that matters."³⁰ Repeating this point in Fourth Amendment parlance, the dissent stated that the reasonable-suspicion inquiry "permits reliance on a particular type of common sense—that of the reasonable officer, developed through her *experiences* in law enforcement."³¹ An officer's "experiences"—or the phrase "training and experience," a leitmotif in Fourth Amendment caselaw—was missing in this case. Justice Sotomayor pointed out that the state "could have easily described the individual or 'accumulated experience' of officers in the jurisdiction," but it "chose not to present such evidence."³² And so the justices had to "fill the gap" in the bare, stipulated facts.³³

The Supreme Court, however, has never required common-sense conclusions to be based only on an officer's training and experience and, in fact, has sometimes relied on the justices' own "commonsense judgment and inferences about human behavior."³⁴ This quote comes from *Illinois v. Wardlow*, a case analytically similar to *Glover*; the issue was whether just two facts—the respondent's presence in a high crime area plus his unprovoked flight upon seeing the police—amounted to reasonable suspicion. The Court agreed with the government, which did not introduce supporting evidence, that "headlong flight—wherever it occurs—is the consummate act of evasion."³⁵

It is true that *Terry v. Ohio*, the case that established the reasonable-suspicion standard, highlighted the officer's "30 years' experience in the detection of thievery" to justify an investigatory stop (and frisk).³⁶

²⁹ *Glover*, 140 S. Ct. at 1194 (Sotomayor, J., dissenting).

³⁰ *Id.* at 1195.

³¹ *Id.* at 1196 (emphasis added).

³² *Id.* at 1197.

³³ *Id.* at 1196.

³⁴ *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000).

³⁵ *Id.* at 124.

³⁶ *Terry v. Ohio*, 392 U.S. 1, 23 (1968).

The *Terry* opinion explained that the officer was “entitled to draw from the facts in light of his experience.”³⁷ It is also true that, since then, the Supreme Court has frequently referred to officers’ training and experience. Justice Sotomayor’s *Glover* dissent quoted from, for example, *Ornelas v. United States* that “a police officer views the facts through the lens of his police experience and expertise.”³⁸ But examining this quote in full and placing it in the context of the case make clear that *Ornelas* doesn’t support Justice Sotomayor’s claim that “reasonable suspicion eschews judicial common sense.”³⁹ According to the complete sentence in *Ornelas*, “A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise.”⁴⁰ Therefore, “background facts” derived from the judge’s knowledge of her community and an officer’s experience both “yield inferences that deserve deference.”⁴¹

At the suppression hearing in *Glover*’s case, the trial judge granted his motion to suppress based on her own personal circumstances. She had three cars registered in her name; she drove one of them, while her husband and daughter drove the other two. “And,” she declared, “that’s true for a lot of families that if there are multiple family members and multiple vehicles, that somebody other than the registered owner often is driving that vehicle.”⁴² Before we can conclude, per *Ornelas*, that the trial judge’s “background facts” and inferences are entitled to deference on review and that the Supreme Court should have upheld the lower courts’ decisions, we ought to consider *Ornelas*’s holding that notwithstanding the “due weight [given] to inferences drawn from those facts by resident judges and local law enforcement officers,” “determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.”⁴³ Although Justice Sotomayor criticized the majority for “relying on judicial inferences [that promote] broad, inflexible rules that overlook

³⁷ *Id.* at 27.

³⁸ *Glover*, 140 S. Ct. at 1195 (Sotomayor, J., dissenting) (quoting *Ornelas v. United States*, 517 U.S. 690, 699 (1996)).

³⁹ *Id.*

⁴⁰ *Ornelas*, 517 U.S. at 699 (emphasis added).

⁴¹ *Id.*

⁴² Brief for Respondent at 5, *Glover*, 140 S. Ct. 1183 (No. 18–556).

⁴³ *Ornelas*, 517 U.S. at 699.

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regional differences,” the overriding concern in *Ornelas* was precisely the opposite. The *de novo* standard of review was intended to “unify precedent” across the country.⁴⁴

Still, appellate judges, including Supreme Court justices, do defer to the police, such that the phrase “training and experience” has now become a recurring theme in Fourth Amendment caselaw.⁴⁵ But there is a difference between relying on an officer’s experience and requiring that experience to support reasonable suspicion. In the mine-run case, an officer’s experience imparts a more sinister color to what could be ordinary inferences. It suggests that while a given set of facts might seem innocent to the layperson or judge, a trained officer would know better. This was the case in *United States v. Cortez*, another opinion that Justice Sotomayor cited in support of her argument that Deputy Mehrer should have grounded his inference on his law enforcement training and experience. In *Cortez*, Border Patrol agents deduced from a set of footprints in the Arizona desert that a person, whom they called “Chevron” after the shoes’ print, was guiding groups of eight to twenty Mexican citizens into the United States by foot; that the groups were then picked up by a truck or camper; and that Chevron and his groups traveled on clear nights on weekends between two and six in the morning. In finding that the agents had reasonable suspicion for the investigatory stop of a pickup truck that, indeed, was transporting a group of six undocumented individuals and the two respondents, one of whom was wearing shoes with a chevron shoeprint, *Cortez* allowed that “when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion.”⁴⁶ Nothing in *Cortez* required the invocation of training and experience. Cases are littered with references to an officer’s training and experience not because Fourth Amendment jurisprudence demands it, but because such testimony can turn a humdrum situation into a suspicious scene that justifies police action.

The ultimate point I want to make is not that Justice Sotomayor was wrong in *Glover*. Rather, I point out the dissent’s doctrinal errors to suggest that there is something terribly wrong with the Fourth

⁴⁴ *Id.* at 697.

⁴⁵ See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995 (2017).

⁴⁶ *United States v. Cortez*, 449 U.S. 411, 419 (1981).

Amendment itself. As interpreted by the Supreme Court over the decades, the guarantee against unreasonable searches and seizures, which was supposed to shield individuals from officials prying into our private lives and spaces, has morphed into a provision quite the opposite. It is no exaggeration to describe the Fourth Amendment today as a source of discretionary power for law enforcement. Even the police are trained (speaking of training) to see the Fourth Amendment that way. A bestselling 1995 textbook exhorted patrol officers to “know search-and-seizure laws inside-out because they are your tools.”⁴⁷ While judges and defense lawyers might read Fourth Amendment caselaw to ascertain what the police cannot do, the police study doctrine, often with the aid of prosecutors, to figure out what they can do.⁴⁸

The over-reliance on training and experience in reasonable-suspicion analyses—a “magic incantation of words,” as Justice Neil Gorsuch put it—offers an example of how the Fourth Amendment has greatly increased the police’s discretion.⁴⁹ Take the common scenario of a drug-enforcement officer frisking a suspect. Under *Terry*, a frisk is justified only when there is reasonable suspicion that the person is armed and presently dangerous, and this limited pat-down of the outer clothing for weapons cannot be expanded into a search for evidence of a crime underneath the clothing. That means that if an officer feels a small, hard object inside a cellophane packet during a frisk, she cannot reach inside the pocket or even move the object around from outside the clothing in order to determine what it is. That would no longer be a frisk but a full-on search, however minimal the movements, which requires probable cause that the packet contains contraband drugs. In *Minnesota v. Dickerson*, the Supreme Court affirmed the suppression of a lump of crack cocaine found inside the respondent’s jacket because the officer did not have probable cause before conducting the search through “the sense of touch.”⁵⁰

What happened after *Dickerson* is instructive. Knowing that they must have probable cause before the search—that is, that they must

⁴⁷ CHARLES REMSBERG, *TACTICS FOR CRIMINAL PATROL: VEHICLE STOPS, DRUG DISCOVERY & OFFICER SURVIVAL* 25 (1995).

⁴⁸ See Daniel Richman, *The Process of Terry-Lawmaking*, 72 ST. JOHN’S L. REV. 1043, 1044 (2012).

⁴⁹ Transcript of Oral Argument at 38, *Kansas v. Glover*, 140 S. Ct. 1183 (2020) (No. 18–556).

⁵⁰ *Minnesota v. Dickerson*, 508 U.S. 366, 370 (1993).

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immediately recognize cocaine on “plain touch” through a suspect’s clothing—law enforcement officers now receive instruction on this particular skill so that they can give testimony on their expertise, like the following:

I have personally frisked at least one hundred (100) suspects, both during *Terry* stops and searches incident to arrest and discovered powdered cocaine in small plastic bags in trousers pockets. In addition, during in-service field training for our officers in “drug recognition,[”] I routinely “frisk” other officers who have placed cocaine in their trouser pants. I have done this at least once a month in the past year. I have also handled at least 25 bags of cocaine in its powdery form seized from automobiles, and this has added to my familiarity with how it feels to the touch[.] I have received formal training on how powdery cocaine feels to the touch at my police academy and while on active duty in the Air Force, using actual powdered cocaine.⁵¹

This is actual, real-life testimony used successfully in New York and Indiana courts and now offered as a model to law enforcement trainees. Perhaps the average person or judge might not be able to tell the difference in feel between a packet of powder cocaine and, say, a packet of sugar. But this sort of testimony suggests that a qualified officer would be able to distinguish between the two. Who knows how often she may be correct—ten percent of the time? Five percent? Regardless, training and experience have effectively expanded the scope of what *Terry* permitted, a limited frisk of the outer clothing.

This is precisely why Justice Sotomayor’s doctrinal argument will backfire. Law-enforcement “training and experience” has become boilerplate for good reason. These credentials are not difficult to obtain and recite in court. In future cases, patrol officers could simply testify that they had read reports on “the percentage of vehicle owners with revoked licenses in Kansas who continue to drive their cars” or on “how the behavior of revoked drivers measures up relative to their licensed counterparts,” to pick a few examples of the sort of expert knowledge

⁵¹ Steven L. Argiriou, *Terry Frisk Update: The Law, Field Examples and Analysis*, FED. L. ENFORCEMENT TRAINING CTR., 5–6.

that the dissent wanted from Deputy Mehrer.⁵² With such testimony, an officer's decision to pull over a car registered to an owner with a revoked or suspended license would become bulletproof. In short, Justice Sotomayor set the bar too low. It will be all too easy to meet the requirement that inferences must be based on training and experience, and Fourth Amendment jurisprudence will only further facilitate the over-policing of the poor.

II. The Originalist Proposal

Given the state of the Fourth Amendment today, how can we recover the right that was meant to protect individuals? I propose that we pursue this goal strategically. Justice Kagan's compromise would not work in many states since, as Justice Sotomayor pointed out, the "distinction between revocation and suspension may not hold up in other jurisdictions."⁵³ In any case, her concurrence enlisted only Justice Ruth Bader Ginsburg. Meanwhile, Justice Sotomayor's doctrinal approach garnered no other votes. Assuming, for the moment, that we have these three votes for some solution to insulate the poor from arbitrary investigative stops, we need at least two more votes. The social-justice implications, however, has so far not persuaded the other six justices. But there is an untried idea that might convince at least two of them: originalism.⁵⁴

Jurisprudential theories, to be frank, are usually aligned with political preferences. Stated generally, living constitutionalists tend to advocate progressive governance while originalists typically prefer small government. But this alignment gets scrambled in the Fourth Amendment context, where many progressives seek minimal state presence in crime and punishment while many conservatives don't mind a strong law enforcement apparatus.⁵⁵ As a result, when it comes to the Fourth Amendment, originalism can help those who want to place some limits on the police.

⁵² *Glover*, 140 S. Ct. at 1197 (Sotomayor, J., dissenting).

⁵³ *Id.* at 1198.

⁵⁴ This idea has worked before with the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36 (2004); *Blakely v. Washington*, 542 U.S. 296 (2004).

⁵⁵ Twenty-first century progressives ought not to be confused with early twentieth-century progressives, who were not opposed to greater government involvement in criminal matters. *See, e.g.*, MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* (2003).

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Here, then, is the originalist road not taken in *Glover*: overrule *Terry v. Ohio* as a radical departure from the Fourth Amendment of the founding era. An examination of officers' authority in the eighteenth century makes clear that the power that twenty-first century police forces wield would be unrecognizable to those who drafted the Bill of Rights.⁵⁶ To be sure, there is no consensus on the original meaning of the Fourth Amendment. Scholars have debated what, exactly, the drafters sought to accomplish and, more specifically, how to interpret the amendment's two clauses in relation to the other.⁵⁷ Namely, does the first clause's prohibition on "unreasonable searches and seizures" stand independently, or is it modified by the second clause that sets forth the requirements for a warrant? Fortunately, this debate has no bearing on the police practice at issue in *Glover* and authorized by *Terry*. On this, there is scholarly consensus that eighteenth-century common law did not license warrantless investigatory stops based on reasonable suspicion (of course, whether lawmen did so anyway is another matter).⁵⁸

A. *Terry's* Transformation of Fourth Amendment Jurisprudence

To begin, the Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" In the founding era, the word "unreasonable" in this context meant unlawful or, more precisely, "against the reason of the common law."⁵⁹ Whether or not the Fourth Amendment was intended to require a warrant for searches of houses and papers—the subject of much scholarly debate—the common law governed when officers could "seize," otherwise known as "arrest," persons without a warrant. For felony offenses, an officer could make a warrantless arrest if (1) the officer witnessed the person commit the

⁵⁶ This is one reason why Carol Steiker has argued that the benchmark time period for interpreting the Fourth Amendment should be the late nineteenth century, when professional police forces were first established, and not circa the eighteenth century. See Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 844–46 (1994). This Essay nevertheless examines the earlier period because the justices that adhere to originalism are likely to do so. In any case, the common law on warrantless seizures remained constant from the founding era through the mid-twentieth century.

⁵⁷ See, e.g., Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181 (2016); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

⁵⁸ For another discussion of *Terry* and originalism, see Larry Rosenthal, *Pragmatism, Originalism, Race, and the Case against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 330–37 (2010).

⁵⁹ Davies, *supra* note 57, at 624–25; Donohue, *supra* note 57, at 1192.

offense, or (2) the officer had probable or reasonable cause for believing that the person in fact committed the offense. The “in fact” in the second scenario set an important limitation; a felony had to have been actually, not probably, committed.⁶⁰ Only the first justification—commission of the offense in the officer’s presence—provided grounds for warrantless arrests for misdemeanors. In *Atwater v. City of Lago Vista*, the Supreme Court noted that in the eighteenth century, “common-law commentators (as well as the sparsely reported cases) reached divergent conclusions with respect to officers’ warrantless misdemeanor arrest power.”⁶¹ The *Atwater* opinion is correct in observing variance among jurisdictions; some allowed warrantless arrests for all misdemeanor offenses while others restricted the authority to the specific misdemeanor of breach of the peace. But it is indisputable that in every jurisdiction, what was not permitted was a seizure, no matter how brief, of an individual based on suspicion that an offense may have been committed. This was the common law until 1968.

In *Terry v. Ohio*, the Supreme Court created a new Fourth Amendment seizure short of an arrest called a “stop” and a lesser Fourth Amendment search called a “frisk.” It then applied a lower standard of reasonable suspicion to the practice now known as a “stop-and-frisk.” In sum, the police may conduct a brief investigatory stop to dispel or confirm their articulable suspicions that criminal activity may be afoot, and they may pat down an individual’s outer clothing for weapons if they have reason to believe that the person is armed and presently dangerous.

Before *Terry*, stop-and-frisks were illegal under the common law except in five states that had updated their laws in the mid-twentieth century.⁶² Nevertheless, the practice proliferated as police officers increasingly viewed themselves as proactive crime fighters. They stopped individuals to ask questions and frisked them for weapons not because they witnessed the individual committing an offense or believed that a felony had in fact been committed, but because their suspicions were aroused. This was the case in *Terry*. Officer McFadden observed two men “who didn’t look right” to him pacing up and down a block

⁶⁰ See Davies, *supra* note 57, at 632–33.

⁶¹ *Atwater v. City of Lago Vista*, 532 U.S. 318, 328 (2001).

⁶² Those states were New Hampshire, Rhode Island, Delaware, California, and New York.

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and reckoned that they were contemplating robbery.⁶³ But before John Terry and Richard Chilton had even begun to attempt robbery, Officer McFadden approached them and in short order frisked the two. The guns that he found should have been excluded from evidence because he didn't have probable cause for the seizure and search.

The *Terry* opinion remarked that the lawfulness of "this on-the-street encounter" raised "issues which have never before been squarely presented to this Court."⁶⁴ What Chief Justice Earl Warren meant, to put it differently, was that law enforcement was asking the Court to legalize what had been unlawful under the centuries-long common law of arrests, which required probable cause for all seizures and searches of persons. Despite the illegality, officers routinely performed stop-and-frisks with impunity before states had adopted the exclusionary rule. After California embraced the rule of exclusion in 1955 and the Supreme Court mandated the rule for every state in the 1961 case *Mapp v. Ohio*, California and New York changed their laws to permit stop-and-frisks.⁶⁵ In *Terry*, Ohio asked the Supreme Court to authorize the practice for the rest of the country. The Court obliged, declaring that "we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest."⁶⁶

B. Originalist Justifications for Overruling *Terry*

Neither the Supreme Court's rationale in 1968, nor the doctrinal and policy developments that have since relied on *Terry*, matter much under the theory of originalism. For its strongest adherents, *stare decisis* takes a backseat to fidelity to original meaning, and Justices Thomas and Gorsuch have demonstrated a willingness to disregard decades of precedent.⁶⁷ Tellingly, both signaled an interest to do so with regard to the Fourth Amendment as recently as 2018. At issue in *Carpenter v.*

⁶³ *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

⁶⁴ *Id.* at 9–10.

⁶⁵ *People v. Cahan*, 44 Cal. 2d 434 (1955); *Mapp v. Ohio*, 367 U.S. 643 (1961). For more on the exclusionary rule and stop-and-frisks, see SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* 142–52, 192–95 (2019).

⁶⁶ *Terry*, 392 U.S. at 24.

⁶⁷ For an "inclusive" version of originalism that allows for "some precedent . . . only to the extent that the original meaning *itself* permits them," see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352 (2015).

United States was whether the government needed a warrant to obtain petitioner's cellphone records from his wireless carrier.⁶⁸ A threshold question in Fourth Amendment analysis is whether there was a "search," and since the 1967 decision in *Katz v. United States*, courts have defined "search" as the invasion of a "reasonable expectation of privacy."⁶⁹ Using this definition, the Supreme Court held in *Carpenter* that a search had occurred and, moreover, that a warrant was required. Justice Thomas dissented not just in outcome but also in methodology, maintaining that the "Katz test distorts the original meaning of 'search.'"⁷⁰ Justice Gorsuch, in a separate dissent, made the same point that "Katz's problems start with the text and original understanding of the Fourth Amendment" and proposed a return to the "traditional approach to the Fourth Amendment" that defines "search" as an intrusion on private property.⁷¹

It's worth a brief pause here to consider whether it would be wise to employ originalism as a means to overrule *Terry* if it would also undermine *Katz*. There are reasons to believe that the consequences of overruling *Katz* might be smaller than feared. For one thing, the Supreme Court's conclusions under the *Katz* test have turned out to overlap significantly with the property-based trespass test.⁷² It is true that the Court in recent years has relied on *Katz* to bestow the greatest Fourth Amendment protection available, the warrant requirement, on non-traditional forms of property in the digital age that do not conform to concepts of ownership and possession. But—and this is the second point—it is not clear that the fate of decisions like *Carpenter* and *Riley v. California* necessarily must rise and fall with *Katz*. Analogizing electronic information to houses and especially to papers might suffice to save those cases. In *Riley*, for example, Chief Justice Roberts compared information stored in a cellphone to documents that would be found in a home and concluded that, in fact, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house."⁷³ In *Carpenter*, Justice Gorsuch indicated that he would find a Fourth Amendment property interest in cellphone records belonging to

⁶⁸ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

⁶⁹ *Katz v. United States*, 389 U.S. 347 (1967).

⁷⁰ *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting).

⁷¹ *Id.* at 2264, 2272 (Gorsuch, J., dissenting).

⁷² See David A. Sklansky, *One Train May Hide Another: Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 885 (2008).

⁷³ *Riley v. California*, 573 U.S. 373, 396 (2014).

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third parties.⁷⁴ Indeed, Justice Antonin Scalia strove to apply the trespass test to place limits on technology-aided searches in cases like *Kyllo v. United States*, which involved a thermal imaging device, and *Jones v. United States*, which involved a GPS tracker. Of course, the problem with the property approach is that newer technologies can, and have, allowed the government to circumvent these rulings. If law enforcement must get a warrant to attach a GPS device on a suspect's car (a trespass on private property under Justice Scalia's analysis), then officers can instead use drones to track the car's movements. But—and this is the third point—decisions relying on *Katz* are also vulnerable to the same obsolescence. If law enforcement must get a warrant to obtain cellphone records under *Carpenter*, then officers can instead use ALPR data to trace a car's location history. All this is to say, the implications of the originalist proposition are uncertain, but it at least provides a baseline. Justice Gorsuch warned that “neglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment.”⁷⁵ Perhaps we should take his warning as a suggestion.

If Justices Thomas and Gorsuch are open to revisiting *Terry v. Ohio* as they are to revisiting *Katz*, then they could provide the remaining two votes necessary to rescind the police's authority to conduct investigatory stops based on reasonable suspicion. But the other three potential votes—Justices Kagan, Ginsburg, and Sotomayor—have recently reaffirmed their commitment to *stare decisis*, and likely the biggest obstacle in persuading them to overrule a solid, fifty-year-old precedent is law enforcement's reliance interest.⁷⁶ And rely they have. Police have operationalized and scaled up their use of stop-and-frisks, which have become an integral component of crime-control programs throughout the United States and are “carried out systematically, deliberately,

⁷⁴ *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting). Justice Thomas, however, maintained that the Fourth Amendment does not protect papers owned and maintained by third parties. *Id.* at 2242–43 (Thomas, J., dissenting).

⁷⁵ *Id.* at 2272 (Gorsuch, J., dissenting).

⁷⁶ See, e.g., *Janus v. AFSCME*, Council 31, 138 S. Ct. 2448, 2497–2501 (2018) (Kagan, J., dissenting); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2189–90 (2019) (Kagan, J., dissenting). When deciding whether to overrule precedent, the Supreme Court considers the quality of the precedent's reasoning, the workability of the rule, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision. *Janus*, 588 U.S. at 2478–79.

and with great frequency,” according to Professor Tracey Meares.⁷⁷ Professor Jeffrey Fagan calls it simply the “*Terry* regime.”⁷⁸ The practice is so common that it has even penetrated American culture, featuring regularly in crime movies and procedurals. If the Supreme Court were to reverse *Terry*, torrents of criticism and predictions of spikes in crime rates are to be expected from law-and-order quarters.⁷⁹

But it would seem that reliance on a prior decision to pursue constitutionally questionable methods of policing ought not to be taken into account when considering whether to overrule that prior decision. Recent cases have highlighted problems with the systematic use of stop-and-frisks. *United States v. Johnson*, a Seventh Circuit case, exposed how the combination of *Terry* and traffic law enforcement has led to the creation of specialized units that engage in pretextual policing in communities of color.⁸⁰ In *Johnson*, five officers from the Milwaukee Police Department’s “Neighborhood Task Force Street Crimes Unit,” whose modus operandi is “to look for smaller infractions and hope that possibly they may lead to bigger and better things,” relied on a *suspected parking violation* to investigate a passenger waiting for a friend in a Toyota Highlander. While they did find a gun on the floor of the SUV, which is why the Fourth Amendment issue was litigated, one wonders about the number of false positives, the number of times that the Unit harassed innocent residents whose experiences never became court cases.

Floyd v. City of New York provides an indication of the ineffectiveness of field interrogations.⁸¹ In the class-action lawsuit, Professor Fagan analyzed eight years’ worth of UF-250 forms, which New York Police Department officers must complete each time they stop an individual.⁸² From 2004 to 2012, he found that fifty-two percent of all stops included a

⁷⁷ Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 164 (2015).

⁷⁸ Jeffrey Fagan, *Terry’s Original Sin*, 2016 U. CHI. LEGAL F. 43, 49 (2016).

⁷⁹ For an example of such criticism coming from the academy, see Paul G. Cassell and Richard Fowles, *What Caused the 2016 Chicago Homicide Spike? An Empirical Examination of the “ACLU Effect” and the Role of Stop and Frisks in Preventing Gun Violence*, 2018 U. ILL. L. REV. 1581 (2018). For a rebuttal, see John Rappaport, *Jeff Sessions Is Scapegoating the ACLU for Chicago’s Murder Rate Spike*, SLATE (May 11, 2018).

⁸⁰ *United States v. Johnson*, 874 F.3d 571, 576 (7th Cir. 2017) (en banc) (Hamilton, J., dissenting), cert. denied, 139 S. Ct. 58 (2018).

⁸¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁸² *Id.* at 558–60.

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frisk, which unearthed a weapon only 1.5 percent of the time. Moreover, the “hit rate” of the stops was very modest; only twelve percent resulted in an arrest or summons. When Professor Fagan more closely examined the bases for investigatory stops indicated on the UF-250 forms, he concluded that six percent of the stops were “apparently unjustified.”⁸³ But this was a conservative estimate. He didn’t count the forms that ticked the mysterious, catch-all justification “other” for the stop (approximately twenty-six percent), nor the forms that failed to identify any suspected crime (thirty-six percent). These numbers strongly suggest either that a significant percentage of stop-and-frisks didn’t meet *Terry*’s reasonable suspicion standard or that the standard is disturbingly low as to be meaningless. In addition to the Fourth Amendment problem, Professor Fagan’s analysis revealed a Fourteenth Amendment issue. Officers did not carry out the department’s stop-and-frisk policy evenly in all high-crime areas, but instead focused on those neighborhoods with large minority populations. Based on his expert testimony, the district court judge held New York City liable for violating the plaintiffs’ constitutional rights.⁸⁴

The NAACP had predicted this outcome. In its amicus brief in *Terry*, the civil rights organization granted that the attempt “to establish some third state of police powers”—a halfway point between probable cause and no cause at all—“has the allure of sweet reasonableness and compromise.”⁸⁵ But it maintained that “there is no third state; the reasonableness of theory is paper thin; there can be no compromise.” Although courts may require reasonableness to be grounded on articulable suspicions and not mere hunches, on the “ghetto street” in “the real world,” reasonable suspicion would operate on the unfounded stereotype that a Black person posed danger “even in the absence of visible criminal behavior.”⁸⁶ The NAACP argued that both

⁸³ *Id.* at 578–79.

⁸⁴ *Id.* at 587. The stop-and-frisk patterns and problems discovered in the *Floyd* litigation are not limited to New York City. A recent study shows that investigative stops conducted in New York City and Ferguson, Missouri, were similarly institutionalized and disproportionately affected the poor and people of color. Jeffrey Fagan & Elliott Ash, *New Policing, New Segregation: From Ferguson to New York*, 106 GEO. L.J. ONLINE 33 (2017).

⁸⁵ Brief for the NAACP Legal Defense and Educational Fund, Inc. as Amicus Curiae at 56, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 67, and 74).

⁸⁶ *Id.* at 38, 56, 64.

the Fourth Amendment and equal protection depended on a steadfast adherence to the probable cause standard. Even if courts applied the standard deferentially, it at least required the police to specify actual criminal conduct.

The *Terry* court, however, prioritized the imperatives of law enforcement at a time when crime rates were going up, and this justification may still cause Supreme Court justices to be wary of overruling *Terry*. Even if mass-scale stop-and-frisks instituted as part of a crime-control program run afoul of the Constitution, there are situations where it may seem appropriate, necessary even, to allow the police to briefly question an individual and quickly check for weapons. But recent scholarship casts doubt on the need for a lower standard than probable cause. In a follow-up study on the *Floyd* data, Professor Fagan found that stops based on probable cause resulted in a greater reduction in crime than stops based on reasonable suspicion. In fact, non-probable cause stops were “unproductive and add[ed] nothing to the crime control efforts of law enforcement.”⁸⁷ It turns out that probable cause, which is tied to behavioral indicia of crime, is more reliable than reasonable suspicion, which “is inherently subjective and prone to cognitive distortion, bias and error.”⁸⁸ In other words, the NAACP was right all along. The third state of police powers might appear indispensable to fighting crime, but it is just an appearance. In reality, the reasonable-suspicion standard and the indiscriminate use of field interrogations have broken people of color’s trust in the very institution that is supposed to protect all of us. According to Professor Fagan, *Terry* is the “original sin” for the seemingly unbounded expansion of the police’s discretionary power. As penance, he proposed that courts recalibrate “*Terry* standards to move them closer to *Mapp*’s more exacting probable cause standard.”⁸⁹

Another way to get at the same result is to overrule *Terry*, which the Court can accomplish in one fell swoop. Professor Fagan’s proposal, by contrast, depends on each individual judge in each case to require more for reasonable suspicion. Overruling *Terry* has the additional benefit of bringing back the distinction between misdemeanors and felonies for

⁸⁷ Fagan, *supra* note 78, at 79.

