



SUPREME COURT REVIEW

2020–2021

Fifth Edition

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American Constitution Society Supreme Court Review 2020–2021

Fifth Edition

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Editor's Note

Steven D. Schwinn*

We're thrilled and honored to bring you the Fifth Edition of the *American Constitution Society Supreme Court Review*. In these pages, you'll find thoughtful and penetrating analyses of the most important cases from the October 2020 Term by many of our nation's leading constitutional scholars and practitioners. You'll also find a trenchant assessment of the Court at this pivotal juncture by scholar, author, and journalist Garrett Epps. We're delighted to bring together this august group in our Fifth Edition of the *Review*. We hope you enjoy reading it as much as we enjoyed putting it together.

As you'll see in these pages, the Court is undergoing a significant transformation. With Justice Amy Coney Barrett replacing Justice Ruth Bader Ginsburg, the Court's traditional ideological alignment took a hard turn even further to the right. We see this in several cases and in trends on the Court's merits docket this past Term, to be sure. But this ideological turn comes into even sharper focus on the Court's "shadow docket."¹

The shadow docket refers to the Court's emergency orders, including orders to stay a lower-court ruling pending appeal, vacating a lower-court stay, granting a writ of injunction pending appeal, and vacating a lower court's emergency injunction.² The Court issues these orders quickly, without the full briefing and oral argument that accompany merits cases. The orders are usually quite brief; they typically contain sparse legal reasoning; they are often unsigned by individual justices; and they come down without prior announcement by the Court. (But just to be clear: these orders are technically preliminary; they do not finally

• Professor of Law, University of Illinois Chicago School of Law; Member, Board of Directors, ACS Chicago Lawyers Chapter.

¹ William Baude, law professor at the University of Chicago Law School, coined this phrase in a 2015 law review article. William Baude, *Foreword, The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3–5 (2015).

² For an excellent review of the Court's shadow docket and its problems, see Texas's *Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. On the Judiciary*, 117th Cong. (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair In Federal Courts, University of Texas School of Law).

resolve the case, even if they powerfully telegraph the Court's likely final say.) In short, these emergency orders and the process that leads to them are extraordinarily opaque, even by the standards of this not-so-transparent Court. Thus, the phrase "shadow docket."

Still, even with all this secrecy, the Court's shadow docket has proliferated dramatically in recent years with highly significant, even momentous, rulings along sharply divided ideological lines. The Court this Term followed that trend.

Perhaps most notably (or infamously), the Court just recently declined to halt a Texas law that created an unprecedented mechanism that effectively shut down abortions in the state for pregnancies beyond the sixth week. The law, S.B. 8, bans abortions after the detection of a so-called "fetal heartbeat,"³ usually around six weeks into a pregnancy. Because that point comes well before fetal viability (usually around twenty-two to twenty-four weeks into a pregnancy), the ban plainly violates the fundamental right to abortion articulated in *Roe v. Wade*⁴ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵

But if that weren't enough, S.B. 8 authorizes any person (yes, *any* person) to sue an abortion provider who violates the ban.⁶ (At the same time, the law specifically prohibits any state official from enforcing the ban.⁷) In such an action, the law provides that a court must award at least \$10,000 in damages "for each abortion that the defendant performed or induced" in violation of the ban.⁸ Even more, S.B. 8 specifically prohibits a defendant from raising a constitutional defense to a civil action.⁹ And it prohibits a defendant from recovering attorney fees and costs, apparently even if the plaintiff filed a bogus case.¹⁰

Add all this up, and abortion providers have powerful, even decisive, economic incentives not to perform abortions after six weeks (or really, *any* abortions) in Texas.

As one might expect, abortion providers and advocates sued state judges and judicial officers and a private individual, all of whom said that they would enforce S.B. 8. The federal district court denied the

³ TEX. HEALTH & SAFETY CODE ANN. § 171.204 (2021).

⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

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

⁶ TEX. HEALTH & SAFETY CODE ANN. § 171.208.

⁷ *Id.* § 171.207.

⁸ *Id.* § 171.208(b)(2).

⁹ *Id.* § 171.208(e)(2), (7).

¹⁰ *Id.* § 171.208(i).

defendants' motion to dismiss,¹¹ but the U.S Court of Appeals for the Fifth Circuit stayed the district court proceedings. The plaintiffs then filed a motion at the Supreme Court for an emergency injunction or, in the alternative, to vacate the Fifth Circuit's stay.

The Supreme Court denied the motion.¹² The Court noted that as a general matter federal courts cannot enjoin laws; they can only enjoin individuals who enforce those laws. But the Court said that it wasn't clear that *these* defendants would seek to enforce the law. In short, the Court ruled that the plaintiffs filed the wrong lawsuit against the wrong defendants. And in so doing, it also suggested that no plaintiff could sue to stop the law against *any* defendant, at least before its enforcement.

The ruling leaves S.B. 8 in place, along with its powerful economic incentive for abortion providers to stop performing abortions after six weeks (and, again, really *any* abortions). The ruling also apparently leaves abortion doctors, advocates, and women just one way to challenge the law: as a defense against a civil action authorized by the law. But the law itself prohibits that defense; and given the economic incentives, we're unlikely to see many of those cases, anyway.

Altogether, the Court's ruling thus effectively shuts down abortions in Texas in plain violation of *Roe* and *Casey*, and leaves doctors, advocates, and women with no practical, realistic way to challenge the law in court. (Oh, and I forgot the *coup de grace*: The Court, without any sense of irony or the practical effects of its action, wrote that the ruling "is not based on any conclusion about the constitutionality of Texas's law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts."¹³) The Court managed all this, including its cynical statement about its ultimate conclusion, within seventy-two hours, without full briefing by the parties, without the benefit of briefing by the scores or hundreds of interested *amici*, and without oral argument.

That's the shadow docket.

(In fairness, Chief Justice John Roberts and Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan all wrote powerful, separate dissents, and mostly joined each other. But that's the point: these were *dissents*.)

¹¹ Whole Women's Health v. Jackson, No. 1:21-CV-616-RP, 2021 WL 3821062 (W.D. Tex. Aug. 25, 2021).

¹² Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021).

¹³ *Id.* at 2496.

But even that's not all. The Court used shadow-docket rulings this past Term to strike state COVID-19 restrictions designed to protect public health and nudge (or thrust) its free-exercise jurisprudence in a fundamentally different direction¹⁴; to halt the federal statutory eviction moratorium,¹⁵ enacted as a response to the COVID-19 pandemic; and to require the Biden administration to reinstate the Trump administration's policy of holding asylum seekers in Mexico pending their asylum hearings¹⁶; and more. All these are preliminary rulings, to be sure, but they all nevertheless dramatically altered significant areas of public policy and even impacted the direction of constitutional law.

Given the number and vast proliferation of shadow-docket rulings in recent years and their significance with respect to public policy and constitutional law, the shadow docket has become a central, defining feature of the Court's work. And given the secrecy of the shadow docket and the increasingly sharp ideological splits in them, it's a feature that demands even closer scrutiny in Terms to come. As you read the following incisive pieces on the Court's merits docket, I urge you to reflect on the merits cases right alongside the trends and rulings in the Court's shadow docket. With the increasingly central role of the shadow docket, we can only get a full sense of the Court today by examining both.

* * *

As always, the *Review* was a team effort, and thanks go out to many. First, my sincere thanks and deep appreciation go to our very talented and committed authors. Each approached the project with tremendous enthusiasm, passion, and singular focus. (You'll see this yourself when you read their outstanding pieces.) Next, I'd like to thank ACS President Russ Feingold, Executive Vice President Zinelle October, and Vice President, Policy & Program Kara Stein. Without their faith, support, and vision, this annual *Review* would not be possible. Third, my sincere gratitude and appreciation go to Assistant Director, Department of Network Engagement Bridget Lawson and 2021-2022 Law Fellow Evan

¹⁴ See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021),

¹⁵ *Chrysafis v. Marks*, 141 S. Ct. 2482 (2021).

¹⁶ *Biden v. Texas*, No. 21A21, 2021 WL 3732667 (U.S. Aug. 24, 2021) (Mem.).

Monod. Both worked tirelessly on this project and provided meticulous and invaluable editorial contributions.

Finally, and most importantly, I'd like to thank Senior Director, Policy & Program Christopher Wright Durocher. I can't say enough what a true pleasure and honor it is to work with Christopher year after year on this project, and how much I appreciate his leadership, guidance, remarkable patience, unwavering drive, and sheer skill. Thank you, Christopher.

With that, we're now honored to bring you the 2020-2021 *American Constitution Society Supreme Court Review*.

Term in Review

The New Supreme Court— A Brief *Inimicus Curiae*

Garrett Epps*

As federal law requires, the October 2020 Term of the United States Supreme Court (OT20) began at 10 a.m. Eastern time on Monday, October 5, 2020, and ended at about the same time on Monday, October 4, 2021.¹

In fact rather than formality, however, OT20 began two weeks early, when Justice Ruth Bader Ginsburg died on September 18, 2020. It then came to its defining moment on September 1, 2021, when, in an unsigned order, the Court permitted the state of Texas to defy its precedent and block an untold number of women from obtaining abortions to which, under the Court's caselaw, they were fully entitled.²

Justice Ginsburg's death, and the bizarre, unexplained decision in the Texas case, signified to the world that the Court had entered a new era—one of conservative dominance, radical legal uncertainty, and stunning indifference to the public the justices nominally serve.

During OT20, as the Court made decisions that impacted religious freedom, public health, workplace safety and labor relations, the detention of immigrants, the right to vote, and the outcome of the presidential election, the Court did not show its face to the public once. Its oral argument sessions, heretofore open to members of the Court Bar, reporters, and members of the public willing to stand in line, were conducted remotely, with audio of the arguments available on CSPAN.³

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¹ 28 U.S.C. § 2.

² Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court's Feminist Icon, is Dead at 87*, N.Y. TIMES (Sept. 18, 2020); Ian Millhiser, *Texas's Radical Anti-Abortion Law, Explained*, VOX (Sept. 2, 2021).

³ Nina Totenberg, *Supreme Court Arguments Resume – But with a Twist*, NPR (May 4, 2020).

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That skittishness in the face of the global COVID-19 pandemic, in an institution whose median age is sixty-six, is understandable.

Less understandable is the fact that this Court has made many of its most important decisions in complete secrecy, without oral argument, full briefing, participation by amici, and even warning to the public. In 2015, University of Chicago law professor William Baude dubbed this second, secret Court “the shadow docket,”⁴ to signify the Court’s careful concealment of its workings. The emergency shadow docket, as University of Texas law professor Stephen Vladeck has noted,⁵ exploded during the Trump administration, as the increasingly conservative majority stepped into dozens of lower court cases to award a win to the administration without bothering to hear the challenges out. The shadow docket has existed for decades, to be sure. But never before have so many consequential national issues been resolved in brief, often unsigned orders, leaving the public in the dark as to what new doctrine is being created.

In September 2021, the Court announced that the first four sessions of OT21, at least, will also be conducted out of public view; although lawyers will present oral argument in the chambers, and the Court press corps will be seated in the gallery, the Court Bar and public seats will be vacant.⁶

Life is a treasure house of metaphor, and the Court’s marked turn toward the tenebrous furnishes a poignant one. One understands the need to protect the justices and Court personnel from COVID. But the fact remains that the public has not seen the assembled justices of the Court since February 2020. Some justices attended Justice Ginsburg’s funeral, a few showed up for the presidential inauguration. But never have they been seen, together, doing their job. In that time, the Court has become a new institution—not simply in terms of its personnel but in its conception of itself, its internal operations, and its assumed role in American life.

⁴ William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 J. OF L. AND LIBERTY 1 (2015).

⁵ Stephen Vladeck, *The Supreme Court, 2018 Term—Essay: The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123 (2019).

⁶ Amy Howe, *Justices to Hold In-Person Arguments in the Fall*, SCOTUSBLOG (Sept. 8, 2021).

There is reason to believe that the members of the new, post-2020 Court feel some unease about how the new Court will be received by the public it nominally serves. In the late summer of 2021, Justice Stephen Breyer, the Court's senior moderate-liberal, published a slim volume, *The Authority of the Court and the Peril of Politics*,⁷ solemnly explaining that neither the media nor the public must refer to justices by partisan affiliation or characterize them as "liberal" or "conservative."⁸ Above all, he wrote, there must be no more talk of court reform, addition of new justices, or term limits.⁹ If that bit of mental hygiene is not observed, he fretted, "the public's willingness to respect its decisions—even those with which they disagree, and even when they believe a decision seriously mistaken"¹⁰—will evaporate, and with it, "the rule of law itself."¹¹

And three weeks before the beginning of OT21, the newest justice, Amy Coney Barrett, told a Kentucky audience, "My goal today is to convince you that this court is not comprised of a bunch of partisan hacks."¹²

The intended reassurance was somewhat weakened by her odd choice of words. Who said it was? And the delivery of her protest at an event at the McConnell Center of the University of Louisville—a center named for Mitch McConnell, the Republican senator most responsible for the brutal hypocrisy of jamming then-Judge Barrett's nomination through the Senate a week before the 2020 election—raised the "huh" factor immeasurably. Senator McConnell, in fact, was present at the event and introduced her, promising listeners that she does not "legislate from the bench." To further highlight the non-partisan nature of the event, Senator McConnell also pointedly noted that Justice Barrett is from "Middle America."¹³

Part of Justice Barrett's complaint was that "the media" does not properly interpret the Court: "The media, along with hot takes on

⁷ STEPHEN G. BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* (2021).

⁸ *Id.* at 50–51.

⁹ *Id.* at 1.

¹⁰ *Id.*

¹¹ *Id.* at 63.

¹² Robert Barnes, *Justices Say Supreme Court Split by Philosophical—Not Partisan—Differences, but Timing Works Against Them*, WASH. POST (Sept. 13, 2021).

¹³ *Id.*

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Twitter, report the results and decisions,” she said. “That makes the decision seem results-oriented. It leaves the reader to judge whether the court was right or wrong, based on whether she liked the results of the decision.”¹⁴ She was speaking to the nation through the media, as the McConnell Center did not allow broadcast or recording for broadcast.

Since 2016, American politics has seen a number of star turns in the art of public gaslighting, blandly indignant insistence that all loyal Americans must now agree that two plus two equals five. Yet for sheer impudence—utter inability or unwillingness to engage with reality as it appears to others—few of them, in my view, equal this attempt by the supposedly saintly Justice Barrett to convince adult Americans that the Court is not partisan—and to do so while standing with, at a center named for, and with the public embrace of, the man who has made it his life’s work to destroy any vestige of non-partisan character for the Court, and create in its place an institution controlled by and loyal to the Republican Party. The ascension of Justice Barrett, in its brutal ham-fisted hypocrisy, marked the successful end of that campaign. Her willingness to say these words in this setting tells us, I fear, all we need to know, not only about her intellectual honesty but about her contempt for the American public.

Either Justice Barrett thinks the public will believe what she says, or she is taunting her political enemies by reminding us that she and her colleagues can do whatever they want—babble any foolishness they wish—free of serious concern for public accountability.¹⁵

The new post-Trump Court, in short, is a very different institution than the one that existed until February 2016. At that time, the death of Justice Antonin Scalia opened the door for Senator McConnell’s *coup de coeur*. Senator McConnell managed to block the Senate from even considering Judge Merrick Garland, President Barack Obama’s

¹⁴ *Id.*

¹⁵ In another seeming victory lap, Justice Clarence Thomas has joined the chorus warning us all not to regard the justices as anything but dispassionate oracles, and in a clear reference to current court-reform proposals warned the nation not to “allow others to manipulate our institutions when we don’t get the outcome that we like.” Mike Berardino & Ann E. Marimow, *Justice Thomas Defends the Supreme Court’s Independence and Warns of ‘Destroying Our Institutions’*, WASH. POST (Sept. 16, 2021). Such rhetoric from the Court’s most polarizing figure leaves me quite literally speechless.

nominee to replace Justice Scalia, holding the seat open so that Donald Trump could promise to name a justice who would “automatically” vote to overturn the Court’s abortion-rights precedents.¹⁶ The following year, after Justice Anthony Kennedy announced his retirement, Senator McConnell forced through the Senate confirmation of then-Judge Brett Kavanaugh, a Republican partisan credibly accused of attempted rape—an accusation that was defused by what we now know was sort of *Casablanca*-level scrutiny by the Federal Bureau of Investigation.¹⁷ Republicans had been discreet in their response to one of his public accusers, Christine Blasey Ford—until Justice Kavanaugh was confirmed. Then President Trump rolled out accusations that she was a liar, and her supporters were man-hating radical feminists. “Think of your husbands. Think of your sons,” he told Republican women.¹⁸ The sexual assault accusation, in the new Republican politics, would now be a net positive for the accused. A vote for Judge Kavanaugh thus became a vote to protect men from the malice of women; and the confirmation of now-Justice Kavanaugh almost certainly represents another step toward the “automatic” rollback of abortion rights.

The third act of this tragedy began in September 2020, when Justice Ruth Bader Ginsburg, the Court’s senior and most eloquent liberal, and a feminist icon for millions of the same young women who had seen the Senate’s response to Judge Kavanaugh, died of pancreatic cancer. The McConnell machine immediately insisted that, regardless of what he had said in 2016, President Trump must name, and the Senate must confirm, a new justice within days of the election—acknowledging with a smirk that the rule for Republican presidents in election years was, well, different from the rule for Democrats.¹⁹ “Fill that seat!”²⁰ crowds chanted at Trump rallies, while President Trump unveiled the nomination of

¹⁶ Dan Mangan, *Trump: I’ll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC (Oct. 19, 2016).

¹⁷ Stephanie Kirchgaessner, *FBI Director Faces New Scrutiny Over Investigation of Brett Kavanaugh*, GUARDIAN (Sept. 14, 2021).

¹⁸ Josh Dawsey & Felicia Sonmez, *Trump Mocks Kavanaugh Accuser Christine Blasey Ford*, WASH. POST (Oct. 2, 2021).

¹⁹ Carl Hulse, *For McConnell, Ginsburg’s Death Prompts Stark Turnabout from 2016 Stance*, N.Y. TIMES (Sept. 18, 2020).

²⁰ Sam Gringlas, *‘Fill That Seat’ Chants Erupt at Trump Rally, a Day after Ginsburg’s Death*, NPR (Sept. 19, 2020).

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then-Judge Amy Coney Barrett, a radically conservative Catholic, an opponent of abortion, and an apparent repudiation of all that Justice Ginsburg had stood for. Now-Justice Barrett was confirmed to the Court on October 26, 2020—eight days before Democrat Joe Biden won the White House from her patron by a margin of seven million votes.²¹

Many Republicans seemed to expect the newly renovated Court to step in and reverse those seven million votes. So distorted had the Court's nature and role become in national politics that, when the Court refused to overturn the clearly valid election results in four swing states, it seemed like a signal of moderation.

Meanwhile, the “shadow docket” ground on, although after the change of administration, with a slightly different tone. Over and over, while Republicans controlled the White House, the Court had stepped in with “emergency” orders upholding presidential authority, often issued in the dead of night without oral argument and only the sketchiest of briefing. As the University of Texas's Vladeck noted, the Trump administration won twenty-eight emergency orders from the Court on issues ranging from executive privilege to the funding of the proposed border wall. After the turnover, the shadow orders overturned blue-state pandemic health measures, upheld religious rights against civil-rights protections, blocked a presidential order that suspended evictions for the duration of the pandemic emergency, ordered the administration to reinstate President Trump's “remain in Mexico” immigration policy—and used the gauzy claim of a procedural quirk as an excuse to allow Texas to shut down almost all legal abortion within its borders.²²

This is the Court that the nation was permitted to catch the faintest glimpse of on the first Monday of October 2021. Who are these people behind the curtain and what does their ascension mean for the nation and the law? And what does the new regime at First Street, N.E. portend for the Constitution and the law the Court is nominally charged with guarding?

Several aspects of that question concern the progressive lawyers who form the core of the American Constitution Society. First, many need to

²¹ Lisa Mascaró, *Barrett Confirmed as Supreme Court Justice in Partisan Vote*, AP (Oct. 26, 2020); Jennifer Agiesta & Kate Sullivan, *Biden's Popular Vote Margin Over Trump Tops 7 Million*, CNN (Dec. 4, 2020).

²² Stephen Vladeck, Opinion, *The Supreme Court's 'Shadow Docket' Helped Trump 28 Times. Biden is 0 for 1*, WASH. POST (Aug. 26, 2021).

understand the new arguments and doctrines the Court has shaped so far, and must in the years ahead, attempt to apply them as law to cases involving constitutional rights and structures. Second, the politically engaged members are desperate to understand what the Court's new makeup means for the long-term health of our constitution and our democracy. And third, all of us need to understand what we can make of the psychology of the new majority on the high court, and of its aspirations and likely eventual achievements, so that we can be ready with an appropriate response.

Articles in this issue of the *ACS Supreme Court Review* consider the first aspect, providing analysis and guidance for lawyers in the full range of legal and constitutional issue the Court must, as a court, confront: religious freedom,²³ free speech,²⁴ presidential authority,²⁵ labor and property law,²⁶ voting rights,²⁷ international human rights,²⁸ the Affordable Care Act,²⁹ computer security,³⁰ personal jurisdiction,³¹ and criminal procedure.³² In this essay, I address the second and third aspects, and offer my own assessment of the historical moment in which the nation and the Court find themselves.

I spent ten years watching the Court's behavior from the Supreme Court's press gallery. (Justice Barrett is the only current justice whom I've not seen on the bench). I have been transfixed by what each of them—especially the three Trump justices—has gone through during the years since 2016. For, just as the nation today is not the same nation it was in

²³ See Ira Lupu & Robert Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on Fulton v. City of Philadelphia*, 5 AM. CONST. SOC'Y SUP. CT. REV. 221 (2021).

²⁴ See Alan K. Chen, *The First Amendment Adrift?* 5 AM. CONST. SOC'Y SUP. CT. REV. 59 (2021)

²⁵ See Alan Morrison, Arthrex and Collins: *The Roberts Court and Presidential Authority*, 5 AM. CONST. SOC'Y SUP. CT. REV. 141 (2021).

²⁶ See Brianne J. Gorod & Dayna J. Zolle, *Cedar Point Nursery v. Hassid and Judicial Expansion of the Takings Clause*, 5 AM. CONST. SOC'Y SUP. CT. REV. 97 (2021).

²⁷ See Davin Rosborough, Brnovich v. Democratic National Committee: *Whitewashing the Voting Rights Act*, 5 AM. CONST. SOC'Y SUP. CT. REV. 15 (2021).

²⁸ See Oona A. Hathaway, *Nestlé USA, Inc. v. Doe and Cargill, Inc. v. Doe: The Twists and Turns of the Alien Tort Statute*, 5 AM. CONST. SOC'Y SUP. CT. REV. 163 (2021).

²⁹ See Nicholas Bagley, *Constitutional Culture, Partisan Politics, and the Failed Campaign to Topple the Affordable Care Act*, 5 AM. CONST. SOC'Y SUP. CT. REV. 203 (2021).

³⁰ See Paul Ohm, *The Computer Fraud and Abuse Act After Van Buren*, 5 AM. CONST. SOC'Y SUP. CT. REV. 181 (2021).

³¹ See Linda Sandstrom Simard et al., *Ford Motor Co.: The Murky Doctrine of Personal Jurisdiction*, 5 AM. CONST. SOC'Y SUP. CT. REV. 119 (2021).

³² See Ekow N. Yankah, *Fourth Amendment Review 2021*, 5 AM. CONST. SOC'Y SUP. CT. REV. 41 (2021).

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2016 and the Court is not the same court it was before Justice Scalia's death, each of the nominees has had his or her own journey to the seat they now hold. It beggars belief to suggest that these experiences have not changed them. What has that journey done to them?

Justice Neil Gorsuch, nominated in March 2017, knew when he accepted President Trump's nomination that he was taking what many (with good reason) regarded as a "stolen seat," kept from Judge Merrick Garland by the rawest of political trickery and deceit. Indeed, news reports indicated that his first phone call, after accepting the nomination from President Trump, was to Judge Garland.³³ What exactly was said isn't recorded; but the conversation cannot have been entirely comfortable. Many federal judges are friends, but friends can be both professional rivals and ideological adversaries, and it's safe to say Judge Garland's hypothetical conduct as a justice would have been very different from Justice Gorsuch's actual behavior. Then-Judge Gorsuch was accepting a seat that Judge Garland had aspired to for much of his career, under circumstances that made clear that he would never attain it. By fair means or foul, Judge Gorsuch won—he accepted a nomination from a president that both men knew to be not only vulgar, corrupt, lawless, and mendacious but also ignorant and, not to put too fine a point on it, let's-put-bleach-in-our-veins stupid.

Judge Gorsuch tried to signal that he would be independent, telling senators that President Trump's attack on sitting judges was "demoralizing and disheartening"—a statement that, by news reports, enraged President Trump and led him to consider withdrawing Judge Gorsuch's name.³⁴ Future nominees, we can note, did not publicly break ranks with President Trump, regardless of his antics. In authoritarian regimes, it does not pay to cross the Boss.

Judge Gorsuch at any rate absorbed enough of the take-no-prisoners Trump approach. He was specific and dramatic in proclaiming that, had President Trump asked him to overrule *Roe v. Wade*, he would have walked out the door (without confronting President Trump's

³³ Rebecca Savransky, *Gorsuch Called Obama's Supreme Court Nominee 'Out of Respect'*, HILL (Feb. 1, 2021).

³⁴ Ashley Parker et al., *Trump Talked About Rescinding Gorsuch's Nomination*, WASH. POST (Dec. 19, 2017).

promise that his nominees would “automatically” do that without being asked). In every other area, he avoided mistakes by patronizing the senators, mischaracterizing their questions, and discussing doctrine in impossibly vague terms. When, for example, Senator Al Franken asked about the Court’s turn toward compulsory arbitration in consumer and employment disputes, he responded that Congress had passed the Federal Arbitration Act—a historical fact that no one disputed. When Senator Ben Sasse asked a question about the “originalist” philosophy, Judge Gorsuch told Senator Sasse that “the Founders really were amazing. If you ever go to Philadelphia, you have got to go to Independence Hall and the National Constitution Center there and see how it happened.”³⁵ That a Yale-trained American historian like Senator Sasse might not need this advice seemed not to matter—and the answer ate up time.

Then-Judge Brett Kavanaugh’s psyche was more fully displayed in his confirmation hearings in 2018. Having presented himself as a paragon of virtue and public spirit, he was confronted with a credible accusation of sexual assault by an acquaintance from his high-school years, Stanford professor Christine Blasey Ford. The paragon’s response was, in full view of the world, to scream, weep, whine—and eventually threaten vengeance against anyone who had obstructed his march to a seat he regarded as his by right. Polls showed that a plurality of the American people believed Professor Ford was telling the truth.³⁶ But Judge Kavanaugh accepted confirmation and traveled to the White House for a ceremony at which his patron, President Trump, with members of the Court in attendance, excoriated in partisan terms all those who questioned Justice Kavanaugh’s virtue.³⁷

Finally, Judge Barrett, also presented in the snowy robes of piety, accepted a nomination procured by truly ostentatious partisan hypocrisy and tendered only days before a presidential election that most observers

³⁵ Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States, 115th Cong., 311, 317–19 (Statements of Sens. Franken and Sasse, Members, S. Comm. on the Judiciary; Statement of Neil M. Gorsuch, Judge of the U.S. Court of Appeals for the Tenth Circuit) (2017).

³⁶ Domenico Mantanaro, *Poll: More Believe Ford Than Kavanaugh, A Cultural Shift from 1991*, NPR (Oct. 3, 2018).

³⁷ Jordan Fabian & Brett Samuels, *Trump, Kavanaugh Celebrate After Brutal Confirmation Battle*, HILL (Oct. 8, 2018).

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expected President Trump to lose. She brought her family to the White House to appear at a partisan announcement of her nomination—without masks or precautions against COVID infection of herself, her family, or the national leadership in attendance. (The Boss disliked masks.) At least eleven cases were later reported among those who attended. Once confirmed, she—voluntarily and unmasked—attended another celebration in the Rose Garden.³⁸

Let me begin by stating that, for purposes of this discussion, I will accept the protestations of virtue and kindness proffered by each of the three nominees and their supporters. But, to elaborate on a metaphor proposed by the Greek philosopher Heraclitus, time does not change only the river.³⁹ The person who stands on one riverbank is by definition not the person who, having crossed the river, will look back from the opposite bank. All had aspired to the high bench since they were young; did any of them really want, in full view of the nation, to accept the ring of power from the Dark Lord? How did the experience of bending the knee to President Donald Trump, of (in two cases) moving into vacancies that should not have been filled by President Trump, of showering praise on the odious President Trump and avoiding any statement he might dislike, of profusely thanking him, of (in Justice Barrett's case) exposing herself and her family to a deadly virus, change them inside? One can imagine that sustained public hypocrisy may generate a core of hollowness and corrosive self-doubt. Inner wounds may sometimes breed a new compassion; but just as likely would be a deep, Kavanaugh-level rage directed at perceived enemies in order to neutralize any inner self-accusation.

These three Trump justices are joining a court that is already volatile. Rage, after all, is at the core of much contemporary conservatism—rage at perceived slights by liberals and imagined oppression by changing gender and religious norms. Justice Clarence Thomas had, after his contentious confirmation to the Court, told friends that his purpose in continuing to serve was to torment liberals.⁴⁰ Justice Samuel Alito,

³⁸ Larry Buchanan et al., *Inside the White House Event Now Under Covid-19 Scrutiny*, N.Y. TIMES (Oct. 5, 2020).

³⁹ Daniel Graham, *Heraclitus*, STAN. DICTIONARY OF PHIL. (June 21, 2021).

⁴⁰ Neil A. Lewis, *2 Years After His Bruising Hearing, Justice Thomas Can Rarely Be Heard*, N.Y. TIMES (Nov. 23, 1993).

whose confirmation was a walk in the park by comparison, nonetheless recently revealed a long list of grievances at those who do not share his political and religious views.⁴¹ Both Justices Thomas and Alito spent the last term giving speeches or penning dissents that were curdled by fury, at imagined opponents of gun rights, religious liberty, and more “culture war” complaints. Add to this mix three new justices and turn the resulting tribunal loose on a bitterly divided country, and the mix is an explosive one.

With that background we reach the question of legitimacy. Justices Breyer and Barrett are concerned with the Court’s proper place in the constitutional system. We should all be. The institution has been at best wounded and at worst poisoned by the successful effort to capture it. This is a problem for the nation as a whole, especially as we slide into the most serious test of American democracy since the Civil War. For the past half century and more, Americans have thought of the Court as one of the guardrails of democracy. Will it play that role in the near future, when we face efforts at voter suppression and election rigging by state legislatures?

Alas, that seems hard to imagine. And if the Court becomes a willing partner in the ongoing authoritarian project the right wing has embarked on, it may gain power, it may further the social and economic outcomes that its members favor, but it will lose its soul; it will have forfeited any claim to respect as a tribunal where power and rights meet the Constitution and the law. Justices care about their place in history; to preside over the eclipse of American democracy would, to paraphrase what President Abraham Lincoln said during another crisis, light them down in dishonor until the latest generation.

The question then becomes whether anything can be done by “we the people” to bring legitimacy to a body teetering on the verge of going rogue, of becoming a wrecking ball striking at the foundations of self-rule. Proposals have come forward for “court reform”—at the baldest level, a simple increase in the number of justices, and at a more sophisticated level, proposals to reconfigure the Court as an appellate court with rotating judge panels that include lower-court judges sitting by designation, to tap lower-court judges for periods

⁴¹ *Supreme Court Justice Samuel Alito Speech Transcript to Federalist Society*, REV (Nov. 12, 2020).

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of service as justices, or to create a system of staggered eighteen-year terms that would guarantee both fresh blood regularly and two Court appointments in every four-year presidential term.⁴² All are worthy ideas, and worthy of study. They will face objections—indeed, have already been criticized by Justice Breyer in his 2021 book⁴³—that they will compromise the Court’s integrity and legitimacy.

The answer to that objection is that it is not possible to compromise a Court that has already compromised itself. The Court’s problem is not preserving its legitimacy—it is *regaining* it, a more daunting task. And the participation by the people in the reworking of this wounded tribunal, by a sober consideration of the Court’s makeup, procedure, jurisdiction, and tenure is perhaps the surest way to achieve it.

That debate is essential, though some voices will counsel that progressives should avoid this debate. The two parties in Congress are almost evenly balanced; court-packing (or anything that seems to be court-packing), they fear, will set off alarm bells among the public that Democrats are anxious to avoid. And considering the efforts underway in red states to purge the electorate, corrupt the vote-counting process, and gerrymander Democratic districts, this relatively feeble Congress may mark the high-water point of Democratic influence for a generation or more. That possibility—that corrupted institutions may entrench one-party rule—requires progressive voices to respond now, to lay out to a candid world the mammoth stakes in the partisan befouling of the Court.

President Biden, of course, has named a Presidential Commission on the Supreme Court of the United States, staffed with luminaries from the practicing bar and the legal academy. The Commission’s charge is “to provide an analysis of the principal arguments in the contemporary public debate for and against Supreme Court reform, including an appraisal of the merits and legality of particular reform proposals.”⁴⁴ Curiously missing is any mention of producing proposals, and we should expect none. The Commission may be viewed as having, on its first day, accomplished its main task—which was to give candidate Biden a sound-bite with which to escape the repeated suggestion by President

⁴² Aaron Blake, *4 Ideas for Supreme Court Reform*, WASH. POST (Apr. 15, 2021).

⁴³ BREYER, *supra* note 7, at 63.

⁴⁴ *Presidential Commission on the Supreme Court of the United States*, THE WHITE HOUSE (last visited Sept. 22, 2021).

Trump that Biden would “pack the Supreme Court.” Indeed, the mere existence of the blue-ribbon panel has become the Biden administration’s response to virtually any action taken by the Court.

Another route to renewed legitimacy for the Court is popular mobilization for statutory or constitutional changes. It’s routine to say that this would be impossible; but history shows us at least one occasion in which such a movement succeeded in making a major change in the Constitution. Indeed, the movement for popular election of senators managed to make the notoriously stubborn Senate in essence vote itself out of existence by formally proposing what became the Seventeenth Amendment, which instituted the election of senators by popular vote rather than legislative appointment. That movement took twenty years to achieve its goal; but a public that does not at least begin to agitate this subject will never reach anything like that point; their political leaders should not shy away from the issue. And as the Court dismantles important precedents, popular response—in political outrage, in public criticism, and in peaceable assembly to seek redress of their grievances—is important. Public response to its actions has, over time, exercised a profound check and influence on the Court.⁴⁵

There is a final route that could return the current, compromised Court to a constitutional role in which the people have confidence. That route might be summed up in a few words from Vito Corleone, the fictional Mafia don of the classic film *The Godfather*. Corleone’s godson, a popular singer, complains that a prominent movie producer is blocking his career. “Oh, Godfather,” he says, “I don’t know what to do. I don’t know what to do.”

Corleone slaps his face. “You can act like a man,” he says.⁴⁶

If the new majority on the Court wants the public to respect it, then it can earn that respect by acting like a Court. Signs so far are that the new majority will act with only token respect for precedent and contempt for transparency. Indeed, the stealth decision to allow Texas to gut abortion rights suggests more than that—it suggests outright lawlessness. But the Court could turn back. If the justices were to show less eagerness to achieve policy goals of the conservative movement, to mow down precedents in high-profile areas such as reproductive rights and gun

⁴⁵ See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2010).

⁴⁶ *THE GODFATHER* (Paramount Pictures 1972).

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safety, to stack the economic deck against workers and consumers, and to impose political rules that favor the Republican Party, the people might begin to trust them. They'd have reason to.

But there is one sure way for the Court *not* to regain that trust—and that is the Breyer-Barrett approach of lauding the justices' own grandeur and berating both the public and press for not affording the nine of them the blind deference they are due. This insult to the nation's intelligence simply will not do—and so far, that seems to be the only approach the new majority is taking.

Brnovich v. Democratic National Committee: Whitewashing the Voting Rights Act

Davin Rosborough*

When the U.S. Supreme Court granted certiorari in *Brnovich v. Democratic National Committee*, voting-rights advocates anticipated the worst. In other times, clarity into the proper standard for vote-denial claims under Section 2 of the Voting Rights Act (VRA) might have been more welcome. The Roberts Court, however, built upon a trend of hostility to racial-discrimination challenges and added its own deep reluctance to allow federal courts to overturn state election laws. The question was not *whether* the Court would reverse the plaintiffs' victory in striking down Arizona's ballot-collection criminalization and out-of-precinct voting prohibitions, but *how* it would do so. That concern was only magnified by the petitioners' arguments, which sought restrictive standards that would, among other things, limit Section 2 vote-denial challenges only to laws concerning voter qualifications rather than time, place, and manner restrictions, and allow challenges only to laws that call for differential treatment based on race.

The die was finally cast on July 1, when the decision arrived. Justice Samuel Alito wrote for a 6–3 majority, reversing the U.S. Court of Appeals for the Ninth Circuit and ruling for the petitioners.¹ At first glance, the decision didn't match the worst-case scenario. It purported not to "announce a test" governing all Section 2 vote-denial claims but

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¹ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

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merely offered five “guideposts,”² and it did not adopt the bright-line prohibitions against certain types of claims urged by the petitioners and some of their amici. Yet a closer look at these guideposts, particularly taken together, and how the Court applied them, reveals a much gloomier picture.

The VRA as construed by the *Brnovich* majority bears little resemblance to the one passed by Congress in 1965 and amended in 1982. The decision certainly repudiates “the core aims” of Section 2,³ to provide “‘the broadest possible scope’ in combating racial discrimination.”⁴ But beyond its wholesale abandonment of the VRA’s broad remedial purpose and flexible text, it is worth examining *how* the Court’s new guideposts and their application will severely limit Section 2’s reach as a tool to combat racial discrimination in voting. These factors quietly import increasingly stringent constitutional standards that fail to account for racial disparities, use 1982 as a benchmark when minority voter registration and turnout rates were still comparatively low, and deprioritize local circumstances and historical linkages in favor of an abstract analysis of theoretical opportunities. They also put a heavy thumb on the scale in favor of an evidence-free voter fraud justification, the primary rationale used to suppress participation by voters of color. Understanding *why* the Court wrote the decision in the way it did requires an analysis of the new way in which this Court sought to pull a functional analysis of racial disparities out of an explicitly race-conscious statute without naming its project. In doing so, it’s helpful to examine how the Court’s simultaneous aversion to race-conscious remedies and interference with state election laws arise out of the same place—through the gaze of white transparency⁵ that refuses to confront pervasive, discriminatory structures built and rebuilt by the states to maintain white supremacy.

² *Id.* at 2336.

³ Guy-Uriel E. Charles and Luis E. Fuentes-Rohwer, *The Court’s Voting-Rights Decision Was Worse Than People Think*, ATLANTIC (July 8, 2021).

⁴ *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

⁵ See Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993) (noting a white “transparency phenomenon” in which white individuals fail to recognize “norms, behaviors, experiences, or perspectives that are white-specific” and which “operates to require black assimilation even when pluralism is the articulated goal; it affords substantial advantages to whites over blacks even when decisionmakers intend to effect substantive racial justice.”).

Before analyzing the decision and what the future holds, a discussion of the development of Section 2 of the VRA and vote-denial claims will help set the stage.

I. A Brief History of Section 2 and Vote-Denial Claims

Congress passed the Voting Rights Act of 1965 “to banish the blight of racial discrimination in voting,” which had “infected the electoral process in parts of our country for nearly a century.”⁶ It did so following years of heroic organizing by Black civil rights activists and allies in the face of brutal violence, and only after the failure of other laws to make a noticeable dent against “facially neutral” voting laws—provisions that did not explicitly discriminate in their text—used to prevent Black citizens and other people of color in much of the South from participating in the political process in anything but trivial numbers.⁷ Section 2 was aimed at voting discrimination nationwide and “broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds.”⁸

Advocates developed two distinct types of claims under Section 2: vote-denial and vote-dilution claims. Vote-dilution claims involve issues like districting and at-large election systems and focus on communities of color being able to cast “a ‘meaningful’ vote for someone who could get elected,”⁹ thus they “necessarily turn on election results.”¹⁰ Vote-denial claims challenge election practices that harm the ability of voters of color to participate in the political process on an equal basis by denying or abridging the opportunity “to register, vote, and have one’s vote counted.”¹¹ Vote-denial claims are “outcome-independent.”¹²

⁶ *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

⁷ See Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965–1990* 30 (Chandler Davidson & Bernard Grofman eds., 1994); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 702 (2006).