⁸⁸ Jeffery Fagan, *Terry’s Original Sin*, 2016 U. CHI. LEGAL F. 43, 66 (2016).

⁸⁹ *Id.* at 95.

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seizure purposes. This, in turn, has the further advantage of providing some regulation of technology used in police work, the larger issue in *Glover*. Under the pre-*Terry* common law, Deputy Mehrer would not have been authorized to stop the truck without personal knowledge that the misdemeanor offense—and driving without a license is a misdemeanor in every state—is being committed.⁹⁰ The information he obtained from his MDT would not have been sufficient, without corroboration, to justify a stop.⁹¹ This is, in fact, the rule that respondent Glover and Justice Sotomayor sought but could not achieve under the existing *Terry* standard, which effectively places the burden on individuals to negate reasonable suspicion once officers meet that low standard. Going back to the older common law would shift the burden back to the government, where it belongs. It could also disincentivize officers from entering any old license plate number they happened upon just to check for possible, suspected violations in the first place. They might not bother if they cannot do anything with information of a revoked or suspended license without confirming that the owner is the one behind the wheel. The old common-law rule would better protect both privacy and the poor than any efforts to rejigger the *Terry* doctrine.

Technology's transformation of policing has raised vexing Fourth Amendment questions at least since the early twentieth century, with the automobile in *Carroll v. United States*⁹² and wiretaps in *Olmstead v. United States*.⁹³ Reverting to an eighteenth-century Fourth Amendment may seem outright dangerous to some and regressive to others. On the one hand, modern society is filled with hazards that did not exist over two centuries ago, and the law-enforcement benefits of technology can be hard to resist. As the *Glover* opinion noted, the ability to pull up

⁹⁰ *Driving While Revoked, Suspended or Otherwise Unlicensed: Penalties by State*, NAT'L CONFERENCE OF STATE LEGISLATURES (last updated July 2016).

⁹¹ Eight states punish subsequent offenses as a felony. See *id.* Whether or how much officers have to corroborate the information they've digitally acquired to meet the probable-cause standard is an open question.

⁹² *Carroll v. United States*, 267 U.S. 132 (1925)

⁹³ *Olmstead v. United States*, 277 U.S. 438 (1928); see, e.g., SARAH E. IGO, *THE KNOWN CITIZEN: A HISTORY OF PRIVACY IN MODERN AMERICA* (2018).

registration information on MDTs (or ALPRs) to enforce suspensions and revocations can promote road safety, since licenses are often taken away for reasons related to dangerous driving. Relying on originalism to limit this capability seems counterproductive to public safety. On the other hand, technology in the hands of law enforcement threatens individual privacy in new ways, and it may seem intuitive that the Fourth Amendment must evolve alongside technological advances. The promises and perils of technology have posed a recurring quandary of figuring out how to simultaneously allow and cabin its use within constitutional boundaries.⁹⁴ Perhaps eighteenth-century common law struck the right balance between individual liberty and public safety. Perhaps those rules can still work in today's modern world. Whether earlier norms governing police encounters will safeguard the rights of vulnerable groups is uncertain, but what is clear is that jettisoning those norms has contributed to police abuse and inequality in the criminal justice system. We need to reclaim the Fourth Amendment as the people's right. As Tracey Maclin once asked, "whose amendment is it, anyway?"

⁹⁴ According to Orin Kerr, the Supreme Court has adjusted Fourth Amendment protections over "several generations" to maintain an equilibrium, set at "Year Zero," between government power and individual rights amid technological and other social changes. Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 481–82 (2011). I make a very different argument: Fourth Amendment jurisprudence has inordinately expanded the government's power vis-à-vis individual rights. *See also* Seo, *supra* note 65. Moreover, while Kerr proposes that courts should continue to preserve the "equilibrium" as technology evolves, this Essay calls for reinstating eighteenth-century common-law rules governing seizures.

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Stranger Still: *Thuraissigiam* and the Shrinking Constitution

Jennifer M. Chacón *

At the end of the 2019 Term, the U.S. Supreme Court released a slew of important decisions: on the short-term fate of DACA recipients,¹ the scope of federal antidiscrimination protections for LGBTQ employees,² the continuing validity of treaties guaranteeing the Muscogee Creek and other Indigenous nations' land rights,³ and much more. One case that drew a good deal of attention from legal scholars and immigration advocates but that received less attention in the popular press was *Department of Homeland Security v. Thuraissigiam*.⁴ It is understandable that a case brought by an asylum seeker seized near the U.S.-Mexico border would not generate the same kind of buzz as the other Term blockbusters. But in a country where seven percent of the population is comprised of noncitizens and over eleven million residents lack legal immigration status, a case that strikes a blow at the constitutional rights of noncitizens in this country is very important. And although it purports to answer a narrow question about the availability of judicial review for the legal claims of an asylum seeker near the border, *Thuraissigiam* is actually a watershed constitutional case.

With the 2019 Term in the rear view, it is time to take account of the full implications of *Thuraissigiam*. The case is definitely a significant loss for asylum seekers. Their ability to access the legal protections guaranteed to them by international and domestic law has been dealt a series of body blows by the Trump administration, to the point where asylum processes are essentially shut down at the U.S. border today.⁵

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¹ *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020) and consolidated cases.

² *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020) and consolidated cases.

³ *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

⁴ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

⁵ See discussion *infra* at Part III.

For these individuals, the closing of the courthouse door functions as yet another nail in the coffin of the legal protections that asylum is supposed to provide. But the decision also has the potential to upend many other lives as well, including the lives of U.S. residents with strong ties to the country.

This essay grapples with the full significance of the decision, starting with a summary of the decision in Part I. Part II then evaluates the significant ways that the decision deviates from precedent. Part III places the decision in the context of the broader legal and political landscape. The decision certainly leaves room for advocates to argue for narrow interpretations that could avert its most disastrous potential consequences. But even at its narrowest, the decision marks an abdication of judicial responsibility—a particularly dangerous abdication in a moment when the executive branch routinely flouts the law in its bid to implement a xenophobic immigration policy unbounded by law.

I. Breaking Down the Decision

Vijayakumar Thuraissigiam is a Sri Lankan national and a member of the Tamil ethnic minority. He left Sri Lanka in June 2016 and flew to Mexico. In February 2017, he entered the United States, crossing the U.S.-Mexico border without inspection or authorization. He was apprehended by a Customs and Border Patrol agent just twenty-five yards north of the border, four miles to the west of the San Ysidro border crossing.⁶

The Department of Homeland Security (DHS) placed Thuraissigiam in expedited removal proceedings. As the result of changes in U.S. immigration law that Congress made in 1996 with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act,⁷ individuals arriving at the border, as well as a small, defined subset of those who already have entered the United States without legal authorization, are subject to expedited removal.⁸ At the time Thuraissigiam was apprehended, expedited removal applied to those who could not demonstrate that they had been “admitted or paroled”

⁶ Basem Besada & Grant Shillington, *Department of Homeland Security v. Thuraissigiam*, LEGAL INFO. INST. SUP. CT. BULLETIN (July 28, 2020).

⁷ Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (2012).

⁸ 8 U.S.C. § 1225(b) (2012).

and who were apprehended within one hundred miles of the border and could not establish that they had been in the country for more than fourteen days.⁹ Because Thuraissigiam had entered the U.S. only a short time before he was arrested near the border, and because he had no visa to authorize his entry, he was placed in this expedited process.

Through expedited removal, a person can be removed from the U.S. based solely upon the decision of an immigration officer. As a practical matter, this means that a Border Patrol agent can decide that a person who lacks proper entry documents should be removed and can directly effectuate that person's removal. There is no right of appeal,¹⁰ so most individuals subject to expedited removal never see an immigration judge, let alone an actual courtroom. However, the law specifies that if a person "indicates either an intention to apply for asylum . . . or a fear of persecution,"¹¹ that person is entitled to additional review. Specifically, she is entitled to have her claim reviewed by an "asylum officer," who is required to determine whether she "has a credible fear of persecution," in which case, she is detained pending further consideration of her asylum claim.¹² Negative determinations by an asylum officer can be appealed and are subject to review by an immigration judge,¹³ but the statute provides for no additional review. This "credible fear" process was designed to flag anyone potentially entitled to protection under the Refugee Convention and related domestic law and to ensure that no immigrant with a valid asylum claim would be inappropriately turned away.¹⁴

Thuraissigiam asserted such a fear of persecution. He communicated to the agents who apprehended him that he feared returning to his country. He was granted an interview with an asylum officer to determine whether he had a credible fear that would require the government to allow him to file an asylum claim. The asylum officer found that Thuraissigiam credibly testified that he had been kidnapped and beaten by a gang of men but concluded that Thuraissigiam had

⁹ Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877–81 (August 11, 2004).

¹⁰ 8 U.S.C. § 1225(b)(1)(B)(iii)(I) (2012).

¹¹ *Id.* § 1225(b)(1)(A)(i).

¹² *Id.* § 1225(b)(1)(B)(ii).

¹³ *Id.* § 1225(b)(1)(B)(iii)(III).

¹⁴ These protective features of the law are under heavy assault by the Trump administration. See Part III, *infra*.

failed to demonstrate that the persecution he had suffered and feared suffering in the future was on account of a protected characteristic under the law. Following the Refugee Convention, U.S. immigration law provides asylum protection for those who fear returning to their country of nationality “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁵ In Thuraissigiam’s case, the asylum officer concluded that he had failed to demonstrate the “significant possibility” that he would be able to establish in asylum proceedings that his persecution was on account of one of these protected characteristics.¹⁶

Determinations in a credible fear hearing are reviewable. Thuraissigiam, accordingly, requested that an immigration judge review this decision, but the immigration judge agreed with the asylum officer and ordered Thuraissigiam’s removal. The statute provides for no further direct review, but Thuraissigiam filed a petition for writ of habeas corpus in federal district court. In his petition, he urged that his abduction and torture clearly fit the pattern of widespread persecution of Tamils in Sri Lanka and that he now faced additional risk because of a documented pattern of state-sponsored violence against failed asylum seekers.¹⁷ He argued that the asylum officer in his case had failed to “elicit all relevant and useful information,” as required by regulation,¹⁸ notably failing to provide translation services adequate to ensure that such elicitation could occur.¹⁹ Nor did the officer understand the “conditions” in Sri Lanka, thus making it impossible for the officer to know what information would be “relevant and useful” in his case, though this was also required by law.²⁰ Thuraissigiam argued that, as a result, the government applied an incorrect legal standard to his claim,

¹⁵ 8 U.S.C. § 1101(a)(42) (2014).

¹⁶ Brief for Respondent at 5, *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (No. 19–161).

¹⁷ *Id.*

¹⁸ 8 C.F.R. § 208.30(d) (2020).

¹⁹ Brief for Respondent at 5, *Thuraissigiam*, 140 S. Ct. 1959 (No. 19–161) (“The record indicates that Mr. Thuraissigiam failed to fully understand the proceedings. *See, e.g.*, J.A.66 (Q: ‘How long were you [in India]?’ A: ‘41 years [Respondent’s age]’); J.A. 64 (Q: ‘Do you have any question about the purpose of today’s interview?’ A: ‘Yes.’ Q: ‘What is your question?’ A: ‘Yes, I understand.’).”). The regulations require interpretation. 8 C.F.R. §208.30(d)(2), (5) (2020).

²⁰ 8 U.S.C. §§1225(b)(1)(B)(v), 1225(b)(1)(E)(i) (2012).

misapplying the statutory requirement that he show a “significant possibility” of establishing asylum eligibility.²¹

The immigration statute provides for extremely limited judicial review of an administrative expedited removal decision. Such review is limited to questions of whether the petitioner is a noncitizen, whether he was, in fact, ordered removed under the grounds covered by the expedited removal provision, and whether he has been admitted as a lawful permanent resident, refugee, or asylum seeker.²² Thuraissigiam’s petition did not fit these categories, but he argued instead that review of his claims were nonetheless required by the Constitution. To the extent the statute prohibited federal courts from reviewing the mixed question of law and fact presented by his habeas petition, he argued that the statute violated the Suspension Clause of the Constitution.²³ Although the federal district court dismissed his petition for lack of jurisdiction, the U.S. Court of Appeals for the Ninth Circuit reversed, agreeing with Thuraissigiam that the Constitution required review of his claim.²⁴

On June 25, 2020, the Supreme Court reversed the decision of the Ninth Circuit by a vote of 7–2.²⁵ Justice Samuel Alito wrote the majority opinion, in which he was joined by Chief Justice John Roberts and Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh. In his opinion, Justice Alito rejected the notion that review of Thuraissigiam’s claim was required by the Suspension Clause. Assuming without deciding that the relevant jurisdiction-stripping provisions of the immigration code could constitute a “suspension” of the writ of habeas corpus, Justice Alito concluded that Thuraissigiam was not entitled to the relief he sought, because it was not covered by the writ of habeas corpus as it was understood at the time of the founding. “Habeas has traditionally been a means to secure release from unlawful detention, but respondent invokes the writ to achieve an entirely different end, namely, to obtain additional administrative review of his asylum

²¹ Brief for Respondent at 6–7, *Thuraissigiam*, 140 S. Ct. 1959 (No. 19–161).

²² 8 U.S.C. § 1252(e) (2005).

²³ U.S. CONST. Art. I, § 9, cl. 2. (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

²⁴ *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097 (9th Cir. 2019).

²⁵ *Thuraissigiam*, 140 S. Ct. 1959.

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claim and ultimately to obtain authorization to stay in this country.”²⁶ Although his decision on this point obviated the due process question, he also expressly rejected Thuraissigiam’s due process claim. Citing the 1892 case of *Nishimura Ekiu v. United States*,²⁷ Justice Alito opined that “an alien at the threshold of initial entry cannot claim any greater rights [than those provided by Congress]. . . . Respondent attempted to enter the country illegally and was apprehended just 25 yards from the border. He therefore has no entitlement to procedural rights other than those afforded by statute.”²⁸

Justice Stephen Breyer wrote a concurring opinion, joined by Justice Ruth Bader Ginsburg, expressing the view that the Court’s holding was only justified in light of the particular facts of this case. Specifically, they focused on Thuraissigiam’s lack of ties to the United States, as a noncitizen apprehended only “25 yards inside the border” who “has never lived in, or been lawfully admitted to, the United States.”²⁹ They also emphasized that “though [Thuraissigiam] framed his two primary claims as asserting legal error . . . both claims are, at their core, challenges to factual findings.”³⁰

Justice Sonia Sotomayor wrote a vigorous dissent, in which she was joined by Justice Elena Kagan. Justice Sotomayor observed that both parties understood Thuraissigiam’s legal challenge as one challenging the administrative adjudicators’ application of law to fact. Federal courts have routinely reviewed this kind of claim upon petitions for writ of habeas corpus throughout history. Notably, these courts did so throughout the “finality era” of immigration law (from the late nineteenth century through the mid-twentieth century)³¹ when the statute provided for no review beyond the administrative agency.³² The dissent also rejected the notion that Thuraissigiam’s status excluded him from the procedural protection of the Constitution. “As a noncitizen within the territory of the United States, respondent is entitled to invoke the protections of the Due Process Clause.”³³

²⁶ *Id.*

²⁷ *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

²⁸ *Thuraissigiam*, 140 S. Ct. at 1964.

²⁹ *Id.* at 1990 (Breyer, J. concurring).

³⁰ *Id.*

³¹ *Id.* at 1973–74 (majority opinion) (defining the “finality era”).

³² *Id.* at 2004–09 (Sotomayor, J. dissenting).

³³ *Id.* at 2012.

II. *Thuraissigiam's* Break with the Past

Thuraissigiam marks a break with past precedent in three significant ways. First, it signals a novel, restrictive understanding of the nature of possible habeas relief—one sharply at odds with recent precedent. Second, it advances a newly constrained vision of who is entitled to constitutional habeas protections. Finally, it misreads over one hundred years of immigration case law to advance an impoverished understanding of constitutional due process protections for noncitizens.

A. Restricting Suspension Clause Relief

Thuraissigiam was detained pending removal as he challenged the insufficiency of his asylum screening process. It was this detention that he challenged through the filing of his habeas petition, and in this posture that he challenged the lawfulness of his restraint. Yet the majority concluded that the relief he sought extended beyond the power of a court deciding a Suspension Clause challenge. Justice Alito wrote:

[N]either respondent nor his *amici* have shown that the writ of habeas corpus was understood at the time of the adoption of the Constitution to permit a petitioner to claim the right to enter or remain in a country or to obtain administrative review potentially leading to that result. The writ simply provided a means of contesting the lawfulness of restraint and securing release.³⁴

There are three debatable claims embedded here: that habeas relief must be granted only in the form that it took at the time of the founding; that habeas relief could not create the possibility of release within the U.S.; and that habeas relief does not encompass access to administrative review.

On the first point, it suffices to say that it is difficult to apply founding-era conceptions of habeas corpus to a contemporary immigration fact pattern given the complete absence of comparable immigration regulation in the era.³⁵ This is why “requiring near-complete

³⁴ *Id.* at 1967 (majority opinion).

³⁵ *Id.* at 1997–99 (Sotomayor, J. dissenting); see also Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998) (enumerating the problems with a strict originalist approach to habeas in this context).

equivalence between common-law habeas cases and respondent's habeas claim is out of step with" the Court's approach in recent cases like *Boumediene v. Bush*³⁶ and *INS v. St. Cyr*,³⁷ as well as in older immigration cases.³⁸ Nevertheless, in *Thuraissigiam*, both parties cited to evidence that pre-dates and encompasses the founding era in support of their arguments, and both majority and dissent (along with Justice Thomas's concurrence) were clearly guided by their understandings of that evidence, though their interpretations of it differed.

The majority construed the founding-era evidence (along with more recent precedent) to conclude that the privilege of habeas corpus does not carry with it a right to remain in the country of release. In this view, habeas relief does not include anything other than "simple release,"³⁹ while *Thuraissigiam*'s petition requires additional administrative proceedings and possible release *into* the U.S. But the majority's notion that habeas only provides for simple release, and not into the U.S., is a crabbed vision of the kinds of habeas relief that courts can grant, and at odds with the kinds of relief that courts have routinely granted.

For support of this narrow view of habeas, the majority relied most heavily not on founding-era cases, but on *Munaf v. Geren*,⁴⁰ a 2008 case involving a U.S. citizen held in custody in Iraq by the U.S.-led Multinational Force-Iraq pending his transfer to Iraqi authorities for criminal prosecution.⁴¹ *Munaf* is of questionable relevance. That case fits into a line of cases denying habeas relief to individuals seeking to avoid extradition.

Much more relevant to *Thuraissigiam*'s situation are the many, many cases spanning a period from before the founding through the present in which "courts routinely granted the writ to release wrongfully detained noncitizens into Territories other than the detainees' 'own.'"⁴²

³⁶ *Boumediene v. Bush*, 553 U.S. 723 (2008).

³⁷ *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).

³⁸ *Thuraissigiam*, 140 S. Ct. at 1999 (Sotomayor, J. dissenting).

³⁹ *Id.* at 1967 (majority opinion).

⁴⁰ *Munaf v. Geren*, 553 U.S. 674, 693 (2008).

⁴¹ For some reason, the majority thinks it is appropriate to joke that the federal government is, of course, happy to release *Thuraissigiam* to "the cabin of a plane bound for Sri Lanka," though the whole point of this case is that *Thuraissigiam* says he fears he will face torture and persecution there as a politically active Tamil who has now sought asylum in the U.S. *Thuraissigiam*, 140 S. Ct. at 1968.

⁴² *Id.* at 2001 (Sotomayor, J. dissenting).

This practice necessarily involved functional protection from deportation (at least in the short term), despite the absence of a formal deportation scheme and immigration regulation.⁴³

Of course, Thuraissigiam was not arguing that he had an unequivocal right to remain in the U.S.—only that the law gave him certain procedural protections from expulsion. There may be valid disagreement over whether, historically, courts viewed themselves as empowered to grant additional process in response to Suspension Clause claims.⁴⁴ But recent precedent resolves this question decisively, too. Both *Hamdi v. Rumsfeld*⁴⁵ and *Boumediene* “remanded petitions for additional judicial process as opposed to awarding outright discharge.”⁴⁶ Additionally, in *St. Cyr*, the Court “considered whether a noncitizen with a controlled substance conviction could challenge on habeas the denial of a discretionary waiver of his deportation order,” and decided the question in the affirmative.⁴⁷ Just like *Thuraissigiam*, *St. Cyr* involved the petition of a detained noncitizen seeking additional process in a proceeding involving discretionary determinations. In *St. Cyr*, the Court concluded that “[f]rom its origins, the writ did not require immediate release, but contained procedures that would allow the state to proceed against a detainee.”⁴⁸ In deciding *Thuraissigiam* as they did, and apparently limiting habeas to situations of “immediate release,” the five justices in the majority quietly unsettled precedent in a way that significantly and inexplicably narrows the scope of potential habeas remedies.⁴⁹

⁴³ *Id.* at 1999–2000.

⁴⁴ See, e.g., AMANDA TYLER, *HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY* (2017); see also *Thuraissigiam*, 140 S. Ct. at 2010 (Sotomayor, J. dissenting) (citing *Boumediene v. Bush*, 553 U.S. 723, 779 (2008), for the proposition that “release ‘need not be the exclusive remedy; [because] ‘common-law habeas corpus was, above all, an adaptable remedy’ whose ‘precise application and scope changed depending upon the circumstances.’”).

⁴⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁴⁶ Amanda Tyler, *Thuraissigiam and the Future of the Suspension Clause*, *LAWFARE* (July 2, 2020); *Strict Scrutiny: Thanks for the Footnote*, *SIMPLECAST*, (June 29, 2020) (noting that *Boumediene* decided this point in the affirmative).

⁴⁷ *Thuraissigiam*, 140 S. Ct. at 1998 (Sotomayor, J. dissenting) (citing *I.N.S. v. St. Cyr*, 533 U.S. 289, 293 (2001)).

⁴⁸ *Id.* at 2002.

⁴⁹ *Id.* at 2010 (“*St. Cyr* and *Boumediene* confirm that at minimum, the historic scope of the habeas power guaranteed judicial review of constitutional and legal challenges to executive action. They do not require release as an exclusive remedy, let alone a particular direction of release.”).

Interestingly, both the majority⁵⁰ and the dissent⁵¹ in *Thuraissigiam* also suggest at various points that there is an open question as to whether the Suspension Clause creates an affirmative right to review of an administrative decision. As Amanda Tyler points out, this is puzzling given that *Boumediene* held that, “[t]he Clause . . . ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”⁵²

In short, the *Thuraissigiam* decision is full of backtracking on the scope of habeas remedies. It also backtracks on the question of who is entitled to the protections of the writ.

B. Restricting the Applicability of the Constitution

For over a century, U.S. courts have interpreted the U.S. Constitution to require federal court review of constitutional questions and questions of law—including mixed questions of law and fact—in cases involving immigrants seeking admission.⁵³ This was true even when, beginning in 1891, Congress enacted legislation purporting to make the attorney general’s determinations in immigration cases “final,” and therefore immune from judicial review.⁵⁴ Throughout this “finality period”—which spanned from the late-1800s to the mid-1950s—courts reviewed these determinations to the extent that such review was “required by the Constitution.”⁵⁵ And yet the majority in *Thuraissigiam* concluded that such review was not constitutionally required for immigrants seeking admission.

To reach this conclusion, the Court leaned upon a questionable deployment of a foundational “finality period” case—*Nishimura Ekiu v. United States*.⁵⁶ Ekiu filed a habeas petition after receiving an exclusion order issued by an administrative agent and upheld by the secretary of

⁵⁰ *Id.* at 1967 (majority opinion).

⁵¹ *Id.* at 2009 (Sotomayor, J. dissenting).

⁵² *Boumediene v. Bush*, 553 U.S. 723, 745 (2008) (quoted in Tyler, *supra* note 46).

⁵³ *See, e.g., I.N.S. v. St. Cyr*, 533 U.S. 289, 304–08 (2001).

⁵⁴ Act of Mar. 3, 1891, ch. 551, §8, 26 Stat. 1085 (“All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury.”).

⁵⁵ *Heikkila v. Barber*, 345 U.S. 229, 233–235 (1953).

⁵⁶ *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

the Treasury. Though the Court rejected her substantive claims, it never questioned her ability to lodge her habeas petition in federal court, notwithstanding language in the 1891 Act purporting to make “final” the secretary of the Treasury’s determination. Justice Alito opined that the 1891 Act “preclude[d] judicial review only with respect to questions of fact,”⁵⁷ so the Court “had no occasion to decide whether the Suspension Clause would have tolerated a broader limitation”⁵⁸ In his view, it would. His opinion invoked *Ekiu* for the proposition that Congress has the absolute power to set the constitutional floor for the procedural protections of noncitizens seeking admission.⁵⁹

The dissent rejected this characterization of *Ekiu*, instead concluding that the Court avoided the Suspension Clause question in *Ekiu* through its narrow, saving construction of the jurisdiction limitations in the 1891 Act, as applying only to questions of fact. Far from proving the point that Congress can suspend habeas review of an immigrant’s legal and constitutional claims, the Court’s constitutional avoidance in *Ekiu*, particularly when read in light of what happened in the wake of that decision, proves the opposite. The dissent observed that “in case after case following *Ekiu*, [the Court] recognized the availability of habeas to review a range of legal and constitutional questions arising in immigration decisions.”⁶⁰ The dissent highlighted in particular the *Ekiu* Court’s statement that a noncitizen “prevented from landing [in the United States] by any [executive] officer . . . and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful.”⁶¹

The Court previously embraced the dissent’s reading of *Ekiu* and other finality era cases. In *St. Cyr*, for example, the Court invoked the finality era cases to conclude that the Suspension Clause “unquestionably” guarantees habeas review of legal and constitutional challenges to deportation orders, notwithstanding the government’s arguments that Congress intended to divest the courts of jurisdiction.⁶² In deciding that the Suspension Clause does not protect noncitizens

⁵⁷ *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1975 (2020).

⁵⁸ *Id.* at 1978.

⁵⁹ *See id.* at 1989–90.

⁶⁰ *Id.* at 2005 (Sotomayor, J. dissenting).

⁶¹ *Id.* at 2012 (citing *Ekiu*, 142 U.S. at 660).

⁶² *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001).

from being denied access to courts for review of their legal and constitutional claims, the *Thuraissigiam* decision retracts habeas protections that the Court had previously acknowledged applied to immigrants seeking admission.

C. Due Process

The backsliding in *Thuraissigiam* is also evident in the majority's due process analysis. Given that the Court decided it has no jurisdiction to hear *Thuraissigiam*'s habeas petition, it is not clear why it weighed in on his due process claim. But it did, and in this entirely unnecessary discussion, it got the due process analysis wrong, too.

The majority opinion treats *Thuraissigiam* as an intending immigrant—and one who had not been admitted to the country. Citing *Ekiu* again, Justice Alito wrote:

In 1892, the Court wrote that as to “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.” *Nishimura Ekiu*, 142 U. S. at 660. Since then, the Court has often reiterated this important rule.⁶³

Justice Alito then claimed that the Court had unquestioningly reiterated this premise in more recent cases.⁶⁴ But his summary of those cases was misleading. While Justice Alito's opinion invokes “admission” as the critical inflection point for due process analysis—and, indeed, the word admission appears in the *Ekiu* decision—his invocation of the term in the contemporary context is ahistorical. The evolution of procedural due process protections for noncitizens over the last century,

⁶³ *Thuraissigiam*, 140 S. Ct. at 1980.

⁶⁴ *Id.*; see, e.g., *U.S. ex rel. 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”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (same); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens . . . is a sovereign prerogative.”).

and statutory changes to the meaning of “admission” in recent years, combine to render this quotation from *Ekiu* inapposite today.

Until 1996, immigration law delineated *entry*, not admission, as the critical point at which a noncitizen with no previous ties to the United States⁶⁵ became eligible for additional procedural protections under the statute.⁶⁶ The focus on entry may well have been informed by constitutional concerns about providing insufficient process for individuals on U.S. soil. But regardless, the focus on entry meant that individuals who had made their way into the U.S. were able to claim additional procedural protection whether they had been authorized to enter—that is, “admitted”—or not.⁶⁷

In 1996, in a problematic effort to disincentivize entry without authorization, Congress passed a law that gave much greater importance to whether an immigrant had been formally admitted, providing more legal process for admitted immigrants than for those who had entered but had not been admitted.⁶⁸ Among other things, individuals in the latter category could, under some circumstances, be subject to expedited removal. But congressional changes to the nature of the process required for individuals in the U.S. does not change the fact that individuals who have entered the U.S. are entitled to due process protections.⁶⁹ In the case of immigrants who have entered, the constitutional question of what constitutes sufficient process for those individuals historically has not been and should not now be determined by looking to the congressionally-set floor. While Congress can certainly provide different procedures for those admitted and those who have not been admitted, it cannot avoid the applicability of the Constitution to people in the

⁶⁵ Those with ties need not even be on U.S. soil to enjoy due process protections in immigration proceedings. See *Landon*, 459 U.S. at 32 (finding the Due Process Clause applicable to returning long-time U.S. residents in exclusion proceedings).

⁶⁶ See, e.g., *Matter of Ching and Chen*, 19 I. & N. Dec. 203 (BIA 1984).

⁶⁷ See, e.g., *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) (distinguishing between noncitizens who “come to our shores seeking admission . . . and those who are within the U.S. after an entry, irrespective of it’s [sic] legality”). Perhaps this is why Congress did not even attempt to apply the expedited removal provision to individuals who had been paroled, but not admitted, to the U.S.

⁶⁸ Interestingly, it did not dispense with the notion of entry, which still appears at various points in the statute and therefore retains legal vitality.

⁶⁹ This is the bare minimum that is required. Constitutional protections also ought to extend outside of the U.S. in certain categories of cases. See generally GERALD NEUMAN, *STRANGERS TO THE CONSTITUTION*, 72–96 (1996).

U.S. by playing with definitions. Because admission in its current form dates from 1996, none of the pre-1996 cases provide insight as to how the Court should handle this question. At the same time, the post-1996 case *Zadvydas v. Davis*⁷⁰ makes it clear that entry, not statutorily defined admission, remains a constitutional touchstone for due process.

There is a long and tortured line of cases seeking to tease out the point at which a noncitizen has “entered” the U.S.⁷¹ To the extent that Thuraissigiam was not free from official monitoring from the time of his entry through the time of his apprehension, he arguably had not “entered” at all. The entry fiction is a dangerous one, and worth critiquing in its own right, but it would have done far less constitutional violence for the Court to decide that the congressional procedural baseline would suffice in his case because Thuraissigiam never *entered* the country. Among other things, this would have reflected a far better understanding of the factual limits of the case than the one offered in Justice Breyer’s concurrence, which incorrectly accepts congressionally-defined admission as a critical, constitutional moment.

The majority did something more dangerous in maintaining that individuals who have entered the U.S. but have not been admitted are entitled to no constitutional floor of procedural protection. As the dissent points out, if it is true that congressionally authorized procedures constitute the full range of process due to individuals who have entered the country but are not admitted, individuals could be subject to summary expulsion no matter how strong their ties to the U.S., provided they could not prove to the satisfaction of an immigration officer that they had been in the U.S. for more than two years. It also means that Congress can change the rules to move the admission line to another, later point in an immigrant’s sojourn and also could allow for the summary expulsion of “unadmitted” immigrants (however defined by Congress) without any process at all. Nothing in the U.S. history of immigration law, as draconian as it has often been, suggests that this is

⁷⁰ *Zadvydas v. Davis*, 533 U. S. 678, 693 (2001) (reiterating that “once an alien *enters* the country,” he is entitled to due process in his removal proceedings because “the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”) (emphasis added).

⁷¹ See, e.g., *Matter of Ching and Chen*, 19 I. & N. Dec. 203 (BIA 1984).

the correct interpretation of the Due Process Clause of the Constitution as applied to resident noncitizens.

Justice Alito equated individuals apprehended and detained within the U.S. with those who are excluded from the country (including those who are paroled into the country under the legal fiction that they remain outside of it). Without citation, he assumed they “must” be in the same constitutional boat.⁷² But his assumption does not necessarily follow. As the dissent noted, his interpretation creates “an atextual gap in the Constitution’s coverage” and “lacks any limiting principle. . . . This Court has long affirmed that noncitizens have due process protections in proceedings to remove them from the country once they have entered.”⁷³ Changes in the “constitutional status” of noncitizens are created by virtue of their functional ties to and presence in the U.S., not by Congress.⁷⁴ Both the majority and the concurrences in *Thuraissigiam* lose sight of this.

III. *Thuraissigiam* in Context

The Court’s abdication of its role as a guarantor of basic constitutional protections for new entrants could hardly have come at a worse time. Until recently, DHS applied the expedited removal provision only to noncitizens within one hundred miles of the border who could not establish that they had been in the country for two weeks or more. But under President Trump, DHS issued a new regulation that applies the provision to the full extent of the statutory authorization,⁷⁵ so as to include those individuals not admitted or paroled who cannot establish that they entered the U.S. more than two years prior.⁷⁶ Officials in previous administrations, including Julie Myers Wood, who directed Immigration and Customs Enforcement (ICE) under President George W. Bush with memorable zeal, avoided expanding expedited removal in this way out of concern that a broader application of the law would create

⁷² Dep’t of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1980 (2020) (“The same must be true of an alien like respondent.”).

⁷³ *Id.* at 2013 (Sotomayor, J. dissenting).

⁷⁴ Landon v. Plasencia, 459 U.S. 21, 32 (1982).

⁷⁵ 8 U.S.C. § 1225(b) (2012).

⁷⁶ 8 C.F.R. § 235.3 (2017).

constitutional due process problems.⁷⁷ But a respect for the due process rights of immigrants certainly did not deter the Trump administration from expanding the application of expedited removal. And instead of flagging the dangerous legal black hole that expedited removal creates, the *Thuraissigiam* majority seems to declare that it is entirely up to the political branches to decide whether and how to regulate the rights of all noncitizens who might fall into that legislatively adjustable hole.

Similarly, the Court's refusal to extend to asylum seekers the protections they are guaranteed by the Constitution is compounded by the Trump administration's failure to extend to those same asylum seekers even the protections that Congress intended for them. By undercutting the protective features of the credible fear process, disregarding statutory protections for asylum seekers and using the ongoing global pandemic as an excuse to end asylum processing on the Southern border, this administration has demonstrated the need for courts to hold the executive branch to the letter of the law that it is charged with enforcing.

First, the Trump administration has watered down the credible fear process in disturbing ways. Beginning last fall, in some cases it was Border Patrol agents, not trained asylum officers, who were conducting these interviews.⁷⁸ These agents are far less knowledgeable about relevant law and facts than the asylum officers who previously conducted these interviews.⁷⁹ Unsurprisingly, these enforcement agents appear to be finding credible fear at a much lower rate than has historically been the case.⁸⁰ But through its decisions in *Thuraissigiam*, along with the *Hernandez v. Mesa* case also decided this term,⁸¹ the Court

⁷⁷ Alan Gomez, *Trump's Quick Deportation Plan May Be Illegal, Past Immigration Chiefs Say*, USA TODAY (Feb. 26, 2017); see also Jennifer M. Chacón, *Immigration and the Bully Pulpit*, 130 HARV. L. REV. F. 243, 259–261 (2017) (discussing the implications of the then-proposed expansion of expedited removal).

⁷⁸ Molly O'Toole, *Border Patrol Agents, Rather than Asylum Officers, Interviewing Families for 'Credible Fear'*, L.A. TIMES (Sept. 19, 2019).

⁷⁹ *Id.*

⁸⁰ *Id.* ("According to separate records obtained by The Times, as of last month, Border Patrol agents had completed 178 credible-fear screenings with asylum seekers from more than 15 countries—all of whom were single adults. They determined 54% met the credible-fear standard and 35% did not.").

⁸¹ *Hernandez v. Mesa*, 140 S. Ct. 735 (2020).

has shown its unwillingness to hold the Border Patrol accountable for the harm it visits on people the Court determines to be outside of the scope of the Constitution's protections—even when those people die.⁸²

Justice Alito's notion that "nearly 77% of screenings have resulted in a finding of credible fear"—a finding that he cited as a means of assuaging concerns about insufficient process for asylum seekers in expedited removal—is a thing of the past. Drastic drops in credible fear grant rates—to as low as ten percent in places that once saw rates in the nineties—led to lawsuits from immigrants, thus far successful, arguing that the administration has made unlawful regulatory changes to the credible fear standard.⁸³ But the *Thuraissigiam* decision will make it almost impossible to hold the administration accountable for illegalities in individual cases.

Ongoing changes to the asylum process are much deeper and broader than this. The Trump administration started uprooting major components of the U.S. asylum system from the very beginning of Trump's presidency. The avalanche of changes is too numerous to exhaustively catalogue here. Just a few examples include the "safe third country" agreements with Honduras, El Salvador, and Guatemala that allowed the administration to offload asylum seekers to countries with underdeveloped asylum infrastructures; the so-called Migration Protection Protocol that has required non-Mexican asylum seekers at the Southern border to remain in Mexico (often in dangerous conditions) pending the resolution of their asylum claims; new limits on asylum eligibility for domestic violence survivors and individuals targeted by gangs; a ban on asylum seekers who pass through a third country *en route* to the U.S.; and family detention, family separation, and systematic

⁸² See, e.g., *id.* (denying a *Bivens* remedy to the family of a child killed by a Border Patrol agent who stood in the U.S. and shot the child across the border); see also discussion *supra* note 41 (noting Alito's joke that *Thuraissigiam* could be released to "the cabin of a plane bound for Sri Lanka," where he fears governmental persecution). The pairing of these two cases also illustrates the ironic way that constitutional protections against the Border Patrol end instantaneously at the border, but the converse proposition that the Border Patrol can be held constitutionally accountable within the border does not follow. *Strict Scrutiny*, *supra* note 46 (noting the irony).

⁸³ Amanda Holpuch, *Asylum: 90% of Claims Fall at First Hurdle After US Process Change, Lawsuit Alleges*, GUARDIAN (Nov. 13, 2019); *Grace v. Barr*, No. 19-5013, 2020 WL 4032652 (D.C. Cir., July 17, 2020) (affirming a district court injunction of DHS policies raising the bar for credible fear determinations as inconsistent with the Immigration and Nationality Act and the Administrative Procedures Act).

efforts to undercut protections for minor children seeking asylum and other humanitarian protections.⁸⁴ Many of these changes appear at odds with statutorily required protections for asylum seekers; some courts accordingly have taken the administration to task for its legal failures.⁸⁵

Rather than rethinking these aggressive changes, however, this administration is doubling down with proposed sweeping regulatory changes to the asylum system. One scholar has noted that these new regulations, if they go into effect, “would effectively abolish asylum in the U.S.”⁸⁶ But we need not wait for those regulations to see the shutdown of asylum; the administration is currently expelling asylum seekers without any process whatsoever, citing the COVID-19 pandemic as a justification.⁸⁷ Those individuals, expelled absent any process, fall into the category of people declared rightless by the Court in *Thuraissigiam*.

But this administration is not just seeking to prevent new asylum seekers from entering; it is also trying to expel long-time residents. It will use expedited removal against residents unable to “affirmatively show, to the satisfaction of an immigration officer,”⁸⁸ that they have been continuously present for two years or more. Most unauthorized residents have been here much longer, but they have not been “admitted,” so how will they challenge wrongful applications of expedited removal? *Thuraissigiam* not only provides no roadmap for such challenges, it actually builds a dead-end.

The Court’s use of history in its evaluation of both the Suspension Clause and the application of the Due Process Clause to noncitizens is selective and problematic. The conclusions reached by the Court are out

⁸⁴ For a detailed timeline of these changes through November 2019, see NAT’L IMMIGR. JUST. CTR., A TIMELINE OF THE TRUMP ADMINISTRATION’S EFFORTS TO END ASYLUM (2019).

⁸⁵ See, e.g., *Grace v. Barr*, No. 19–5013, 2020 WL 4032652 (D.C. Cir., July 17, 2020).

⁸⁶ Sarah Sherman-Stokes, *Trump’s Proposed Changes Would Effectively Abolish Asylum*, WBUR (June 25, 2020).

⁸⁷ Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020).

⁸⁸ 8 U.S.C. § 1225(b)(iii)(II) (2012).

of line with precedent and rights-restrictive in novel and troubling ways. What happened here?

With his introductory discussion, Justice Alito made it very clear what is motivating him. He has embraced the restrictionist narrative that an overly generous U.S. asylum system is being completely overwhelmed by bogus asylum seekers. In this view of the world, the administration is merely seeking to streamline a bloated process in a way that will not require either lengthy, expensive detentions for asylum seekers or their release into the U.S. (where, Justice Alito suggests, they will abscond).⁸⁹ This dystopic vision of the asylum system, undergirded by a racist, xenophobic view toward certain kinds of immigrants, involves a hyperbolic distortion of what is actually happening along the U.S.-Mexico border, as well as a deliberate underestimation of both the U.S. government's legal obligations and its capacity to fulfill them.

"No human being subject to the governance of the United States should be a stranger to the Constitution."⁹⁰ Yet the *Thuraissigiam* decision trims the protective reach of the U.S. Constitution. It leaves the most vulnerable subjects of U.S. governance exposed not only to the caprices of Congress but also, and more dangerously in this moment, to the unchecked and illegal impulses of the executive branch.

⁸⁹ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

⁹⁰ NEUMAN, *supra* note 69, at 189.

Hernandez v. Mesa: **Questions Answered and** **Questions Avoided**

Andrew Kent*

The international border of the United States has been a site of acute legal and political controversy during the administration of President Donald Trump. Beginning with the travel ban affecting visitors and immigrants from several Muslim-majority countries, imposed one week after President Trump’s inauguration, and continuing with battles about separation of families of unauthorized migrants, funding for a southern border “wall,” the outsourcing of refugee-claim processing to third-party countries, and coronavirus-related travel restrictions, the border has loomed large since January 2017.

But it was during the administration of President Barack Obama, not President Trump, that a significant U.S. Supreme Court decision from the October 2019 Term arose at the southern border between El Paso, Texas, and Ciudad Juarez, Mexico. In *Hernandez v. Mesa*, the Court for the second time considered a tragic case involving the June 2010 death of Sergio Hernández Güereca, a fifteen year-old Mexican national.¹ Among the only undisputed facts are that Sergio was killed on the Mexican side of the border, near the Paso del Norte Bridge, among a group of people gathered in the concrete culvert which extends along the border. Also undisputed is that U.S. Border Patrol Agent Jesus Mesa, Jr., using his sidearm and while remaining on the United States side of the border, fired the shot that killed Sergio.

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¹ *Hernandez v. Mesa (Hernandez II)*, 140 S. Ct. 735 (2020). When the case was at the Court the first time, remand was ordered. See *Hernandez v. Mesa (Hernandez I)*, 137 S. Ct. 2003 (2017) (per curiam).

The Hernández family sued a mix of defendants—Agent Mesa, his supervisors, the United States, and several U.S. agencies—under a variety of bases of liability, including the *Bivens* doctrine,² the Alien Tort Statute (ATS),³ and the Federal Tort Claims Act (FTCA).⁴ Their complaint alleged that Sergio and some friends were playing an innocent game when the shooting occurred. Agent Mesa—supported by the Department of Justice after it conducted an investigation and declined to charge him—contends that he fired while seeking to apprehend a group engaged in illegal border crossing who were throwing rocks at him. Because the case never proceeded past the motion to dismiss stage, the Hernández family’s factual allegations in the complaint were accepted as true throughout. After other claims and defendants were dismissed,⁵ the Hernández family was left only with their *Bivens* claims against Agent Mesa.

Congress has never enacted a federal officer equivalent to 42 U.S.C. § 1983, which authorizes money damages and injunctive suits against *state and local* officials for their constitutional wrongs. In the absence of a statute, the Supreme Court recognized a judicially implied cause of action and money damages remedy under the Constitution against federal officials who violate constitutional rights in the 1971 *Bivens* case.⁶

Bivens itself involved federal narcotics officers who allegedly violated the Fourth Amendment by entering Webster Bivens’s home without a warrant and mistreating him. For that type of unexpected, one-time misconduct, an injunction is not available for both practical and legal reasons.⁷ Rogue action not undertaken pursuant to official policy, and not representing final agency action, cannot be challenged under the

² See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

³ 28 U.S.C. § 1350.

⁴ The FTCA “is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment.” *United States v. Orleans*, 425 U.S. 807, 813 (1976).

⁵ For example, claims against the United States and its agencies under the FTCA were dismissed because the FTCA does not cover tort claims arising in a foreign country—here Mexico. See *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc) (approving and reinstating in relevant part the panel opinion, *Hernandez v. United States*, 757 F.3d 249, 257–59 (5th Cir. 2014)).

⁶ *Bivens*, 403 U.S. at 397; see also Andrew Kent, *Are Damages Different?: Bivens and National Security*, 87 S. CAL. L. REV. 1123, 1126–27 (2014).

⁷ See e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (stating strict requirements to have standing to seek an injunction based on threatened future injury).

Administrative Procedure Act.⁸ Where, as in *Bivens*, there is no allegedly unconstitutional statute, regulation, or official policy, nullification is not an available remedy.⁹ Similarly where, as in *Bivens*, the government does not pursue a criminal prosecution, the exclusionary rule provides no relief. Without a detention, a writ of habeas corpus is unavailing, leaving damages as the only viable judicial remedy for *Bivens*. As Justice John Marshall Harlan said in concurrence, “[f]or people in *Bivens*’ shoes, it is damages or nothing.”¹⁰ Finding that state tort law did not adequately protect against all of the injuries and harms recognized by the U.S. Constitution, the *Bivens* majority, in an opinion authored by Justice William Brennan, held that it was the federal judiciary’s role to provide remedies for federal rights, and that the Fourth Amendment was best understood to authorize the Court to craft a damages cause of action and remedy in that case.

In subsequent Brennan opinions, the Court authorized *Bivens* damages claims to go forward in two additional contexts: an Eighth Amendment claim against prison administrators for inadequate medical care of a federal inmate,¹¹ and an employment discrimination suit against a U.S. congressman under the equal protection component of the Fifth Amendment Due Process Clause.¹² The Supreme Court then abruptly stopped applying *Bivens* to new contexts.

Not once since *Carlson* in 1980 has the Court approved a new *Bivens* claim. Instead, in a series of decisions, it has refused to extend *Bivens* to any new contexts, new constitutional provisions, or new types of defendants. Its decisions are based on two caveats in *Bivens* itself: that a *Bivens* remedy should be withheld if Congress has created an effective alternate remedial scheme, or if there are other “special factors counseling hesitation” by the judiciary.¹³

⁸ See 5 U.S.C. § 704 (specifying the agency actions which are subject to judicial review).

⁹ See generally Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 942 (2020) (tracing the “nullification” remedy to *Marbury v. Madison*: “Under *Marbury*, a court must deny effect to any purported law that violates the Constitution and thereby nullify any constitutionally impermissible threat that the law otherwise would pose”).

¹⁰ *Bivens*, 403 U.S. at 410 (Harlan, J., concurring).

¹¹ *Carlson v. Green*, 446 U.S. 14 (1980).

¹² *Davis v. Passman*, 442 U.S. 228 (1979).

¹³ *Bivens*, 403 U.S. at 396–97.

Bivens skeptics on the Supreme Court—notably Justices Antonin Scalia and Clarence Thomas—frequently criticized *Bivens* as “a relic of the heady days” of the Warren and early Burger Courts during which the “Court assumed common-law powers to create causes of action” to enforce federal statutory provisions.¹⁴ Since the Supreme Court had largely rejected this case law on separation-of-powers grounds,¹⁵ Justices Scalia and Thomas could be read as calling to overrule *Bivens*, *Davis*, and *Carlson*, though they did not do so expressly. Instead, their opinions advocated accepting *Bivens*, *Davis*, and *Carlson* limited to their facts while never expanding the doctrine.¹⁶ New Justices Neil Gorsuch and Brett Kavanaugh appeared likely to be *Bivens* skeptics, and their elevation to the Court in 2017 and 2018 raised anew the question whether the Court might overrule or dramatically narrow *Bivens*. Supporters of *Bivens* hoped, however, that if faced with sufficiently egregious facts or a plaintiff’s lacking any other judicial remedy, a majority of the Court might reinvigorate *Bivens* by recognizing a new claim, context, or type of defendant who could be sued. The 2016 grant of certiorari in *Hernandez v. Mesa* offered hope and fear to both supporters and detractors of *Bivens*. It ended up taking four years and a second trip to the Supreme Court to finally resolve the litigation.

After reviewing the progression of the *Hernandez* litigation, this essay will explore some of the issues that were clarified by the Court in 2020 and then some important issues that the Court ignored or avoided.

¹⁴ *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring, joined by Thomas, J.); see *Minneci v. Pollard*, 565 U.S. 118, 131 (2012) (Scalia, J., concurring, joined by Thomas, J.); *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring, joined by Scalia, J.).

¹⁵ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (“Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago That understanding is captured by the Court’s statement in *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), that ‘it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose’ expressed by a statute. We abandoned that understanding in *Cort v. Ash*, 422 U.S. 66, 78 (1975) . . . and have not returned to it since.”).

¹⁶ See, e.g., *Minneci*, 565 U.S. at 131–32 (Scalia, J., concurring, joined by Thomas, J.) (“I would limit *Bivens* and its two follow-on cases (*Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*, 446 U.S. 14 (1980)) to the precise circumstances that they involved.”).

I. The *Hernandez* Litigation

The *Bivens* claims against Agent Mesa were brought under the Fourth Amendment and the Fifth Amendment Due Process Clause.¹⁷ In cases arising under § 1983, the Supreme Court had long established that law enforcement uses of force that are objectively unreasonable and excessive under the circumstances violate the Fourth Amendment.¹⁸ Deadly force may only be used if “the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.”¹⁹

There was some reason to hope that the Court would extend *Bivens* to the circumstances in *Hernandez*, given that the *Bivens* case itself had involved a Fourth Amendment claim—albeit one premised on an unreasonable search rather than a deadly seizure, and one involving an ordinary narcotics investigation rather than a cross-border shooting. But the fact that Sergio was a Mexican national located in Mexico when he was killed complicated the Fourth Amendment claim. In 1992, in *United States v. Verdugo-Urquidez*, the Supreme Court held that the Fourth Amendment did not apply extraterritorially to a search in Mexico by U.S. and Mexican law enforcement of the home of a Mexican national detained in the United States on criminal charges.²⁰ This was in keeping with a centuries-long tradition under which noncitizens outside the United States were understood to lack individual-rights protection under the Constitution.²¹ It is true, though, that Agent Mesa caused the injury from the United States, and so perhaps the claim against him should not be thought to involve an extraterritorial extension of the Fourth Amendment. But for non-U.S. citizens, Supreme Court case law

¹⁷ *Hernandez I*, 137 S. Ct. 2003, 2005 (2017).

¹⁸ See *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014); *Graham v. Connor*, 490 U.S. 386, 394–96 (1989); *Tennessee v. Garner*, 471 U.S. 1, 7–8 (1985).

¹⁹ *Garner*, 471 U.S. at 11.

²⁰ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990).

²¹ See, e.g., Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1036 (2015); Andrew Kent, *Boumediene, Munaf, and the Supreme Court’s Misreading of the Insular Cases*, 97 IOWA L. REV. 101, 123–32 (2011) [hereinafter Kent, *Insular Cases*]; J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 *passim* (2007).

seems to treat the location of the allegedly harmed individual as the primary factor.²²

The Hernández family's substantive due process claim had some problems as well. The *Davis* case arose under the Due Process Clause but concerned employment discrimination—so there was no direct precedent for a *Bivens* due process claim in the context of a law-enforcement officer using lethal force. The substantive due process doctrine “prevents the government from engaging in conduct that ‘shocks the conscience’ or interferes with rights ‘implicit in the concept of ordered liberty.’”²³ In theory, that could cover a bad-faith or outrageous use of lethal force. The Supreme Court has held, however, that “all claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach.”²⁴ Adding to the problems for the Hernández family's Fifth Amendment claim, the Court's 1992 case on extraterritorial constitutional rights described an earlier precedent, *Johnson v. Eisentrager*, as having been “emphatic” in its “rejection of extraterritorial application of the Fifth Amendment” to benefit German nationals detained by the U.S. military in post-World War II Germany.²⁵

Agent Mesa moved to dismiss on the ground that Sergio's status as a foreign national with no voluntary connection to the United States, and his location outside U.S. territory when killed, meant that he had no constitutional rights. Agent Mesa prevailed in the district court, but a split panel of the U.S. Court of Appeals for the Fifth Circuit reversed

²² See *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953); *Johnson v. Eisentrager*, 339 U.S. 763, 770–71, 776–77, 784 (1950); *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893); *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154 (1872). In a case involving an alleged constitutional harm to a property interest—a search unreasonable under the Fourth Amendment—the Court treated the location of the property as determinative of whether extraterritorial application of a constitutional right was being sought. See *Verdugo-Urquidez*, 494 U.S. at 264. To the extent tort principles are relevant here, I note that in the late eighteenth century when the Constitution was adopted, “the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti*: courts generally applied the law of the place where the injury occurred.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705 (2004). Under the traditional *lex loci* approach, the place of the wrong for torts involving bodily harm is “the place where the harmful force takes effect upon the body.” Restatement (First) of Conflict of Laws § 377, Note 1 (1934).

²³ *United States v. Salerno*, 481 U.S. 739, 746 (1987).

²⁴ *Graham v. Connor*, 490 U.S. 386, 395 (1989).

²⁵ *Verdugo-Urquidez*, 494 U.S. at 269 (discussing *Eisentrager*, 339 U.S. at 784).

in part. It found that the Fourth Amendment claim was barred by the Supreme Court's extraterritoriality decision in *Verdugo-Urquidez*, but the Fifth Amendment claim could go forward because that amendment's protections were geographically broader than the Fourth's, reaching into Mexico.²⁶ On rehearing en banc, the Fifth Circuit unanimously held that the Hernández's complaint had failed to state a Fourth Amendment claim because Sergio was "a Mexican citizen who had no 'significant voluntary connection' to the United States" and "was on Mexican soil at the time he was shot."²⁷ On the Fifth Amendment claim, the court split on whether Agent Mesa had violated that amendment, but unanimously found that, even if so, Agent Mesa was entitled to qualified immunity, since it was unclear at the time of the shooting whether the Fifth Amendment protected a foreign national injured in a foreign country by a federal officer in the United States.²⁸

After granting cert, the Supreme Court in a short per curiam opinion vacated and remanded for consideration, prior to reaching the merits, whether a *Bivens* remedy was available in the circumstances,²⁹ based on the framework set forth in 2017 in *Ziglar v. Abbasi*.³⁰ Justice Thomas dissented in *Hernandez I* on the ground that the *Bivens* question could and should be answered right away: "'*Bivens* and its progeny' should be limited 'to the precise circumstances that they involved.'"³¹ Justices Stephen Breyer and Ruth Bader Ginsburg also dissented, stating that *Bivens* should be available for all Fourth Amendment violations, and that Sergio's Mexican nationality and location in Mexico when shot should not, based on a variety of factors, preclude him from asserting rights under the Fourth Amendment.

²⁶ *Hernandez v. United States*, 757 F.3d 249, 267–75 (5th Cir. 2014); *id.* at 280–81 (Dennis, J., concurring in part and concurring in the judgment).

²⁷ *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015) (en banc) (per curiam) (quoting *Verdugo-Urquidez*, 494 U.S. at 271).

²⁸ *Id.* at 120; *see also id.* at 119–20 ("The remaining issue for the en banc court is properly described as whether 'the Fifth Amendment . . . protect[s] a non-citizen with no connections to the United States who suffered an injury in Mexico where the United States has no formal control or de facto sovereignty.'" (citation omitted)).

²⁹ *Hernandez I*, 137 S. Ct. 2003, 2006–07 (2017).

³⁰ *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

³¹ *Hernandez I*, 137 S. Ct. at 2008 (Thomas, J., dissenting) (quoting *Abbasi*, 137 S. Ct. at 1870 (Thomas, J., concurring in part and concurring in the judgment)).

Abbasi had been decided a week before *Hernandez I*, but by a short-handed Court. Justice Gorsuch was seated only after *Abbasi* was argued and so he did not participate. President Obama's two appointees—Justices Sonia Sotomayor and Elena Kagan—also did not participate in *Abbasi*, for different reasons. In a 4–2 split, the *Abbasi* Court, per Justice Anthony Kennedy, found that no *Bivens* cause of action was available against the former FBI Director, U.S. Attorney General, and other senior federal officials for their part in devising and implementing a policy during the immediate aftermath of the 9/11 attacks of lengthy civil detention for immigration violations of non-U.S. citizens of Arab, South Asian, and Muslim background. The detainees were held for long periods of time because of a policy of “hold until cleared” (of connections to terrorism), and many were mistreated while in custody.