⁸ *Katzenbach*, 383 U.S. at 316.

⁹ Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1094 (1991).

¹⁰ Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 769 (2016).

¹¹ Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 442 (2015).

¹² Karlan, *supra* note 10, at 769–70.

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The first several years of VRA enforcement focused on attacking voter registration barriers and other formal barriers to Black voters' participation,¹³ but vote-dilution claims dominated the next several decades as states and localities used more subtle techniques to keep Black- and Latino-preferred candidates out of office.¹⁴ Plaintiffs brought Section 2 claims—primarily vote-dilution claims—based not only on discriminatory *intent*, but also on discriminatory *results*, after the Supreme Court appeared to recognize that theory in 1973.¹⁵ That changed in 1980 when the Supreme Court decided *City of Mobile v. Bolden*, holding proof of a “racially discriminatory motivation” was necessary for a Section 2 claim.¹⁶

Civil rights groups immediately began advocating to revert Section 2 to the previous standard and successfully convinced Congress to amend it in 1982 to create a discriminatory-results test. The revised text tracked the original in providing that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision,” but the amendment replaced “to deny or abridge the right of any citizen of the United States to vote on account of race or color”¹⁷ with “in a manner which results in a denial or abridgement on account of race or color.”¹⁸ It also included another subsection providing guidance on this “results test.”¹⁹ The legislative history of the 1982 amendments almost solely concerned vote-dilution claims. But the Senate Report also made explicit that “Section 2 remains the major statutory prohibition of all voting rights discrimination” and “also prohibits practices, which, while episodic and not involv[ing] permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members.”²⁰

In 1986, in *Thornburg v. Gingles*,²¹ the Supreme Court announced a standard for the results test in the vote-dilution context, and refined

¹³ See Davidson, *supra* note 7, at 32; Tokaji, *supra* note 7, at 702.

¹⁴ Dale E. Ho, *Building an Umbrella in A Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J. FORUM 799, 801 (2018).

¹⁵ *White v. Regester*, 412 U.S. 755, 766 (1973).

¹⁶ *City of Mobile v. Bolden*, 446 U.S. 55, 60–62 (1980).

¹⁷ See *South Carolina v. Katzenbach*, 383 U.S. 301, 338 (1966).

¹⁸ 52 U.S.C. § 10301(a).

¹⁹ *Id.*

²⁰ S. REP. NO. 97–417, at 30 (1982), *reprinted in* U.S.C.C.A.N. 177, 207.

²¹ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

that test over the next two decades.²² Vote-denial claims became much more common following the wave of voter suppression laws after the election of President Barack Obama in 2008,²³ and the Supreme Court's holding in *Shelby County v. Holder*, which killed preclearance of voting changes in covered jurisdictions by declaring the preclearance formula unconstitutional.²⁴ This new wave of vote-denial litigation produced decisions from circuit courts that coalesced around a single standard. The U.S. Courts of Appeals for the Fourth, Fifth, Sixth, and Ninth Circuits all agreed on the appropriateness of a two-part test that examined whether: (1) the challenged practice "impose[s] a discriminatory burden on members of a protected class"; and (2) the burden is "in part [] caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class."²⁵ Under the second part of the test, these circuits endorsed the use of nine nonexclusive factors set forth in the Senate Report to the 1982 Amendments (the "Senate Factors") to guide this inquiry.²⁶ Both the Seventh and Eleventh Circuits expressed skepticism of the second step, with the former expressing the view that Section 2 contains "an equal-treatment requirement,"²⁷ and the latter reading in an explicit causation requirement and rejecting the relevance of the Senate Factors.²⁸

II. The *Brnovich* Litigation and the Supreme Court's Decision

A. Lower Court Proceedings

Several Democratic party groups brought this case to challenge two Arizona election laws, one old and one new: "(1) Arizona's policy to not count provisional ballots cast in the wrong precinct"; and (2) a new

²² See, e.g., *Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Abrams v. Johnson*, 521 U.S. 74 (1997); *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Holder v. Hall*, 512 U.S. 874 (1994); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Chisom v. Roemer*, 501 U.S. 380 (1991).

²³ Ho, *supra* note 14, at 823.

²⁴ *Shelby County v. Holder*, 570 U.S. 529 (2013).

²⁵ *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); see also *Ohio Democratic Party v. Husted*, 834 F.3d 620, 637 (6th Cir. 2016); *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 400 (9th Cir. 2016) (en banc), *stay granted*, 137 S. Ct. 446 (2016) (mem.); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014).

²⁶ *Veasey*, 830 F.3d at 245–46; *Ohio Democratic Party*, 834 F.3d at 639; *Feldman*, 843 F.3d 404–05; *League of Women Voters of N.C.*, 769 F.3d at 240.

²⁷ *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

²⁸ *Greater Birmingham Ministries v. Sec'y of State of Alabama*, 992 F.3d 1299, 1330 (11th Cir. 2021).

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law that made “it a felony for anyone other than the voter to possess that voter’s early mail ballot” except for family members, household members, or caregivers.²⁹ The plaintiffs claimed that both laws violated Section 2 of the VRA and the First and Fourteenth Amendments as an unconstitutional burden on the right to vote, and that the ballot-collection law also violated the Fifteenth Amendment as motivated by intentional racial discrimination.³⁰ After a ten-day bench trial, the district court found for the defendants on all claims.³¹

The Ninth Circuit initially affirmed the district court in a 2–1 decision, but it accepted the case en banc and reversed the district court’s Section 2 and intentional-discrimination holdings.³² As to the out-of-precinct policy, it found that the district court clearly erred by requiring that the challenged law directly cause the racial disparity, finding the causal connection between the disparity and the result sufficient, and after evaluating the Senate Factors, the Ninth Circuit held the plaintiffs had proven a Section 2 violation.³³ Concerning the ballot-collection policy, the Ninth Circuit held the district clearly erred by discounting direct evidence of racial disparities and comparing the number of ballots collected for voters of color to total ballots rather than to white voters,³⁴ and found after analyzing the Senate Factors that the totality of the circumstances supported finding a Section 2 violation.³⁵

B. The Supreme Court Majority’s Opinion

Justice Alito wrote for the majority, joined by Chief Justice John Roberts, and Justices Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. If any questions remained about which way the decision was headed, the statement that the case “concerns two features of Arizona voting law, which generally makes it quite easy for residents

²⁹ *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 831–32, 839 (D. Ariz. 2018), *aff’d*, 904 F.3d 686 (9th Cir. 2018), *rev’d and remanded sub nom. Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc), *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

³⁰ *Reagan*, 329 F. Supp. 3d at 831.

³¹ *Id.*

³² *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020), *rev’d and remanded sub nom. Brnovich*, 141 S. Ct. 2321.

³³ *Hobbs*, 948 F.3d at 1016.

³⁴ *Id.* at 1033.

³⁵ *Id.* at 1037.

to vote,”³⁶ left little doubt. Before diving into the dispute at issue or the details of the standard to apply, the Court addressed two preliminary issues.

First, it disposed of the argument that Arizona Attorney General Mark Brnovich lacked standing to appeal after the Arizona secretary of state turned against the challenged laws.³⁷ Second, it explained that the Court declined to announce a test governing time, place, or manner rules under Section 2, noting that “no fewer than 10 tests have been proposed.”³⁸ Instead, the Court believed all that was necessary at the present was to “identify certain guideposts” that led to its decision.³⁹

The Court then turned to the text of Section 2. Before its analysis, and without a hint of irony, the majority subtly knocked the Court’s interpretation of Section 2 in *Gingles* by noting how the *Gingles* Court was quick to jump from reciting the statutory text to the legislative history.⁴⁰ The opinion’s first project—and only direct attempt at textual analysis—looked at subsection (b) of the statute, which was added as part of the 1982 amendments to provide the burden of proof to establish a violation. The main portion of that provision provides that a violation occurs when, “based on the totality of circumstances . . . the political processes . . . are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁴¹ In *Brnovich*, the Court focused on the term “equally open,” defining it as “without restrictions as to who may participate.”⁴² It noted that the term “equal opportunity” contributes to defining “equally open” and may “stretch that concept to some degree,” but inexplicably discounted the term’s import by declaring that “equal openness remains the touchstone.”⁴³

³⁶ *Brnovich*, 141 S. Ct. at 2333.

³⁷ *Id.* at 2336.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 2337 (citing *Thornburg v. Gingles*, 478 U.S. 30, 36–37, 43 n.7 (1986)) (“In *Gingles*, our seminal § 2 vote-dilution case, the Court quoted the text of amended § 2 and then jumped right to the Senate Judiciary Committee Report, which focused on the issue of vote dilution.”).

⁴¹ 52 U.S.C. § 10301(b).

⁴² *Brnovich*, 141 S. Ct. at 2337 (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1008 (J. Stein ed. 1966)).

⁴³ *Id.* at 2338.

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Having largely discarded equal opportunity, the Court moved on to discuss the five guideposts in assessing whether a time, place, or manner restriction violates the Section 2 results test—the basis for a vote-denial claim. Before discussing each one, it mentioned that Section 2 calls for a “totality of the circumstances” analysis, so while these factors are not exclusive, they are “important.”⁴⁴

First, the Court explained that “the size of the burden imposed by a challenged voting rule is highly relevant,” and used the “usual burdens of voting” as its barometer.⁴⁵ In doing so it quoted and relied on *Crawford v. Marion County Election Board*, a constitutional case involving Indiana’s voter ID law, but did not explain what those usual burdens entailed or how the concept may not apply equally across racial groups.

Second, the Court noted that whether a “voting rule departs from what was standard practice when § 2 was amended in 1982 is a relevant consideration.”⁴⁶ Without attempting to justify this based on a rule of statutory interpretation, the Court merely referred to the utility of benchmarks, and decided that the status quo at the time of the amendments made sense. Revealing its underlying purpose, the Court described how “nearly all voters” had to “cast their ballots in person on election day.”⁴⁷ It doubted that Congress intended “to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States,” despite the fact the amendments occurred less than two decades after the use of such rules like literacy tests and poll taxes to almost entirely disenfranchise Black voters throughout much of the South.⁴⁸

Third, the Court described the importance of the size of the racial disparity.⁴⁹ This was unsurprising and the most reasonable factor to consider, but the Court went on to explain away some amount of disparity because “minority and non-minority groups” may “differ with respect to employment, wealth, and education,” resulting “in some predictable disparities in rates of voting and noncompliance with voting rules.”⁵⁰

⁴⁴ *Id.*

⁴⁵ *Id.* (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008)).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Fourth, the Court instructed that “courts must consider the opportunities provided by a State’s entire system of voting when assessing the burden” of a challenged law.⁵¹ It relied on the reference in Section 2(b) referring to political processes being equally open, neglecting to consider that this section described the standard for Section 2(a), which protects against not just “denial” but also “abridgment” and evaluates whether a “standard, practice, or procedure” results in denial or abridgement of the franchise on account of race.⁵² Therefore, the Court explained that in states with multiple options for how to vote, even if there exists a disparate racial burden in one area, a court must consider the “other available means.”⁵³

Fifth, as expected, the Court held that evaluating courts must consider the strength of the state interest in the voting rule, noting that “strong state interests are less likely to violate § 2.”⁵⁴ From there, though, the Court took particular care to single out states’ “strong and entirely legitimate state interest” in preventing voter fraud, as well as making sure that “every vote is cast freely, without intimidation or undue influence.”⁵⁵

The Court also discussed the lack of relevance of most of the Senate Factors employed in vote-dilution cases for evaluating vote-denial claims, with the exception of past discrimination and whether “effects of that discrimination persist,” yet remarkably, it then held that the relevance of these discrimination-related factors “is much less direct” than the Court’s five guideposts.⁵⁶ It also rejected disparate impact, burden-shifting models from the employment and housing discrimination contexts.⁵⁷

Before applying the guideposts to the facts, the majority turned to Justice Elena Kagan’s dissent, castigating it for undertaking a “radical project,” accusing it of putting forward a standard that would undermine states’ authority to establish neutral, nondiscriminatory voting laws,

⁵¹ *Id.*

⁵² 52 U.S.C. § 10301(a).

⁵³ *Brnovich*, 141 S. Ct. at 2339.

⁵⁴ *Id.* at 2339–40.

⁵⁵ *Id.* at 2340.

⁵⁶ *Id.*

⁵⁷ *Id.* at 2341.

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and focusing “almost entirely” on disparate impact.⁵⁸ It charged that the dissent’s position meant that “[e]ven if a State could point to a history of serious voting fraud within its own borders,” a rule designed to prevent fraud could still be struck down “unless the State could demonstrate an inability to combat voting fraud in any other way.”⁵⁹ The majority closed by paying lip service to Section 2 providing “vital protection against discriminatory voting rules” and insisting that “no one suggests that discrimination in voting has been extirpated or that the threat has been eliminated.”⁶⁰

As to the longstanding out-of-precinct policy, which invalidated the entire ballots of voters who voted at an incorrect precinct, the Court described the need to identify and find one’s correct polling place as a “usual burden of voting” and noted the different sources of information available to do so.⁶¹ It then evaluated the policy as part of Arizona’s entire election system, brushing away evidence of frequent polling place changes and confusing placement by stating that even if it made finding assigned polling places “marginally harder” than other states, Arizona provided “other easy ways to vote.”⁶² Next, the Court found only a small racial disparity in burdens of rejected ballots of “a little over 1% of Hispanic voters, 1% of African-American voters, and 1% of Native American voters” compared to “around 0.5%” for “non-minority voters.”⁶³ Finally, it faulted the Ninth Circuit for failing to “give appropriate weight” to state interests.⁶⁴ In sum, the Court found that the policy’s “modest burdens . . . the small size of its disparate impact, and the state’s justifications,” meant it does not violate Section 2.⁶⁵

The Court next considered whether the criminalization of ballot delivery for other voters violated Section 2. It explained that early voters can mail ballots, use drop boxes, return them to an election office, or turn them in on election day—all trips that the Court found to be “usual burdens of voting.”⁶⁶ The Court also faulted the plaintiffs for failing

⁵⁸ *Id.* at 2341–43.

⁵⁹ *Id.* at 2343.

⁶⁰ *Id.*

⁶¹ *Id.* at 2344 (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008)).

⁶² *Id.*

⁶³ *Id.* at 2344–45.

⁶⁴ *Id.* at 2345.

⁶⁵ *Id.* at 2346.

⁶⁶ *Id.* (quoting *Crawford*, 553 U.S. at 198).

to provide statistical evidence on disparate impact, instead using fact witnesses who testified about the disproportionate use of third-party ballot collection among “minorities in Arizona—especially Native Americans.”⁶⁷ But the Court held that even if the plaintiffs had provided statistical evidence of a disparate impact, limiting the people handling early ballots “to those less likely to have ulterior motives deters potential fraud and improves voter confidence” and so it was justified.⁶⁸ Due to the “modest evidence of racially disparate burdens” and “in light of the State’s justifications,” the Court found no Section 2 violation.⁶⁹

Finally, the Court rejected the Ninth Circuit’s finding that the ballot-delivery criminalization was motivated by intentional discrimination. In doing so, it focused on the Ninth Circuit’s evaluation of “unfounded and often far-fetched allegations of ballot collection fraud” by State Senator Don Shooter and a “racially-tinged” video.⁷⁰ The Court dismissed the relevance of these factors in motivating passage of the bill because it believed that a “sincere” and “serious legislative debate on the wisdom of early mail-in voting” followed, evidentially purging the stain of the racism that began it.⁷¹ In doing so, it rejected the “cat’s paw theory” of liability borrowed from employment discrimination as having “no application to legislative bodies.”⁷²

C. Justice Kagan’s Dissent

Following a disturbing one-paragraph concurrence by Justice Gorsuch joined by Justice Thomas, in which they questioned whether a private right of action exists under Section 2,⁷³ Justice Kagan launched into a thorough and impassioned dissent. Joined by Justices Sonia Sotomayor and Stephen Breyer, she seized upon the VRA’s “far-reaching goal” to end voting discrimination, noted the VRA’s broad text, and

⁶⁷ *Id.*

⁶⁸ *Id.* at 2347.

⁶⁹ *Id.* at 2348.

⁷⁰ *Id.* at 2349 (quoting *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 880 (D. Ariz. 2018)).

⁷¹ *Id.*

⁷² *Id.* at 2350. “A plaintiff in a ‘cat’s paw’ case typically seeks to hold the plaintiff’s employer liable for ‘the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision.’” *Id.* (quoting *Staub v. Proctor Hospital*, 562 U.S. 411, 415 (2011)).

⁷³ *Id.* (Gorsuch, J., concurring).

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recognized the purpose of the 1982 amendments to undo a previous instance “when this Court construed the statute too narrowly.”⁷⁴ The dissent acknowledged the historical legacy that made a strong VRA necessary: the promise of the Fifteenth Amendment during Reconstruction and its failure for the next hundred years.⁷⁵ It then placed that historical legacy in context, describing how the VRA’s “success lay in its capacity to meet ever-new forms of discrimination,”⁷⁶ a project especially vital after states and localities implemented “new restrictive voting laws” following the *Shelby County* decision and again in recent months.⁷⁷ With this background, the dissent chastised the majority for dealing with a fear of the statute itself by writing its own rules and giving “a cramped reading to broad language.”⁷⁸ Justice Alito responded to that charge by reproaching the dissent for trying “to bring about a wholesale transfer of the authority to set voting rules from the States to the federal courts.”⁷⁹

The dissent then provided its own reading of Section 2’s basic standard: Courts must “strike down voting rules that contribute to a racial disparity in the opportunity to vote, taking all the relevant circumstances into account.”⁸⁰ It focused first on the import of the totality-of-circumstances inquiry which accounts for the law itself and its historical and local “background conditions,” while also accounting for strong state interests in a voting rule.⁸¹ The dissent turned next to Section 2’s inquiry as focused on the law’s effects rather than its purpose, recognizing that discriminatory laws “can arise from facially neutral (not just targeted) rules,” especially when “operating against the backdrop of historical, social, and economic conditions.”⁸² When a law places a disproportionate burden on voters of color, the dissent proposed that “strong state interests may save” such a rule but “only if that rule is needed to achieve them.”⁸³

⁷⁴ *Id.* at 2351 (Kagan, J., dissenting)

⁷⁵ *Id.* at 2353.

⁷⁶ *Id.* at 2354.

⁷⁷ *Id.* at 2355–56.

⁷⁸ *Id.* at 2351.

⁷⁹ *Id.* at 2343 (majority opinion).

⁸⁰ *Id.* at 2357 (Kagan, J., dissenting).

⁸¹ *Id.* at 2359.

⁸² *Id.* at 2360.

⁸³ *Id.*

Following the articulation of what it believed to be the proper standard, the dissent turned to the specific guideposts identified in the majority opinion. It criticized first the majority's standardless use of the concepts of a "mere inconvenience" or "usual burden," noting that disparities arising from "social and historical conditions" mean that one person's mere inconvenience could be another's significant burden.⁸⁴ The dissent also found fault with the majority requiring an evaluation of all other options of voting as at odds with the statutory text, because making even one voting method less available means it creates an abridgement to the right to vote on equal terms.⁸⁵ As to considering common voting practices in 1982, the dissent explained that Section 2 sought to disrupt the status quo in 1982, not to preserve it, making that factor contrary to the Act's text and purpose.⁸⁶ The dissent also panned how the majority proposed to weigh state interests in a voting law. It explained that while preventing fraud and voter intimidation are valid interests, asking only where the law "reasonably pursues" those interests gives the state too much of an escape valve given how easily states may assert those interests "groundlessly or pretextually" and the long history of using fraud as a justification for suppression and disenfranchisement.⁸⁷ Finally, the dissent criticized the majority for "declaring some racially discriminatory burdens inconsequential, and by refusing to subject asserted state interests to serious" scrutiny, thereby enabling discrimination.⁸⁸

Turning to the laws at issue, the dissent focused on the majority's disregard of strong disparate-impact evidence. The dissent noted that "Arizona threw away ballots in that year at 11 times the rate of the second-place discarder," and that "Hispanics, African Americans, and Native Americans were about twice as likely . . . to have their ballots discarded than whites."⁸⁹ It also faulted the majority for failing to conduct a "searching practical evaluation" into the sources of these disparities—namely, that Arizona changed forty percent of its polling places before the 2008 and 2012 elections, that Arizona did so in "African

⁸⁴ *Id.* at 2363.