In *Abbasi*, Justices Scalia and Thomas's critique of *Bivens* first entered a majority opinion (albeit one speaking for only four justices). *Abbasi* situated *Bivens* as the product of an era, now over, when the Court “assumed it to be a proper judicial function to ‘provide such remedies as are necessary to make effective’ a statute's purpose,”³² and further assumed that the same logic and same common-law creative power allowed the federal courts to craft causes of action to enforce the Constitution.

Having rejected the routine creation of implied private rights of action to enforce statutory purposes, *Abbasi* suggested that the time for creating new *Bivens* causes of action to enforce the Constitution had also passed. “[I]t is a significant step under separation-of-powers principles,” the Court wrote, “for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation.”³³ And further: “The question is ‘who should decide’ whether to provide for a damages remedy, Congress or the courts? The answer most often will be Congress.”³⁴ The Court pointedly suggested that *Bivens* would have been decided differently if the issue presented in 1971 came to the Court for the first time today.³⁵

³² *Abbasi*, 137 S. Ct. at 1855 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

³³ *Id.* at 1860.

³⁴ *Id.* at 1857.

³⁵ *Id.* at 1856.

There were, however, aspects of *Abbasi* that could give the Hernández family a bit of optimism about their putative *Bivens* claim. First, the *Abbasi* Court emphasized that *Bivens* is inappropriate if plaintiffs seek to “call into question the formulation and implementation of a general policy,” especially one in the national security or foreign affairs areas, and especially one devised by very senior executive officials responding to an emergency, such as the 9/11 attacks.³⁶ By contrast, *Abbasi* suggested that *Bivens* actions under the Fourth Amendment challenging misconduct by individual officers in “standard ‘law enforcement operations’” continue to be appropriate.³⁷

Second, although I think *Abbasi* is best read as calling a halt to the expansion of *Bivens*, it might be read to leave the door slightly ajar.³⁸ Step one of the decisional framework asks whether an injured plaintiff is requesting a “new” *Bivens* claim—anything different than the claims approved in *Bivens* itself, *Davis*, or *Carlson*. If no, the claim proceeds. Maybe *Hernandez* could be shoehorned into the Fourth Amendment claims approved in *Bivens* itself? Conversely, if the requested *Bivens* claim is new, the test proceeds to step two, asking “if there are ‘special factors counselling hesitation in the absence of affirmative action by Congress.’”³⁹ Here the Court was rather adamant that it did not envision new claims being approved.⁴⁰

Finally, *Abbasi* emphasized that the lack of any other judicial remedy counts in favor of allowing *Bivens*. Since their complaint alleged a one-off, rogue, unconstitutional “seizure” by a single officer in violation of Border Patrol policy, and since no other judicial remedy was available to them, the Hernández family must have hoped that their case would

³⁶ *Id.* at 1860.

³⁷ *Id.* at 1861 (quoting *Verdugo-Urquidez*, 494 U.S. at 273). See text accompanying *infra* note 44.

³⁸ See Fallon, *supra* note 9, at 953 (“As a practical matter, however, it is not clear that much space exists between the Court’s *Ziglar* [*v. Abbasi*] ruling and the earlier demand of Justices Scalia and Thomas that *Bivens*, *Davis*, and *Carlson* ‘should be limited “to the precise circumstances that they involved.”’”) (quoting *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring) (in turn quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

³⁹ *Abbasi*, 137 S. Ct. at 1857 (quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980)) (in turn quoting *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 396 (1971)).

⁴⁰ *Id.* at 1856–58.

arrest, even if only temporarily, the Court’s trend of rejecting *Bivens* claims. It did not turn out that way.

II. Questions Answered and Questions Avoided

Hernandez II provided answers to some important questions about the current status of *Bivens*, but also ignored or avoided confronting some difficult issues. After briefly reviewing some of the points of clarity that emerged from the *Hernandez* litigation, this section delves more deeply into four issues about which uncertainty remains.

A. What *Hernandez* Answered

Hernandez II—in a majority opinion authored by Justice Samuel Alito and joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh—confirmed that *Bivens* is still heavily “disfavored” by a majority of the Supreme Court.⁴¹ And the decision also confirmed that a majority of the Court is willing to reject the creation of a *Bivens* cause of action even if it leaves a plaintiff with no means of judicial redress for alleged constitutional injuries.⁴²

More specifically, the Court signaled that *Bivens* is likely to be confined to the precise contexts and constitutional provisions in *Bivens*, *Davis*, and *Carlson*—the position long advocated for by Justices Scalia and Thomas. We can see this from how *Hernandez II* implemented the Court’s two step doctrinal framework. Although *Bivens* approved a Fourth Amendment claim and *Davis* approved a Fifth Amendment Due Process claim, the Court in *Hernandez II* called it “glaringly obvious” that the claims under the same constitutional provisions were “new” in the present case. And the Court noted, “*Bivens* concerned an allegedly unconstitutional arrest and search carried out in New York City; *Davis* concerned alleged sex discrimination on Capitol Hill.”⁴³ This incredibly fact-specific description of the Court’s prior cases approving of *Bivens* causes of action seems intended to signal that every case that is not on point factually and legally with *Bivens*, *Davis*, or *Carlson* will be treated as

⁴¹ *Hernandez II*, 140 S. Ct. 735, 742 (2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)).

⁴² See Kent, *supra* note 6, at 1143 (citing earlier Supreme Court cases in which that had occurred).

⁴³ *Hernandez II*, 140 S. Ct. at 744.

“new” and hence in need of affirmative justification. And in both *Abbasi* and *Hernandez II*, the Court suggested that the answer at step two—should the Court endorse a “new” *Bivens* cause of action—will almost invariably be “no.” Thus the majority of the Court seems to have arrived at or close to the position long advocated by Justices Scalia and Thomas.

On the other hand, *Hernandez II* confirms that, even with the addition of two very conservative new justices—Justices Gorsuch and Kavanaugh—there are not presently five votes for simply overruling the *Bivens/Davis/Carlson* trio of cases. Just three years ago, Chief Justice Roberts and Justices Alito and Thomas joined the part of the *Abbasi* opinion which stated:

[T]his opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose. *Bivens* does vindicate the Constitution by allowing some redress for injuries, and it provides instruction and guidance to federal law enforcement officers going forward. The settled law of *Bivens* in this common and recurrent sphere of law enforcement, and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere.⁴⁴

Some of the same things could be said about *Carlson* and its approval of Eighth Amendment *Bivens* claims against federal prison officials. Litigation there is “common and recurrent” too, and the law is pretty well-settled because of the enormous volume of Eighth Amendment cases arising under 42 U.S.C. § 1983 suits against state and municipal corrections officers. In both settings, it seems reasonably frequent that rogue actions by individual officers requires judicial “redress for injuries.” *Hernandez II* does not contain anything that appears to back away from these views expressed in *Abbasi*. Thus, the current majority of the Court seems satisfied for now to leave in place ordinary *Bivens* and *Carlson* claims under the Fourth and Eighth Amendments.

Justice Thomas, for his part, has decided to increase his demands, having secured victory (seemingly) on confining the *Bivens* doctrine

⁴⁴ *Abbasi*, 137 S. Ct. at 1856–57.

to the facts of *Bivens*, *Carlson*, and *Davis*. In *Hernandez II*, Justice Thomas, joined by Justice Gorsuch, argued that those three cases should be overruled.⁴⁵

B. Questions Avoided

This essay next reviews two important issues avoided by the Court in the *Hernandez* litigation: whether the Constitution is violated by the lack of any judicial remedy for a constitutional wrong and whether the Constitution's protections extend to noncitizens outside the United States.

1. The Westfall Act and *Ubi Jus Ibi Remedium*

The Court expressly avoided one question in *Hernandez II*. The cert petition by the Hernández family asked the Court, if it found no *Bivens* remedy available, to decide “whether the Westfall Act violates the Due Process Clause of the Fifth Amendment insofar as it preempts state-law tort suits for damages against rogue federal law enforcement officers acting within the scope of their employment for which there is no alternative legal remedy.”⁴⁶ But the Court declined to grant cert on that question and, predictably, said nothing about it in *Hernandez II*.

Historically, tort suits under state common law or general law were an important method by which persons injured by federal officers' misconduct could seek compensation and redress.⁴⁷ The U.S. government's briefing in *Bivens* in 1971 urged the justices not to create a damages remedy under the Constitution because ordinary tort law sufficiently protected the interests in being free from unreasonable searches and seizures by federal law enforcement officers. Might tort law have provided a remedy for the Hernández family? Certainly, Texas courts could have heard a state-law tort suit for personal injury to a

⁴⁵ *Hernandez II*, 140 S. Ct. at 753 (Thomas, J., concurring) (“It is time to correct this Court’s error and abandon the doctrine altogether.”).

⁴⁶ Petition for a Writ of Certiorari at i, *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) (No. 17–1678).

⁴⁷ See, e.g., James E. Pfander, *Dicey’s Nightmare: An Essay on the Rule of Law*, 107 CAL. L. REV. 737, 754–56 (2019); Kent, *supra* note 6, at 1163–64; Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 399 (1987); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 9–16 (1963).

Mexican national occurring in Mexico.⁴⁸ And the same suit should have been viable in federal court under diversity jurisdiction.⁴⁹

But congressional action since the initial *Bivens* decision prohibited the Hernández family from bringing an ordinary tort suit against Agent Mesa. Under the Westfall Act of 1988,⁵⁰ Congress designated the Federal Tort Claims Act (FTCA) as the exclusive remedy for nonconstitutional torts committed by federal officials within the scope of their employment, except for constitutional torts.⁵¹ In other words, state-law tort claims against individual federal officers acting within the scope of employment were barred. Now, a state-law tort suit can be brought only if it falls with the FTCA's waiver of sovereign immunity, and in that case, it will be a suit against the United States, subject to the various limitations of the FTCA. Unfortunately for the Hernández family, the FTCA does not allow suits on any claim "arising in a foreign country."⁵² So even though a state tort action was barred, Sergio's death in Mexico could not be the basis for a FCTA action against the United States either.

When the Court held in *Hernandez II* that no *Bivens* suit was available, the combined actions of the Court and Congress meant that there was no judicial remedy available for a plausible claim of a constitutional violation and tortious misconduct that resulted in the taking of human life. Does this violate due process? The Court refused to even receive briefing on the topic.

⁴⁸ See *Carmack v. Panama Coca Cola Bottling Co.*, 190 F.2d 382, 386 (5th Cir. 1951) ("An action to recover damages for a tort is not local, but transitory, and can, as a general rule, be maintained wherever the wrongdoer can be found. But in the few states where the rule does not prevail, it does not bar the federal courts of jurisdiction if the cause of action and the controversy come under the grant of federal jurisdiction."); *Keller v. Millice*, 838 F. Supp. 1163, 1172 (S.D. Tex. 1993) (stating that under Texas law tort claims are "clearly transitory actions"). For examples of transitory tort actions arising in Mexico and heard in Texas state courts, see *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979) (tort suit concerning a car crash in Mexico; plaintiff was a resident of El Paso, Texas); *Vizcarra v. Roldan*, 925 S.W.2d 89 (Tex. Civ. App.—El Paso 1996) (same; plaintiffs were Mexican nationals).

⁴⁹ See 28 U.S.C. § 1332(a)(2) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of a State and citizens or subjects of a foreign state."). The plaintiffs are citizens and residents of Mexico. See Second Amended Complaint ¶¶ 17–19, *Hernandez v. United States*, 3:11-CV-00027 (W.D. Tex.). Agent Mesa's agency appears to require U.S. citizenship for employment. See *What Are the Basic Requirements for Employment?*, U.S. CUSTOMS AND BORDER PROTECTION.

⁵⁰ Westfall Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified as amended at 28 U.S.C. § 2621 et seq.).

⁵¹ 28 U.S.C. § 2679(b).

⁵² *Id.* § 2680(k).

The Court's decision in *Hernandez II* is inconsistent with the ancient maxim *ubi jus ibi remedium* (for every right there must be a remedy). The notion that a rights violation requires a civil remedy lies at the foundation of the common law of torts,⁵³ was assumed by the framers of the American Constitution to underlie our legal system,⁵⁴ and has been reiterated by the Supreme Court in many decisions, including *Marbury v. Madison* and *Bivens* itself.⁵⁵ It is widely considered a foundational principle of our constitutional order, premised on limited government and the rule of law, that wrongs by government officials can be redressed through the legal system. The Supreme Court has several times used the avoidance canon in a way that implies a constitutional right to present constitutional claims to court: a "'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."⁵⁶ But here, Congress has not barred constitutional claims. It has failed to enact a statute to authorize constitutional damages claims against federal officers; has arguably acquiesced by inaction in the Court's modern *Bivens* jurisprudence, which refuses to judicially imply causes of actions for damages for constitutional torts by federal officers in most circumstances; and at the same time has barred state-law tort claims against federal officers acting within the scope of their employment, substituting instead a limited waiver allowing suits against the sovereign in some circumstances.

Notwithstanding the general assumptions reflected in the *ubi jus* maxim, the Court's case law leaves few solid guideposts for deciding whether these actions and inactions by Congress and the Supreme Court

⁵³ See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 5, 16 (1998).

⁵⁴ See, e.g., THE FEDERALIST NOS. 15, 70 (Alexander Hamilton). See generally John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005).

⁵⁵ See, e.g., *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *United States v. Loughrey*, 172 U.S. 206, 232 (1898); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 624 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147, 163 (1803).

⁵⁶ *Webster v. Doe*, 486 U.S. 592, 603 (1988) (citing *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681, n. 12 (1986); see also *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 498 (1991); *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974).

have denied injured individuals of due process.⁵⁷ Perhaps the leading source of wisdom on the general topic—Professors Hart and Wechsler’s *Federal Courts* casebook and writings by some of its authors—offer that “Congress necessarily has a wide choice in the selection of remedies,” and it is “rarely” an issue of “constitutional dimension” if Congress has chosen one over the other.⁵⁸ But there is no judicial remedy in *Hernandez*—what then? The casebook continues that the *ubi jus* dictum “can sometimes be outweighed” to “permit accommodation of competing interests,” but the “overall system of remedies” must be “effective in maintaining a regime of lawful government.”⁵⁹

Competing interests—doctrines like standing, mootness, sovereign immunity, official immunity, state secrets, the political question doctrine, congressional control of jurisdiction, abstention, exhaustion of remedies, procedural default, plausibility pleading, and others—mean that the Court and Congress frequently tolerate instances in which wrongs, even constitutional wrongs, go unremedied.⁶⁰ In *Hernandez*, however, none of the constitutional rules and policies supporting these doctrines—rules and policies that sometimes outweigh the remedial imperative of *ubi jus*—are applicable. For instance, there is no question that the claim is justiciable; a suit against an officer in his individual capacity for tort damages does not implicate sovereign immunity; *Hernandez I* suggested that qualified immunity is likely inapplicable here;⁶¹ Agent Mesa admitted shooting Sergio and thus the complaint stated an at least plausible claim; and Congress has provided jurisdiction in 28 U.S.C. § 1331.

The one competing constitutional policy at play in *Hernandez* is the modern Court’s view that the separation of powers commands that

⁵⁷ The Constitution expressly mentions two remedies, habeas corpus and just compensation, for a taking of private property for public use. In addition, in a few cases involving allegations of unconstitutional or otherwise illegal state or local government collection of taxes, the Court has held or implied that due process requires a judicial remedy. See, e.g., *McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18 (1990); *Ward v. Love Cty.*, 253 U.S. 17 (1920).

⁵⁸ RICHARD FALLON JR., ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 331 (7th ed. 2015) (quoting Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1366 (1953)).

⁵⁹ *Id.* at 775–76 (quoting Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991)).

⁶⁰ See Fallon & Meltzer, *supra* note 59, at 1779–86; Kent, *supra* note 6, at 1156–57.

⁶¹ *Hernandez I*, 137 S. Ct. 2003, 2007 (2017).

Congress expressly create causes of action and remedies when money damages are sought for constitutional torts by federal officers. It would have been useful for the Court to have explained in *Hernandez II* why that view of separation of powers outweighs *ubi jus* here, particularly when a human life was taken. Such an explanation would have been particularly welcome because, as I discuss below, the modern Court believes that it has common law powers to create an injunctive cause of action and remedy to stop unconstitutional action by federal (and state) officers.

2. Extraterritoriality

By resolving the *Hernandez* litigation on *Bivens* grounds, the Supreme Court avoided a decision about the extraterritorial reach of the Constitution to protect noncitizens. The Hernández family argued that the Court’s 1992 holding concerning the lack of extraterritorial Fourth Amendment protection for noncitizens without substantial voluntary connections to the United States⁶² had been undermined by an intervening decision in *Boumediene v. Bush*, arising out of war-on-terror detentions at Guantanamo Bay, Cuba.⁶³ Though nominally about only one constitutional provision—the Habeas Suspension Clause—and one unusual piece of territory that was quasi-domestic and quasi-foreign—Cuban land permanently leased to the United States, over which the U.S. government exercises total jurisdiction and control—*Boumediene* contained broader language about the application of the Constitution to noncitizens outside U.S. borders.⁶⁴

According to the family’s brief in *Hernandez I*, “*Boumediene* held that ‘de jure sovereignty’ is not and has never been ‘the only relevant consideration in determining the geographic reach of the Constitution’ because ‘questions of extraterritoriality turn on objective factors and practical concerns, not formalism.’”⁶⁵ The brief argued that under

⁶² See *supra* note 20 and accompanying text.

⁶³ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁶⁴ See Andrew Kent, *Judicial Review for Enemy Fighters: The Court’s Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 245–46 (2013).

⁶⁵ Brief for Petitioners at 12, *Hernandez I*, 137 S. Ct. 2003 (2017) (No. 15–118) (quoting *Boumediene*, 553 U.S. at 764). As I have shown, *Boumediene* was incorrect on this point: formalism, not factual and practical balancing, dominated the Court’s approach to extraterritoriality through at least the mid-twentieth century, if not later. See Kent, *Insular Cases*, *supra* note 21.

Boumediene's approach, “functional” and “practical” considerations might limit constitutional rights for non-U.S. citizens outside U.S. borders, if granting or applying those rights proved “impracticable and anomalous.”⁶⁶ According to the Hernández family, it was neither impractical nor anomalous to apply the Fourth Amendment to the shooting, because the Mexican side of the U.S-Mexican border area where Sergio was shot was part of a “shared [] community,” and “heavily patrolled by [U.S.] federal agents.”⁶⁷ As a result, *Verdugo-Urquidez*, the 1992 case in which Fourth Amendment warrant requirements were held inapplicable to a search of a Mexican national’s home in Mexico, was not controlling.

Since *Boumediene* in 2008, and throughout the *Hernandez I* and *II* litigation, the Supreme Court had not clarified whether *Boumediene* was intended to broadly undermine the traditional view that noncitizens outside U.S. borders lack U.S. constitutional rights (unless they have significant voluntary connections to the United States, as lawful permanent residents do, for example). As I wrote when *Hernandez I* was pending at the Supreme Court:

This case could be significant because the Fourth Amendment governs all manner of searches and seizure by U.S. officials, everything from electronic surveillance to physical searches of persons, buildings, computers and other devices, to thermal imaging to shootings. . . .

If [the Fourth Amendment were] held to apply outside U.S. borders to protect noncitizens, a huge array of intelligence, military, immigration, customs, and law enforcement activity could be impacted. To take two examples that are salient to . . . readers: extraterritorial foreign intelligence surveillance and drone strikes, both of which have proceeded to date under the executive branch’s assumption that noncitizens outside the United States have no relevant constitutional rights in those contexts.⁶⁸

⁶⁶ Brief for Petitioners at 17, *Hernandez I*, 137 S. Ct. 2003 (2017) (No. 15–118).

⁶⁷ *Id.* at 20–21.

⁶⁸ Andrew Kent, *Thoughts on the Briefing to Date in Hernandez v. Mesa—The Cross-Border Shooting Case*, *LAWFARE* (Dec. 27, 2016).

In *Hernandez I*, the Court criticized the Fifth Circuit for addressing the extraterritoriality of the Fourth Amendment prior to deciding that *Bivens* was available, because the Fourth Amendment issue is “sensitive and may have consequences that are far reaching.”⁶⁹ This reluctance continued in *Hernandez II*. The majority opinion did not cite the sensitivity and significance of the Fourth Amendment question as a “special factor” suggesting that *Bivens* should not be available. Nor did the Court expressly reference the concerns Justice Kennedy raised in *Abbasi* about *Bivens* being used as a vehicle to judicialize and constitutionalize the governance of national security and foreign affairs. Rather the *Hernandez II* opinion rotely recited “the potential effect on foreign relations” and on “an element of national security,” namely border control, if the courts were to rule for the plaintiffs in this case, and the fact that “Congress has repeatedly declined to authorize the award of damages for injury inflicted outside our borders.”⁷⁰

One might have speculated that the extraterritoriality of the Fourth Amendment to protect noncitizens was so sensitive a topic that the majority in *Hernandez II* felt it best to say nothing at all. A few months after *Hernandez II* was decided, however, the Court in an opinion joined by the same justices stated that it is a “bedrock principle . . . of American constitutional law” that “foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution,” citing *Boumediene* among other decisions.⁷¹ The dissent countered that *Boumediene* demanded a multi-part test weighing practicality and other soft factors, rather than the formal line-drawing employed by the majority.⁷² So perhaps the failure to address the extraterritoriality issue in *Hernandez II* resulted from other impulses, such as judicial minimalism; or a desire to avoid the doctrinal messiness of sorting out whether a cross-border shooting called for the extraterritorial application of the Constitution; or from concern about the optics of holding that a teenager shot dead by the U.S. Border Patrol lacked individual rights under the Constitution.

⁶⁹ *Hernandez I*, 137 S. Ct. at 2007.

⁷⁰ *Hernandez II*, 140 S. Ct. 735, 744, 746–47 (2020).

⁷¹ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082, 2086–87 (2020). The case concerned whether separately-incorporated foreign affiliates possess the same First Amendment speech rights that the Court had previously found that the American parent organizations possessed.

⁷² *See id.* at 2100 (Breyer, J., dissenting).

III. Some Unanswered Questions

In addition to issues raised by the parties or pleadings but avoided by the Court, there are two (at least) major puzzles or tensions in the Court's *Bivens* jurisprudence, neither of which the Court addressed in *Hernandez* (or its prior cases cabining *Bivens*). One asks why the Court treats equitable remedies so differently than legal, damages remedies. The second concerns the lawmaking power of the federal courts.

A. Why Are Damages Different?

Concurring in *Bivens*, Justice John Marshall Harlan argued that the existence of “inherent equitable powers” of the federal courts to issue injunctions against unconstitutional action suggests that the courts similarly possess inherent nonstatutory power to remedy constitutional violations with compensatory damages.⁷³ There are legions of cases in which the Supreme Court has approved equitable causes of action and remedies against both federal and state government actors violating federal law.⁷⁴ Why, Justice Harlan asked, are judicially-created money-damages remedies any different?

In theory, this is a good question,⁷⁵ but the law and history are complex and the Court's statements somewhat confused. In addition to suggesting that the power to issue injunctions against unconstitutional action is “inherent,” Justice Harlan also suggested it derived from

⁷³ *Bivens v. Six Unknown Names Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 402 (1971) (Harlan, J., concurring) (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 460 (Burton, J., concurring in result)).

⁷⁴ See e.g., *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015); *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 487, 491 (2010); *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 640, 644–45 (2002); *Schneider v. Smith*, 390 U.S. 17, 21–22 (1968); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583–84 (1952); *Mulford v. Smith*, 307 U.S. 38, 46–47 (1939); *Rickert Rice Mills v. Fontenot*, 297 U.S. 110, 113 (1936); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619–20 (1912); *Ex parte Young*, 209 U.S. 123, 129, 132, 144–45 (1908); *American Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902); *Carroll v. Safford*, 44 U.S. (3 How.) 441, 463 (1845); *Osborn v. Bank of U. S.*, 22 U.S. (9 Wheat.) 738, 838–39, 844 (1824).

⁷⁵ Scholars have been critical of the Court's seemingly incongruous approach, pointing out that historically damages have been the ordinary remedy for invasion of legally protected interests, including by government officials, and equity the extraordinary remedy—the reverse of the modern Court's doctrine. See John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 3 (2013) (citing examples). I have previously suggested some answers to the question why the Court prefers injunctions to damages in the national security context. See Kent, *supra* note 6.

Congress's grant of subject-matter jurisdiction over federal question cases.⁷⁶ Justice Alito, author of *Hernandez II*, followed Justice Harlan by writing in another case that under the subject-matter jurisdiction statute, 28 U. S. C. § 1331, "it has long been established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."⁷⁷ As Jack Preis has noted, for many decades the federal courts have expressed the "view that their equitable power springs from Congress's grant of subject matter jurisdiction to the court," and nothing more.⁷⁸ But the Court has also referred to its cases authorizing injunctions against unconstitutional state government action as "nonstatutory,"⁷⁹ and a Justice Scalia-authored decision more recently seemed to suggest the same.⁸⁰

Not only does the modern Court seem to believe that its power to issue injunctions against unconstitutional action is inherent as long as Congress has granted subject-matter jurisdiction over federal-question cases, it seems to believe that this has always been true. Justice Scalia in *Armstrong* referenced the injunction power as one "creat[ed]" by the courts and traced its lineage back to English law prior to American independence.⁸¹ Relatedly, the Court has suggested that it was understood at the time of the Founding and the Judiciary Act of 1789, in the "ambient law of the era," that the federal courts had common-law powers to create "causes of action," once jurisdiction had been provided by Congress.⁸² This means that the Supreme Court thinks federal courts' common law powers at the time of the Founding allowed them to create remedies as long as there was subject-matter jurisdiction, because in the eighteenth century, causes of action—forms of proceeding, often simply referred to as writs—combined what we think of today as the

⁷⁶ *Bivens*, 403 U.S. at 405 (Harlan, J., concurring).

⁷⁷ *Elgin v. Dept. of Treasury*, 567 U.S. 1, 25 (2012) (Alito, J., dissenting) (quoting *Bell v. Hood*, 327 U. S. 678, 684 (1946)).

⁷⁸ Preis, *supra* note 75, at 41.

⁷⁹ *Bush v. Lucas*, 462 U.S. 367, 374, n.12 (1983) (describing *Ex parte Young*, 209 U.S. 123 (1908)).

⁸⁰ *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–27 (2015).

⁸¹ *Id.*

⁸² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714, 724 (2004).

separate issues of a right of action, substantive law, some procedure, and remedies.⁸³

The Supreme Court previously had a different understanding of the source of its power over rights to sue and remedies: the power came from Congress. The Judiciary Act of 1789,⁸⁴ and more importantly the Temporary Process Act of 1789⁸⁵ and the Permanent Process Act of 1790,⁸⁶ were understood to authorize the federal courts, where they had subject-matter jurisdiction, to adopt the writs and forms of action from state law as of 1789 in cases at common law (which would include money-damages remedies in appropriate cases) and to develop a uniform body of equitable law, including remedies, based on the traditional equity as practiced in the English Chancery Court.⁸⁷ In 1828, these same rules were extended by statute to new states admitted since 1789.⁸⁸ In 1872, Congress directed that federal courts in cases at law apply the procedure then existing in state law.⁸⁹

As Professors AJ Bellia and Bradford Clark explain, over time the nineteenth-century codification movement and a changing distinction between substance and procedure meant that in some states, causes of action and remedies were no longer considered part of state procedure

⁸³ See Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 631–36 (2015); Preis, *supra* note 75, at 9–10.

⁸⁴ Judiciary Act of 1789, ch. 20, §§ 11, 13–14, 34, 1 Stat. 73, 78–82, 92.

⁸⁵ An Act to Regulate Processes in the Courts of the United States, ch. 21, § 2, 1 Stat. 93, 93–94 (1789). More specifically, this statute provided that “forms and modes of proceeding” in equity, admiralty, and maritime cases should be “according to the course of the civil law.” *Id.*

⁸⁶ An Act for Regulating Processes in the Courts of the United States, ch. 36, § 2, 1 Stat. 275, 276 (1792). In this statute, the forms of proceeding for non-common law cases were required to be “according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law.” *Id.*

⁸⁷ See Bellia & Clark, *supra* note 83, at 614–15, 627–28, 643–45; Preis, *supra* note 75, at 24; Kristin A. Collins, *A Considerable Surgical Operation: Article III, Equity, and Judge-Made Law in the Federal Courts*, 60 DUKE L.J. 249, 259–60, 264, 278 (2010). For Supreme Court decisions on this point, see, for example, *Robinson v. Campbell*, 16 U.S. 212, 221–23 (1818); *Boyle v. Zacharie*, 31 U.S. (6 Pet.) 648, 658 (1832); *Livingston v. Story*, 34 U.S. 632, 655–56 (1835); *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939).

⁸⁸ Process Act of May 19, 1828, ch. 68, §1, 4 Stat. 278, 278–82. Louisiana was excepted, because it had a civil law-based system from its time under Spanish and French rule.

⁸⁹ An Act to Further the Administration of Justice, ch. 255, 17 Stat. 196 (1872) (Conformity Act).

and thus not covered by the 1872 Act. If that were the case, the Rules of Decision Act (derived from section 34 of the 1789 Judiciary Act) directed the application of state substantive law in cases not covered by federal enactment or the *Swift v. Tyson*⁹⁰ general common law. Conversely, if then-existing state law forms of action were still “procedural” in a given state, the 1872 Act directed that federal courts located there apply them. The bottom line was that tort damages for invasions of rights by federal officials were still sanctioned by Congress.

After *Erie*⁹¹ and the new Federal Rules of Civil Procedure in 1938, federal courts applied state law as determined by state statutes and state court decisions as the rule of decision, in the absence of federal enactment. If applicable state law provided them, causes of action in tort and money-damages remedies against lawbreaking government officials continued to be available, still with congressional imprimatur. But a new question arose: since causes of action and remedies were considered substantive, and the Federal Rules of Civil Procedure did not grant any new substantive rights, could federal courts hear U.S. *constitutional* tort suits seeking money damages remedies? For state and local official defendants, Congress has provided a cause of action and remedies in 42 U.S.C. § 1983, enacted in 1871. But no statute allowed constitutional tort suits for damages against federal officials. Thus, the question underlying the *Bivens* case was presented as of 1938, not by any conscious choice by judges or lawmakers, but as a result of related changes in law and background understandings.

Practice on the equity side continued throughout the nineteenth century under the Judiciary Act of 1789 and the 1792 Permanent Process Act, with one major change. With the enactment of general federal question jurisdiction in 1875, the federal courts were now frequently confronted with bills in equity seeking to enjoin government action for violations of the U.S. Constitution.⁹² Before then, the more limited subject-matter jurisdiction of the federal courts meant that

⁹⁰ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

⁹¹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁹² See Henry Paul Monaghan, *A Cause of Action, Anyone?: Federal Equity and the Preemption of State Law*, 91 NOTRE DAME L. REV. 1807, 1825 n.122 (2016); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 949 (2011).

many equity cases were based on diversity of citizenship. In equity, the bottom line remained the same: Congress authorized the issuance of injunctions, including those to restrain unconstitutional government action. Congress's codification of procedure in 1911 contained provisions assuming rather than granting the right of the federal courts to issue injunctions.⁹³

As Professor Preis has argued, anti-injunction statutes enacted by Congress in the 1930s "by divesting federal courts of the power to issue injunctions in specific types of cases . . . implicitly confirmed that the courts enjoyed a freestanding authority to issue injunctive relief."⁹⁴ I would put it slightly differently: the statutes confirmed that Congress assumed the continuance of the congressionally-granted power to issue injunctions.

Next, the new Federal Rules of Civil Procedure, issued under the Rules Enabling Act of 1934⁹⁵ and effective in 1938, replaced previous procedure statutes and continued to assume the existence (and regulate the procedure of) the injunctive power of the federal courts.⁹⁶ Because the Federal Rules could not "abridge, enlarge or modify any substantive right,"⁹⁷ and because a right to sue for a particular claim and the ability to obtain an injunction are now best understood to be matters of substance rather than procedure,⁹⁸ arguably the best understanding is that congressionally-conferred injunctive power, as derived originally from the 1792 Permanent Process Act, continued in force. At mid-century, the Supreme Court and scholars seemed to think that power to issue injunctions followed simply from Congress's provision of subject matter jurisdiction.⁹⁹ Justice Harlan in *Bivens* referenced both of these understandings while at the same time also calling the court's injunctive

⁹³ An Act to Codify, Revise, and Amend the Laws Relating to the Judiciary, §§ 263–66, Pub. L. No. 61–475, 36 Stat. 1087 (Judicial Code of 1911).

⁹⁴ Preis, *supra* note 75, at 42.

⁹⁵ Rules Enabling Act, Pub. L. No. 73–415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. § 2072).

⁹⁶ See Rules 67 and 70, Fed. R. Civ. P. (effective 1938).

⁹⁷ 28 U.S.C. § 2072(b).

⁹⁸ The Federal Rules of Civil Procedure do not purport to decide when parties may sue for particular kinds of relief.

⁹⁹ Preis, *supra* note 75, at 42–44; see also *Leedom v. Kyne*, 358 U.S. 184, 190 (1958); *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Holmberg v. Armbrrecht*, 327 U.S. 392, 395 (1946); *Guaranty Trust Co. v. York*, 326 U.S. 99, 104–05 (1945); *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939).

power “inherent”¹⁰⁰— a third view of the source of power, this one seemingly divorced from congressional grant.

The Court would do well to sort out these knotty issues. If injunctive power in constitutional cases is best understood as congressionally conferred, the Court’s hesitance to create on its own a *Bivens* cause of action and remedy for money damages seems more understandable. But if inherent judicial power is the authorizing source of constitutional injunctions, an acute question is posed as to why *Bivens* actions are not routinely available.

B. Federal Common Law

There is another underexamined puzzle in the current Court’s *Bivens* jurisprudence. As discussed above, the modern Supreme Court views it as constitutionally inappropriate to act in a common-law capacity to imply a cause of action to enforce a statute, in the absence of clear congressional intent that there be a judicial remedy. And the Court has a similar view of the inappropriateness, under the separation of powers, of expanding *Bivens* beyond the three contexts already recognized in *Bivens*, *Davis*, and *Carlson*.

But the same justices who form the majority opinions just summarized also appear to view it as entirely appropriate for the federal courts to craft *substantive* rules of federal common law governing the primary conduct of private persons and government officials. For instance, one of the more controversial extensions of substantive federal common law in the modern era is *Boyle v. United Technologies Corp.*,¹⁰¹ written by *Bivens* skeptic Justice Scalia, and joined by *Bivens* skeptics Chief Justice William Rehnquist and Justices Kennedy and Sandra Day O’Connor. Many other examples can be given.¹⁰²

As Justice Harlan noted in his *Bivens* concurrence, “it would be at least anomalous to conclude that the federal judiciary—while

¹⁰⁰ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 402 (Harlan, J., concurring) (quoting *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 460 (Burton, J., concurring in result)).

¹⁰¹ *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

¹⁰² See e.g., *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97–98 (1991) (unanimous decision joined by *Bivens* skeptics Justices Rehnquist, Scalia, Kennedy, and O’Connor); *Collins v. Virginia*, 138 S. Ct. 1663, 1678–80 (2018) (Thomas, J., concurring); *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 702 (2006) (Alito and Kennedy, J.J., joining a dissent).

competent . . . to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or Constitution . . . is powerless to accord a damages remedy to vindicate” constitutional rights designed to restrain government abuse.¹⁰³

It seems at least as great a separation-of-powers problem for the Court to craft primary rules governing the conduct of private parties as it does to allow a damages suit against federal officials who have violated the Constitution. For as Alexander Hamilton put it in *The Federalist* number 78, it is the task of the legislature to “prescribe[e] the rules by which the duties and rights of every citizen are to be regulated.”¹⁰⁴ With the Court in *Abassi* and especially *Hernandez II* seeming to confine *Bivens* to the precise contexts found in *Bivens*, *Davis*, and *Carlson*, the Court’s under-theorized distinction between the federal common law of remedies and substantive law calls for explanation.

The lengthy *Hernandez* litigation did not result in a blockbuster decision. That could only have occurred if the Court had either extended *Bivens* to the new context presented in this case and the reach of the Fourth Amendment to a noncitizen outside the international border, or overruled *Bivens*, *Davis*, and *Carlson*. In retrospect, neither of those extreme outcomes was likely to occur. The Court has been muddling along since the early 1980s, circumscribing *Bivens* more and more, bit by bit. That long process simply continued here. Still, the decision is not without significance. A human life was taken, in highly questionable circumstances, perhaps unconstitutionally—and a majority of the Court displayed no hesitation or remorse about denying a right to sue the responsible officer. The unresolved tensions and questions in the Court’s *Bivens* jurisprudence were shown in sharp relief by the tragic facts of this case.

¹⁰³ *Bivens*, 403 U.S. at 403–04 (Harlan, J., concurring).

¹⁰⁴ See also *Gundy v. United States*, 139 S. Ct. 2116, 2131, 2133 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J. and Thomas, J.) (citation omitted) (“The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty” or “prescrib[ing] the rules by which the duties and rights of every citizen are to be regulated.”).

Mazars and Vance, and President Trump's Ongoing Assault on our Structural Constitution

Steven D. Schwinn*

It's no secret that President Donald J. Trump has waged a brazen and relentless assault on our constitutional structures of government. Indeed, he may be the first to say so. From his open attacks on the "deep state" to his public disparagement of sitting federal judges to his division of the nation into (favored) "red states" and (disfavored) "blue states," President Trump wears his constant attacks on the structures of government as a badge of honor. And he uses those attacks as red meat for his political base.

But President Trump's assault on our constitutional structures extends well beyond his rhetoric. The examples are legion, but here are just a few: He has misused the military for his own domestic political purposes. He has illegally reprogrammed federal funds to achieve his own policy objectives. He has politicized independent agencies for his own ends. He has openly violated federal law, most notably in the areas of immigration and environmental protection. He has strong-armed state and local governments to fall in line with his priorities by threatening, without statutory authorization, to withhold federal funds. The list could go on and on.

These attacks follow a common course of action. First, President Trump lodges an aggressive or even outlandish constitutional claim in support of a new controversial policy. Often, his claim, if ultimately accepted, would dangerously aggrandize the power of the presidency at

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the expense of the coordinate branches and the states in violation of the separation of powers and federalism. Next, he adjusts his claim, and his policy, in reaction to push-back from Congress, the courts, or the states. But he does so only begrudgingly, often leaving a trail of damage to our structural Constitution in his wake. Finally, he nevertheless achieves his original policy goal, or much of it, by further abusing the coordinate branches and the states.

In addition to following a common course of action, President Trump's attacks also have a common feature: They exploit the comparative institutional strengths of the presidency and the comparative institutional weaknesses of the coordinate branches and the states. President Trump is all too aware that the modern president wields enormous power. At the same time, he realizes that Congress, the courts, and the states often lack effective institutional powers or cooperative ability to rein him in. (And even when effective institutional powers may exist, they can be frustrated or undermined when the coordinate branches or the states share President Trump's political objectives.) By exploiting the institutional strengths of the presidency and the institutional weaknesses of the coordinate branches and the states, President Trump can yet further aggrandize his own power at the expense of Congress, the courts, and the states.

All this runs directly against our system of separation of powers and federalism. The framers designed those structural features of our Constitution specifically to protect against tyranny, not to enable it. Under that design, the branches of our federal government push against each other to keep each other in check, and to ensure that no single branch grows too powerful. In a similar way, the federal government and the states push against each other to maintain checks. The constant give-and-take between the branches of our federal government, and between the federal government and the states, protects against any single government body gaining too much power.

President Trump has trampled on these protective structural features of our Constitution in every way imaginable, and in many ways unimaginable. With each passing news cycle, he seems to devise new and surprising ways to run roughshod over the coordinate branches and the states. His entire presidency has become a stress-test of our structural Constitution.

Two cases before the U.S. Supreme Court last Term are emblematic. In these cases, *Trump v. Mazars*¹ and *Trump v. Vance*,² President Trump challenged congressional subpoenas and a state grand jury subpoena for his financial records. President Trump's strategy in these cases and their aftermaths had all the hallmarks of his many other attacks on our structural Constitution. First, his constitutional claims, designed to protect his financial records, were aggressive, even outlandish, and plainly violated the separation of powers and federalism. In *Mazars*, he claimed that congressional committees lacked a legitimate legislative purpose in seeking his records. In *Vance*, he argued that the president was categorically immune from all state criminal processes. Under President Trump's theories, the president could simply ignore congressional subpoenas and any state criminal processes, thus eviscerating these critical constitutional checks on the presidency. Next, he adjusted his constitutional claims in reaction to the Court's rejection of his arguments in *Mazars* and *Vance*. On remand in those cases, President Trump raised only more modest arguments, but still arguments that would lead to the same result. Finally, President Trump continues to drag his feet in the courts in an effort to run out the clock and to ensure that his records do not come out before the 2020 election, or ever.

President Trump's strategy in these cases also share the common feature of many of his attacks on our structural Constitution: They exploit the comparative institutional powers of the presidency and the comparative institutional weaknesses of the coordinate branches and the states. President Trump determined early on that neither Congress nor the state grand jury had any realistic authority to enforce their subpoenas without a court order. He knew that they simply lacked the institutional tools to unilaterally enforce the subpoenas against an intransigent president. He determined somewhat later that the famously slow-moving courts lacked any realistic authority to finally rule against him when it mattered, especially if he dragged out the litigation by, among other things, initially forcing the courts to deal with his aggressive and outlandish constitutional claims.

¹ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

² *Trump v. Vance*, 140 S. Ct. 2412 (2020).

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None of this takes away from the fact that *Mazars* and *Vance* together stand as an unequivocal repudiation of President Trump's most outrageous separation-of-powers and federalism claims. *Mazars* reaffirms the sweeping authority of Congress to investigate matters that aid in its lawmaking function, including matters involving the president's private records. *Vance* reaffirms that the president is not categorically immune from state criminal processes. These rulings are certainly something to celebrate.

But on the other hand, the rulings, by remanding the cases for further proceedings, specifically invite President Trump to continue to evade the subpoenas through the courts. President Trump has already accepted this invitation, and he now continues to ignore and undermine Congress and the state, and to enlist the courts in his obstruction. In the end, despite the coordinate branches and the state all pushing against him, and despite the Court's rulings, President Trump will succeed in protecting his financial records from disclosure under these subpoenas, at least before the 2020 election and maybe beyond. In the process, he'll also succeed in undermining Congress, undermining the state grand jury, and undermining the courts.

I. Trump v. Mazars USA, LLP

President Trump's attacks on our structural Constitution were on full display in *Mazars*, the case testing Congress's authority to subpoena his private financial records from his accounting firm and banks—the private records of the sitting president. President Trump sued to halt the subpoenas, arguing that the congressional committees that issued them lacked authority. In particular, he claimed that the committees could not use the records in aid of their legitimate lawmaking functions. Instead, he said that the subpoenas were designed to enforce the law against the president in violation of the separation of powers.

President Trump's argument was extreme, but it was hardly a surprise. President Trump's reaction to these subpoenas fit a larger pattern in the Trump administration of frustrating congressional investigations by simply declining to turn over requested documents or make available requested officials. In reaction to different investigations, President Trump and other administration officials variously raised

executive privilege; a broader deliberative-process privilege; lack of congressional authority; Congress's failure to cite the right authority; impermissible congressional encroachment on the president's unitary authority to enforce the law; and even pure politics (by making certain officials available to the Republican-controlled Senate, but not to the Democratic-controlled House). Finally, there came a point when the administration dropped its pretense, stopped citing reasons, and just declined to produce records or witnesses, without even pretending to offer an explanation.

President Trump's strategy in reaction to congressional investigations drew on Congress's comparative institutional weakness—its effective inability to enforce its own subpoenas. As a result, President Trump's claims allowed him to unilaterally set the scope of Congress's power to investigate—a shocking encroachment by the executive on the powers of the legislature. In order to avoid this problem, the committees in *Mazars* sidestepped the president and issued their subpoenas directly to third parties. But President Trump then sued to halt the subpoenas. In doing so, he drew on the comparative institutional weakness of the judiciary: the courts' inability to rule quickly on cases. In other words, now unable to undermine Congress directly, President Trump turned to abuse the courts in order to run the clock on the subpoenas.

The Supreme Court in *Mazars* flatly rejected President Trump's constitutional claims. That ruling stands as an important reaffirmation of Congress's broad powers to investigate, and a solid bulwark against an executive's efforts to subvert congressional subpoenas. But at the same time, the ruling opened the door for President Trump to continue to challenge the subpoenas in court. This is exactly what President Trump is doing, dragging out the litigation—and protecting the requested records—past the 2020 election and after the current Congress, along with its outstanding subpoenas, expire. In the process, he effectively undermined the powers of both Congress and the courts.

A. Background

In the spring of 2019, three different committees of the U.S. House of Representatives issued four separate subpoenas to President Trump's banks and accounting firm for financial documents of President

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Trump and Trump Organization businesses. The House Committee on Financial Services issued two of the four subpoenas, one to Deutsche Bank (for records from 2010 to the present) and another to Capital One (for records from 2016 to the present). The Committee sought these records in order to help it draft legislation “to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country’s financial system,” including money from Russian oligarchs that flows into the United States through “anonymous shell companies” and investments like “luxury high-end real estate,” and to “prevent the abuse of the financial system.”³ The Committee also sought the records to engage in oversight regarding “the implementation, effectiveness, and enforcement” of laws that prohibit money laundering and funding of terrorism.⁴ The Committee issued the subpoenas pursuant to House Resolution 206, which called out loopholes “that allow corruption, terrorism, and money laundering to infiltrate our country’s financial system” and noted, among other things, that “the influx of illicit money, including from Russian oligarchs, has flowed largely unimpeded into the United States through . . . anonymous shell companies and into U.S. investments, including luxury high-end real estate.”⁵ The Resolution called for “efforts to close loopholes that allow corruption, terrorism, and money laundering to infiltrate our country’s financial system.”⁶ In addition to the Resolution, the Committee also relied on its own oversight plan. According to the plan, the Committee intended to “examine the implementation, effectiveness, and enforcement” of laws designed to halt money laundering and the financing of terrorism and to “consider proposals to prevent the abuse of the financial system” and “address any vulnerabilities identified” in the real estate market.⁷

The same day that the Committee on Financial Services issued its subpoenas, the Permanent Select Committee on Intelligence issued a subpoena to Deutsche Bank, but for different reasons. The Intelligence Committee sought to investigate foreign efforts to undermine the U.S. political process, including attempts by Russia to influence the 2016 presidential election and links between Russia and the Trump Campaign.

³ *Mazars*, 140 S. Ct. at 2027.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* (quoting H.R. Rep. No. 116–40 at 84 (2019)).

The Intelligence Committee also sought the material to determine whether President Trump or his associates were compromised by certain foreign actors. According to Intelligence Committee Chairman Adam Schiff, the Committee planned “to develop legislation and policy reforms to ensure the U.S. government is better positioned to counter future efforts to undermine our political process and national security.”⁸

Finally, the House Committee on Oversight and Reform issued a subpoena to Mazars for financial documents of President Trump and his businesses from 2011 through 2018, for yet different reasons. The Oversight Committee sought these records to determine, in light of testimony and documents provided by the president’s personal attorney, Michael Cohen, whether President Trump engaged in illegal conduct, whether he disclosed conflicts of interest, whether he violated the Emoluments Clauses of the Constitution,⁹ and whether he accurately reported his finances to the Offices of Government Ethics and other government entities. Oversight Committee Chairman Elijah Cummings wrote to the Committee that its “interest in these matters informs its review of multiple laws and legislative proposals under our jurisdiction.”¹⁰

In response, President Trump, his children, and his businesses filed two separate lawsuits against Mazars and the banks seeking to stop the defendants from complying with the subpoenas. The president asserted breathtaking claims: He argued that the subpoenas were invalid, because the committees lacked a legitimate legislative purpose, and that the subpoenas violated the separation of powers by impermissibly encroaching on the Executive’s plenary power to enforce the law.

The lower courts flatly rejected these arguments. In the first case, *Trump v. Mazars*,¹¹ the U.S. Court of Appeals for the D.C. Circuit held that the Oversight Committee’s subpoena served “legitimate legislative pursuits,” because it sought information that was relevant to reforming financial-disclosure requirements for the president.¹² The court said that Congress may legislate in this area under the Emoluments Clauses:

⁸ *Id.* (quoting Press Release, House Permanent Select Committee on Intelligence, Chairman Schiff Statement on House Intelligence Committee Investigation (Feb. 6, 2019)).

⁹ U.S. Const. art. I, § 9, cl. 8; art. II, § 1, cl. 7; art. I, § 6, cl. 2.

¹⁰ *Id.* at 2028.

¹¹ *Trump v. Mazars USA, LLP*, 940 F.3d 710 (D.C. Cir. 2019).

¹² *Id.* at 726.

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“If the President may accept no domestic emoluments and must seek Congress’s permission before accepting any foreign emoluments, then surely a statute facilitating the disclosure of such payments lies within constitutional limits.”¹³ The court noted that “[t]he United States Code, too, provides ample precedent for laws that regulate Presidents’ finances and records,” and that past presidents have consistently complied with financial-disclosure requirements.¹⁴ Moreover, the court ruled that the subpoena was not based on “an impermissible law-enforcement purpose.”¹⁵ The court noted that the Committee might have had several purposes behind the subpoena, perhaps even including a law-enforcement purpose, but that its legitimate legislative purpose was sufficient to empower it to issue the subpoena.

Judge Naomi Rao argued in her dissent that the Committee sought to investigate alleged illegal behavior by the president, and that it could only pursue this kind of investigation pursuant to its impeachment power—even if the investigation also had a valid legislative purpose. She explained,

When Congress seeks information about the President’s wrongdoing, it does not matter whether the investigation also has a legislative purpose. Investigations of impeachable offenses simply are not, and never have been, within Congress’s legislative power. Throughout our history, Congress, the President, and the courts have insisted upon maintaining the separation between the legislative and impeachment powers of the House and recognized the gravity and accountability that follow impeachment. Allowing the Committee to issue this subpoena for legislative purposes would turn Congress into a roving inquisition over a co-equal branch of government.¹⁶

Judge Rao argued that because the Committee intended to investigate alleged illegal behavior by the president, it could do so only pursuant to its impeachment authority. And because the Committee did not issue its subpoenas pursuant to any impeachment power, the subpoenas were invalid. (Judge Rao later argued, in dissent from the

¹³ *Id.* at 734.

¹⁴ *Id.* at 734–35.

¹⁵ *Id.* at 726.

¹⁶ *Id.* at 748 (Rao, J., dissenting).

court's denial of rehearing en banc, that the House's later authorization of an impeachment inquiry did not ratify the Committee's power to issue the subpoenas, because "the Committee has relied consistently and exclusively on the legislative power to justify this subpoena."¹⁷) The full D.C. Circuit denied en banc review.¹⁸

The U.S. Court of Appeals for the Second Circuit similarly rejected the president's claims. The court in *Trump v. Deutsche Bank AG*,¹⁹ ruled that the Financial Services Committee and the Intelligence Committee had valid legislative purposes in seeking the information:

[t]he Committees' interests concern national security and the integrity of elections, and, more specifically, enforcement of anti-money-laundering / counter-financing of terrorism laws, terrorist financing, the movement of illicit funds through the global financial system including the real estate market, the scope of the Russian government's operations to influence the U.S. political process, and whether the Lead Plaintiff was vulnerable to foreign exploitation.²⁰

It also held that the subpoenas did not impermissibly encroach upon the Executive's law-enforcement authority:

the Committees are not investigating whether [President Trump] has violated any law. To the extent that the Committees are looking into unlawful activity such as money laundering, their focus is not on any alleged misconduct of [President Trump] (they have made no allegation of his misconduct); instead, it is on the existence of such activity in the banking industry, the adequacy of regulation by relevant agencies, and the need for legislation.²¹

The court upheld the lower court opinion and ordered prompt compliance with the subpoenas. At the same time, it remanded the case

¹⁷ *Trump v. Mazars USA, LLP*, 941 F.3d 1180, 1182 (D.C. Cir. 2019) (Rao, J., dissenting).

For a critique of this argument, see Steven D. Schwinn, *The Misguided On-Off Theory of Congressional Authority*, 95 CHL.-KENT L. REV. (forthcoming 2020).

¹⁸ *Id.* at 1182.

¹⁹ *Trump v. Deutsche Bank AG*, 943 F.3d 627 (2d Cir. 2019).

²⁰ *Id.* at 658–59.

²¹ *Id.* at 659–60.

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to give President Trump an opportunity to object to specific documents that the president claimed contained sensitive personal information and other particular documents from Deutsche Bank.

Judge Debra Ann Livingston dissented on this point. Given the breadth of the subpoenas, Judge Livingston questioned whether the committees truly issued them to advance their legitimate lawmaking functions. She also questioned the historical precedent for the subpoenas and whether Congress was sufficiently careful in authorizing them and attentive to the sensitive separation-of-powers concerns that they raised. “[T]he Plaintiffs have raised serious questions on the merits, implicating not only Congress’s lawmaking powers, but also the ability of this and future Presidents to discharge the duties of the Office of the President free of myriad inquiries instigated ‘more casually and less responsibly’ than contemplated in our constitutional framework.”²² She claimed that the majority did not grant sufficient weight to these concerns. She would have remanded the case for a closer look at these issues.²³

The Supreme Court granted certiorari in both cases, stayed the judgments, and consolidated the cases for appeal.

B. President Trump’s Arguments

As he had in the lower court proceedings, at the Supreme Court President Trump raised a breathtaking claim that had no support in the law. He argued that the committees lacked authority to issue the subpoenas, because the subpoenas did not advance the committees’ legitimate lawmaking functions.²⁴ In particular, he claimed that the subpoenas at best sought information that only *might* lead to legislation, and that this was too speculative to fall within the committees’ lawmaking authority. Next, he asserted that the subpoenas sought information in areas where Congress simply could not legislate, for example, extending conflict-of-interest restrictions to, and imposing disclosure

²² *Id.* at 678 (Livingston, J., dissenting) (quoting *U.S. v. Rumely*, 345 U.S. 41, 46 (1953)).

²³ *Id.* at 679 (“As set forth herein, I would remand, directing the district court promptly to implement a procedure by which the Plaintiffs may lodge their objections to disclosure with regard to specific portions of the assembled material and so that the Committees can clearly articulate, also with regard to specific categories of information, the legislative purpose that supports disclosure *and* the pertinence of such information to that purpose.”).

²⁴ *See generally* Brief for Petitioners, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

requirements upon, the president. Third, he said that the bank subpoenas impermissibly sought his personal financial information only as a “case study” for financial sector reform, and that this simply did not fit within Congress’s legitimate lawmaking power. Fourth, he argued that the subpoenas represented Congress’s attempt at law enforcement, not law-making, and that they therefore impermissibly encroached on the president’s plenary law-enforcement power under Article II. Fifth, President Trump claimed that the subpoenas were based only on the committees’ political interests, not their legitimate lawmaking interests. Finally, President Trump contended that the committees lacked express authority under House rules to issue the subpoenas.

President Trump claimed that the congressional subpoenas should be subject to an even higher standard under the separation of powers, because they sought the president’s personal financial information. In making the claim, the president and the government (as amicus in support of the president) tried to leverage the principles behind executive privilege, without formally invoking the privilege. Under its patched-together standard, the president and the government argued that the House must establish a heightened, “demonstrated, specific need” for the financial information, and that the financial information is “demonstrably critical” to its legislative function. The government said it this way:

At the threshold, the full [House] chamber should unequivocally authorize a subpoena against the President. Moreover, the legislative purpose should be set forth with specificity. Courts should not presume that the purpose is legitimate, but instead should scrutinize it with care. And as with information protected by executive privilege, information sought from the President should be demonstrably critical to the legitimate legislative purpose. A congressional committee cannot evade those heightened requirements merely by directing the subpoenas to third-party custodians, for such agents generally assume the rights and privileges of their principal²⁵

²⁵ Brief for the United States as Amicus Curiae Supporting Petitioners at 8, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

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President Trump’s argument that the Committees lacked a legitimate legislative purpose defied the Supreme Court’s plain rulings. The Court time and again has reaffirmed Congress’s broad powers to investigate in aid of its power to legislate. For example, in *McGrain v. Daugherty*, the Court explained that Congress’s “power of inquiry . . . is an essential and appropriate auxiliary to the legislative function,” because “[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.”²⁶ The Court held that it did not matter that a congressional resolution authorizing an investigation did not specifically identify particular legislation that Congress may enact, so long as “the subject to be investigated was . . . [p]lainly [a] subject . . . on which legislation *could* be had”²⁷ The Court has also held that it did not matter if the investigation examined issues that could also be the subject of a criminal prosecution. The Court explained that “the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power is not abridged because the information sought to be elicited may also be of use in such suits.”²⁸ Moreover, congressional inquiries throughout our history involved the president, and the courts have been clear that the president enjoys no absolute immunity from these inquiries. Still, there are limits to these powers. In particular, Congress cannot use its investigatory powers to engage in “law enforcement,”²⁹ to “try” someone “for any crime of wrongdoing,”³⁰ or to expose private information only “for the sake of exposure.”³¹ But the committees’ subpoenas did not come close to these restrictions.