⁸⁵ *Id.*

⁸⁶ *Id.* at 2363–64.

⁸⁷ *Id.* at 2365–66.

⁸⁸ *Id.* at 2366.

⁸⁹ *Id.* at 2367–68.

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American and Hispanic neighborhoods 30% more often than in white ones,” that “Hispanic and Native American voters had to travel further than white voters” to polling places, and that “minority voters were disproportionately likely to be assigned to polling places other than the ones closest to where they lived.”⁹⁰

On the criminalization of ballot collection, the dissent focused on facts specific to Arizona concerning Native American communities’ lack of access to mail service—just “18% of Native voters in rural counties” receive home mail delivery “compared to 86% of white voters” in those counties, and many Native Americans in rural Arizona “must travel 45 minutes to 2 hours just to get to a mailbox.”⁹¹ It then explained that no fraud involving ballot collection has ever been found in Arizona, and that other statutes help prevent ballot-collection fraud such as felony offenses for a ballot collector who fails to deliver a ballot or who tampers with a ballot.⁹² It criticized the majority for looking at how the ban interferes “with the voting opportunities of minority groups generally” rather than addressing the Ninth Circuit’s “separate finding that the ban poses a unique burden for Native Americans.”⁹³ The dissent closed by reemphasizing that Section 2’s language “is as broad as broad can be,” but that the majority had cut “Section 2 down to its own preferred size” by using “extra-textual exceptions and considerations to sap the Act’s strength.”⁹⁴ It skewered the majority by quoting *Shelby County* and suggesting that some may “think that vote suppression is a relic of history—and so the need for a potent Section 2 has come and gone,” but that it is Congress, rather than the Court, that “gets to make that call.”⁹⁵

III. Whitewashing Section 2: *Brnovich*’s Abandonment of Equal Opportunity and Silent Subversion of Race-Conscious Anti-Discrimination Laws.

Confronting constitutional challenges to the newly passed VRA in 1966, the Supreme Court highlighted two points that stood out

⁹⁰ *Id.* at 2368–69 (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994)).

⁹¹ *Id.* at 2371 n.15 (citing *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1006 (9th Cir. 2020)).

⁹² *Id.* at 2372.

⁹³ *Id.* at 2371.

⁹⁴ *Id.* at 2372–73.

⁹⁵ *Id.* at 2373 (quoting *Shelby County v. Holder*, 570 U.S. 529, 547 (2013)) (contending that “things have changed dramatically” since the enactment of the Voting Rights Act).

from the debates about the law's passage. First, Congress recognized it was confronting "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."⁹⁶ Second, due to the steadfastness and stealth with which state legislatures devised workarounds to previous attempts to confront racial discrimination in voting, the VRA's remedies would need to be "sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment."⁹⁷ When Congress amended Section 2 of the VRA in 1982 in response to the Supreme Court's decision in *City of Mobile* reading the section as only prohibiting intentional discrimination, it crafted a standard it believed would confer upon "litigants a flexible tool and a broad mandate to challenge inequalities in the political process."⁹⁸ This left little doubt among members of the Court that the 1982 amendments created the discriminatory-results standard to provide "the broadest possible scope in combating racial discrimination."⁹⁹ Even Justice Antonin Scalia recognized that Congress had provided in Section 2 a "powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination."¹⁰⁰ *Brnovich* turns these principles on their head without justifying how it did so.

A. Five Ways in Which the Five Guideposts Undermine Racial Justice Litigation

The five guideposts are not all equally destructive to fighting racial discrimination in voting. Also, taking the Court at its word, it declined to "announce a test," meaning that the existing two-part test continues to govern in the circuits which had adopted it, as supplemented by the guideposts. Yet the guideposts do present a danger, which lies in how the Court conceptualizes them—prioritizing state interests and dismissing many types of racial disparities—and how they interact. Taken individually, even some of the worst, atextual factors leave openings. For example, examining whether certain voting practices existed in 1982

⁹⁶ *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

⁹⁷ *Id.*

⁹⁸ Guinier, *supra* note 9, at 1095.

⁹⁹ *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

¹⁰⁰ *Id.* at 406 (Scalia, J., dissenting).

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may harm the effectiveness of claims against discriminatory rollbacks to early voting, but it could benefit a challenge to a strict in-person voting photo-ID law. But then the Court's heavy weighting of a state's voter-fraud rationale and the potential availability of voting by mail may nonetheless tip the scales, at least for some courts, even with strong statistical evidence of a significant racial disparity. This section discusses some of the specific ways in which the Court's guideposts may severely limit Section 2's utility in challenging discriminatory voting laws.

The *first* striking aspect of the Court's guideposts and treatment of other previously relied-upon factors is how it subordinates the impact of historical racial discrimination while elevating the concept of the "usual burdens of voting" from the constitutional context where "[p]roof of racially discriminatory intent or purpose is required" ¹⁰¹ Both the concept of and specific terminology around the "usual burdens of voting" arise from the Supreme Court's decision in *Crawford v. Marion County Election Board*, ¹⁰² where it rejected a constitutional challenge to Indiana's voter-ID law. The Court found that the "inconvenience of making a trip to the [DMV], gathering the required documents, and posing for a photograph" does not "represent a significant increase over the usual burdens of voting" except for a "limited number of persons." ¹⁰³

Despite this carve out that "usual burdens of voting" might be different for some people, in practice this concept has meant that since *Crawford*, few federal appellate decisions not stayed by the Supreme Court have found that a voting law constitutes an unconstitutional burden. The Seventh Circuit's decision rejecting a Section 2 vote-denial claim challenging Wisconsin's strict voter-ID law offers a preview of how this concept may be applied after *Brnovich*. There, the court acknowledged racial disparities in possession of IDs or documents required to get IDs, and the proportion of individuals born out of state that may face steeper burdens in obtaining necessary documents. ¹⁰⁴ Nonetheless, it held that there was no Section 2 violation because Wisconsin "extends to every citizen an equal opportunity to get a photo

¹⁰¹ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977).

¹⁰² *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

¹⁰³ *Id.* at 198–99.

¹⁰⁴ *Frank v. Walker*, 768 F.3d 744, 752–53 (7th Cir. 2014).

ID” and had not made it “needlessly hard to get photo ID, it has not denied anything to any voter.”¹⁰⁵ Then-Professor and now Assistant Director-Counsel of the NAACP Legal Defense & Educational Fund Janai Nelson foresaw this danger back in 2013, explaining that “[e]qual protection jurisprudence’s notorious ambivalence toward proof of bias (explicit or implicit) sufficient to sustain a constitutional violation” was already “infect[ing] analyses of the VRA.”¹⁰⁶

Worse still, *Brnovich* appears not only to import this concept from equal protection jurisprudence, but as Justice Kagan explained, does so in a way that minimizes the likelihood of racial differences in what constitutes a “usual burden of voting.”¹⁰⁷ The Court’s later discussion of two factors previously given important weight in vote-denial claims—past discrimination and whether and how the “effects of that discrimination persist”—confirms this, when it explains that these factors have “much less direct” relevance compared to the five guideposts.¹⁰⁸

Second, the Court’s benchmark of common practices in 1982 and privileging of longstanding, facially neutral voting laws will undermine the project of Section 2 to dismantle discriminatory voting systems. It strains credulity to believe that in amending Section 2 to create a stronger, more direct discriminatory-results standard, Congress intended to freeze the status quo. As the former head of the Department of Justice Civil Rights Division, Drew Days, wrote in 1981, the gains made by voters of color since 1965 “have not taken on such a permanence as to render them immune to attempts by opponents of equality to diminish their political influence”—he plainly saw that these gains earned “through courageous and tenacious effort, could be swept away overnight” if the VRA’s protections were removed.¹⁰⁹ Likewise, former Florida Governor Reubin Askew noted in 1981 that although the VRA had successfully stripped away “virtually all the overt means of discrimination by which the right to vote was so cynically withheld

¹⁰⁵ *Id.*

¹⁰⁶ Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 584 (2013).

¹⁰⁷ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2361–63 (2021) (Kagan, J., dissenting).

¹⁰⁸ *Id.* at 2340.

¹⁰⁹ Drew Days, *How the Voting Rights Act is the Most Effective Act on the Books*, 4 S. CHANGES 16, 25 (1981).

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for so long,” discrimination “simply assumed other, subtler forms.”¹¹⁰ Indeed, as of 1981, the difference in voter registration between Black and white citizens still exceeded sixteen percent in Georgia, North Carolina, and South Carolina, and was almost twenty percent in Louisiana.¹¹¹ The lookback to 1982 wipes away the role of new voting practices like expanded registration opportunities and broader early in-person and mail voting may have played in improving participation rates among communities of color.

The Court’s privileging of “facially neutral time, place, and manner regulations that have a long pedigree” represents a galling misunderstanding of the history of the VRA and the importance of Section 2’s flexible test.¹¹² Many of the laws responsible for disenfranchising Black voters across the South after Reconstruction—literacy tests, grandfather clauses, and poll taxes—fell into this very category, yet they (and the violence through which they were enforced) proved largely responsible for minimizing Black Southerners’ ability to participate in the political process. Had the Court’s current interpretation prevailed in 1966, Section 2 would have been stopped dead in its tracks.

The *third* way in which the *Brnovich* guideposts harm Section 2 vote-denial challenges is by requiring courts to assess the discriminatory burden of a challenged practice in the context of a state’s entire electoral system. In the most obvious sense, by reading out abridgement and the reference to specific challenged practices in Section 2(a), this requirement allows courts to disregard specific harmful practices based on the availability of other voting opportunities. The Court makes this even more burdensome by framing the inquiry theoretically rather than through a searching, practical examination of how the other practices actually function.¹¹³

Plaintiffs may be able to show how the other options of voting are harder for a specific racial group in a state due to the interaction of historical discrimination, but then the second problem of this requirement comes into play. Even if the strongest claim under Section

¹¹⁰ Reubin Askew, *Why the South Needs the Voting Rights Act*, 4 S. CHANGES 10, 11 (1981).

¹¹¹ Raymond Brown, *Barriers to Voter Registration Remain Southwide*, 4 S. CHANGES 34, 34–35 (1981).

¹¹² *Brnovich*, 141 S. Ct. at 2339.

¹¹³ See *id.* at 2346.

2 rests on attacking a specific practice with discriminatory results, the electoral-system consideration will require plaintiffs to examine and potentially challenge the whole election system, making litigation more time-consuming and expensive. For the groups and individuals who nonetheless decide to mount these challenges, they may face the higher barrier of convincing a court to find that a state's electoral system as a whole creates discriminatory results. True, a court need not make this specific finding to rule in favor of a plaintiff, but it may interpret this decision as requiring it to look at each aspect of the voting system and decide that the non-challenged aspects also do not provide equal opportunity based on race. This may prove a heavy lift with Chief Justice Roberts's recent words ringing in the ears of even those judges more open to such claims that courts should be wary of "federal intrusion on state lawmaking processes."¹¹⁴

Fourth, while the Court's guidance to adequately weigh a state's interest in its voting laws makes practical sense and already existed as part of the evaluation courts performed, the way it frames those interests and heavily weighs them may sabotage vote-denial claims. The Court's singling out of voter-fraud prevention as a "strong and entirely legitimate state interest" merits concern given the ubiquitous use of this justification for many state voting practices.¹¹⁵ More alarming, however, is the Court's application of this justification in analyzing the criminalization of ballot delivery in Arizona. Despite the undisputed fact that no incidences of ballot-collection abuse or fraud have been documented in Arizona,¹¹⁶ the Court appeared to rely on the state's voter-fraud justification alone as being sufficient to save the law.¹¹⁷ Besides making all such laws *de facto* permissible under Section 2 in spite of the Court's previous command to conduct an "intensely local appraisal,"¹¹⁸ some courts could interpret this application to eliminate any need to actually examine the evidentiary basis of a voter-fraud rationale. Consider the notoriously conservative Fifth Circuit's striking

¹¹⁴ Democratic Nat'l Comm. v. Wisconsin State Legislature, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring in denial of application to vacate stay).

¹¹⁵ *Brnovich*, 141 S. Ct. at 2341.

¹¹⁶ *Id.* at 2370 (Kagan, J., dissenting).

¹¹⁷ *Id.* at 2347 (majority opinion).

¹¹⁸ *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).

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down of Texas's restrictive voter-ID law under Section 2's results test just a few years ago.¹¹⁹ There, the en banc court upheld the district court's findings of a "stark, racial disparity between those who possess or have access" to the necessary types of ID "and those who do not," and that the Senate Factors "worked in concert with Texas's legacy of state-sponsored discrimination to bring about this disproportionate result."¹²⁰ Following *Brnovich*, would this decision have come down differently based largely on Texas's voter-fraud rationale? Perhaps not, but it certainly makes an alternative outcome more likely.

Additionally, Justice Kagan correctly explained in her dissent that "election officials have asserted anti-fraud interests in using voter suppression laws" throughout our history, including for laws like poll taxes.¹²¹ This tactic does not belong merely to the pre-VRA period. For example, a federal court detailed how in the 1980s and 1990s, Alabama had used the specter of voter fraud in rural Black communities to pass restrictive absentee ballot reforms in the wake of growing Black political success using absentee balloting as a get-out-the-vote technique. It found that the legislature passed legislation that "had a 'laser focus on Black political activists' who had used Alabama's absentee ballot process to increase Black voter turnout."¹²² This voter-fraud justification hampered a manner of voting that helped rural Black citizens who "regularly worked long hours outside their counties and often lacked access to vehicles," and "struggled to reach 'far-flung polling places' on Election Day"—these communities "saw sharp declines in the number of absentee ballots cast" in the face of these new laws.¹²³

As Professor Lorraine Minnite explained, voter-fraud allegations are still commonly used to "shrewdly veil a political strategy for winning elections by tamping down turnout among socially subordinate groups."¹²⁴ White politicians are currently using this strategy in Texas, where the attorney general has targeted recently two Black voters

¹¹⁹ *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

¹²⁰ *Id.* at 264–65.

¹²¹ *Brnovich*, 141 S. Ct. at 2365 (Kagan, J., dissenting) (citing J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* 111 n.9 (1974)).

¹²² *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1106–07 (N.D. Ala.), *stayed in part by* *People First of Ala. v. Sec'y of State of Alabama*, No. 20-13695-B, 2020 WL 6074333, at *1 (11th Cir.), *stayed in full sub nom.* *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020).

¹²³ *Id.* at 1107.

¹²⁴ LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 89 (2010).

who allegedly attempted to vote while still on probation from a felony conviction and did not realize they were ineligible: Crystal Mason received a five-year sentence and Hervis Rogers's arrest was touted by Texas Attorney General Ken Paxton on social media.¹²⁵ A similar tactic was used in Alabama in the 1980s.¹²⁶ The Court's easy acceptance of a voter-fraud rationale ignores an ugly history and an ugly present.

A *fifth* way the *Brnovich* guideposts may undermine future vote-denial cases is by stepping away from the "intensely local" appraisal called for by Congress and downplaying important linkages between a voting rule's disparate impact and sociohistorical discrimination.¹²⁷ As explained previously, the Court appeared to treat the vote-denial test as a more categorical approach to voting systems rather than considering the particular operation of the voting rule "in the State or political subdivision."¹²⁸ It also brushed away the importance of how racial disparities in "employment, wealth, and education" create "some predictable disparities" in voting, ignoring that many of these disparities result from state-sponsored or endorsed discrimination.¹²⁹ The Supreme Court recognized in 1966, for example, how literacy tests succeeded in keeping many Black Southerners from voting because of the deep legacy of educational discrimination.¹³⁰ But some courts may read *Brnovich* to minimize the proper consideration of such discrimination.

Scenarios that should have or have created Section 2 liability based on the unique history and local circumstances in a state may now be brushed aside by some courts. Then-Professor and now Principal Deputy Assistant Attorney General for DOJ's Civil Rights Division Pam Karlan discussed how, "in a jurisdiction where [B]lack voters disproportionately vote on Sundays—particularly when that decision can be explained as stemming from factors connected to socioeconomic disparities—a decision to cut back on Sunday voting will, as a practical matter, disproportionately burden or abridge [B]lack citizens' right to

¹²⁵ Alexa Ura, *Texas Court of Criminal Appeals Will Review Crystal Mason's Controversial Illegal Voting Conviction*, TEX. TRIB. (March 31, 2021); Attorney General Ken Paxton (@KenPaxtonTX) TWITTER (July 9, 2021, 7:32 PM).

¹²⁶ See CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* 30–35 (2018).

¹²⁷ *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).

¹²⁸ 52 U.S.C. § 10301(b).

¹²⁹ *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021).

¹³⁰ See *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 nn.9–10.

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vote.”¹³¹ Even in this case, Native Americans living in rural communities in Arizona face wide disparities in accessing mail service and must travel long distances to access polling places—the very sort of localized facts that should strongly support Section 2 liability—but the Court largely ignored them.

Taken together, and as applied by the *Brnovich* Court, the five guideposts spell significant danger for future vote-denial litigation, particularly for courts already skeptical of challenges to state voting rules.

B. *Brnovich* as an Unspoken Subversion of Race-Conscious Decision Making

It’s easy to explain *Brnovich* as the confluence of two dominant trends in the Supreme Court’s decision-making: an aversion to race consciousness and an increasing deference to state election laws. On the first trend, as Professor Guy-Uriel Charles aptly noted, “[f]or the Court, race consciousness is a temporary way station on the road to the Nirvana that is colorblindness.”¹³² Considering racial classifications, Justice Anthony Kennedy declared that they “are permitted only ‘as a last resort,’”¹³³ and Justice Sandra Day O’Connor asserted that they threaten “to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody.”¹³⁴ More recently, Chief Justice Roberts famously declared that the “way to stop discrimination on the basis of race is to stop discriminating on the basis of race” in striking down school desegregation plans.¹³⁵ And in the VRA context, in a partial concurrence and dissent joined by Justice Alito, he proclaimed that it “is a sordid business, this divvying us up by race.”¹³⁶ Even when Justice Kennedy was the swing vote back in 2011, Professor Luis Fuentes-Rohwer observed that “five Justices on the Court have strong reservations about

¹³¹ Karlan, *supra* note 10, at 773–74.

¹³² Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1272 (2003).

¹³³ *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518, 519 (1989) (Kennedy, J., concurring in part and concurring in the judgment)).

¹³⁴ *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

¹³⁵ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

¹³⁶ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

the use of race in general and the modern uses of section 2 of the Act in particular.”¹³⁷

Unlike earlier decisions such as *Shaw v. Reno*, however, the *Brnovich* Court did not proclaim the virtues of escaping from race-conscious decision-making. Instead, the Court used its five guideposts to dismantle Section 2 from within, without ever acknowledging it was “de-racing” the statute. Of course, unlike *Shaw* and other constitutional cases, the VRA demands consideration of a law’s racial impacts. The Court could have taken another approach like it did in *Shelby County* and declared the results test unconstitutional. Thankfully, it did not, but one wonders why, given the direct hostility to race-conscious statutes expressed by most of the justices in the majority. The best guess lies with the one saving grace of this dark moment in our nation’s voting rights jurisprudence—the growing public knowledge and awareness of voter suppression and attacks on communities of color, much of it sparked by a new generation of Black, Latinx, Native American, and Asian American activists. With this growing awareness, Americans are recognizing that recent laws introduced by state legislatures target many widely popular provisions such as expanded early and mail voting.¹³⁸ Perhaps then, it was to reduce public ire and attempt to maintain the Court’s legitimacy that the majority hid the project behind neutral-sounding phrases.

On the second trend, as early as 2009, Professor Ellen Katz noted that the Roberts Court sought “to avoid active federal engagement with the state-created rules regulating democratic participation.”¹³⁹ That trend only accelerated, with the Court using new doctrines like the *Purcell* principle—which it expanded from considering the impact of court-made changes close to an election on voter confusion to a de facto

¹³⁷ Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL’Y 125, 152 (2010); see also Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 264 (2020) (“The Court thus views Section 2’s race-conscious predicate for liability with suspicion.”).