President Trump’s and the government’s arguments that the committees’ subpoenas must meet a higher standard defied the Court’s rulings, too. That argument attempted to shoehorn the standard for executive privilege into a claim over congressional authority, a completely unrelated doctrine. The Court had never held anything like this. Again, President Trump’s claims represented a novel and breathtaking restriction on congressional authority to investigate.

²⁶ *McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927).

²⁷ *Id.* at 176 (emphasis added).

²⁸ *Sinclair v. United States*, 279 U.S. 263, 295 (1929).

²⁹ *Quinn v. United States*, 349 U.S. 155, 161 (1955).

³⁰ *McGrain*, 273 U.S. at 179–80.

³¹ *Watkins v. United States*, 354 U.S. 178, 200 (1957).

C. The Court's Ruling

The Court flatly rejected President Trump's claims. The Court reaffirmed Congress's broad powers of investigation, including powers to investigate the president. And it held that the executive-privilege standard had no application to a case over congressional authority to subpoena documents, even documents of the president. At the same time, however, the Court said that a congressional subpoena directed at the president's private documents could raise separation-of-powers concerns, and that courts should evaluate such subpoenas with an eye toward those concerns.

Chief Justice John G. Roberts wrote for the Court, joined by Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, Elena Kagan, Neil M. Gorsuch, and Brett M. Kavanaugh. The Court started by noting that Congress and the president have a long history, going all the way back to the early congresses, of negotiating these kinds of disputes between themselves, without involving the courts.³² The Court traced the history to 1792, when a House committee sought Executive Branch documents relating to General St. Clair's "utter rout" by Native Americans in the Northwest Territory, near the current border between Ohio and Indiana.³³ After consulting his cabinet, President George Washington concluded that the House had authority to "institute inquiries" and "call for papers," but that the president could withhold "such papers as the public good would permit."³⁴ President Washington then dispatched Secretary of State Thomas Jefferson to persuade members of the House to come around to the administration's position. In response, the House voluntarily narrowed its request.

The Court noted that this kind of negotiation continued through modern times.³⁵ For example, the Court recounted that the Reagan administration engaged in a similar negotiated agreement with a House subcommittee over the subcommittee's request for documents related to an administration decision under the Mineral Lands Leasing Act. It also recalled a negotiation between President Bill Clinton and a Senate committee over the committee's subpoena for the White House

³² *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2029–31 (2020).

³³ *Id.* at 2029.

³⁴ *Id.* at 2029–30.

³⁵ *Id.* at 2030–31.

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attorney's notes from a meeting with the president over the Whitewater matter. In each case, the Court noted, the president and Congress negotiated a resolution, without the intervention of the Supreme Court. In these most recent examples, Congress and the president negotiated a resolution even when the president had a legitimate claim of privilege over some of the material.

The Court noted that this longstanding practice left the Court without any meaningful precedent on this kind of dispute. But at the same time it noted that the longstanding practice itself "is a consideration of great weight" in balancing out the allocation of power, and that "it imposes on us a duty of care to ensure that we not needlessly disturb 'the compromises and working arrangements'" that those branches have achieved.³⁶

The Court then rejected the president's claim that congressional subpoenas for the personal records of the president should be subject to the more demanding standard based on executive privilege. It held that executive privilege was designed to protect communications with the president over official matters, and that it therefore had no application to a congressional request for the private and unofficial documents of the president. The Court explained:

[Executive privilege] safeguards the public interest in candid, confidential deliberations within the Executive Branch; it is "fundamental to the operation of Government." As a result, information subject to executive privilege deserves "the greatest protection consistent with the fair administration of justice." We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations.³⁷

The Court noted that the president and the government argued for a heightened standard for *all* congressional subpoenas aimed at the president, without distinguishing between private material and official material, privileged communications or non-privileged communications, and irrespective of the legislative purpose. Under this sweeping

³⁶ *Id.* at 2031.

³⁷ *Id.* at 2032–33.

approach, the Court said that the heightened standard “would risk seriously impeding Congress in carrying out its responsibilities,” depart from “the longstanding way of doing business between the branches,” and impermissibly intrude upon Congress’s power to “have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government”³⁸

But on the other hand, the Court recognized that congressional investigations into the president (and not just the Executive Branch more generally) raise “significant separation of powers issues.”³⁹ The Court recognized that the president, as the sole head of the Executive Branch, has a unique place in our constitutional system. As a result, the Court said that “congressional subpoenas for the president’s information,” unlike any other congressional subpoenas, “unavoidably pit the political branches against one another.”⁴⁰ Without some guardrails on subpoenas for the president’s information, “Congress could ‘exert an imperious controul’ over the Executive Branch and aggrandize itself at the President’s expense, just as the Framers feared.”⁴¹ Finally, the Court said that the potential separation-of-powers problems exist even though the subpoenas are directed at the president’s personal (not official) documents, and even though the president sued in his personal capacity. The Court noted that “the President is the only person who alone composes a branch of government.”⁴² It wrote that “[g]iven [this] close connection between the Office of the President and its occupant, congressional demands for the President’s papers can implicate the relationship between the branches regardless whether those papers are personal or official.”⁴³ And in any event, the Court said that Congress could use a demand for a president’s private documents “to harass the President or render him ‘complaisan[t] to the humors of the Legislature.’”⁴⁴

To address the separation-of-powers concerns, and to determine the validity of any particular congressional subpoena to the president, the

³⁸ *Id.* at 2033 (quoting *Rumely*, 345 U.S. at 43).

³⁹ *Id.* at 2033.

⁴⁰ *Id.* at 2034.

⁴¹ *Id.* (quoting THE FEDERALIST NO. 71 (Alexander Hamilton)).

⁴² *Id.* at 2034.

⁴³ *Id.*

⁴⁴ *Id.* (quoting THE FEDERALIST NO. 71 (Alexander Hamilton)).

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Court held that courts must balance “[s]everal special considerations.”⁴⁵ First, the Court said that courts should determine whether Congress really needs the president’s documents, or whether it could get the information it needs from other sources. Second, the Court wrote that a congressional subpoena to the president should be “no broader than reasonably necessary to support Congress’s legislative objective.”⁴⁶ Third, the Court held that courts “should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose.”⁴⁷ And fourth, the Court said that courts should consider “the burdens imposed on the President by a subpoena.”⁴⁸ The Court held that other considerations may come into play, too, depending on the particulars of the case.

Justice Clarence Thomas dissented. He argued that “Congress has no power to issue a legislative subpoena for private, nonofficial documents—whether they belong to the President or not.”⁴⁹ Justice Thomas argued that Congress can only obtain this kind of material by using its impeachment power, not its ordinary legislative powers. But he declined to say “whether there are any limitations on the impeachment power that would prevent the House from subpoenaing the documents at issue.”⁵⁰

Justice Samuel Alito also dissented.⁵¹ He agreed with the Court that courts should be more attentive to the separation-of-powers concerns when they evaluate a congressional subpoena for the president’s personal records. (Justice Alito seemed to argue for even more attentiveness to these concerns.) But he went on to argue that the subpoenas in this case did not survive that scrutiny.

D. Significance

The ruling vacated the lower courts’ rulings and sent the cases back to the district courts for further proceedings. In particular, the

⁴⁵ *Id.* at 2035.

⁴⁶ *Id.* at 2036.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 2037 (Thomas, J., dissenting).

⁵⁰ *Id.* at 2045 n. 7.

⁵¹ *Id.* at 2048 (Alito, J., dissenting).

district courts must now reconsider the committees' subpoenas in light of the four (and possibly more) new special separation-of-powers considerations that the Court outlined in its ruling. But given the timing, the lower courts are highly unlikely to issue rulings before the current Congress ends. And even if they could, President Trump would surely appeal any adverse ruling and run the clock beyond the end of the current Congress. (To be sure, the Committees could issue new subpoenas and tailor them more closely to the separation-of-powers considerations in the Court's ruling. But President Trump would challenge any new subpoenas, too, and similarly run the clock.) In short, President Trump effectively undermined congressional authority to subpoena his private financial records merely by lodging outlandish constitutional claims, forcing the committees to litigate them, and dragging the litigation out until the committees' authority expires.

If the committees in the new Congress issue new subpoenas, we are likely to see this whole case replayed. Whether reelected or not, President Trump will undoubtedly challenge any new subpoenas under the Court's new separation-of-powers considerations. If President Trump is reelected, the committees and President Trump will stand in exactly the same constitutional positions that they occupied in *Mazars*, and the courts will apply the new separation-of-powers consideration much as they would have applied them had there been time on remand. The justices in the majority in *Mazars* gave no hint as to how they might apply these considerations to the subpoenas.

If, on the other hand, President Trump is not reelected, the constitutional positions would change dramatically. Any separation-of-powers concerns would substantially diminish or disappear entirely, because Trump and the president would no longer be one in the same person. At the same time, the committees' interests in the records would remain strong. The committees would then use the records of a former president to help inform any legislation on the same matters.

II. *Trump v. Vance*

Just as President Trump's attacks on the separation of powers were on full display in *Mazars*, his attacks on federalism principles were on

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full display in *Vance*. *Vance* tested whether a state grand jury can issue a subpoena to a third party for the president's personal financial records. Just as in *Mazars*, President Trump sued to halt the subpoena. He lodged a very different, but even more breathtaking claim, that the president enjoyed absolute, categorical immunity from all state criminal processes, including a state grand jury subpoena. President Trump claimed that federalism principles in the Constitution compelled this result.

Just as in *Mazars*, President Trump's argument was extreme, but not a surprise. He campaigned on the claim that he could shoot a person on Fifth Avenue without losing supporters.⁵² He said that as president the Constitution gave him the power to do whatever he wanted.⁵³ And then at the oral argument in the lower court in *Vance*, President Trump's attorney doubled down on his shooting claim and argued that the president would be absolutely immune from a state criminal investigation if he shot someone in the middle of Fifth Avenue.⁵⁴

The Court had never said anything close to this. To be sure, the Court had recognized executive privilege, and it had ruled that a president is absolutely immune from claims for civil damages arising out of the president's official conduct. But at the same time, the Court held that a sitting president is not immune from a suit for civil damages arising out of the president's unofficial conduct before the president came to office. President Trump's argument for categorical immunity from all state criminal processes flew in the face of these rulings.

Moreover, President Trump's strategy, like his strategy in *Mazars*, drew on the comparative institutional strengths of the presidency and the comparative institutional weaknesses of the state grand jury and prosecutor. President Trump knew that the state prosecutor, like

⁵² Jeremy Diamond, *Trump: I Could 'Shoot Somebody and I Wouldn't Lose Voters'*, CNN (Jan. 24, 2016) (then-candidate Trump said during the 2016 Republican presidential primary campaign "I could stand in the middle of Fifth Avenue and shoot somebody, and I wouldn't lose any voters, OK?").

⁵³ Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him 'the Right to Do Whatever I Want'*, WASH. POST (July 23, 2019) (President Trump stated "I have an Article II, where I have to the right to do whatever I want as president.").

⁵⁴ Lauren Aratani, *Trump Couldn't Be Prosecuted If He Shot Someone on Fifth Avenue, Lawyer Claims*, GUARDIAN (Oct. 23, 2019).

Congress, lacked any meaningful authority to enforce a subpoena against the president without involving the courts in a long, drawn-out process. By preemptively suing the prosecutor, President Trump set the judicial process in motion on his own terms.

Still, the Court flatly rejected the president's claims. It held that the president is not categorically immune from state criminal processes. But at the same time, it noted that the president, like anyone else, can challenge the breadth and scope of a state grand jury subpoena, and it remanded the case to allow the president to do just that. President Trump is now pressing those claims in the next round of litigation in an effort to draw this dispute out even longer, simultaneously abusing federalism principles and the federal courts in the process.

A. Background

The case started in the Summer of 2018, when the New York County District Attorney's Office opened an investigation into possible criminal misconduct in financial transactions related to President Trump and his corporations. The transactions included the now-familiar "hush money" that President Trump's attorney, Michael Cohen, paid to two women with whom President Trump had extra-marital affairs. (Cohen admitted that he violated campaign finance laws in coordination with, and at the direction of a person later identified as President Trump. Cohen pleaded guilty to the charges and was sentenced to prison.) We have since learned that the investigation included other matters, too.

As part of the investigation, the district attorney's office served the Trump Organization with a grand jury subpoena for records and communications concerning certain financial transactions and tax returns. The Trump Organization produced some of the documents, but not all, and in particular, not President Trump's tax returns. The district attorney's office then served a grand jury subpoena on Mazars USA, LLP, President Trump's accounting firm. The subpoena sought financial and tax records from January 1, 2011, to August 29, 2019 (the date of the subpoena). Like the congressional subpoenas in *Mazars*, the grand jury subpoena sought only the purely private financial records of President Trump; it did not seek any official government communications or any material related to

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any official presidential conduct. (Indeed, the grand jury subpoena was patterned on one of the committee subpoenas in *Mazars*.)

The Trump Organization then sued the district attorney, Cyrus Vance, and Mazars in federal court, seeking a preliminary injunction to halt Mazars from complying with the subpoena. The district court ruled that the case belonged in state court, not federal court, and that in any event President Trump was not categorically immune from the subpoena.⁵⁵

The Second Circuit vacated the district court's ruling that the case belonged in state court but affirmed its alternative ruling that President Trump was not categorically immune from the subpoena.⁵⁶ The court noted that the requested documents, all private financial records, were not covered by executive privilege and did not implicate President Trump's official duties. The court recognized that the president, as sole head of the Executive Branch, "occupies a unique position in the constitutional scheme,"⁵⁷ and that a state criminal process could interfere with the president's Article II responsibilities. But it said that

we are not faced, in this case, with the President's arrest or imprisonment, or with an order compelling him to attend court at a particular time or place, or, indeed, with an order that compels the President himself to do anything. The subpoena at issue is directed not to the President, but to his accountants; compliance does not require the President to do anything at all.⁵⁸

The court concluded "that presidential immunity does not bar the enforcement of a state grand jury subpoena directing a third party to produce non-privileged material, even when the subject matter under investigation pertains to the President,"⁵⁹ and declined to enjoin the subpoena.

B. President Trump's Arguments

President Trump appealed to the Supreme Court. His argument

⁵⁵ *Trump v. Vance*, 395 F. Supp. 3d 283 (S.D.N.Y. 2019).

⁵⁶ *Trump v. Vance*, 941 F.3d 631 (2d Cir. 2019).

⁵⁷ *Id.* at 642 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982)).

⁵⁸ *Id.*

⁵⁹ *Id.* at 640.

was breathtaking: He claimed that under federalism principles, he, as president, was absolutely immune from all state criminal processes, including the *Mazars* subpoena.⁶⁰ He argued that any state criminal process would distract the president from performing the president's constitutional duties; that state criminal processes would stigmatize the president and interfere with the president's ability to perform Article II duties; and that state prosecutors could use state criminal processes to harass the president for political reasons. President Trump said that without such immunity, states could impermissibly interfere with the president's constitutional responsibilities in violation of federalism principles.

The government weighed in to support President Trump.⁶¹ Unlike the president, however, the government did not argue that the president is categorically immune from state criminal processes. Instead, the government argued only that the Court should apply a higher standard to a state-court subpoena issued to the president than it would apply to a state-court subpoena issued to any other person. The government argued that in order to protect the president from impermissible interference with the president's constitutional duties, the Court should require the state prosecutor to demonstrate a "heightened standard of need" for the material.

The president's argument had no support in the law. While the Court had previously recognized executive privilege and the president's categorical immunity from lawsuits for civil damages arising out of the president's official conduct, it had also ruled that a sitting president was not immune from a lawsuit for civil damages arising out of the president's unofficial, pre-presidential conduct. Moreover, presidents have long been subject to federal criminal processes, and President Trump did not raise any especially constitutional reasons the president should not also be subject to state criminal processes. To be sure, the Department of Justice has long held that a sitting president is absolutely immune from federal criminal prosecution. That's not uncontroversial.

⁶⁰ See generally Brief for Petitioner, *Trump v. Vance*, 140 S. Ct. 2412 (2020).

⁶¹ See generally Brief of the United States Supporting Petitioner, *Trump v. Vance*, 140 S. Ct. 2412 (2020).

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But even if it were settled, there's an awfully long stretch from absolute immunity from *federal criminal prosecution* to absolute immunity from *all state criminal processes*. Not even the government went this far.

C. The Court's Ruling

The Court rejected it, too.⁶² Chief Justice Roberts again wrote for the Court, this time joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. The Court ruled that President Trump was not absolutely immune from all state criminal processes, but that the president could challenge a state grand jury subpoena under state and federal law, like anybody else.

The Court started by reciting the long history, going back to Aaron Burr's 1807 treason trial, of presidents complying with criminal subpoenas, subject to the president's availability and in light of the president's constitutional responsibilities. As a "bookend" to the Burr case, the Court cited the special prosecutor's subpoena directed at President Richard Nixon in *United States v. Nixon*.⁶³ The Court noted that it later described *Nixon* as "unequivocally and emphatically endor[ing] Marshall's holding that Presidents are subject to subpoena."⁶⁴

The Court held that this same rule applied with equal force to a *state* grand jury subpoena, notwithstanding President Trump's federalism arguments to the contrary. First, the Court rejected President Trump's claim that the subpoena would distract the president from the president's Article II responsibilities. The Court wrote that

two centuries of experience confirm that a properly tailored criminal subpoena will not normally hamper the performance of the President's constitutional duties. If anything, we expect that in the mine run of cases, where a President is subpoenaed during a proceeding targeting someone else, as Jefferson was, the burden on a President will ordinarily be lighter than the burden of defending against a civil suit.⁶⁵

Next, the Court rejected President Trump's claim that the subpoena

⁶² *Trump v. Vance*, 140 S. Ct. 2412 (2020).

⁶³ *United States v. Nixon*, 418 U.S. 683 (1974).

⁶⁴ *Vance*, 140 S. Ct. at 2424 (quoting *Clinton v. Jones*, 520 U.S. 681 (1997)).

⁶⁵ *Id.* at 2426.

would stigmatize the president. The Court noted that it previously rejected this same claim as a basis for immunity in both *Nixon* and *Clinton*. In any event, it held that the president is not stigmatized by performing “the citizen’s normal duty of . . . furnishing information relevant” to a criminal investigation.⁶⁶ The Court wrote that other legal protections were already in place to ensure against President Trump’s worry: “longstanding rules of grand jury secrecy aim to prevent the very stigma the President anticipates.”⁶⁷

Finally, the Court rejected President Trump’s argument that without immunity, state and local prosecutors could use criminal processes to harass the president. The Court again noted that it rejected a nearly identical argument in *Clinton*, and, as with stigma, it said that ordinary procedural protections ensure against this. In sum, “Given these safeguards and the Court’s precedents, we cannot conclude that absolute immunity is necessary or appropriate under Article II or the Supremacy Clause.”⁶⁸ (The Court similarly rejected the government’s argument for a higher standard when a state grand jury issues a subpoena for the president’s private documents.)

The Court noted that the president could still raise subpoena-specific challenges to a state grand jury subpoena; it said that the president could challenge the subpoena on any basis permitted by state law and under separation-of-powers principles. This meant that the president could challenge the subpoena for the mundane reason that it is overbroad, for example. Or the president could challenge the subpoena for the constitutional reason that would impede the president in the performance of the president’s Article II duties. The court wrote that if the president can demonstrate that a subpoena would interfere with Article II responsibilities, “[a]t that point, a court should use its inherent authority to quash or modify the subpoena, if necessary to ensure that such ‘interference with the President’s duties would not occur.’”⁶⁹

Justice Kavanaugh concurred, joined by Justice Gorsuch.⁷⁰ Justice

⁶⁶ *Id.* at 2427 (quoting *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

⁶⁷ *Id.*

⁶⁸ *Id.* at 2429.

⁶⁹ *Id.* at 2431 (quoting *Jones*, 520 U.S. at 710).

⁷⁰ *Id.* (Kavanaugh, J., concurring).

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Kavanaugh argued for a somewhat higher standard for the subpoena, given the president's unique place in our constitutional system. In particular, drawing on *Nixon*, Justice Kavanaugh argued that the prosecutor should have to show a "demonstrated, specific need" for the information. According to Justice Kavanaugh, this "tried-and-true test . . . accommodates both the interests of the criminal process and the Article II interests of the Presidency."⁷¹

Justice Thomas dissented.⁷² He agreed with the Court that the president is not absolutely immune from a state grand jury subpoena. He also agreed with the Court that President Trump could challenge this subpoena on remand. But Justice Thomas would have applied "the standard articulated by Chief Justice Marshall in *Burr*: If the President is unable to comply because of his official duties, then he is entitled to injunctive and declaratory relief."⁷³

Justice Alito dissented, too.⁷⁴ Justice Alito argued that, given the unique place of the president in our constitutional system and federalism considerations, the president is absolutely immune from state criminal prosecution while in office. He wrote that

a State's sovereign power to enforce its criminal laws must accommodate the indispensable role that the Constitution assigns to the Presidency. . . . Both the structure of the Government established by the Constitution and the Constitution's provisions on the impeachment and removal of a President make it clear that the prosecution of a sitting President is out of the question.⁷⁵

Warning of a slippery slope from a subpoena to a state criminal charge, Justice Alito argued for a higher standard for a state grand jury subpoena. He wrote that "a prosecutor should be required (1) to provide at least a general description of the possible offenses that are under investigation, (2) to outline how the subpoenaed records relate

⁷¹ *Id.* at 2432.

⁷² *Id.* at 2433 (Thomas, J., dissenting).

⁷³ *Id.* at 2436.

⁷⁴ *Id.* at 2439 (Alito, J., dissenting).

⁷⁵ *Id.* at 2444.

to those offenses, and (3) to explain why it is important that the records be produced and why it is necessary for production to occur while the President is still in office.”⁷⁶

D. Significance

The Court remanded the case back to the lower court and invited President Trump to challenge the subpoena again, this time on subpoena-specific bases under state law and the separation of powers. The ruling not only gave the president another shot at challenging the subpoena; it also allowed the president to continue to drag out the litigation and abuse the courts in an effort to run out the clock on the subpoena past the 2020 election and beyond. In short, the ruling meant that President Trump could start his legal challenge all over again.

President Trump readily accepted the invitation. He filed a new complaint alleging that the subpoena was overbroad for a variety of reasons, and that it was issued in bad faith. The lower courts categorically rejected these claims.⁷⁷ On October 13, 2020, President Trump filed an application for a stay pending a petition for writ of certiorari with the Court. As this piece goes to print, the Court has not yet ruled.

So, on the one hand, *Vance* stands as a resounding rejection of the president's most outlandish claim, that the president is categorically and absolutely immune from all state criminal processes. It also stands for the age-old principle that no person is above the law. The ruling reaffirmed these bedrock principles in our structural Constitution.

But on the other hand, the ruling allows the president to continue his specious challenge to the subpoena in the federal courts. It invites him to start his challenge anew, which he has done, and to abuse the state grand jury and the federal courts by dragging his litigation out and attempting to run the clock on the subpoena.

If the president is reelected, he will continue to fight and challenge the subpoena to the Court. If he loses at the Court, he will undoubtedly employ some new, novel, and as-yet-unimagined gambit under the guise of executive authority or federalism to continue to delay

⁷⁶ *Id.* at 2449.

⁷⁷ *Trump v. Vance*, No. 19-cv-8694, 2020 WL 4861980 (S.D.N.Y. Aug. 20, 2020); *Trump v. Vance*, No. 20-2766, 2020 WL 5924199 (2d Cir. Oct. 7, 2020).

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compliance and, ultimately, perhaps prosecution. If, on the other hand, he is not reelected, he will simply have a harder time challenging the subpoena and other state criminal processes, because he will lose his constitutional claims entirely.

Either way, he has already damaged our structural Constitution. Even with a Court ruling against him, he continues to play the courts in order to delay compliance with the subpoena, at the expense of the state grand jury and of our federal judiciary.

On their face, *Vance* and *Mazars* are resounding reaffirmations of fundamental separation-of-powers and federalism principles in our Constitution. By rejecting President Trump's most outlandish constitutional claims, these cases show that on one level our structural Constitution works: When one constitutional actor pushes too hard, another can push it back to its place.

But on a different level, the cases represent just one stage in President Trump's larger strategy to attack and dismantle our structural Constitution. Both rulings invite President Trump to continue his fights against the subpoenas through the courts. He has happily accepted this invitation, and he is now working to drag these cases out past the 2020 election, past the current Congress, and beyond. In so doing, he continues to abuse and undermine the coordinate branches and the states, and to wreak havoc on our structural Constitution.

A Major Step Backwards for Civil Rights: *Comcast v. National Association of African American-Owned Media*

Erwin Chemerinsky*

Perhaps the lawyer on the losing side of a 9–0 decision in the Supreme Court is not the best person to tell the story of the case and lament the ruling. But with that disclosure at the outset, I feel comfortable saying that I believe that the Supreme Court was wrong in its decision in *Comcast v. National Association of African American-Owned Media*—wrong in its reasoning and wrong in its conclusion.¹ The decision is a major setback for civil rights law that is going to have implications for the way many federal statutes are interpreted.

The case involves a crucial federal civil rights law, 42 U.S.C. § 1981, which prohibits race discrimination in contracting. Section 1981 was adopted as part of the Civil Rights Act of 1866, just a year after the end of the Civil War.² It provides that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.³

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¹ *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S.Ct. 1009 (2020).

² The Civil Rights Act of 1866, Pub. L. 39–31, 14 Stat. 27 (1866).

³ 42 U.S.C. § 1981(a) (1991).

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Although it is not acknowledged in Justice Neil Gorsuch's opinion for the Court,⁴ there is no doubt that this statute was meant to have a broad remedial effect.⁵ Unfortunately, the Court's decision in *Comcast* makes that much more difficult. The Court held that plaintiffs in § 1981 actions must allege and prove that race was the "but-for" cause for the denial of a contract.⁶ The Court rejected the U.S. Court of Appeals for the Ninth Circuit's approach that it is sufficient to allege that race was the "motivating factor" for the denial of the contract.

A simple example I used in answering a question from Justice Sonia Sotomayor at oral argument⁷ reveals the importance of this difference. Imagine that an African American individual goes to rent a hotel room. The proprietor says, "We don't have any rooms available. Besides, we don't rent to Black people." Reciting those facts in a complaint would be sufficient to withstand a motion to dismiss if it were enough to allege that race is a motivating factor. But this hypothetical complaint does not allege that race was the but-for cause of the denial of the contract. Under the Court's "but-for" standard, the motion to dismiss would have to be granted, even though discovery might have shown that the assertion of a lack of rooms was untrue and a pretext. In fact, with those facts, it is hard to see how a plaintiff could allege enough to state a plausible claim that race was the but-for cause for the denial of a contract to rent the room.

Indeed, the lineup of the briefs in this case tells a lot. Comcast, a huge corporation, was supported by the Trump administration and the Chamber of Commerce. Every major civil rights organization joined briefs on the other side.⁸

⁴ See *Comcast*, 140 S.Ct. 1009 (holding that a § 1981 plaintiff bears the burden of showing that the plaintiff's race was a but-for cause of its injury and that burden remains constant over the life of the lawsuit).

⁵ Brief for Law and History Professors as Amicus Curiae in Support of Respondents, *Comcast*, 140 S. Ct. 1009.

⁶ *Comcast*, 140 S. Ct. at 1013.

⁷ Oral Argument at 33:47, *Comcast*, 140 S.Ct. 1009.

⁸ Amici for National Association of African American-Owned Media included, among others, the NAACP Legal Defense and Educational Fund, Inc., the American Civil Liberties Union, Americans for Separation of Church and State, Farmworker Justice, The Fred T. Korematsu Center for Law and Equality, the Impact Fund, LatinoJustice PRLDEF, the Mexican American Legal Defense and Educational Fund, the National Women's Law Center, and the Southern Coalition for Social Justice. Brief for NAACP Legal Defense & Educational Fund, Inc. et al. as Amici Curiae in Support of Respondents, *Comcast*, 140 S.Ct. 1009 (No. 18-1171).

The larger significance of the case comes from the Court's assertion that all civil rights statutes should be interpreted as requiring allegation and proof of but-for causation unless Congress clearly specifies otherwise.⁹ In this way, the Court's decision in *Comcast* deals a blow not only to § 1981 plaintiffs, but those under many other federal civil rights statutes as well.

Part I of this essay briefly recites the facts of the case. Part II describes the Court's decision and explains why I think the Court was unanimously wrong. Finally, Part III discusses why this case is likely to matter for future civil rights litigation.