¹³⁸ See, e.g., Matthew Brown, *Most Americans Back Both Early Voting and ID Requirements, Monmouth University Poll Finds*, USA TODAY, (June 21, 2021); Christina A. Cassidy & Hannah Fingerhut, *AP-NORC Poll: Majority in US Back Easier Voter Registration*, AP (Apr. 2, 2021).

¹³⁹ Ellen Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615, 1616 (2009).

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prohibition of such changes in the last months preceding one—to avoid striking down state election laws.¹⁴⁰

It appears true that *Brnovich* was a “repudiation of the core aims” of the VRA, in which the Court showed more interest in “protecting the electoral rules of the states from undue intrusion by voters of color” than in fighting racial discrimination in voting.¹⁴¹ But can one distinguish the Court’s primary motivation: dismantling laws that explicitly consider race or preserving the right of states to create election laws with little interference? Looking only slightly below the surface reveals that these aims are closely interconnected.

Deferring to state legislatures may reference federalism, but the practical impact in the voting context has always been allowing states to discriminate with near-impunity. The Supreme Court abandoned Black voters many times before, with only a few decades of exception. Sometimes, these decisions carried decades-long lasting effects, such as the Court’s abdication to white supremacy in 1903 by declaring that “relief from a great political wrong, if done . . . by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.”¹⁴² As Professor Richard Pildes described, “once the Supreme Court effectively blessed the disfranchising constitutions, those constitutions then created an electorate in their own image.”¹⁴³

Though the Court may justify its retreat from the “political thicket” as a desire to keep the Court out of partisan disputes, the intertwining of race and party means voters of color bear the burden of that reticence. Professor Franita Tolson rightfully declared, “[P]artisanship that harms a racial group cannot be valid simply because the legislature’s reasons are more partisan than racial.”¹⁴⁴ Yet that is precisely the point at which we have arrived. Justice Alito explained his position a few years back in a racial gerrymandering case when he noted the difficulty of

¹⁴⁰ *Compare* *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam), with *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam).

¹⁴¹ Guy-Uriel E. Charles and Luis E. Fuentes-Rohwer, *The Court’s Voting-Rights Decision Was Worse Than People Think*, ATLANTIC (July 8, 2021).

¹⁴² *Giles v. Harris*, 189 U.S. 475, 488 (1903).

¹⁴³ Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 313 (2000).

¹⁴⁴ Franita Tolson, *Election Law “Federalism” and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2233 (2018).

“distinguishing between racial and political motivations,” and seemed to accept that when “a plan that packs Democratic voters” looks “very much like a plan[] that packs African–American voters,” it is better to refrain from intervening.¹⁴⁵

Whatever the label, *Brnovich* represents a new capstone in the Court’s withdrawal from the project of remediating racial discrimination in voting, but one it won’t admit.

* * *

Jamelle Bouie recently wrote that “[o]ne of the lessons of the South after Reconstruction is that democratic life can flourish and then erode, expand and then contract.”¹⁴⁶ This moment certainly feels like the beginning, or perhaps middle, of a contraction. And as always, voters of color, by design, will feel the brunt of that retrenchment.

In light of intransigence from the Court, how do we proceed? No single, clear answer exists, but several together may push back against this trend and allow the fight against racial discrimination to regain some momentum. For one, Congress should amend both Sections 2 and 5 of the Voting Rights Act. For Section 2, Congress should make clear that it seeks “equal opportunity” rather than “equal openness.”¹⁴⁷ It should also direct courts to analyze current conditions and how past discrimination has created them rather than looking to 1982; explain that one discriminatory aspect of a voting process cannot be cured merely by referring to another method of voting; and explain that a state’s asserted interests must be justified by actual supporting evidence from the state. It should also consider adding an alternative authority in the Act supported by the Constitution’s Elections Clause¹⁴⁸ so that even if the Court strikes down Section 2 as beyond the bounds of the Fourteenth or Fifteenth Amendment, it should continue to apply to time, place,

¹⁴⁵ *Cooper v. Harris*, 137 S. Ct. 1455, 1488 (2017) (Alito, J., concurring in the judgment in part and dissenting in part).

¹⁴⁶ Jamelle Bouie, Opinion, *If It’s Not Jim Crow, What Is It?* N.Y. TIMES (Apr. 6, 2021).

¹⁴⁷ Cf. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2338 (2021) (stating that “equal openness remains the touchstone” of a Section 2 analysis).

¹⁴⁸ U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . .”).

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and manner laws governing congressional elections. This does run the risk, however, of states creating dual election systems, which may make participating in state rather than federal elections especially difficult. As to Section 5, whether by amending the formula struck down in *Shelby County* to reflect current conditions or using the Elections Clause to require nationwide preclearance when the laws affect congressional elections, reinstating some form of preclearance is vital. Section 2 can only reach so many laws at once, especially if it depends on civil rights organizations to enforce it.

All of this is easier said than done. Any of this legislation currently requires sixty votes to overcome the filibuster, and fifty votes do not yet exist in favor of eliminating the filibuster.¹⁴⁹ Any chance, then, will depend on grassroots efforts and continuing to make people aware of the persistence of racial discrimination in voting and the need to act. Yet we also cannot keep “asking Black and brown activists to out-organize racist laws.”¹⁵⁰ We need political courage and leadership from our elected officials.

Justice Kagan was right that if “a single statute represents the best of America, it is the Voting Rights Act.”¹⁵¹ If we want to keep it, we have work to do.

¹⁴⁹ Brian Slodoyko et al., *GOP Filibuster Blocks Democrats’ Big Voting Rights Bill*, AP (June 22, 2021).

¹⁵⁰ Markus Batchelor (@MarkusforDC), TWITTER (July 22, 2021, 1:28 AM).

¹⁵¹ *Brnovich*, 141 S. Ct. at 2350 (Kagan, J., dissenting).

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Ekow N. Yankah*

When it comes to policing, the U.S. Supreme Court too often plays the role of the garish sun.¹ Scholars counsel that policing is the quintessential local activity, often repeating that the United States has up to 18,000 local police forces, and if one wants to change policing, the place to look is your police chief, sheriff, or mayor.² Yet despite our own warnings, we cannot help staring towards that Washingtonian marbled temple, to divine the shape of policing to come. If the Supreme Court cannot readily modify policing in each city and hamlet, it is unique in its ability to establish binding nationwide Fourth Amendment rulings and set minimum guarantees on the limits of policing power. And though we know it to be ridiculous, we seek some magic bullet solution to cure the turmoil of contemporary debates and protests surrounding policing.

If our impulse is to look to the Court for answers, this Term revealed no revolutionary solution but rather the dim outlines of our own reflection. As Court watchers occasionally remind, Supreme Court justices read *The New York Times* too. Whatever their newspaper of choice, this Term's policing cases, if not monumental in nature, reflect a Court that seems affected by the national reckoning with police power and police brutality. To be sure, there is no grand movement or iconic case engaging with the numerous brutal police killings, particularly of Black men. Direct engagement is seen only in innuendo, in dissenting opinions at that. But one senses a Court touched by the nationwide call to attend to the way policing interacts with policed communities.

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¹ See WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 3, sc. 2 ("Give me my Romeo. And when I shall die, / Take him and cut him out in little stars, / And he will make the face of heaven so fine / That all the world will be in love with night / And pay no worship to the garish sun.").

² Leandra Bernstein, *America has 18,000 Police Agencies, No National Standards; Experts Say That is a Problem*, WJLA (June 9, 2020).

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Perhaps I am reading a Supreme Court Rorschach test, seeing the things in the cases that matter most to me. After all, one of the three major Fourth Amendment rulings of this Term actually expanded the power of the police, though in a particularized context, and the other two offered only mild constraints on policing powers. A politicized, abolitionist Court or Fourth Amendment revolution this is not. Yet, against a generation of largely (if not universally) expanding policing power, one can search this Term's cases for a bulwark against further free reign to police in giving chase and using violence to seize ordinary citizens.

I. *United States v. Cooley*: Who Gets to Police Whom?

Begin first with the counter example. On June 1, 2021, the Supreme Court decided *United States v. Cooley*.³ The defendant, James Cooley, was in the Crow Indian Reservation in Montana when tribal police officer James Saylor noticed his truck idling by the side of the road. While questioning Cooley to determine if he needed help, Saylor noticed Cooley's bloodshot eyes and suspected Cooley was intoxicated. More pressingly, Saylor saw two semiautomatic rifles in Cooley's front seat. The situation reportedly grew tense; Saylor drew his weapon, detained Cooley, and called for backup.⁴ During this process, Saylor also saw drug paraphernalia, plastic bags, and a glass pipe associated with methamphetamine use. The drug paraphernalia was seized as it was in plain sight, and Cooley was questioned by federal and local officers and eventually indicted on gun and drug charges.⁵

Even given the tense arrest, the surface facts of the arrest hardly seem remarkable. An intoxicated driver with weapons and drugs is hardly unique. But what made this case sufficiently important for the Supreme Court was the location of the arrest and the people involved. Cooley, a non-Indian, was traveling on Indian land when he was arrested by Officer Saylor, a tribal police officer, bringing to the fore a unique facet of American policing law regarding racial minorities.⁶

³ *United States v. Cooley*, 141 S. Ct. 1638 (2021).

⁴ *Id.* at 1639; Elizabeth Reese, *Affirmation of Inherent Tribal Power to Police Blurs Civil and Criminal Indian Law Tests*, SCOTUSBLOG (June 7, 2021).

⁵ *Cooley*, 141 S. Ct. at 1639.

⁶ *See id.*

Indian tribal law occupies a unique space in American law. Obviously, Indian nations were once independent. After the colonization, conquering, and genocide of the Native Americans, the majority of Native Americans were packed into reservation lands. Thus, Indian nations became a hybrid creature: domestic land that was granted wide sovereign powers to govern its own affairs but with those powers limited and superseded by the laws of the United States. This has resulted in a complex and understudied interplay of federal, state, and tribal law.⁷ Particularly, pertaining to criminal law and policing, the right of Indian territories to enforce their own laws and police their own customs has posed an enduring question.⁸

Picking up on earlier law that disabled tribal authorities from regulating hunting and fishing, Cooley argued that as a non-Indian, tribal officer Saylor lacked the authority to search and detain him. Rather, he argued that once tribal officers realized he was a non-Indian, they were obligated to release him unless they had actively witnessed him committing a crime. Cooley further argued tribal officers should be required to ask a detainee whether they are Indian and only authorized to detain those who answer yes (or presumably were otherwise reasonably ascertained as Indian).

The Supreme Court, succinctly reviewing the retained inherent sovereign authorities of tribal powers, unanimously rejected Cooley's argument. The Court was unpersuaded that tribal powers derived merely from the power to keep non-Indians from entering reservation

⁷ For more on this history and the role the U.S. Supreme Court has played, see Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, AM. BAR ASSOC. (Oct. 1, 2014).

⁸ A famous example, illustrating the interplay between state employment law, criminal law, and tribal law and norms is *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990). There, two defendants, Smith and Black, were counselors at a private drug rehabilitation clinic. They were fired for ingesting peyote, a powerful and outlawed hallucinogen, which they took as a part of a religious ceremony at the Native American Church. They were both subsequently denied unemployment benefits. Both sued, arguing that denying them benefits premised on work-related misconduct violated their rights under the Free Exercise Clause of the U.S. Constitution. After a circuitous route, the Court eventually found that though employment benefits could not be conditioned on one surrendering their religious practices, one could be legally sanctioned for behavior in violation of justifiable criminal laws. *Id.* at 779–80.

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lands.⁹ Instead, the Court determined the case was straight-forwardly settled by its prior precedent. In earlier language, the Supreme Court held that whatever the restraints on their legal authority, tribal authorities “retain[ed] inherent power to exercise civil authority over the conduct of non-Indians . . . within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”¹⁰ The Court thought it obvious that detaining persons, Indian or not, suspected of intoxicated driving fit this reasoning “like a glove.”¹¹

Ultimately then, the Supreme Court expanded the power of the police throughout bounded regions of the country. It firmly dismissed arguments that the police establish the ethnic identity of a person before asserting authority.¹² Given the crime at bar, an intoxicated man with semi-automatic weapons, it would have been surprising, circuit court ruling notwithstanding, had the Court ruled otherwise. It is natural to read this outcome as the Court continuing to expand police power.

But another reading of this case admits interesting nuance. Obviously, Supreme Court cases typically eschew any explicit allegiances to political positions or stakes in sweeping controversies. But among the sociological, legal, and everyday political accusations in modern policing has been the charge that minority communities are both overpoliced and under-protected. This phrase captures the phenomenon that minority communities are often the focus of concentrated policing, yet that policing is often not viewed as serving the interests of the patrolled community. At its heart, it describes the all-too-common feeling in many communities that the police are something like an occupying army, serving wealthy, powerful, and often White constituencies elsewhere.

⁹ *Cooley*, 141 S. Ct. at 1643. As mentioned, the interplay between inherent tribal authority and the powers of the United States and questions as to whether *Cooley* presented an opportunity for the Court to trim back those powers is complex and beyond both my expertise and purpose. See Reese, *supra* note 4, for an excellent starting point for this wider inquiry.

¹⁰ *Montana v. United States*, 450 U.S. 544, 566 (1981).

¹¹ *Cooley*, 141 S. Ct. at 1643.

¹² Dismissing such invitations for the police to cabin their authority by first seeking a sort of jurisdictional authority is independently interesting. It recalls the analogous invitation for police to inform citizens of their right to withhold consent when asking to conduct searches. A generation ago, the Supreme Court rejected that requirement as well. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

While the Supreme Court denies it is a player in this political debate, there is a clear sense in which *Cooley* puts this question unavoidably in front of the Court. Ultimately, *Cooley* asks not just what is policed but who is permitted to do that policing. More specifically, *Cooley* asks if a minority community is permitted to take control of its own policing, by its own members, for its own good, even to the point of enforcing laws on non-Indians. This, of course, does not mean that tribal policing is unproblematic; policing in Black-majority cities by Black policemen, as an analogy, does not magically cure the racial tensions in policing.¹³ Still, it is hard to ignore that the Court's ruling explicitly rejects a position that would have further neutered a semi-sovereign nation, housing arguably America's most vulnerable racial minority, from policing its own streets from non-Indians. In this sense, the result of *Cooley* was not only to expand policing power but also to place greater control of that policing in the hands of the racial minority being policed.

II. *Lange v. California*: What Are the Limits to Hot Pursuit?

Perhaps the most consequential of this Term's policing cases may be the one with the most seemingly innocuous facts, *Lange v. California*.¹⁴ Indeed, it is precisely because the facts are so quotidian that the ruling holds so much meaning. In October 2016, Arthur Lange was "rolling down the street,"¹⁵ to wit, Lange was driving while playing loud music, with his windows down and honking his horn. Surprising perhaps no one but himself, Lange caught the attention of a California highway patrol officer who, believing Lange to be in violation of at least California misdemeanor noise statutes, signaled for Lange to pull over.¹⁶

By then Lange, who claimed to not have seen the flashing lights, was only one hundred feet from his home and so pulled into his garage. The officer followed Lange into his garage to question him. Believing Lange to be drunk, the officer put Lange through a field sobriety test. Lange did

¹³ See JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

¹⁴ *Lange v. California*, 141 S. Ct. 2011 (2021).

¹⁵ SNOOP DOGG, *GIN AND JUICE* (Death Row/Interscope Records, Inc. 1993). This represents a vague attempt to be whimsical. I am sad to inform the reader your author is not particularly "hip." And, of course, drunk driving is not to be taken lightly. Sigh...

¹⁶ *Lange*, 141 S. Ct. at 2013.

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not pass, surely because his blood-alcohol level was later revealed to be over three times the legal limit.

The legal issue at the center of the case focused on the moment the officer entered Lange's garage. There may be no more repeated incantation in Fourth Amendment jurisprudence than the declaration that the home is the heart of the protection against (literally) unwarranted police intrusion.¹⁷ Famously, even when the police have probable cause to believe a murder suspect is home, with lights on and music playing, police entry without a warrant is unauthorized and may lead to suppression of any recovered evidence.¹⁸

To the dismay of generations of criminal-procedure students, though the home is held up as sacrosanct, there are myriad exceptions to the warrant requirement. The most prominent among these are grouped into "exigent circumstances." The archetypal exigent circumstance, at issue in *Lange*, is "hot pursuit."¹⁹ For obvious reasons, if police are chasing a felony suspect, they are not obligated to stop helplessly at the door of the home. They may enter the home to capture the suspect so long as they were in hot pursuit. Any other rule risks turning policing into an elaborate game of tag, with one's home acting as "base."

Were *Lange* suspected of a felony, the legal analysis would have been well-settled by precedent. Whether or not the facts on the ground show the police are in hot pursuit will often be controversial. In one case cited by the Court, police pulled up to a home, guns drawn, finding a female suspect with one foot in and one foot out of her home.²⁰ Whether her fleeing into her home in fact constituted hot pursuit was hotly debated. But if the police are in hot pursuit of a felon, the law is clear they may enter a home without a warrant. Remember, however, that when California Highway Patrol followed *Lange* into his home, the officer only had evidence that *Lange* had violated a misdemeanor, the willful failure to comply with a lawful order by a police officer (and perhaps a noise infraction).

¹⁷ Intrusions are governed by the warrant requirement when they are fundamentally related to policing and crime control. Non-crime-control police acts, such as a welfare check, are considered community caretaking and are not governed by the warrant requirement. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

¹⁸ *Payton v. New York*, 445 U.S. 573 (1980).

¹⁹ *Lange*, 141 S. Ct. at 2016.

²⁰ *U.S. v. Santana*, 427 U.S. 38 (1976).

Given the constant invocations about the sanctity of the home, one might think the legal question would turn on whether a police officer can *ever* enter a home in hot pursuit of a misdemeanor offense. But that would be to sorely misread the vast default permissiveness of our national policing culture. Rather, the legal question put to the Court was whether the pursuit of a fleeing misdemeanor suspect always, i.e., categorically, permits the police to follow a suspect into a home. Put slightly differently, does hot pursuit by itself create an exigent circumstance, waiving the warrant requirement?

The Court unanimously rejected a categorical rule that would allow a categorical hot pursuit exigency in misdemeanor cases.²¹ But the unanimous vote both belied a fairly modest view of the limitations on police and hid rather sharp disagreements between the majority and a separate opinion by Chief Justice John Roberts and Justice Samuel Alito that was a dissent in everything but name.

Even in rejecting the over-expansive proposal allowing warrantless entry in pursuit of misdemeanants, the majority made clear that a case-by-case analysis would often permit home entry when chasing a person who did not yield to police commands.²² Police often must make quick decisions in rapidly changing and charged circumstances. A circumstance that initially appears to be a relatively minor legal issue may reveal unanticipated dangers. Additionally, the fact that a suspect fled may obviously charge the situation further. Hot pursuit of a suspect, whether a misdemeanant or not, may give rise to other classic exigencies, such as fear of harm to officers or bystanders, or the destruction of evidence. In short, there may be many reasons for the police to treat hot pursuit of a misdemeanant as an exigency requiring them to enter a home.

Nonetheless, the Court balked at a categorical permission to ignore the warrant requirement in what are, after all, minor infractions. First, the Court relied on a little-referenced thread in its Fourth Amendment jurisprudence that where there was no immediate danger, the severity of a crime has some effect on the license given police to execute a warrantless search. The supporting case, *Welsh v. Wisconsin*,²³ bore at

²¹ *Lange*, 141 S. Ct. at 2016.

²² *Id.* at 2021–22.

²³ *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

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least a passing resemblance to the facts of *Lange*. In *Welsh*, police officers, responding to a call about a drunk driver, tracked Welsh to his nearby home and entered without a warrant to investigate. In that case, the Supreme Court ruled that the police could not enter the home as an exigency for such a minor offense.²⁴

Welsh differed in important ways from the facts of *Lange*. Most obviously, Welsh was already home in bed, thus removing the critical facet of hot pursuit.²⁵ But the point remained that the lack of urgency was a reason to restrain police from entering a home without a warrant. The same reasoning applied here. If true that a misdemeanor does not always rule out an urgent situation, surely the opposite conclusion, that any flight from any minor offense should permit an unrestricted police chase no matter the underlying issue, borders on the unbelievable. This insight was highlighted in the majority's historical survey of Fourth Amendment law, exploring the starkly different powers police had to enter a home in pursuit of a suspected felon versus those suspected of minor infractions. Ultimately, the majority ruled that police entry into a home in hot pursuit of a misdemeanant must turn on the totality of the circumstances.

The decision produced brief concurring opinions, including from Justice Clarence Thomas. Justice Thomas's double-pointed concurrence first contented that any rule prohibiting police from entering a home must carve out an exception for officers pursuing anyone fleeing even minor violence or breach of the peace. Secondly, Justice Thomas continued his long-held insistence that even if police violated the newly announced rule against misdemeanor home entries, the classic Fourth Amendment remedy of suppressing evidence should not be assumed.²⁶

While the precise legal remedy for a violation would not seem critical in deciding the core of the case, Justice Thomas's shot across the

²⁴ *Id.* at 740–41. To be sure, the Court's view of how the weightiness of an offense affects police authorization under the Fourth Amendment is at least unclear. In contrast to its reasoning in *Welsh* and *Lange*, the Supreme Court rejected the idea that police arrests in the case of minor, "non-arrestable" crimes are Fourth Amendment violations. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). More recently, the suggestion that police power to electronically follow suspects by, for example, monitoring their cars for weeks on end, might turn on the seriousness of the suspected crime was dismissed as unheard of in its Fourth Amendment jurisprudence. *U.S. v. Jones*, 565 U.S. 400 (2012).

²⁵ Compare *Lange*, 141 S. Ct. at 2016, with *Welsh*, 466 U.S. at 740.

²⁶ *Lange*, 141 S. Ct. at 2026–28 (Thomas, J., concurring in part and concurring in the judgment).

bow is much more than a theoretical skirmish about how best to enforce an agreed-upon rule. Legal scholars have long recognized the difficulty of enforcing Fourth Amendment restrictions and further translating those restrictions into policing culture. As anyone who follows the pitched political battle surrounding qualified immunity in cases of police misconduct can attest, civil damages and other alternatives have shown little impact in altering policing behavior. To be frank, police behavior is often hard to alter even with the “sanction” of excluding evidence. Thus, Justice Thomas’s insistence that the exclusionary rule ought not to be applied to curtail police violations of this rule threatens to neuter the rule at inception.

If Justice Thomas’s additions would fatally weaken *Lange*’s holding, Chief Justice Roberts’s separate opinion was all but aghast that the rule would apply except in the rarest of cases. In Chief Justice Roberts’s view, Supreme Court precedent has already established that hot pursuit, without regard to the underlying offense, established the exigency required for warrantless home entry. He further blasted the majority’s ruling as both dangerous for police officers and encouraging suspects to flee rather than obey police orders. In Chief Justice Roberts’s view, the majority opinion does so only to impose the time-consuming formality of securing a warrant. Lastly, he warns that the majority ruling imposes uncertainty onto police officers who often do not (or cannot) know whether the facts in front of them amount to a misdemeanor or felony. The only remaining question was whether *Lange*’s case was one of the rare instances in which warrantless entry ought not to be allowed despite the exigent circumstances.²⁷

A one hundred-yard police “chase” of an obnoxious drunk, booming loud music, resulting in a unanimous opinion, hardly seems worthy of great note. But it is precisely the innocuous contours of the case that lend it such weight. While spectacular cases of violent felonies most readily capture our imagination, the overwhelming majority of police work concerns anything but. Police officers spend their days engaged in ordinary order maintenance: unruly drunken behavior, heated tempers and sudden fights, overly loud music, drug use, and vandalism. In short, the misdemeanor hallmarks of *Lange* are precisely the daily

²⁷ *Id.* at 2028–37 (Roberts, C.J., concurring in the judgment).

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grist of policing work.²⁸ That is not yet to even mention the seemingly endlessly proliferating criminal laws, infractions, and vehicle regulations that mean that police have nearly limitless power to find misdemeanor criminal violations of any suspects they wish to investigate.

Further, it would be willfully blind to ignore the obvious racial implications of the ruling in *Lange*. If *Lange*'s behavior was obviously attention grabbing, it remains true that generations of African-Americans, myself included, have internalized the unchecked power of the police to stop you for the crime of "driving while Black."²⁹ Nor does racist harassment disappear once Black and Hispanic citizens exit their cars. The recent nationwide political fights and lawsuits surrounding institutionalized "stop and frisk" regimes revealed stunning racially disproportionate frisks. There is every reason to believe that a rule categorically permitting police to chase citizens into homes in pursuit of any infraction, no matter how minor, would have the same effects.

In the real world, police choose whom to police at least as often as they are compelled to intervene. A categorical permission to pursue any misdemeanor would give police unchecked power to chase anyone, anywhere, without limitation. Chief Justice Roberts addresses this glaring issue only in passing, noting that earlier precedent prohibits police from purposefully generating an exigent circumstance in order to gain access to homes. But the cases mentioned in the majority opinion tell a very different story. In *Wardlow v. Illinois* a caravan of police, known as a "jump out" squad, descended on a high drug-trafficking area, scattering a number of people, and starting a police chase.³⁰ Similarly, in *California v. Hodari D.* police officers sent four or five panicked youths fleeing.³¹ Nor should one be misled because those famous cases involved people ultimately captured with contraband. It is one of the standing truths about criminal procedure that highly visible cases typically involve the guilty. Those facing jail time are the ones with the incentive to litigate cases to the Supreme Court. As the stop-and-frisk litigation

²⁸ ISSA KOLHER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN THE AGE OF BROKEN WINDOWS POLICING* (2018).

²⁹ Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 957 n.1 (1999); CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014).

³⁰ *Illinois v. Wardlow*, 528 U.S. 119, 121–24 (2000).

³¹ *California v. Hodari D.*, 499 U.S. 621, 622 (1991).

reminds, countless instances of other innocents chased by the police typically disappear without record.

And as the majority's opinion illustrates, it takes little imagination to multiply the examples endlessly. People with mental disabilities may quickly retreat from the police. A teenager, driving without headlights, faced with police lights, continues a couple blocks home to hide in the bathroom. More charged are the words of caution in earlier cases, which remind that ordinary, law-abiding citizens may have sound reason to flee in the face of police activity because they fear trouble or violence. Indeed, as the Massachusetts Supreme Judicial Court recently recognized, Black men in particular, well aware of the racial inequities in policing, may have particular reasons to avoid or run from the police.³²

No thoughtful observer need be naïve. Police may have reason to believe people fleeing from what seem like small crimes may create the urgency that requires police to follow them into their homes. But even when faced with more pressing and dangerous situations in the past, including authorization for no-knock warrants in narcotics busts, the Supreme Court has prohibited categorically authorizing police power.³³

So too, the Court here rightfully rejected an unfettered license for police to chase any teenager playing music too loud through streets, hedges, and into their home, to enforce a law no matter how minor the infraction. Such headlong chases too often turn minor incidents into adrenaline-fueled situations, where the slightest misunderstandings result in fatal police violence. One hardly needs a litany to recall the number of nationally searing police killings that resulted from the enforcement of minor infractions: from Walter Scott's murder over a non-functioning taillight to Eric Garner's killing over the sale of loose cigarettes.³⁴ As the Supreme Court realized decades ago, capturing lawbreakers is an important civic project but not at any cost.³⁵ Even if *Lange* did not frame a situation as serious as police use of deadly force, these cases remind us both that deadly force in police chases is an ever-present danger and that not every minor infraction must be pursued no matter the cost.

³² *Commonwealth v. Jimmy Warren*, 58 N.E.3d 333, 342–43 (Mass. 2016).

³³ *Richards v. Wisconsin*, 520 U.S. 385, 393 n.3 (1997) (refusing to adopt a categorical rule).

³⁴ *George Floyd: Timeline of Black Deaths and Protests*, BBC NEWS (Apr. 22, 2021).

³⁵ *Tennessee v. Garner*, 471 U.S. 1 (1985) (holding that a Tennessee statute authorizing the use of deadly force against an unarmed, non-dangerous fleeing suspect is unconstitutional).

III. *Torres v. Madrid*: Is an Unsuccessful Seizure Still a Seizure?

If unglamorous *Lange* is most likely to affect daily lives across the country, it is *Torres v. Madrid* that reminds of the cases of police violence that stop the nation in its tracks.³⁶ *Torres* presents another painful story of police officers, claims of mortal danger, and a hail of bullets hitting an unsuspecting victim. Like so many highly visible police shootings over the past years, the case is ultimately about a citizen accusing the police of using unjustified deadly violence, seeking accountability and compensation as against police insistence that their actions were justified. Though *Torres* lacks nationwide recognition because it is unaccompanied by the now-too-common searing video, the Court surely could not consider the case without being caught in the shadow of too many well-known deaths at the hands of police and nationwide protests demanding greater scrutiny of police violence.

On a mid-July morning in 2014, four New Mexico State Police officers arrived at an Albuquerque apartment complex to serve an arrest warrant on a female, white-collar suspect also suspected of drug trafficking and murder. According to the plaintiff, Roxanne Torres, and hotly contested by police defendants Janice Madrid and Richard Williamson, the officers spotted Torres speaking to a companion and understood she was not the target of the warrant. Torres's companion left and she, at the time suffering from drug-withdrawal symptoms, got into her car to do the same. As the officers approached her, Torres testified that she did not see their clothing identifying them as police but only noticed their guns. Fearing the worst, she fled a potential carjacking.

Despite not being in the way of her vehicle, the officers reacted by opening fire on Torres, firing thirteen bullets, hitting her twice in the back and paralyzing her left arm. Torres managed to steer the car one-handed until she left the complex, asked a bystander to report an attempted carjacking, and then stole another car and drove over an hour to a hospital in a neighboring town. That hospital then airlifted her back to Albuquerque for medical treatment, where she was arrested the next day.³⁷

After pleading guilty to a slew of crimes pertaining to assaulting the police and stealing the car, Torres turned around and sued the police

³⁶ *Torres v. Madrid*, 141 S. Ct. 989 (2021).

³⁷ *Id.* at 993–94

officers for using excessive force to “seize her,” that is, for shooting her. Thus, in order to recover damages for sustaining gunshot wounds, Torres now had to prove that the shooting was unreasonable under the Fourth Amendment. One might think that question was hard enough, but the facts of the case focused the Supreme Court on an even more nuanced preliminary question. Given that Torres was shot as she fled the police, before Torres could prove the police opening fire was an unreasonable seizing by gunfire, the Court had to answer whether a suspect that escaped the hold of the police after being shot had been “seized” at all! That is, if Torres’s successful (temporary) evasion, with two bullets in her back, meant she had not been seized, then there could be no claim for excessive force in seizing her.³⁸

For readers unfamiliar with Fourth Amendment doctrine, there is something awkward, even off-putting about this Fourth Amendment language and logic. The text of the Fourth Amendment, written long before armed police were a regular civic feature, only secures people against unreasonable searches or seizures.³⁹ Thus, rather than simply discussing whether what the police did was right or necessary, Fourth Amendment doctrine forces us into describing police shootings as seizures and asks if the seizure was “reasonable.” It is bad enough such language forces us to describe death in antiseptic language. It can feel like desecration to speak of Derek Chauvin or Timothy Loehmann as having illegally “seized” George Floyd or Tamir Rice. But in *Torres*, the Fourth Amendment language did not simply plague our language, it generated a perplexing legal issue where none would otherwise exist. Because we must determine if you were “seized,” our natural focus is shifted from the morality of the police opening fire or the broader ethical culture of our police departments to the odd question of whether Fourth Amendment rights are violated if one manages to crawl or drive away.

³⁸ *Id.* at 994.

³⁹ U.S. CONST. amend IV (protecting the “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures”). Actually, the text indicates that the right against unreasonable searches and seizures shall not be violated and no warrant shall issue without probable cause. Please do not ask me about the relationship between the reasonableness requirement and the warrant requirement in the Fourth Amendment. I’m begging you. We will be here all night. It is . . . shall we say, controversial.

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The Supreme Court has trod this ground before. Indeed, the majority opinion asserted that *Torres* was largely decided by earlier precedent in *California v. Hodari D.*⁴⁰ As mentioned earlier, *Hodari D.* involved police officers converging on a suspected drug-trafficking area, sending young men running. As officers gave chase, one suspect, *Hodari D.*, threw a small rock out of his hand, which turned out to be crack cocaine. *Hodari D.* argued the drugs should be suppressed because at the time the chase began, the police lacked probable cause to seize him. If the police assertion of authority were considered an arrest, then *Hodari D.* was unlawfully seized when the police yelled “Stop!” and gave chase. The Supreme Court, in an opinion penned by conservative icon Justice Antonin Scalia, rejected the argument. Rather, the *Hodari D.* Court insisted that seizure did not occur until the police applied physical force to bring a person or thing under their control. A seizure occurred when the police applied physical force or the suspect submitted to police authority. Thus, *Hodari D.* was not seized, the Court concluded, until he was tackled.⁴¹

Applying that logic to the facts of *Torres*, the majority insists, made for an easy ruling. One is seized in a single moment, the Court opined, even if the seizure is not permanent and one escapes. That single moment is when force is applied. Thus, *Torres* was seized the moment she was shot. Distilled into a holding, the Court held that the use of force with the intent to restrain constituted a seizure. Further, the majority stressed the importance of a bright-line rule to govern police officers in the field.⁴²

Though the *Torres* majority confidently asserted the case was neatly resolved by precedent, as lawyers are keenly aware, precedent is only as valuable as the next Supreme Court decides. Thus, the majority insisted on supporting the ruling on independent grounds as well. Specifically, the majority marshalled broad historical examples illustrating that at the founding, an official’s application of force, even if just a touch, which revealed an intent to seize was considered an arrest. The Court recalled historical examples of officials reaching into windows and executing arrests with a touch. In the most quizzical or charming example,

⁴⁰ *California v. Hodari D.*, 499 U.S. 621 (1991).

⁴¹ *Id.* at 622–26

⁴² *Torres*, 141 S. Ct. at 1002–03 (citing *Hodari D.*, 399 U.S. at 626).

depending on one's taste, a "serjeant-at-mace" executed an arrest of an English noblewoman by theatrically touching her with a mace and proclaiming, "we arrest you, madam."⁴³

Such genteel considerations are a far cry from having two bullets rip into your back; a conversation focused on antique methods of arresting noblewomen would border on obscene if it were not necessitated by the originalist preoccupation of much of the current Court. A detour through the debate about the persuasiveness of originalism would derail our review. But what is clear is that originalism, the view that what the writers of the Constitution wrote or referenced in their legal concepts fixes a special meaning on our modern-day constitutional rights, holds sway over much of a (conservative) wing of this Court. By grounding their reading in colonial-era understandings of arrest and highlighting that their decision fit with *Hodari D.*, penned by originalist icon Justice Scalia, the majority offered a sort of jurisprudential olive branch to skeptical originalists.

The dissent was having none of it. A blistering dissent, written by Justice Neil Gorsuch, entirely rejects the majority's originalist interpretation, pointing out that the cases cited were largely from obscure colonial debt-collection practices. Because debt collectors could not enter a home unless they first laid hands on their quarry, there was apparently a strange practice of hiding about windows to touch someone in order to then storm their home. Accusing the majority of wandering through legal fields and history to cobble together a "pastiche" justification, the dissent rejects this peculiar colonial game of debt-collector tag as an analogy to modern police practices.⁴⁴ The dissent argued simply that if a suspect is not brought under police control, it is impossible to find that they have been seized.⁴⁵

To what end would the majority engage in this accused chicanery? For that matter, why engage in this rather peculiar debate about whether Torres was unlawfully seized, by the lights of colonial administrators, in the first place? Surely, police shooting and hitting someone who subsequently escapes is not so common as to plague our jurisprudence?

⁴³ *Id.* at 995–98 (quoting Countess of Rutland's Case, 77 Eng. Rep. 332, 336 (Star Chamber 1605)).

⁴⁴ *Id.* at 1010–11, 14 (Gorsuch, J., dissenting).

⁴⁵ *Id.* at 1015–17.

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The dissent's clearly stated accusation reminds us of what is really at stake and its centrality in contemporary conversations around policing. Remember that determining whether Torres was unreasonably seized was critical in determining whether she may sue the police for using unreasonable force. Ultimately, the Court's stunted language framed a much simpler and more charged political conversation. How difficult will courts make it to even attempt to hold police accountable in cases of excessive or near fatal uses of force?

Keep in mind that the question does not assume the answer. Skepticism aside, I do not pretend to know if the officers were justified in firing on Torres. And as the dissent harshly notes, for Torres to recover in a federal lawsuit under § 1983 or the Fourteenth Amendment, she must still clear the disturbingly high "shocks the conscience" standard.⁴⁶ Additionally, the now infamous qualified immunity doctrine bars recovery for much police misconduct that falls short of that line. But on the dissent's Fourth Amendment view, one would not even have the opportunity to ask the question. While the majority rebuffs the suggestion that they are driven by secondary consequences in defining "seizure,"⁴⁷ for Torres, the conclusion is critical.

So, this peculiar conversation about whether one is seized by bullets that do not kill you is a proxy battle for whether citizens can even call the police to account in such peculiar situations. It invites us to inspect how we collectively respond to police shooting in their myriad incarnations. If this circumstance is unlikely to repeat itself often, our response says much about our default legal instincts in restraining police force and demanding accountability. If our first instinct is to adopt readings of the Fourth Amendment that shelter police not from ultimate liability but from even being inspected, then it is impossible to place faith in the Supreme Court as an avenue of legal progress on police reform. Protests in the street are not primarily aimed at the Supreme Court. But surely the weight of our national police reckoning mattered. In the midst of generational protests focused on the intersection of police force and race, a ruling that ignored police bullets because Torres *did not die* would have been unbearable.

⁴⁶ *Id.* at 1004.

⁴⁷ *Id.* at 1003–04 (majority opinion).

* * *

What then to make of this trio of policing cases? Do they gesture at any sweeping movements in Fourth Amendment law? Even more politically, do they offer any reform agenda at the Supreme Court level for those committed to more just, less deadly, and less racist policing across the country?

I doubt it. But then, I doubt such a thing was possible. Remember we began with the reminder that the Supreme Court is a poor place to look for systemic changes of policing, the quintessential local governing power. Barring a once-in-several-generations makeover, such as the Warren Court, the Supreme Court can do little more than set national minimal standards through its Fourth Amendment interpretation. That is not to say such changes cannot be important. Cutting back on the staggering deference we pay to extraordinarily aggressive policing liberties would have real practical effects. As might paring back on qualified immunity doctrines. Moreover, the symbolic effect of such signals from the Supreme Court would send ripples across the country. But the most promising changes to policing will always be fought within the corners of state constitutions, state capitals, and city halls. Successful change will require the support of reform-minded police chiefs, mayors, city councilors, state legislators, and governors in opposition to leaders who would maintain the status quo.

Still, a progressive optimist might find hope in these three cases. The cases do not speak with a singular voice restraining police power. But even those of us with progressive commitments understand that no collection of nine oracles could sensibly be charged with setting police policies across the nation. What the cases do, however, is reverberate some of the most important notes surrounding policing today.

Cooley empowers a vulnerable minority community to police its boundaries and rejects the idea that privileged non-Indians can behave with impunity while traveling through reservation lands.

Lange curbs police power to chase people through backyards and into their homes to enforce the law no matter how minor the legal infraction. The Court's language in that case seemingly accepts that the circumstances where police chase someone for a misdemeanor without other signs of exigency will be rare. I rather wonder. For many communities where the enforcement of misdemeanors blurs with the

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imposition of social control, limits on enforcement powers will be welcome. And for some within those communities and too many outside of them who view policing as the most-ready mechanism of social control, *Lange* may be a reminder that we cannot police our way out of every minor social problem.

Lastly, shootings as extraordinary as *Torres* may not occur every day, but our nation has seen enough of them to weigh on our collective souls. Particularly, for people of color, the steady rhythm of videos displaying callous murder after murder of unarmed people of color has become an undoing experience. If nothing else, *Torres* holds that such a shooting cannot be simply ignored, that victims may at least begin the laborious process of seeking accountability, and that the argument that there is no Fourth Amendment violation because one survived a volley of uncalled-for police bullets is beyond the constitutional pale.

First Amendment Adrift?