I. The Facts

The federal district court dismissed the case for failure to state a claim, so all of the allegations in the complaint had to be accepted as true in the course of appellate review.¹⁰ Entertainment Studios is a media company, owned by Byron Allen, that produces television series, owns and operates multiple television networks (channels), and operates a full-service, motion-picture production and distribution company.

The case is about seven channels Entertainment Studios owns and operates: JusticeCentral.TV, Cars.TV, ES.TV, MyDestination.TV, Pets.TV, Comedy.TV and Recipe.TV (the "Entertainment Studios Channels"). They are award-winning lifestyle channels with general audience appeal and carried by major multichannel video programming distributors, including Verizon FIOS, AT&T U-verse, DirecTV, Suddenlink, RCN, CenturyLink, and many others.

Since 2008, Entertainment Studios has offered its channels to Comcast for carriage on its cable distribution platform. Entertainment Studios has even offered JusticeCentral.TV for free with no license fees. But Comcast consistently refused to contract with Entertainment Studios.¹¹

⁹ *Comcast*, 140 S. Ct. at 1016.

¹⁰ Nat'l Ass'n of African Am.-Owned Media v. Comcast Corp., No. CV151239TJHMANX, 2016 WL 11652073 (C.D. Cal. Oct. 5, 2016).

¹¹ Nat'l Ass'n of African Am.-Owned Media v. Comcast Corp., 743 F. App'x 106 (9th Cir. 2018).

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For years, Comcast gave Entertainment Studios the run-around with false promises of carriage. Comcast told Entertainment Studios that its channels are “good enough” for carriage. But Comcast told Entertainment Studios that it needed to get support “in the field,” which meant support from Comcast’s regional offices and management. When Entertainment Studios obtained field support, Comcast reversed course and said that field support no longer mattered.

Comcast then told Entertainment Studios to get support from Comcast’s various division offices, but the divisions told Entertainment Studios that they deferred to the decision of the corporate office. Comcast’s false promises and instructions caused Entertainment Studios to incur hundreds of thousands of dollars in travel, marketing, and other costs.

Comcast also told Entertainment Studios that its channels were on the “short list” for imminent carriage, but that Comcast lacked sufficient bandwidth to carry the channels. Comcast’s explanation, however, does not match up with its conduct, because Comcast launched more than eighty networks since 2010, including the lesser-known, white-owned channels Inspirational Network, Baby First Americas, Fit TV (now defunct), Outdoor Channel, and Current TV (now defunct).

As the largest cable distributor, with the most state-of-the-art platform, Comcast has bandwidth to carry the Entertainment Studios Channels. Of the more than 500 channels carried by Comcast’s major competitors—Verizon FIOS, AT&T U-verse and DirecTV—Comcast carries every single one of those channels, except the Entertainment Studios Channels.

One Comcast executive candidly told Entertainment Studios why it refused to contract: “We’re not trying to create any more Bob Johnsons.” Bob Johnson is the African American founder of Black Entertainment Television (“BET”), a groundbreaking network that was eventually sold to Viacom for \$3 billion. Comcast did not want to support an African American media entrepreneur who would compete against the white-owned networks Comcast owned and carried.

On February 20, 2015, Entertainment Studios, along with the National Association of African American-Owned Media (NAAAOM), filed a lawsuit against Comcast and other parties in the Federal District Court for the Central District of California alleging racial discrimination

in contracting in violation of 42 U.S.C. § 1981. The district court, in a short, unpublished opinion, granted Comcast's motion to dismiss.¹²

The Ninth Circuit—and I should disclose that this is the stage that I became involved and argued the case there—unanimously reversed the district court's dismissal of Entertainment Studio and NAAAOM's claim. The Ninth Circuit, based on its companion decision in *National Association of African American-Owned Media v. Charter Communications*, held that to state a claim under § 1981, a plaintiff only need allege that racial discrimination was a “motivating factor” in Comcast's refusal to contract.¹³ The Ninth Circuit held that Entertainment Studios adequately alleged racial discrimination through the following well-pleaded allegations of fact:

Comcast's expressions of interest followed by repeated refusals to contract; Comcast's practice of suggesting various methods of securing support for carriage only to reverse its position once Entertainment Studios had taken those steps; the fact that Comcast carried every network of the approximately 500 that were also carried by its main competitors (Verizon FIOS, AT & T U-verse, and DirecTV), except Entertainment Studios' channels; and, most importantly, Comcast's decisions to offer carriage contracts to “lesser-known, white-owned” networks (including Inspirational Network, Fit TV, Outdoor Channel, Current TV, and Baby First Americas) at the same time it informed Entertainment Studios that it had no bandwidth or carriage capacity.¹⁴

¹² *Comcast*, 2016 WL 11652073.

¹³ *Nat'l Ass'n of African Am.-Owned Media, v. Charter Commc'ns*, 915 F.3d 617, 622 (9th Cir. 2019). A procedural complexity of the case is that there were two cases in the district court: one against Comcast and one against Charter Communications, both of which had refused to carry Allen's channels. The cases were assigned to different district court judges, both in the Central District of California. One district court judge granted Comcast's motion to dismiss, while the other denied Charter Communications's motion to dismiss. The latter certified to the Ninth Circuit the question of whether holding Charter Communications liable for failure to carry the channels violated the First Amendment. The cases were briefed and argued separately in the Ninth Circuit. The Ninth Circuit wrote a published opinion in the Charter Communications case and then relied on it in the Comcast case. Both Charter Communications and Comcast sought certiorari. The Court granted Comcast's certiorari petition.

¹⁴ *Comcast*, 743 F. App'x at 107.

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Comcast sought certiorari in the U.S. Supreme Court, which was granted.¹⁵

II. The Court's Decision and Why It Was Wrong

A. An Ancient Presumption of But-For Causation?

The Supreme Court unanimously reversed the Ninth Circuit. Justice Gorsuch began the Court's opinion by declaring: "Few legal principles are better established than the rule requiring a plaintiff to establish causation. In the law of torts, this usually means a plaintiff must first plead and then prove that its injury would not have occurred 'but for' the defendant's unlawful conduct."¹⁶ Turning then to the specifics of the case before it, the Court held that Entertainment Studios' assertion "that 42 U.S.C. § 1981 departs from this traditional arrangement" fails because "looking to this particular statute's text and history, we see no evidence of an exception."¹⁷

The Court said that the presumption for all federal laws is that but-for causation is required. The Court declared: "This ancient and simple 'but for' common law causation test, we have held, supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated when creating its own new causes of action. That includes when it comes to federal antidiscrimination laws like § 1981."¹⁸ The Court said that but-for causation was the "prerequisite to a tort suit" in 1866.¹⁹ The Court saw nothing in the text or history of § 1981 to change that.

The Court stressed that the standard for causation is the same at all stages of the proceedings. The complaint must allege but-for causation, and the plaintiffs must ultimately prove but-for causation in order to recover.

The Court remanded the case to the Ninth Circuit to allow the plaintiffs to show that their complaint sufficiently alleged but-for causation.

B. Why the Court Erred

Although the Court was unanimous, I think it seriously erred. First, the Court was wrong in concluding that but-for causation

¹⁵ Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 139 S. Ct. 2693 (2019).

¹⁶ Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media, 140 S.Ct. 1009, 1013 (2020).

¹⁷ *Id.*

¹⁸ *Id.* at 1014.

¹⁹ *Id.* at 1016.

was the tort standard in 1866. There were no general rules on factual causation in intentional tort cases in the mid-nineteenth century. Professor G. Edward White attributes this to causation not being at issue in “intentional tort cases or cases where an act-at-peril standard of liability governed”²⁰ As Professors John Witt and Mark Gergen, legal historians who submitted an amicus brief to the Court, explain, in the mid-nineteenth century, tort law was understood as a body of “wrongs,” many of which were actionable without the plaintiff having to establish they were actually harmed.²¹ The requirement for but-for causation for intentional torts did not evolve into the familiar concept that is known today until later in the nineteenth century.²² In fact, as recently as the early twentieth century the phrase “but-for” had still not entered the common law mainstream of the United States for intentional torts; causation focused on proximate cause.²³

The renowned torts scholar William Prosser details the rise of but-for causation, describing the ongoing debate in the legal community in the middle of the twentieth century about whether but-for causation was a viable test for determining liability.²⁴ In all the cases that he references that deal with *causa sine qua non*, or but-for causation, none go further back than the 1893 case *Stacy v. Knickerbocker Ice. Co.*²⁵

As Professor Beale explains, courts in the nineteenth century were more concerned with the “consequences of an act” than with the causes of the damage.²⁶ While “in very few cases up to the year 1900” is proximate cause even part of the investigation, but-for causation is not mentioned at all.²⁷ When it came to causation, the general consensus during this time was that one bad apple spoils the bunch, because “[t]he

²⁰ G. EDWARD WHITE, *TORT LAW IN AMERICA AN INTELLECTUAL HISTORY* 314 (1980) (explaining that rules on factual causation emerged relatively late in the development of tort law).

²¹ Brief for Tort Scholars as Amicus Curiae in Support of Respondents, *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009 (2020); see also CHARLES G. ADDISON, *WRONGS AND THEIR REMEDIES, A TREATISE ON THE LAW OF TORTS* 775 (1860).

²² *Id.*; see also Joseph H. Beale, *Proximate Consequences of an Act*, 33 HARV. L. REV. 633, 641 (1920).

²³ See Nicholas St. John Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201, 205 (1870); see also William Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 396 (1950).

²⁴ Prosser, *supra* note 23, at 377.

²⁵ *Stacy v. Knickerbocker Ice Co.*, 54 N.W. 1091 (Wis. Sup. Ct. 1893); Prosser, *supra* note 23, at 377 n. 22.

²⁶ Beale, *supra* note 22, at 636.

²⁷ *Id.*

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question is not what would have happened, but what did happen. A murdered man would have died in time if the blow had not been given; yet the murderer's blow is a cause of his death."²⁸ Therefore, it did not matter if there were multiple causes for an event: the consequence remained the same, so the actor was responsible for the damage. As a result, parties seeking recovery in the nineteenth century for intentional torts did not have to prove that the offender's act was a but-for cause for their injury.

In the case of intentional torts, like §1981, damages were presumed, and factual causation was not required. Justice Gorsuch, then, is incorrect in his conclusion that that but-for causation was the assumed standard for tort law in 1866 when § 1981 was adopted.

The majority opinion's second error was its failure to acknowledge that the Court never before had required but-for causation in the absence of statutory language such as the words "because," "because of," "based on," "by reason of" or other language that requires but-for causation. In *Gross v. FBL Fin. Servs., Inc.*,²⁹ the Court held that but-for causation applied to disparate treatment claims under the Age Discrimination in Employment Act.³⁰ But the Court said that this was because the statute used the words "because of":

The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." The words "because of" mean "by reason of: on account of." . . . Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the but-for cause of the employer's adverse decision.³¹

²⁸ *Id.*

²⁹ *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174 (2009).

³⁰ 29 U.S.C. § 623(a)(1) (2015).

³¹ *Gross*, 557 U.S. at 176 (citations omitted).

The Court followed this reasoning in *University of Texas Southwestern Medical Center v. Nassar*,³² again stressing that the words “because of” give rise to a requirement of but-for causation. The Court relied on *Gross* and held that but-for causation is required for retaliation claims under Title VII. Like the Age Discrimination Act at issue in *Gross*, the Court explained, Title VII “makes it unlawful for an employer to take adverse employment action against an employee ‘because’ of certain criteria.” The Court further explained that, “the lack of any meaningful textual difference between” the two statutes led to the conclusion that “Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action.”³³

Quite significantly, the Court explicitly contrasted this with statutes like §1981 that do not use the words “because of.”³⁴ The Court explained that § 1981 is a “broad, general bar[] on discrimination” that uses “capacious language,” unlike Title VII which is a “detailed statutory scheme” that “enumerates specific unlawful employment practices.”³⁵

Section 1981 does not employ specific but-for language, such as barring discrimination “because of,” “on account of,” or “based on” race.” Nonetheless, in evaluating Entertainment Studios’ claim, the Court found a requirement for but-for causation. This, of course, is significant for litigation under § 1981, but it also reinforces that the significance of this case is not limited to that statute. Now the Court will require but-for causation under *all* civil rights laws, even if they do not have the but-for causation creating language that was critical in *Gross* and *Nassar*.

The third way in which the Court erred was in failing to recognize that the statutory text of § 1981 supports the conclusion that it is sufficient for a plaintiff to plausibly allege that race was a motivating factor in the refusal to contract. The first step in statutory interpretation is to examine the statutory text and, unless otherwise defined, “statutory terms are generally interpreted in accordance with their ordinary meaning.”³⁶

³² *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013).

³³ *Id.* at 352.

³⁴ *Id.* at 355–56.

³⁵ *Id.*

³⁶ *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citation omitted).

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Section 1981 provides that all persons “shall have the same *right* . . . to make and enforce contracts . . . as is enjoyed by white citizens.”³⁷ The phrase “same right” is the critical language.

An African American individual is not accorded the “same right” to contract if race is used as a motivating factor for denying him or her the ability to enter into a contract. As the Ninth Circuit explained: “If discriminatory intent plays *any* role in a defendant’s decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen.”³⁸

African Americans who seek a contract are not treated identically as white persons if their race is a significant reason that they are denied a contract. In other words, if the defendant places added burdens on a person of color seeking a contract that do not apply to similarly situated white persons, the plaintiff has not enjoyed the same right to make a contract.

Justice Gorsuch, writing for the Court, said that the but-for causation language in the criminal part of the Civil Rights Act of 1866 supports requiring it for the entire statute. The Court noted that the criminal sanctions that Congress established “in a neighboring section . . . permitted the prosecution of anyone who ‘depriv[es]’ a person of ‘any right’ protected by the substantive provisions of the Civil Rights Act of 1866 ‘on account of’ that person’s prior ‘condition of slavery’ or ‘by reason of’ that person’s ‘color or race.’”³⁹ The Court concluded that the use of terms it has “often held indicate a but-for causation requirement” demonstrate that in the criminal context under the Civil Rights Act of 1866, the government must establish that the defendant’s challenged actions were taken “on account of” or “by reason of” race.⁴⁰ Justice Gorsuch then extended this reading to § 1981 civil litigation, arguing, “it would be more than a little incongruous for us to employ the laxer [motivating factor standard] for this Court’s judicially implied cause of action.”⁴¹

³⁷ 42 U.S.C. § 1981(a) (emphasis added).

³⁸ Nat’l Ass’n of African Am.-Owned Media, v. Charter Commc’ns, 915 F.3d 617, 626 (9th Cir. 2019); see also *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 182 n.5 (3d Cir. 2009) (“If race plays any role in a challenged decision by a defendant, the plain terms of the statutory text suggest the plaintiff has made out a prima facie case that section 1981 was violated because the plaintiff has not enjoyed ‘the same right’ as other similarly situated persons.”).

³⁹ *Comcast Corp. v. Nat’l Ass’n of African Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020).

⁴⁰ *Id.*

⁴¹ *Id.*

Quite the contrary, the difference in language used in the criminal enforcement provision of the Civil Rights Act of 1866 should lead to the opposite conclusion: a civil suit under § 1981 requires only that the plaintiff plausibly allege that race was a motivating factor in the refusal to contract. Section 1981 was originally enacted as part of section 1 of the Civil Rights Act of 1866.⁴² Section 1 contained similar language to § 1981 today, namely that all persons shall enjoy the same right to contract as is enjoyed by white persons. Section 2 of the Civil Rights Act of 1866 set forth a criminal penalty for any person “who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . by reason of his color or race.”⁴³

Critically, the phrase “by reason of” does not appear in section 1 of the Civil Rights Act of 1866. This shows that Congress knew how to use language that connotes but-for causation, but made a deliberate choice to use broader language in defining the rights protected by § 1981.⁴⁴

Finally, the Court’s decision requiring but-for causation ignores the broad remedial intent of the Civil Rights Act of 1866.⁴⁵ As early as *The Civil Rights Cases*, the Supreme Court acknowledged that Congress undertook to enforce the Thirteenth Amendment by “secur[ing] to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.”⁴⁶

As the Court explained in *Jones v. Alfred Mayer*, section 1 of the Civil Rights Act of 1866 was “sweeping” and is a “comprehensive

⁴² The Civil Rights Act of 1866, Pub. L. No. 39–31, 14 Stat. 27 (1866).

⁴³ *Id.*

⁴⁴ See e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (explaining that the “usual rule [is] that ‘when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended’”) (quoting NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* 194 (6th rev. ed. 2000)).

⁴⁵ See Robert J. Kaczorowski, *Congress’s Power to Enforce Fourteenth Amendment Rights: Lessons from Federal Remedies the Framers Enacted*, 42 HARV. J. ON LEGIS. 187, 199–200 (2005) (“[O]ne of the principal objectives of the Thirty-Ninth Congress was to make the Constitution’s guarantees of freedom and fundamental rights a practical reality. Republicans achieved this objective by enacting the Civil Rights Act of 1866 . . .”).

⁴⁶ *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

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statute forbidding all racial discrimination affecting the basic civil rights enumerated in the Act.”⁴⁷ Simply put, between the two approaches before the Court—one of which is far more restrictive of civil rights suits—is there really any doubt as to which is more consistent with the intent behind the Civil Rights Act of 1866?

The goal of economic equality underlying that law is no less important today. “Though black people make up nearly 13 percent of the United States population, they hold less than 3 percent of the nation’s total wealth. The median family wealth for white people is \$171,000, compared with just \$17,600 for black people.”⁴⁸

According to a January 2016 report from the Minority Business Development Agency, African American-owned businesses account for only \$150.2 billion in gross receipts whereas all U.S. firms account for \$33.5 trillion.⁴⁹ In other words, African American-owned firms account for roughly 0.4% of the gross receipts in the entire U.S. economy.

In the area of media ownership, the focus of this litigation, the picture is similarly dismal. “[A]ccording to the latest FCC analysis, people of color collectively owned 7 percent of all U.S. full-power commercial broadcast television stations, or just 98 of the nation’s 1,388 stations. (Though we note that a significant number even of these stations are only nominally owned by people of color, with broadcasters like Sinclair using shell companies headed by people of color to evade FCC ownership rules).”⁵⁰ According to the Federal Communications Commission, in 2015 whites owned 1,030 stations (74.4%), while African Americans owned twelve stations (0.9%).⁵¹

⁴⁷ Jones v. Alfred Mayer, 392 U.S. 409, 433, 435 (1968); see also *id.* at 431–32 (Senator Trumbull, the proponent of the bill that became the Civil Rights Act of 1866, said that the purpose of the law was to give “practical freedom” to the newly freed slaves and that it would affirmatively secure basic civil rights by “break[ing] down all discrimination between black men and white men”).

⁴⁸ Trymaine Lee, *A Vast Wealth Gap, Driven By Segregation, Redlining, Evictions and Exclusion, Separates White and Black America*, N.Y. TIMES MAGAZINE (Aug. 18, 2019).

⁴⁹ MINORITY BUS. DEV. AGENCY, U.S. DEP’T OF COMMERCE, FACT SHEET: U.S. MINORITY-OWNED FIRMS (2016).

⁵⁰ *The State of the Television and Video Marketplace: Hearing Before the Subcomm. on Commc’ns, Tech., Innovation, and the Internet of the S. Comm. on Sci., Commerce, and Transp.*, 116th Cong. 17 (2019) (written testimony of Craig Aaron, President and CEO, Free Press).

⁵¹ INDUS. ANALYSIS DIV., FED. COMM’NS COMM’N, THIRD REPORT ON OWNERSHIP OF COMMERCIAL BROADCAST STATIONS: OWNERSHIP DATA AS OF OCTOBER 1, 2015 7 (2017).

None of this was even mentioned in Justice Gorsuch's opinion for the Court. The Court's requirement for but-for causation under § 1981 is inconsistent with Congress's expansive goals in adopting the Civil Rights Act of 1866.

III. Why *Comcast* Matters

Obviously, the Court's decision in *Comcast* will make it more difficult for § 1981 plaintiffs to withstand a motion to dismiss and ultimately to prevail. Alleging and proving but-for causation is much harder than alleging and proving that race was a motivating factor in the denial of the contract. Justice Sandra Day O'Connor recognized that the but-for test, at times, "demands the impossible."⁵² By contrast, a motivating factor standard would require a plaintiff to plausibly allege intentional racial discrimination, but it would allow many more potentially meritorious cases to proceed to discovery.

The Court's analysis, though, is not limited to § 1981. It seemingly would apply to every civil rights statute, unless Congress expressly provides a different causation standard, as it did in Title VII.

Moreover, the Court was clear that but-for causation must be met at both the pleading and the proof stage. The Court stated: "To prevail, a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right."⁵³ The Court rejected the argument that allowing allegations that race was a motivating factor in the denial of the contract should be enough to shift the burden to the defendant. It often will be difficult for the plaintiff to have the information to allege in the complaint, prior to discovery, that race was the but-for cause of the denial of the contract. As a result, this but-for causation requirement will bar many otherwise meritorious claims from the opportunity for adequate investigation, allowing those who discriminate in the making of contracts to safely hide behind this heightened standard.

⁵² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring).

⁵³ *Comcast Corp. v. Nat'l Ass'n of African-Am.-Owned Media*, 140 S.Ct. 1009, 1019 (2020).

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As I write this in July 2020, nine months after arguing the case in the Supreme Court and four months after the Court's decision in *Comcast*, there is a national focus on racial discrimination and especially anti-Black racism. This, of course, was precipitated in part, by the murder of George Floyd and the protests that followed it. There is a dissonance between this focus and the Court's making it much harder for victims of discrimination to sue under a crucial federal civil rights law.

But Congress can remedy this by revising § 1981, and for that matter all civil rights laws, to make clear that it is enough to allege that the prohibited ground of decision, such as race, was a motivating factor. There is certainly precedent for this. In 1989, in a series of cases, the Court narrowly interpreted federal civil rights statutes. Two years later, Congress enacted the Civil Rights Act of 1991 to effectively overrule those decisions. My hope is that a new Congress and a new president will do the same: reverse the Court's narrowing of § 1981 and other civil rights laws, and expand the ability of victims of discrimination to have their day in court.

Department of Homeland Security v. Regents of the University of California: **A Dream Deferred**

Cecillia D. Wang*

On June 18, 2020, the Supreme Court of the United States decided its highest-profile and most politically charged immigration case of the term, *Department of Homeland Security v. Regents of the University of California*.¹ The case was a hot one primarily because it pitted President Donald Trump against former President Barack Obama: Did President Trump's secretary of Homeland Security lawfully rescind her predecessor's Deferred Action for Childhood Arrivals (DACA) program? *Regents* was covered widely by mainstream media, and many reports of the Court's decision hailed it as a decisive blow to President Trump,² and he initially seemed to receive it that way himself.³ Other reports, however, noted that the decision only dealt a temporary setback to the Trump administration.⁴ Across the board, the litigants and observers alike reacted with surprise.⁵

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¹ Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020); see, e.g., Adam Liptak & Michael D. Shear, *Trump Can't Immediately End DACA, Supreme Court Rules*, N.Y. TIMES (June 18, 2020) ("The Supreme Court ruled Thursday that the Trump administration may not immediately proceed with its plan to end a program protecting about 700,000 young immigrants known as Dreamers from deportation, dealing a surprising setback to one of President Trump's central campaign promises.")

² *Id.*

³ John Wagner, *Trump Lashes Out at Supreme Court, Tries to Turn DACA Decision into a Campaign Issue*, WASH. POST (June 18, 2020) (reporting on Trump's tweets criticizing *Regents* as "'shotgun blasts into the face' of conservatives" and wondering if the Court "doesn't like [him]").

⁴ See Liptak & Shear, *supra* note 1; Robert Barnes, *Supreme Court Blocks Trump's Bid to End DACA, a Win for Undocumented 'Dreamers'*, WASH. POST (June 18, 2020).

⁵ Barnes, *supra* note 4 (describing Democratic members of Congress as being "as stunned as Trump seemed to be" with the decision).

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The varied reactions to the *Regents* decision reflected the realities of the case—both the fate of the legal arguments, which took strange twists, and the political calculations made by all involved parties, including the Supreme Court itself. Despite the 5–4 victory, despite winning over the Chief Justice to strike down the Trump administration’s rescission of DACA, *Regents* is a narrow victory. It remains to be seen whether it was a sufficient victory, as the political follow-through now plays out. But in a more fundamental sense, *Regents* is not only a narrow victory for immigrants, but ultimately may prove to be a Pyrrhic victory unless the Court significantly changes its general direction in immigration cases.

Why the doom and gloom? First, the victory on an Administrative Procedure Act (APA) claim provides a check on an unreasoned executive branch decision but obviously leaves the door open for the Trump administration to attempt once again to rescind DACA. Second, and less obviously, the respondents’ case, as it was framed for the Court by many of the respondents and even more amici who chimed in on their behalf, reinforces a “deserving immigrant” trope that harms other noncitizens, who are as much a part of U.S. society or as entitled to legal protection as the “Dreamers.” This binary trope—the innocent immigrant versus the culpable immigrant—comes at a steep cost, which is evident in the Court’s other immigration cases this term, including *Dep’t of Homeland Security v. Thuraissigiam*, which departs from decades of precedent to hold that a person seeking asylum who was apprehended within yards of the U.S.-Mexico border cannot obtain habeas corpus review of an expedited removal order.⁶ On balance, *Regents* is not a substantial counterweight to other recent Supreme Court precedents that fail to apply basic judicial and constitutional norms to protect noncitizens from injury at the hands of the executive branch.

I. The *Regents* Decision

In *Regents* and its companion cases, *NAACP v. Trump* and *Wolf v. Batalla Vidal*, the Court granted certiorari to consider two questions: first, whether the secretary of Homeland Security’s rescission of DACA was subject to judicial review and, second, whether the Secretary’s rescission of DACA was lawful.⁷ A third question—whether the Obama

⁶ *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020).

⁷ *Regents*, 140 S. Ct. at 1901.

administration's DACA policy was lawful in the first place—was not one of the questions presented but loomed large in the many briefs, as well as the Court's opinion.

A. Reviewability Under *Heckler v. Chaney*

The majority of the Court held that the rescission of DACA was reviewable and rejected the government's argument that the reversal of policy was unreviewable as an agency decision to forbear from enforcement proceedings under *Heckler v. Chaney*.⁸ In answer to the government's argument that a policy guiding agency forbearance should be nonreviewable for the same reason that an individual nonenforcement decision is nonreviewable under *Chaney*, the Court observed that "DACA is not simply a non-enforcement policy," but instead "'establish[ed] a clear and efficient process' for identifying" eligible individuals, adjudicating applications, and notifying applicants of the results.⁹ The Court concluded that "the [Obama administration's] DACA Memorandum does not announce a passive non-enforcement policy; it created a program for conferring affirmative immigration relief" and was therefore reviewable.¹⁰ The decision could well have gone the other way, since Secretary of Homeland Security Janet Napolitano had described DACA expressly in terms of "prosecutorial discretion" in her 2012 memorandum creating the program, in order to leave a wide berth around Congress's power to "confer[] substantive right[s], immigration status or [a] pathway to citizenship."¹¹

Notably, on the *Chaney* question the Court was offered a clearer path to reviewability but unfortunately did not take or even mention it. The University of California respondents urged the Court to discern in *Chaney* a "critical distinction between enforcement decisions and *non-enforcement* decisions, noting that 'when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property

⁸ *Id.* at 1906 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). Justice Alito wrote separately and alone to opine that he would hold the case unreviewable under *Chaney*. *Id.* at 1932 (Alito, J., concurring in judgment and dissenting in part).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot. et al. (June 15, 2012).

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rights.”¹² The University pressed a cogent argument that “eliminating a non-enforcement policy . . . paves the way for the subsequent exercise of coercive power over individuals”¹³—an important reason to distinguish the non-reviewability principle in *Chaney*. If the Court had adopted this logical ground for distinguishing *Chaney*, the *Regents* decision would have been a more significant victory than it was.

B. Reviewability Under the Immigration and Nationality Act

The Court made short work of the government’s statutory arguments for non-reviewability, holding that two judicial review provisions in the Immigration and Nationality Act, 8 U.S.C. §§ 1252(b)(9) and (g), did not preclude review.¹⁴ The U.S. Department of Justice routinely asserts these statutes as jurisdictional bars in all manner of affirmative litigation challenging federal immigration policies, despite the statutes’ plainly inapplicable terms. In *Regents*, the Court disposed of these assertions in two paragraphs, holding that the respondents’ claims did not fall within § 1252(b)(9)’s limitation on claims “arising from any action taken or proceeding brought to remove an alien from the United States under [Title 8 of the U.S. Code]” or § 1252(g)’s “narrow” limitation on claims “arising from the decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the Immigration and Nationality Act].”¹⁵ The Court emphasized that it has “previously rejected as ‘implausible’ the Government’s suggestion that § 1252(g) covers ‘all claims arising from deportation proceedings’ or imposes ‘a general jurisdictional limitation.’”¹⁶

C. Administrative Procedure Act

On the merits of the respondents’ APA claim, the Court held that the rescission was arbitrary and capricious, affording DACA grantees the stingiest relief possible by remanding to the Department of Homeland Security (DHS)—in effect, giving the Trump administration a mulligan.