Alan K. Chen*

A substantial body of thoughtful First Amendment scholarship in recent years has argued that the law of free speech is experiencing an important and troubling ideological drift. These scholars suggest that while a robust free speech doctrine has in the past promoted important avenues for participation in our democracy for disempowered groups, the mantle of freedom of speech has more recently been hijacked by conservatives to serve more questionable substantive goals, such as dismantling government regulatory regimes.¹ Furthermore, some argue that modern First Amendment law too often prioritizes speech over other important constitutional values, such as equality and privacy, and fails to sufficiently account for power differentials among speakers.² Finally, commentators worry that the expansion of speech through widely available, inexpensive social media platforms has created new problems that existing precedents are ill-equipped to address.³

Ultimately, these arguments are based on the premise that free-speech values are doing their best work when protecting the expression of the marginalized and oppressed and that these new developments in free-speech doctrine threaten, rather than promote, democracy.⁴ In

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¹ See, e.g., Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953 (2018); Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547 (2018); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016). Though it has perhaps been exacerbated by the expansion of powerful privately-owned speech platforms run by social media companies, the essence of this debate is not new. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L. J. 375 (1990).

² See, e.g., Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in A Democracy*, 44 WAKE FOREST L. REV. 497 (2009); Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341 (2021).

³ See Wu, *supra* note 1.

⁴ See, e.g., Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631 (2021).

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laying out these claims, critics suggest that these developments require a reexamination of our prior commitments to expressive liberty to reflect this new era of speech. This discourse is not limited, moreover, to legal scholarship. Public discussions of free speech have also questioned whether promotion of free speech in contemporary times has come to more effectively serve conservative causes, creating tensions between the old Left and the new Left concerning free speech controversies.⁵

To others, the First Amendment's doctrinal neutrality towards speakers and their views is essential to guard against whatever government happens to be in power at a given moment in history, and that recalibrating our understanding of constitutional speech protection is a dangerous enterprise that could later lead to censorship of the very marginalized people that critics are worried about protecting.⁶ Furthermore, others have contended that current First Amendment rules, perhaps with some modest adjustments, are sufficient to accommodate both free speech and the potential harms that new technology may generate.⁷

The problems identified by the progressive critics of contemporary free speech law are in tension with the First Amendment's theoretical and doctrinal commitment to government neutrality toward speech without regard to the speaker's viewpoint or the content of her expression; the constitutional protection of speech at one end of the political spectrum generally requires equally robust protection for speech at the other end. And that's precisely why free-speech problems are ongoing and thorny, and especially hard to evaluate in the short term. We sometimes see this reflected in unexpected alignments of justices

⁵ Compare Andre Marantz, Opinion, *Free Speech is Killing Us*, N.Y. TIMES (Oct. 4, 2019), with Suzanne Nossel, Opinion, *Those Who Exercise Free Speech Should Also Defend It – Even When It's Offensive*, L.A. TIMES (June 19, 2020).

⁶ See, e.g., Nadine Strossen, *Counterspeech in Response to Changing Notions of Free Speech*, 43 HUM. RTS. 16 (2008).

⁷ See Mark Tushnet, *The Kids Are Alright: The Law of Free Expression and New Information Technologies*, (Harv. Pub. L., Working Paper No. 21-09, 2020).

on the Supreme Court in speech cases,⁸ in groups that are ordinarily at ideological odds joining forces on free speech causes,⁹ and in the recent controversy within the ranks of the ACLU in which some have questioned the organization's commitment to protecting conservative speech and speakers.¹⁰

In its most recent term, the Supreme Court decided two major free speech cases, *Mahanoy Area School District v. B.L. by & through Levy*¹¹ and *Americans for Prosperity Foundation v. Bonta*.¹² In *Mahanoy*, the Court examined whether a school district's sanctions of a student for her profane off-campus expression are prohibited by the Free Speech Clause. *Americans for Prosperity Foundation* ("AFP") asked whether the First Amendment prohibits a state government from forcing a charitable organization to reveal the identities of its largest donors. Though the cases addressed widely different First Amendment rules, I suggest one take-away from these decisions is that they illustrate the complexity and nuance of ideological drift claims. We can observe this in part from the cross-ideological alignment of amici that filed briefs in each case. Of course, amicus briefs only tell us what these groups *perceive* to be in their best interests, though that can still reveal important insights.

While each case makes consequential modifications to existing First Amendment doctrine, they could also have important implications for speakers at both ends of the political spectrum. This makes them difficult to classify as wholly positive or negative developments, despite what immediate reactions might suggest. Whether we "like" the direction of First Amendment doctrine is highly dependent on how confident we are in our predictions about the unanticipated future applications of its

⁸ For example, by a 5–4 vote, the Supreme Court struck down a state flag desecration law on free speech grounds. *Texas v. Johnson*, 491 U.S. 397 (1989). The majority opinion was written by the liberal Justice Brennan, who was joined by Justices Marshall and Blackmun, considered to be more liberal members of the Court, but also by Justices Scalia and Kennedy, who were more conservative. The dissents were written by Justice Rehnquist, considered to be a conservative, along with Justices White, and O'Connor, whom I would classify as moderates, and by Justice Stevens, who was on the Court's left.

⁹ See *infra* notes 162–195 and accompanying text.

¹⁰ Michael Powell, *Once a Bastion of Free Speech, the A.C.L.U. Faces an Identity Crisis*, N.Y. TIMES (June 6, 2021); David Cole, *Defending Speech We Hate*, ACLU (June 6, 2021); Michelle Goldberg, Opinion, *The Left Needs the A.C.L.U. to Keep Defending Awful Speech*, N.Y. TIMES (June 7, 2017); K-Sue Park, Opinion, *The A.C.L.U. Needs to Rethink Free Speech*, N.Y. TIMES (Aug. 17, 2017).

¹¹ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2043 (2021).

¹² *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

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legal standards. Who has the better foresight about the impact of these decisions on progressive speakers, the scholars or the advocates? When it comes to assessing ideological drift claims in the short run, I submit that none of us should feel that confident about our predictions.

After discussing the two cases in some detail, the discussion turns to an examination of their doctrinal and ideological significance.

I. Mahanoy Area School District v. B.L.

A. Facts

Toward the end of her freshman year in high school, Brandi Levy¹³ tried out for both her school's varsity cheerleading squad and a non-school affiliated softball team. To her disappointment, neither endeavor was successful. Instead, the school offered her a position on the junior varsity cheerleading team. Soon after, she expressed her frustration in the same way that most teenagers (and to be sure, many adults) now do—by posting on social media. While at a local convenience store with a friend, Levy used her smartphone to post two images on Snapchat, a popular social media app. The first image was a photo of her and a friend with raised middle fingers and was captioned “Fuck school fuck softball fuck everything.” The second image she posted contained only the caption “Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?” along with an upside-down smiley face emoji.

Levy posted these images using the “story” function of Snapchat, which meant that they would be seen only by people who were “friends” on her account and would disappear after twenty-four hours. Before that time had expired, however, at least one of her Snapchat friends, a member of the cheerleading squad, took photos of the images Levy had posted and shared them with other team members. Another student showed the images to her mother, who was one of the school's cheerleading coaches.

The images continued to spread. Some students said they were “visibly upset,” and a short discussion about the posts occurred

¹³ Although Ms. Levy's lawyers filed her case using her initials, as is frequently done to protect the privacy of minor plaintiffs, she and her father have made numerous media appearances that make it clear that her family has no problem with identifying her by name. The description of the facts is drawn from the Supreme Court's opinion.

during a class that was taught by one of the cheerleading coaches. The cheerleading coaches then moved to suspend Levy from the junior-varsity cheerleading squad for the coming school year on the ground that she used profanity in connection with an extracurricular activity. Although Levy then apologized for her actions, the suspension was confirmed by other school officials. Represented by the ACLU, Levy filed a suit challenging the school's actions, arguing that they violated her First Amendment right to freedom of speech.

B. Doctrinal Background

Since the 1960s, the Supreme Court has set forth a separate First Amendment doctrine for students in public secondary schools.¹⁴ In doing so, it has recognized that the special interests of school administrators and teachers in providing an education for students mean that the standard doctrinal tools of contemporary First Amendment analysis do not translate perfectly into the school setting. The foundational case is *Tinker v. Des Moines Independent Community School District*.¹⁵ *Tinker* involved a free speech challenge by students in high school and middle school who were suspended after they showed up to school wearing black armbands to protest the war in Vietnam. The students participated as part of a larger protest group, but Des Moines school principals heard about the plan and authorized school officials to ask students to remove any armbands worn at school and to suspend any student who refused to comply. The plaintiffs all defied the policy and were suspended until they would agree to return to school without their armbands. The students sued the school district asking for an injunction barring school officials from punishing them and for an award of nominal damages, but their claims were rejected in the lower federal courts.

In a 7–2 decision, the Court reversed and remanded the case, holding that the armband policy violated the students' right to freedom of speech under the First Amendment. The Court began by noting that although the "special characteristics of the school environment" must be considered, neither students nor teachers "shed their constitutional

¹⁴ Conversely, the Court has almost never touched on the issue of free speech for college students. *Mahanoy*, 141 S. Ct. at 2038–44.

¹⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

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rights to freedom of speech or expression at the schoolhouse gate.”¹⁶ The Court observed that the students were engaged in “silent, passive expression of opinion,” and that there was no evidence that their behavior either intruded upon the work of the schools or invaded other students’ rights.¹⁷ In response to the schools’ assertion that their policy was needed to protect the school environment from disturbances, the Court pointed out that there was no evidence in the record that the students’ wearing of armbands caused any disturbance.¹⁸ Indeed, out of apparent concern about extensive deference to the schools’ assertions of such interests, the Court went on to say that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”¹⁹

Since 1969, the Supreme Court has decided a few cases that limit the scope of Tinker’s free-speech protection for students. In *Bethel School District No. 403 v. Fraser*,²⁰ the Court upheld a school’s suspension of a high school student who gave a speech at an official school assembly that included several statements obviously meant to be interpreted as sexual innuendo. In rejecting the student’s free-speech claim, the Court held that the speech was “plainly offensive to both teachers and students,” and that it was appropriate for public schools to “prohibit the use of vulgar and offensive terms in public discourse.”²¹ The Court has also been less protective of student expression that was communicated as part of a curricular program, such as a faculty-supervised school newspaper, and which, consequently, could be erroneously attributed to the school itself.²² In yet another case, the Court upheld a school’s authority to suspend a student who displayed a fourteen-foot banner that contained the words “BONG HiTS 4 JESUS” close to, but outside of the school building, during what was described as a class trip.²³ Despite

¹⁶ *Id.* at 506.

¹⁷ *Id.* at 508–09.

¹⁸ *Id.* at 508.

¹⁹ *Id.*

²⁰ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

²¹ *Id.* at 683.

²² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263, 271 (1988) (rejecting a First Amendment claim by students who worked under the supervision of a faculty member on an officially sanctioned school newspaper after the school refused to publish two articles it deemed to include inappropriate content).

²³ *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

the cryptic message on the student's banner, which some might describe as nonsense,²⁴ the student was suspended for violating a school policy against advocating or promoting illegal drug use.²⁵ Thus, even before this Term, the free speech rights of students at school were strongly circumscribed in ways that would not be permissible if they were adults.

Although these limitations are well established, student-speech cases have continued to arise in the lower courts. An issue that has continued to require elaboration is whether schools may, in light of their power to protect the school environment and to promote teaching and learning, regulate student speech that occurs away from campus. Particularly given the advent and ubiquity of social media, the lines between what occurs at school and what happens off campus are exceedingly blurry. It was also unclear whether the *Tinker* rule or some other First Amendment standard applied to school regulation of off-campus speech. It was against this backdrop that the *Mahanoy* case was decided.

C. Lower Court Rulings

A federal district court ruled for Levy, declaring that the school's suspension violated her First Amendment rights, enjoining officials to reinstate her to the junior varsity squad, and awarding nominal damages and attorneys' fees.²⁶ It also ordered the school to expunge Levy's disciplinary record. On the school's appeal, a panel of the U.S. Court of Appeals for the Third Circuit affirmed.²⁷ In doing so, the court held that where a student is engaged in off-campus speech, her speech rights are essentially no different from those of an adult, and that the school's disciplinary actions were not sufficiently justified to overcome Levy's rights.²⁸ Judge Thomas Ambro concurred in the judgment, claiming that it was inappropriate for the majority to establish a categorical rule that the Supreme Court's school-speech precedents do not apply to any off-campus

²⁴ See MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017); Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423 (2014).

²⁵ *Morse*, 551 U.S. at 401–02.

²⁶ The district court first granted Levy's request for a preliminary injunction. *B.L. v. Mahanoy Area Sch. Dist.*, 289 F. Supp. 3d 607 (M.D. Pa. 2017), and later granted her summary judgment and awarded the other specified relief. *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429 (M.D. Pa. 2019).

²⁷ *B.L. v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3d Cir. 2020).

²⁸ *Id.* at 178.

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speech.²⁹ Rather, Judge Ambro argued, the case could be resolved without deciding whether the *Tinker* standard applied because it was clear to him that Levy's speech had not caused a substantial disruption to the school environment.³⁰ The school district then petitioned the Supreme Court for a writ of certiorari, which the Court granted.

D. The Supreme Court's Decision

The Court affirmed the Third Circuit's decision in an 8–1 decision, though it disagreed with the panel decision's reasoning. Writing for the Court, Justice Stephen Breyer began the discussion by reaffirming the central principles laid out in *Tinker*—public school students enjoy First Amendment rights even when they are at school, but schools may regulate student speech “in light of the special characteristics of the school environment.”³¹ The Court also reaffirmed that under *Tinker*, schools are free to regulate speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”³² It underscored the idea, referenced in earlier cases, that an important factor in deciding student speech cases is whether the schools are acting *in loco parentis*, that is, in the place of the parents, when they enforce a speech regulation.³³

Rejecting the Third Circuit's categorical holding that schools may not regulate speech more restrictively than the government may regulate the speech of other people when the speech occurs off campus, the Court acknowledged the reality that the border between on- and off-campus speech is no longer very clear.

The school's regulatory interests remain significant in some off-campus circumstances. . . . These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security

²⁹ *Id.* at 194 (Ambro, J., concurring in the judgment).

³⁰ *Id.* at 195.

³¹ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2044 (2021) (citation and internal quotation marks omitted).

³² *Id.* at 2045 (citation omitted).

³³ *Id.*

devices, including material maintained within school computers.³⁴ Levy had even proposed her own set of examples where schools might regulate off-campus student speech, including when students are traveling to and from school or engaged in remote learning.³⁵

The Court acknowledged the difficulty of articulating a legal standard for determining when speech could be considered to have occurred off campus given the large number of variables that might be relevant in defining off-campus speech, and particularly in light of computer-based learning. Instead, it listed three factors that must be considered in student speech cases. First, it held that schools will rarely be properly acting *in loco parentis* with regard to off-campus speech.³⁶ Second, because regulations of off-campus speech could effectively result in twenty-four-hour-a-day restrictions on students, the Court said that courts must be “more skeptical” of school regulations that reach off-campus speech, and that schools must meet a “heavy burden” to justify regulations that touch on political or religious speech that occurs off campus.³⁷ Finally, the Court argued that as “nurseries of democracy,” schools themselves have an interest in protecting students’ unpopular expression, especially when students are off campus.³⁸

Next, the Court recognized that Levy’s speech, while “vulgar,” had First Amendment value, as it conveyed “criticism of the rules of a community of which [she] forms a part.”³⁹ Nor, the Court added, did her expression fall within one of the categories of “no value” speech, such as fighting words or obscenity, that would otherwise open the door to government restriction.⁴⁰ And though the Court did not define off-campus speech, it effectively held that Levy’s speech was off-campus because it did not occur at school, took place outside of school hours (she posted on a weekend), was transmitted through a personally-owned phone, and was limited to an audience of her Snapchat friends.⁴¹

The Court then addressed the school’s potential interests in

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 2046.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 2047.

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restricting Levy's speech—teaching “good manners,” preventing disruption in the school, and promoting team morale. With regard to the first interest, the Court concluded that the school's interest was diminished by the fact that the speech took place off campus and on Levy's own time.⁴² It also factored in the notion that the school was not acting *in loco parentis* here, since there was “no reason to believe [Levy's] parents had delegated to school officials their own control of [her] behavior” at a local convenience store.⁴³

Though *Tinker* makes clear that schools may regulate student speech to prevent disruptions of the school environment, the Court in *Mahanoy* concluded that there was no evidence of any “substantial disruption” or threat to others' interests or rights in this case.⁴⁴ Finally, a similar lack of evidence doomed the school's assertion that suspending Levy from the cheerleading squad was meant to address concerns about team morale.⁴⁵ Both of these responses are evocative of *Tinker*'s admonition against courts accepting schools' speech restrictions on the basis of “undifferentiated fear or apprehension of disturbance.”⁴⁶

Justice Samuel Alito wrote a concurring opinion in which Justice Neil Gorsuch joined. Though he agreed with the Court's decision and rationale, he wrote separately to ensure that “our opinion not be misunderstood.”⁴⁷ Justice Alito elaborated on the Court's discussion of how and why schools operate *in loco parentis*, suggesting that by enrolling their children in public schools, parents might be understood to have consented to limits on their children's free speech rights.⁴⁸ While the scope of that consent might have been quite broad when students were more frequently sent to boarding schools, the structure of contemporary education means that parents relinquish much less control over their children.⁴⁹ Justice Alito's opinion argued that the degree of inferred parental consent must be determined in relation to “the measure of authority that schools must be able to exercise in order to carry out

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 2047–48.

⁴⁵ *Id.* at 2048.

⁴⁶ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 508, 508 (1969).

⁴⁷ *Mahanoy*, 141 S. Ct. at 2049 (Alito, J., concurring).

⁴⁸ *Id.* at 2051.

⁴⁹ *Id.* at 2051–52.

their state-mandated educational mission.”⁵⁰ When a school attempts to regulate off-campus speech, Justice Alito explained, parents cannot be regarded as having consented to as much school control, since they have “the primary authority and duty to raise, educate, and form the character of their children.”⁵¹

As discussed below, Justice Alito’s opinion can be read as being a bit more skeptical of school speech regulations than Justice Breyer’s opinion for the Court. While Justice Alito acknowledged that there are several circumstances in which off-campus speech falls within the scope of schools’ *in loco parentis* authority, he cautioned that much of schools’ authority did not reach “student speech that is not expressly and specifically directed at the school, school administrators, teachers, or fellow students and that addresses matters of public concern, including sensitive subjects like politics, religion, and social relations.”⁵² At most, he wrote, a school’s attempt to restrict such speech would have to be based on the argument that offensive off-campus student speech “may cause controversy and recriminations among students and may thus disrupt instruction and good order on school premises.”⁵³ But a regulation based on this claim would violate the principle that “speech may not be suppressed simply because it expresses ideas that are ‘offensive or disagreeable.’”⁵⁴ In cases of students’ off-campus speech about matters of public concern, he continued, their speech rights against the government are the same as they would be for state regulation of any other person.⁵⁵

Justice Alito then addressed speech that fell in between on-campus speech and off-campus speech on matters of public concern, acknowledging that these are the types of questions that have generated the most litigation and conceding that he was not trying to set out a particular test. First, there are cases involving student threats to school administrators, teachers, staff members, and other students. Although threats are prohibited by generally applicable criminal law, he noted that some schools have tried to assert authority even more broadly

⁵⁰ *Id.* at 2052.

⁵¹ *Id.* at 2053.

⁵² *Id.* at 2055.

⁵³ *Id.*

⁵⁴ *Id.* (citations omitted).

⁵⁵ *Id.* at 2056.

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than those laws would permit.⁵⁶ Second, he discussed speech that criticizes or derides school administrators, teachers, or staff. While schools will argue that parents implicitly consent to allow schools to “[d]emand that the child exhibit the respect that is required for orderly and effective instruction,” Justice Alito suggested that did not mean parents waived their children’s rights to “complain in an appropriate manner about wrongdoing, dereliction, or even plain incompetence.”⁵⁷ Lastly, Justice Alito addressed the difficult category involving “criticism or hurtful remarks about other students.”⁵⁸ While acknowledging the seriousness of the problems of bullying and harassment, he warned that “these concepts are not easy to define with the precision required for a regulation of speech.”⁵⁹

The Court’s sole dissenter was Justice Clarence Thomas, who would have upheld Levy’s suspension. Justice Thomas’s dissent is based on an argument he has made in previous school-speech cases, which is that ordinary citizens at the time of the Fourteenth Amendment’s ratification would have understood that public schools had broad discretion to discipline students.⁶⁰ Looking to state-court cases (though not free speech cases) decided in the late 1800s, he noted that they generally followed the rule that “[a] school can regulate speech when it occurs off campus, so long as it has a proximate tendency to harm the school, its faculty or students, or its programs.”⁶¹ Justice Thomas criticized the majority opinion for not providing a “good constitutional reason to depart from this historical rule.”⁶² Applying the standard from these state-law cases, he concluded that the school could discipline Levy for her speech in this case because it had the “direct and immediate tendency” to undermine the cheerleading coach’s authority.⁶³

⁵⁶ *Id.* at 2056–57.