¹² Brief for Respondents Regents of Univ. of Cal. et al. at 23–24, *Regents*, 140 S. Ct. 1891 (Nos. 18–587, 18–588, 18–589).

¹³ *Id.* at 24.

¹⁴ *Regents*, 140 S. Ct. 1907.

¹⁵ *Id.*

¹⁶ *Id.* (quoting *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999)).

The Chief Justice started his merits analysis by noting that “judicial review of agency action is limited to ‘the grounds that the agency invoked when it took the action.’”¹⁷ This was of special importance because of the procedural posture of the litigation. In one of the consolidated cases, *NAACP v. Trump*, the district court granted partial summary judgment for the plaintiffs and held that the September 2017 rescission memorandum by then-Acting Secretary for Homeland Security Elaine Duke (the Duke Memorandum) was “conclusory” and “insufficient to explain” the government’s reversal on DACA.¹⁸ As a statement of reasons for the rescission of DACA, the Duke Memorandum had cited only a letter sent to her by then-Attorney General Jefferson Sessions the day before, advising her to rescind DACA on the view that it was unlawful pursuant to a 2015 decision by the U.S. Court of Appeals for the Fifth Circuit holding that a later Obama administration program, Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), was contrary to the INA.¹⁹ The *NAACP* district court stayed its own order for ninety days to give DHS time to reissue a decision with a “fuller explanation.” In June 2018, Acting Secretary Duke’s successor, then-Secretary of Homeland Security Kirstjen Nielsen, issued a memorandum (the Nielsen Memorandum) stating that “she ‘decline[d] to disturb’ the rescission.”²⁰ Secretary Nielsen then purported to state her “understanding” of the Duke Memorandum as setting forth three reasons for the rescission: 1) that DACA was “contrary to law”; 2) that she had “serious doubts” about DACA’s legality; and 3) that there were multiple policy reasons for the rescission including deference to Congress on immigration relief, a preference for exercising prosecutorial discretion in a “truly individualized” way, and the importance of projecting a pro-enforcement “message.”²¹

¹⁷ *Id.* (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)).

¹⁸ *See id.* at 1904 (citing *NAACP v. Trump*, 298 F. Supp. 3d 209, 243 (D.D.C. 2018)).

¹⁹ *See id.* at 1902 (citing *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015)). As noted, an evenly divided Supreme Court affirmed the Fifth Circuit’s decision on DAPA without an opinion. *Id.* at 1903 (citing *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam)).

²⁰ *Id.* at 1904 (citing appendix to the certiorari petition).

²¹ *Id.*

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In short, as the respondents noted, Secretary Nielsen tried to have it both ways.²² While purporting to leave undisturbed Acting Secretary Duke's decision and reasoning (such as it was), Secretary Nielsen simultaneously tried to set forth new reasons that were nowhere to be found in the Duke Memorandum. The Chief Justice called DHS out on this and ruled that the new reasons set forth in the Nielsen Memorandum were a *post hoc* rationalization, forbidden under the APA.²³

The Court then went on to hold that the rescission of DACA was arbitrary and capricious because Acting Secretary Duke had failed to consider the possibility of terminating only the work authorization and other "benefits" flowing from a grant of deferred action under DACA, without terminating the deferred action or forbearance. The Court thus seemed to assume, casually and without discussion, that DACA was unlawful insofar as it permitted work authorization and other "benefits" to flow from a DACA grant pursuant to longstanding regulations generally applicable to deferred action grantees.²⁴

The Court held that the Nielsen Memorandum was also arbitrary and capricious because she had failed to take into consideration the reliance interests created by Secretary Napolitano's 2012 DACA memorandum.²⁵ The Court rejected the government's citation to the DACA memorandum's express disclaimer that it "conferred no substantive rights," noting that it was "surely pertinent" but that the APA required the agency to consider whether there were reliance interests.²⁶ The Chief Justice went out of his way to emphasize that on remand, DHS might find that reliance was unjustified in light of the DACA memorandum's disclaimer or that any reliance interests "are entitled to no or diminished weight," or that they are outweighed by other "interests or policy concerns."²⁷

²² See, e.g., Brief for District of Columbia Respondents at 2, *Regents*, 140 S. Ct. 1891 (Nos. 18-587, 18-588, 18-589). The Court's opinion does not mention one oddity about DHS's decisional sequence: Why didn't Secretary Nielsen simply issue a new memorandum with fulsome reasoning? The respondents in the D.C. Circuit case put it plainly: "[The district court] invited the Government to issue a new rescission decision based on an appropriate administrative record assembled for that purpose. The Government instead elected to re-defend the Duke Memorandum, thereby steering the case toward what it perceived as a path to faster review. The result is a jumble of conclusory, post hoc policy justifications made for litigation advantage, resting on an old administrative record assembled for an entirely different purpose." *Id.* (emphasis added).

²³ *Regents*, 140 S. Ct. at 1908-09.

²⁴ *Id.* at 1912-13.

²⁵ *Id.* at 1913-14.

²⁶ *Id.* at 1913.

²⁷ *Id.* at 1914.

D. Equal Protection

Finally, a plurality of the Court (the Chief Justice joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan) rejected the respondents' claim that the decision to rescind DACA was motivated by animus toward Latinos, as evidenced by the fact that seventy-eight percent of DACA recipients are Mexican nationals, the "unusual history behind the rescission," and "pre- and post-election statements by President Trump."²⁸ The plurality brushed aside, without even describing, the "cited statements" of the president, stating that the "relevant actors were most directly Acting Secretary Duke and the Attorney General."²⁹ The Court dismissed the evidence of animus without addressing the New York-led state respondents' arguments linking the "unusual history" of the rescission to President Trump's expressed hostility toward Latino and particularly Mexican immigrants,³⁰ or the University of California's arguments that the reasons set forth in the DHS memoranda were pretextual.³¹ As Justice Sonia Sotomayor noted in her opinion concurring in part and dissenting from the Chief Justice's equal protection analysis, the complaint should have been remanded on the low motion-to-dismiss threshold under *Ashcroft v. Iqbal*.³² She said out loud what the majority apparently preferred to keep suppressed: that the President of the United States had stated publicly that Mexicans are "the bad ones . . . criminals, drug dealers, [and] rapists" and that undocumented immigrants are "animals" responsible for crime.³³

The Chief Justice also failed to mention the strong record presented by the *NAACP* respondents in support of the equal protection claim, demonstrating that the rescission decision came directly from the White House, and that "[t]he agencies carried out their assigned tasks" as directed during a White House meeting.³⁴ The Court also ignored the New York-led state respondents' argument that Acting Secretary Duke and Secretary Nielsen both gave false information in asserting

²⁸ *Id.* at 1915–16.

²⁹ *Id.* at 1916.

³⁰ Brief for Respondents New York et al. at 53–56, *Regents*, 140 S. Ct. 1891 (Nos. 18–587, 18–588, 18–589).

³¹ Brief for Respondents *Regents et al.*, *supra* note 12, at 56–58.

³² *Regents*, 140 S. Ct. at 1917 (Sotomayor, J., concurring in part, concurring in judgment in part, dissenting in part) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

³³ *Id.* at 1917 (quoting *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 276 (E.D.N.Y. 2018)).

³⁴ Brief for District of Columbia Respondents, *supra* note 22, at 12.

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that there had been no denials of DACA (and therefore no meaningful exercise of discretion) and that the government had failed to produce an administrative record, a basic requisite in an APA case,³⁵ and the evidence in the California case that the Trump administration “terminated the [DACA] policy after private deliberations with the state plaintiffs [led by Texas] in the DAPA litigation (which are not reflected in the proffered administrative record).”³⁶ Under the Court’s keystone equal protection standards, these facts were probative evidence supporting the respondents’ equal protection claims.³⁷

II. Weighing the Victory

When the *Regents* decision was handed down, many of the respondents’ and other immigrant advocates’ declarations of victory were notably muted. Immigrants’ advocates, including some of the respondents’ counsel, declared a mixed result and muted their celebrations with calls for further action, in recognition of the re-rescission that would likely flow from the Court’s narrow opinion.³⁸ Justice Brett Kavanaugh underscored this dynamic set up by the majority, observing in his dissenting opinion that “the only practical consequence of the Court’s decision to remand appears to be some delay.”³⁹

And indeed, the *Regents* decision has, so far, not amounted to a substantial victory for DACA-eligible people. Although the Trump administration has not yet re-rescinded DACA altogether, it has already substantially curtailed the program. In a July 28, 2020, memorandum,

³⁵ Brief for Respondents New York et al., *supra* note 30, at 32–33, 52.

³⁶ Brief for Respondents California et al. at 54, *Regents*, 140 S. Ct. 1891 (Nos. 18–587, 18–588, 18–589); Brief for DACA Recipients et al. at 19–20, *Regents*, 140 S. Ct. 1891 (Nos. 18–587, 18–588, 18–589).

³⁷ *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) (holding discriminatory intent “demands a sensitive inquiry into such circumstantial and direct evidence” which may include legislative or administrative history); *cf. also* *Masterpiece Cakeshop Ltd. v. Colo. Civil Rts. Comm’n*, 138 S. Ct. 1719, 1731 (2018) (applying same standard in First Amendment Free Exercise Clause case).

³⁸ *See, e.g., Post-Supreme Court Decision DACA Guidance*, UNITED WE DREAM (June 18, 2020). (United We Dream advising DACA recipients to apply “now” because of risk of Trump administration again terminating the policy after the Supreme Court’s decision); *see also Monumental Victory for DACA Recipients Before Supreme Court in Wolf v. Batalla Vidal*, NAT’L IMMIGR. L. CTR. (June 18, 2020) (National Immigration Law Center calling the Supreme Court decision a “monumental victory” but also noting “potential for future attacks on DACA recipients” and need for legislative fix).

³⁹ *Regents*, 140 S. Ct. at 1935 (Kavanaugh, J., concurring in judgment in part and dissenting in part).

Acting Secretary for Homeland Security Chad Wolf announced that the government would reject all new DACA applications, would no longer grant any applications for advance parole (a mechanism to permit deferred action grantees to travel outside the United States without fear of being denied entry), and would limit renewals of deferred action for current DACA grantees to only one year rather than the two years provided under the 2012 DACA memorandum.⁴⁰ The next day, Acting Deputy Secretary of Homeland Security Ken Cuccinelli confirmed that a complete re-rescission is, at the very least, still on the table, saying that Acting Secretary Wolf's memorandum was an "interim action" and refusing to rule out full termination.⁴¹

To be sure, *Regents* is a victory, albeit a narrow one with uncertain consequences. Forced to reconsider the rescission of relief for Dreamers, who enjoy overwhelming popular support,⁴² in an election year, the Trump administration has so far stopped short of full rescission. Thus, Justice Kavanaugh may have been wrong when he predicted that the remand to DHS would only result in delay;⁴³ and the NAACP respondents were correct when they argued that "vacatur is not an empty gesture."⁴⁴ The APA's requirement of transparency in agency decision making matters, because political accountability matters. Recognizing the popularity of Dreamers, and perhaps even feeling sympathy himself, the president has been forced to play both to the sizable center, which supports Dreamers, and to the virulently anti-immigrant and white nationalist fringe.

Through the attorney general and the secretary of Homeland Security, the president attempted to punt the fate of DACA grantees to the Supreme Court, but the Court refused to play. During the current administration, no branch of the federal government has proved willing either to take meaningful steps to protect Dreamers or to risk the scorn of the majority of

⁴⁰ Memorandum from Chad Wolf, Acting Sec'y, Dep't of Homeland Sec., to Mark Morgan, Senior Official Performing the Duties of Comm'r, U.S. Customs and Border Prot. et al. (July 28, 2020).

⁴¹ Priscilla Alvarez, *DACA Changes Are Temporary, Trump Administration Officials Say*, CNN (July 29, 2020).

⁴² See Anita Kumar, *Poll: Trump Voters Want to Protect Dreamers*, POLITICO (June 17, 2020) (reporting that sixty-eight percent of Republicans, seventy-one percent of conservatives, and sixty-nine percent of people who voted for Trump in 2016, favor protecting Dreamers from deportation).

⁴³ *Regents*, 140 S. Ct. at 1935 (Kavanaugh, J., concurring in part and dissenting in part).

⁴⁴ Brief for District of Columbia Respondents, *supra* n. 22, at 3.

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U.S. voters by accepting responsibility for leaving them without any relief. In his dissenting opinion, Justice Clarence Thomas wrote that the majority opinion “must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision [to strike down DACA as contrary to the INA].”⁴⁵ He was half correct. *Regents* is a highly politicized decision, calculated to evade accountability, just as the president attempted to shift the downside risk of rescinding DACA to the courts (through reliance on the Fifth Circuit’s ruling on DAPA in *Texas v. United States* and the Supreme Court’s affirmance of that ruling). As Justice Sotomayor observed in her separate opinion, the majority had to ignore the Court’s own *Iqbal* pleading standard in order to preclude the respondents’ equal protection claims at the motion-to-dismiss stage.⁴⁶

The *Regents* decision thus kicks the can farther down the road for Dreamers. It has also left them with a diminishing measure of relief, as the government grudgingly confers year-to-year reprieves from removal for over 800,000 of them, and they and their allies work to effect a favorable election outcome, a change in executive policy, and more permanent congressional action.

III. The Price of Victory

As a narrow win for DACA grantees, *Regents* is cold comfort. Nothing in *Regents* mitigates the Court’s disastrous rulings in other recent immigration cases. To the contrary, the stinginess of the *Regents* decision underscores the Supreme Court’s deference to the executive branch on immigration matters and its hostility toward noncitizens. Indeed, the *Regents* decision might be a Pyrrhic victory for three reasons.

First, the Chief Justice’s gratuitous rejection of the respondents’ equal protection claims—with Justice Sotomayor the lone dissenting voice—repeats the travesty of his majority opinion two terms earlier in *Trump v. Hawai’i*,⁴⁷ which reversed decisions by the Fourth and Ninth Circuits striking down the third version of President Trump’s Muslim ban. In *Trump v. Hawai’i*, the Court closed its eyes to the voluminous evidence that

⁴⁵ *Regents*, 140 S. Ct. at 1919 (Thomas, J., concurring in judgment in part and dissenting in part).

⁴⁶ *Id.* at 1917 (Sotomayor, J., concurring in part, concurring in judgment in part, dissenting in part).

⁴⁷ *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

President Trump was carrying out his campaign promise to institute a “complete shutdown” of Muslim immigration to the United States:

Plaintiffs argue that this President’s words strike at fundamental standards of respect and tolerance, in violation of our constitutional tradition. But the 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 of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself.⁴⁸

The Court thus deliberately disregarded the president’s statements that, in the Fourth Circuit’s words, “drip[ped] with religious intolerance, animus, and discrimination”⁴⁹ expressly for the purpose of enlarging presidential power when “national security” is invoked in the immigration arena.

Regents sadly echoes *Trump v. Hawai’i*. Confronted with the president’s undeniable racist statements, in this case against Mexicans and Latinos rather than Muslims, the Chief Justice again reasoned, contrary to the record evidence, that the relevant decisionmakers were the secretaries for Homeland Security, and not the president, and pointed to the lack of any racist statements by the cabinet officials. In doing so, the Chief Justice adopted the solicitor general’s arguments, which did not even mention President Trump’s racist statements that the plaintiffs relied upon.⁵⁰ The Chief Justice also failed to acknowledge the clear evidence in the record that the decision was in fact made by the White House and merely executed by the attorney general and secretary for Homeland Security. The Chief Justice’s recitation of the history of DACA rescission begins with Attorney General Sessions’s letter to Acting Secretary Duke in 2018, and ignores the White House meeting that preceded both cabinet

⁴⁸ *Id.* at 2418.

⁴⁹ *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017) (en banc) (affirming preliminary injunction against second version of Muslim ban).

⁵⁰ Brief for Petitioners at 55–56, *Regents*, 140 S. Ct. 1891 (Nos. 18–587, 18–588, 18–589).

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secretaries' actions to rescind DACA.⁵¹ The Chief Justice's opinion on the equal protection claim in *Regents* thus provides good material for those who view the Court with cynicism.

Second, as noted above, the Court's APA ruling imposes little constraint on executive power. The *Regents* majority did impose a measure of accountability on the secretary of Homeland Security, as precedents forbidding *post hoc* rationalizations of agency action required. While the remand has, so far, turned out to make a difference, the APA section of the Chief's opinion is hardly a strong check on executive power. The Court's failure even to acknowledge the government's incorrect factual submissions and refusal to produce discovery, even two years into the litigation, further encourage and abet Justice Department litigation tactics that are aggressive at best, and bad faith at worst.

Third, the framing of DACA, the litigation to save it, and the victory, all reinforced a narrative that empowers the great damage the Supreme Court has done in the immigration law arena in other cases. Throughout the convoluted history of DACA from 2012 to 2020, most of those who advocated on behalf of the Dreamers focused on their lack of culpability, even as immigrant youth-led organizations themselves deliberately rejected that narrative framework.⁵² Secretary Napolitano's original 2012 memorandum described the intended beneficiaries of DACA as "young people who were brought to this country as children and know only this country as home . . . [and] lacked the intent to violate the law."⁵³ President Obama famously referred to Dreamers in terms that also played up their lack of volition in coming to the United States:

⁵¹ See Brief for District of Columbia Respondents, *supra* note 22, at 12–13 (setting forth record evidence of sequence of events beginning with August 24, 2017, meeting with cabinet secretaries and agency heads at the White House, at which an agreement was reached to end DACA); also see Brief for Respondents *Regents et al.*, *supra* note 12, at 57–58 (noting record evidence that the administration rescinded DACA "to gain leverage in negotiations [with Congress] for a border wall and other immigration matters" and President Trump's own statements on the subject).

⁵² See, e.g., Sheridan Aguirre, *Immigrant Youth to Trump's White Supremacist Proposal: "No," UNITED WE DREAM*, Jan. 25, 2018 ("Trump and Stephen Miller killed DACA and created the crisis that immigrant youth are facing. They have taken immigrant youth hostage, pitting us against our own parents, Black immigrants and our communities in exchange for our dignity."); see also Press Release, *Building on the Successes of DACA To Include Our Parents*, UNITED WE DREAM, June 5, 2014.

⁵³ Memorandum from Janet Napolitano, *supra* note 11.

These are young people who study in our schools, they play in our neighborhoods, they're friends with our kids, they pledge allegiance to our flag. They are Americans in their heart, in their minds, in every single way but one: on paper. They were brought to this country by their parents—sometimes even as infants—and often have no idea that they're undocumented until they apply for a job or a driver's license, or a college scholarship.⁵⁴

Many of the parties and amici supporting DACA grantees in the litigation also emphasized the economic and societal value of Dreamers. The plaintiffs-respondents included not only individual DACA grantees like Martín Batalla Vidal, the lead plaintiff in one of the cases filed the Eastern District of New York, and civil rights organizations NAACP and Make the Road New York, but also the University of California and Princeton, twenty states in two district court actions led by New York and California, the District of Columbia and the City of San Jose (California), labor unions, and the Microsoft Corporation. Amici filing briefs in support of the respondents included an additional six states or governors, 109 municipalities, Apple, 143 other U.S. businesses, numerous additional universities and labor unions, and dozens of religious institutions including the U.S. Conference of Catholic Bishops. Ted Olsen, the conservative solicitor general in the George W. Bush administration now in private practice, argued the case for the respondents alongside Michael Mongan, the solicitor general of California. These briefs argued, for example, that "DACA enabled more than 825,000 individuals to come out of the shadows, participate in the economy, and contribute to U.S. companies and the economy, which benefits us all."⁵⁵

While these arguments about the Dreamers' productivity and lack of culpability as a group certainly reveal an essential truth and reflect the genuine interests of the many various U.S. governmental and business institutions who rallied to the DACA grantees' side in the *Regents* litigation, they unwittingly reinforce a dangerous thematic trap that has

⁵⁴ President Barack Obama, Remarks on Immigration (June 15, 2012).

⁵⁵ Brief for 143 Bus. Ass'ns and Cos. as Amici Curiae Supporting Respondents, *Regents*, 140 S. Ct. 1891 (Nos. 18–587, 18–588, 18–589).

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developed in the Supreme Court's jurisprudence affecting immigrants and noncitizens. This trap paints "Dreamers" in an innocent light and places them in a semi-protected safe zone (because of their popular support) but paints others—newly arrived migrants seeking asylum, or Mexican nationals living in binational communities spanning the border, or longtime lawful permanent residents who are defending against removal charges based upon criminal convictions—as lawbreakers who do not deserve even the most basic protections against overwhelming government power.

To trace this theme, one need only look to two other cases involving U.S. immigration enforcement in the Court's October 2019 Term, *Dep't of Homeland Security v. Thuraissigiam*,⁵⁶ which concerned whether the Suspension Clause guarantees habeas review of expedited removal orders, and *Hernández v. Mesa*,⁵⁷ a *Bivens* action by the estate of a fifteen-year-old Mexican boy killed by a U.S. Border Patrol agent in a cross-border shooting, allegedly without any justification. Neither Vijayakumar Thuraissigiam, a Sri Lankan Tamil seeking asylum in the United States, nor the parents of Sergio Adrián Hernández Güereca, had nearly as large an army of supporters as the DACA grantees in *Regents*, even though both their cases raised fundamental issues of due process, personal liberty, and executive branch accountability. Neither of them could claim to be Americans already "except on paper." Neither had a groundswell of popular support in the United States. But they both deserved a chance to seek justice in the courts and were denied that chance.

In *Hernández v. Mesa*, the Court affirmed the dismissal of Sergio Hernández's parents' case on the grounds that his killing, which involved legally routine use-of-force questions, is a "new context" to which the *Bivens* remedy cannot be extended—just because the bullet struck him on the Mexican side of the border—and that "foreign relations and national security implications" were special factors precluding a *Bivens* remedy.⁵⁸ Despite the fact that the case reached the Supreme Court on a grant of the defendant's motion to dismiss, and thus the courts should have taken

⁵⁶ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020). The author was one of the attorneys for Vijayakumar Thuraissigiam.

⁵⁷ *Hernández v. Mesa*, 140 S. Ct. 735 (2020).

⁵⁸ *Id.* at 735.

as true the parents' factual allegations that Sergio had been shot while playing with friends, the Court credited the government's arguments about foreign affairs and national security. This narrative is at odds with the reality of communities at the border.⁵⁹ It also makes *Hernández* one in a long line of cases in which the modern Court has adopted congressional immigration hawks' framing of immigrants as criminals and national security threats and warped its broader constitutional jurisprudence as a result.

Thuraissigiam is another immigration case in which the Court departed from decades of its precedents in order to rule against a noncitizen. Mr. Thuraissigiam is a Sri Lankan Tamil who fled to the United States after being abducted and beaten severely. He was apprehended by Border Patrol agents just inside the U.S.-Mexico border and placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1)(A), a form of summary removal created in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), with truncated administrative proceedings and strictly limited Article III court review. Writing for the majority, Justice Samuel Alito reversed the Ninth Circuit and held that the Suspension Clause in Article I of the Constitution⁶⁰ did not guarantee federal court review of the expedited removal order against Mr. Thuraissigiam.⁶¹ Justice Alito brushed aside the Court's prior decision in *INS v. St. Cyr*,⁶² which applied the doctrine of constitutional avoidance to construe another of IIRIRA's judicial review provisions to permit federal court review. His majority opinion only states that *St. Cyr* "reaffirmed" "that the writ could be invoked by aliens already in the country who were held in custody pending deportation," without actually explaining how *St. Cyr*'s Suspension Clause analysis should be distinguished.⁶³ As Justice Sotomayor wrote in dissent, joined by Justice Kagan, the majority's Suspension Clause ruling "flouts over a century of this Court's practice"

⁵⁹ See Brief for Am. Civil Liberties Union et al. as Amici Curiae Supporting at 7–8, *Hernández*, 140 St. Ct. 735 (No. 17–1678) (setting forth facts of cross-border shooting of another Mexican teenager, "J.A.," and describing the place of his life and death, Nogales, Arizona, and Nogales, Sonora, as "one town divided by the border fence").

⁶⁰ U.S. Const. art I, § 9, cl. 2.

⁶¹ *Thuraissigiam*, 140 S. Ct. at 1969.

⁶² *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001).

⁶³ *Thuraissigiam*, 140 S. Ct. at 1981.

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of hearing “indistinguishable” cases that “fall within the heartland of habeas jurisdiction going directly to the origins of the Great Writ.”⁶⁴

The Court also went out of its way to opine on a due process argument that Mr. Thuraissigiam never raised: “that IIRIRA violates his right to due process by precluding judicial review of his allegedly flawed [expedited removal proceeding].”⁶⁵ The Court gratuitously extended the longstanding “entry fiction”—under which noncitizens who have effected an entry into the United States are entitled to the protections of the Due Process Clause while those who are apprehended at the border are entitled only to whatever process Congress has provided by statute—to hold that the judicial review provision did not violate due process.⁶⁶ Once again, Justice Alito ignored the fact that Mr. Thuraissigiam was unquestionably inside the United States when he was apprehended. Justice Sotomayor pointed out in dissent that this due process ruling was contrary to over a century of Supreme Court precedents holding that “[n]oncitizens in this country . . . undeniably have due process rights” under the Constitution, as opposed to those seeking admission at a port of entry, who are limited to the process afforded by Congress.⁶⁷

Tellingly, in *Thuraissigiam*, as in *Hernández*, the majority opinion reinforces a narrative of lawbreaking. Justice Alito opens the opinion with the sentence, “Every year, hundreds of thousands of aliens are apprehended at or near the border attempting to enter this country illegally.” He asserts that “[m]ost asylum claims . . . ultimately fail, and some are fraudulent.”⁶⁸ *Thuraissigiam* and *Hernández* demonstrate the ways in which a narrative of immigrant lawlessness and criminality entered the U.S. immigration laws through a congressional act in 1996 and has thoroughly permeated the Court’s immigration decisions. *Regents* demonstrates how immigrant advocates who buy into that narrative, by distinguishing some immigrants as innocent in contrast, have little to gain and much to lose.

⁶⁴ *Id.* at 1993 (Sotomayor, J., dissenting).

⁶⁵ *Id.* at 1981.

⁶⁶ *Id.* at 1982–83 (citing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)).

⁶⁷ *Id.* at 2012 (Sotomayor, J., dissenting) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Zadvydas v. Davis*, 533 U.S. 678 (2001)).

⁶⁸ *Thuraissigiam*, 140 S. Ct. at 1963.

To be clear, the Court's *Regents* decision represents a hard-won victory by immigrants and their allies. The extraordinarily broad coalition of respondents stopped the Trump administration from completely terminating the DACA program, which was no small feat in light of the many legal hurdles. But as a victory, the *Regents* decision is an anomaly among the Court's immigration precedents, and the narrative that many of the respondents advanced in defending DACA fits all too neatly into a larger context of Supreme Court decisions that leave noncitizens without meaningful protection against even the grossest abuses of executive power. If *Regents* is, as Justice Thomas opined, a political trade-off,⁶⁹ it is a bad deal for immigrants. Greisa Martínez Rosas of United We Dream put it best: "[O]ur fear, our pain, and our lives must not be used to shackle our parents and ban those seeking refuge; we must not be used to tear apart the moral fabric of this country."⁷⁰

From Vijayakumar Thuraissigiam's expedited removal without habeas corpus review and the Güereca Hernández family's dashed hopes for a measure of redress, to the Court's 2003 decision in *Demore v. Kim* approving the "brief" detention without a hearing of immigrants defending against removal⁷¹—the only context in which the Court has ever held that the Due Process Clause permits civil detention without any individualized hearing—the Court has refused to afford basic constitutional protections to noncitizens. Until the Court recognizes that noncitizens, regardless of their perceived innocence or culpability, are entitled to basic protections of due process and equal protection, *Regents* is only a small step forward on the path to real victory.

⁶⁹ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1919 (2020) (Thomas, J., concurring in judgment in part and dissenting in part) ("Today's decision must be recognized for what it is: an effort to avoid a politically controversial but legally correct decision.").

⁷⁰ Aguirre, *supra* note 52 (reacting to Trump administration's January 2018 legislative proposal to trade immigration relief for Dreamers for cuts to family-based immigration, termination of the diversity visa program, and increased funding for immigration enforcement).

⁷¹ *Demore v. Kim*, 538 U.S. 510 (2003).



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