⁵⁷ *Id.* at 2057.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2059 (Thomas, J., dissenting); *see also* *Morse v. Frederick*, 551 U.S. 393, 419 (2007) (Thomas, J., concurring). The relevance of the Fourteenth Amendment’s ratification date as the measuring point for the original public meaning does not, of course, consider the fact that the First Amendment only applies to the States because the Court has held that its rights have been incorporated through the Due Process Clause, which did not occur until the early twentieth century. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁶¹ *Mahanoy*, 141 S. Ct. at 2061.

⁶² *Id.*

⁶³ *Id.*

The Court's student speech cases, Justice Thomas argued, are "untethered from any textual or historical foundation."⁶⁴ He claimed that in its entire line of school-speech cases, the Court had ignored that at the time the Fourteenth Amendment was ratified, public schools were not viewed as state actors, but as "delegated substitutes of parents."⁶⁵ Although he conceded that the state and scope of public education was very different at that time, he complained that the Court had never attempted to justify its departure from that understanding.

Justice Thomas made three other points to support his dissent. First, Levy was voluntarily engaged in an extracurricular activity, and there are good historical reasons for schools to have greater regulatory control over off-campus speech related to such activities.⁶⁶ Second, the Court did not consider the fact that speech on social media might necessarily require more regulation than other types of speech, because it can reach from outside of campus to the school and have a "greater proximate tendency" to intrude on the school's environment.⁶⁷ Third, the majority did not fully analyze whether Levy's speech was truly off campus, but because speech is now frequently communicated from off campus to the school, it is difficult to define "off campus" with regard to the speaker's location (though he did not disagree that in this case, the student's speech should be treated as being off campus).⁶⁸ The Court's failure to fully analyze these arguments, Justice Thomas suggested, meant that its decision would not provide sufficient guidance for either courts or schools.⁶⁹

We will return to a discussion of the implications of the decision in *Mahanoy* after a description of the Court's other major free speech case this Term, which addresses a very different First Amendment issue.

II. *Americans for Prosperity Foundation v. Bonta*

A. Facts

The Court's second major free speech decision this Term addresses a long-standing question about the role of anonymous speech and association under the First Amendment. On the one hand, anonymous speech has been a traditional component of expression since the

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 2062.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2063.

⁶⁹ *Id.*

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Federalist Papers were published under the pseudonym “Publius,” suggesting fairly strong evidence that the Framers thought such anonymity to be valuable.⁷⁰ And many of the Court’s prior decisions in this realm have provided great protection from forced disclosure of the identity of speakers and the membership of advocacy organizations to protect them from potential retaliation and harassment. On the other hand, anonymity in contemporary times is sometimes thought to be one of the negative externalities of inexpensive and widespread speech on the internet, particularly on social media platforms.⁷¹ Furthermore, disclosure is an important component of many campaign finance regulations, and transparency in political donations has been thought to be less protected than spending itself.⁷²

*Americans for Prosperity v. Bonta*⁷³ reflects these tensions. The case involved conservative private charitable organizations⁷⁴ that raise money in California who challenged the state attorney general’s enforcement of a state law requiring charitable organizations to register with the attorney general and to renew their registrations annually. Pursuant to statutory authorization to make rules and regulations concerning the registration and renewal process, the attorney general issued a regulation requiring charities wishing to renew their registration to submit copies of their federal 990 tax forms to the state. Those forms are required under federal law for the charities to maintain their tax-exempt status. Schedule B of the 990 form requires charities to disclose the names and addresses of donors who contributed more than \$5,000 in a single tax year. Americans for Prosperity (AFP) and other organizations had previously refused to comply with the regulation regarding disclosure of

⁷⁰ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 360–61 (1995) (Thomas, J., concurring in the judgment).

⁷¹ *See, e.g., Alexander Tsesis, Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 658 (2017) (“[T]he internet emboldens terrorists by providing them with the tools to post anonymously and inexpensively.”).

⁷² *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976).

⁷³ *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

⁷⁴ The Court consolidated cases brought by the Americans for Prosperity Foundation (AFP), a nonprofit organization, and by the Thomas More Law Center (Law Center), a conservative religious advocacy group. The AFP was founded by Charles and David Koch, and it has operated to promote conservative causes through donations from extremely wealthy donors. Alexander Hertel-Fernandez et al., *How the Koch Brothers Built the Most Powerful Rightwing Group You’ve Never Heard Of*, GUARDIAN (Sept. 26, 2018). In this article, I will refer to the plaintiffs collectively as AFP, except where their arguments and claims differ.

Schedule B without consequence, but in 2010 the state began to enforce that requirement. The AFP received deficiency letters from the state for a couple of years, and when the attorney general threatened to suspend their registrations and impose fines, they sued to challenge the attorney general's actions as a violation of their First Amendment rights as well as those of their donors. They claimed that the disclosures were not necessary to enforce the state's charitable organization laws and that they previously had been subjected to harassment.

B. Doctrinal Background

Since the 1950s, the Supreme Court has decided a number of cases establishing a First Amendment right to anonymous speech and association. Generally, the challenged laws and regulations in these cases involved compelled disclosure of identities as a condition of either being subject to a state regulation (e.g., regulating out-of-state corporations) or participation in some aspect of the political process (e.g., making campaign contributions). Though there are numerous cases in this area of law, discussion of those most relevant to the Court's decision in *AFP* follows.

In *NAACP v. Alabama*,⁷⁵ the Court unanimously overturned a civil contempt judgment against the national civil rights organization after it refused to comply with the state attorney general's order that it turn over lists including the names and addresses of its Alabama members. The attorney general maintained that this disclosure was required under the state's laws regulating foreign corporations. Treating the case as asserting the rights of the NAACP's members, the Court held that the state's compulsion of membership lists interfered with those members' rights of association. The Court wrote, "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved."⁷⁶ Importantly, the Court recognized that the NAACP had submitted uncontroverted evidence showing that "on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations

⁷⁵ *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁷⁶ *Id.* at 462.

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of public hostility.”⁷⁷ After acknowledging the right to associate as one of the liberties protected by the Due Process Clause, the Court held that Alabama did not provide a sufficiently compelling interest to justify this intrusion and invalidated the contempt order.⁷⁸

Two years later, in *Shelton v. Tucker*,⁷⁹ the Court invalidated an Arkansas law requiring public school teachers to provide the names and addresses of all organizations to which they had belonged or contributed in the preceding five years. The state asserted that the law was justified as part of its power to investigate the competence and fitness of teachers. But while the Court acknowledged that the state’s inquiry was relevant to its interest in assessing teachers’ fitness, it also recognized that the disclosure requirement would impair teachers’ rights to freedom of association, which it linked to free speech rights.⁸⁰ In light of those rights, the Court said that

even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be *more narrowly achieved*. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.⁸¹

Applying that standard, the Court concluded that the statute’s unlimited sweep was far too broad to serve the state’s asserted interests.⁸²

Disclosure requirements have become fairly routine in the context of the regulation of campaign financing. Although the Court has taken an aggressive stance to invalidate limits on campaign expenditures,⁸³ it has at least thus far been slightly more tolerant of laws requiring the reporting of the names of campaign donors.⁸⁴ The Court first comprehensively examined the constitutionality of a range of campaign finance regulations nearly five decades ago in *Buckley v. Valeo*. The

⁷⁷ *Id.*

⁷⁸ *Id.* at 463.

⁷⁹ *Shelton v. Tucker*, 364 U.S. 479 (1960). The vote in this case was 5–4.

⁸⁰ *Id.* at 485–86.

⁸¹ *Id.* at 488 (emphasis added).

⁸² *Id.* at 490.

⁸³ See generally *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁸⁴ *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976).

federal law challenged in *Buckley* required both political committees and candidates to disclose to the federal government the names and addresses of all persons who contributed more than a minimal amount for the purpose of influencing the nomination or election of any person to federal office.⁸⁵

Relying on *NAACP*, *Shelton*, and other prior cases, the Court recognized that such disclosures may infringe on the “privacy of association and belief” guaranteed under the First Amendment and that laws compelling disclosures therefore must be evaluated under “exacting scrutiny.”⁸⁶ This standard requires that such laws may not be upheld based only on a showing of a “legitimate governmental interest,” and that there be a “relevant correlation” or “substantial relation” between that interest and the information required to be disclosed.⁸⁷ Notwithstanding this heightened-scrutiny requirement, the Court found that three of the government’s interests were “sufficiently important” to outweigh the associational rights raised in the case. Those interests were: providing the electorate with information that would help voters evaluate candidates, including where their campaign money comes from; the deterrence of actual corruption and the avoidance of the appearance of corruption by exposing larger contributions to public scrutiny; and the interest in gathering data necessary to detect violations of campaign contribution limits.⁸⁸ Even though it acknowledged that disclosure requirements might deter some individuals from making contributions and could expose some contributors to harassment or retaliation, the Court held that on balance, the government’s interests outweighed those concerns and the requirements seemed to be the “least restrictive means” of advancing those interests.⁸⁹

The Court also upheld disclosure requirements in a 2010 case involving citizen referendum petitions. In *Doe v. Reed*,⁹⁰ the Court upheld the State of Washington’s disclosure under the state’s open records act of petitions to place a citizen referendum on the ballot. The petitions

⁸⁵ *Id.* at 62–63.

⁸⁶ *Id.* at 64. Though the Court cited to *NAACP v. Alabama* (among other cases) for this proposition, the phrase “exacting scrutiny” does not appear in that case. *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 66–68.

⁸⁹ *Id.* at 68.

⁹⁰ *Doe v. Reed*, 561 U.S. 186 (2010).

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in question, which included the signatories' names and addresses, requested that the state place on its election ballot a referendum to have voters reject a state law that had expanded the rights of domestic partners, including same-sex partners, who were registered as such under a state law. After receiving several open records requests from those opposed to the petition, the secretary of state concluded that the petitions fell within the state's open records law. After two organizations announced their intent to post the names of petition signers online, the petition's sponsor and some of its signers sued for an injunction to stop the secretary from releasing the petitions. Their complaint asserted first that the open records act was unconstitutional as applied to all referendum petitions, and second that it was unconstitutional as applied to their petition in particular because there was a "reasonable probability" that disclosure would lead to "threats, harassment, and reprisals" to those who signed the petition.⁹¹

Viewing the only issue on appeal as the challenge to the application of the open records act to *all* petitions, the Supreme Court rejected the petition supporters' First Amendment claim.⁹² It relied on the cases previously discussed to invoke the "exacting scrutiny" standard, which it articulated as requiring a substantial relation between the disclosure requirement and a "sufficiently important" government interest.⁹³ Application of this standard, it stressed, also required that the strength of the government's interest "reflect the seriousness of the actual burden on First Amendment rights."⁹⁴ The majority held that the state's disclosure requirement was designed to advance an "undoubtedly important" interest in preserving the integrity of the electoral process.⁹⁵ In this context, that interest was not limited to detecting fraud, but also to ensuring that the petitions had valid signatures. The promotion of transparency and accountability in the electoral process, the Court continued, was a component of preserving such integrity. It also rejected the petition supporters' claim that the disclosure requirement

⁹¹ *Id.* at 193.

⁹² Interestingly, the majority treated the issue not as a freedom-of-association claim, but as an issue of compelled speech, concluding that signing a petition is an expressive act. *Id.* at 195.

⁹³ *Id.* at 196.

⁹⁴ *Id.* (citation omitted).

⁹⁵ *Id.* at 197.

was not “substantially related” to promoting those interests, because other measures were in place to validate the signatures. It found that the job of verification is so large that the state could not possibly detect all problems, and that public disclosure served the purpose of supplementing the law by compelling public disclosures, which permit others outside of government to also check signature validity.

Finally, the Court examined whether the strength of the government’s interest reflected the seriousness of the actual burden on the petition supporters’ First Amendment rights. Supporters argued that those who sought the identities of petition signers were interested not in verifying the validity of signatures, but in publicly identifying those signers and subjecting them to harassment and intimidation.⁹⁶ Although the Court conceded that those opposing disclosure in this kind of case could prevail if there was “a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either Government officials or private parties,” it pointed out that the only evidence of potential harassment pertained to their own petition, whereas the only issue before the Court was whether the disclosure rule was invalid as to *all* petitions.⁹⁷ The Court observed that not all petitions attract the type of partisan attention that was apparently at issue in this case, but deal with matters such as revenue and budget matters, which are far less likely to result in burdens on their supporters’ First Amendment rights.⁹⁸ However, the Court left open the possibility of an as-applied challenge to the state’s open records law.⁹⁹

C. Lower Court Rulings

Returning to AFP’s challenge to California’s requirement that charitable organizations disclose the names of their large donors, that litigation proceeded in the lower courts over several years, including extensive preliminary injunction proceedings. When the case went to bench trial, the district court entered judgment for AFP, permanently enjoining the attorney general’s enforcement of the disclosure law. Applying the “exacting scrutiny” standard, the court concluded that

⁹⁶ *Id.* at 199–200.

⁹⁷ *Id.* at 200 (citations and internal quotation marks omitted).

⁹⁸ *Id.* at 200–01.

⁹⁹ *Id.* at 201–02.

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the law was not narrowly tailored to advance the state's interest in investigating the misconduct of charities.¹⁰⁰ In addition to finding that the disclosures were frequently unnecessary for the state to conduct such investigations, the court made factual findings that the plaintiffs in both cases had suffered threats and harassment, and that its donors were likely to be similarly harassed if their identities were disclosed.¹⁰¹ Finally, the district court found that although the Schedule B disclosures were not legally supposed to be available to the public, there was evidence that the state had been ineffective in maintaining the confidentiality of the information it collected.¹⁰²

The U.S. Court of Appeals for the Ninth Circuit vacated the injunctions and reversed and remanded the cases, directing the district court to enter judgment for the attorney general. It found that the district court erred in applying a "narrow tailoring" requirement and that under the exacting scrutiny standard, the disclosure law served the state's interest in carrying out efficient and effective investigations, and that the plaintiffs' rights would not be burdened because, among other things, the attorney general had taken steps to fix the leaking of confidential information to the public.¹⁰³

D. The Supreme Court's Decision

In a 6–3 ruling, the Supreme Court reversed the Ninth Circuit, concluding that the district court's entry of a permanent injunction against the attorney general was proper. Although the majority agreed that the law should be enjoined, there was some disagreement on the proper standard of review. The Court held that there was undoubtedly a First Amendment right of association that was important in facilitating the express rights of speech, assembly, and petition.¹⁰⁴ Writing only for himself and Justices Brett Kavanaugh and Amy Coney Barrett, Chief Justice John Roberts reviewed the Court's disclosure cases and wrote that the proper standard of review in such cases was the "exacting scrutiny" standard articulated in *Buckley*.¹⁰⁵ That standard demanded that a

¹⁰⁰ *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2371, 2381 (2021).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2382.

¹⁰⁵ *Id.* at 2382–83.

disclosure law that affected associational rights could be upheld only if there is “a substantial relation between the disclosure requirement and a sufficiently important government interest.”¹⁰⁶ In doing so, the opinion rejected the argument of the Thomas Moore Law Center, whose case was consolidated with *AFP*, that the appropriate standard should be strict scrutiny, which would require that the state show that the law served a compelling government interest and that it was the least restrictive means of advancing that interest.¹⁰⁷ The Law Center argued that only this higher standard of scrutiny would protect charities’ associational rights.¹⁰⁸ It claimed that to the extent that the Court had applied exacting scrutiny, rather than strict scrutiny, to previously examined disclosure regimes, it had done so in the context of regulations concerning the integrity of elections, where the government’s interests were stronger and therefore called for “less searching review.”¹⁰⁹

Chief Justice Roberts rejected this argument, noting that while the exacting-scrutiny standard had first been expressly articulated in a campaign-finance case, the standard was really derived from *NAACP v. Alabama* and other non-election cases.¹¹⁰ He contended that the same exacting scrutiny standard should apply to all types of associational claims, whether they involved association for political, economic, religious, or cultural matters.¹¹¹

Both plaintiffs had argued, however, that a least restrictive means test was required even as part of the exacting scrutiny test, while the attorney general contended that the law need only bear a “substantial relation” to the government’s interest. Choosing a middle ground, Chief Justice Roberts wrote, “While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be *narrowly tailored* to the government’s asserted interest.”¹¹² In a somewhat confusing exposition of the difference, his opinion went on to say that “[a] substantial relation is necessary, but not sufficient” to uphold a disclosure law that affects First Amendment

¹⁰⁶ *Id.* at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* (emphasis added).

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interests.¹¹³ Rather, “[w]here exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.”¹¹⁴ Ultimately, then, the exacting scrutiny standard apparently requires *both* that there be “a substantial relation between the donor disclosure requirement and a sufficiently important governmental interest,” “and that the disclosure requirement be narrowly tailored to the interest it promotes.”¹¹⁵ Applying that standard, while the Court concluded that the state had an “important interest in preventing wrongdoing by charitable organizations,” it said there was a “dramatic mismatch” between that interest and the broad disclosure regime it had adopted.¹¹⁶ The record showed that about 60,000 charitable organizations a year submitted requests to renew their registrations, and were therefore subject to the disclosure requirement. Because the Court found that the record did not reflect that all of this information was integral to the state’s fraud-detection investigations, the disclosure regime was too broad in relation to the state’s interests.¹¹⁷

Finally, the Court addressed whether the case was appropriate for a facial challenge to the state’s disclosure law. It noted that in First Amendment cases, a law may be unconstitutionally overbroad if a “substantial number” of its applications are unconstitutional as compared to its legitimate applications.¹¹⁸ Because it found that the disclosure requirement applied to all charities renewing their registrations every year without regard to whether there was a concern about fraud, the Court deemed the disclosure law to be sweeping in its breadth in a way that might chill association (that is, deter people from donating out of concern for their privacy).¹¹⁹ Rejecting the dissent’s argument that the plaintiffs could not succeed in their facial challenge unless they carried the evidentiary burden that a substantial number of organizations would be subject to harassment because of the disclosure of their donors’ identities, the Court said that was not a requirement where the law was not already narrowly tailored to serve an important

¹¹³ *Id.* at 2384.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 2385.

¹¹⁶ *Id.* at 2385–86.

¹¹⁷ *Id.* at 2386.

¹¹⁸ *Id.* at 2387 (citation omitted).

¹¹⁹ *Id.*

governmental interest.¹²⁰

Justice Thomas wrote a separate opinion concurring in most parts of the Court's opinion and concurring in the judgment. His opinion highlights three disagreements with the Court's opinion. First, he argued that strict scrutiny, rather than exacting scrutiny, should apply to laws that infringe on the freedom of association, which he argued includes the right to associate anonymously.¹²¹ Second, he disagreed with the Court's overbreadth analysis. He has previously called into question the Court's overbreadth doctrine and has disputed the Court's power to invalidate an entire statute where there are even some legitimate applications of the law.¹²² In a related point, he also argued that even where the Court believed that all future applications of a law will likely be unconstitutional, it still lacks the authority to "resolve the legal rights of litigants not before them."¹²³

Justice Alito, joined by Justice Gorsuch, also wrote a separate opinion concurring in most of the Court's opinion and concurring in the judgment. His primary point was that he did not interpret the Court's prior cases to have definitively decided that exacting scrutiny, rather than strict scrutiny, applied to all compelled-disclosure laws.¹²⁴ As he correctly pointed out, the Court's earlier compelled-identity-disclosure cases were decided before the modern strict scrutiny doctrine had emerged.¹²⁵ Because he concluded that the California disclosure law failed exacting scrutiny, and therefore also would fail strict scrutiny, he did not believe it necessary for the Court to address the appropriate standard of review in this case.¹²⁶

Justice Sonia Sotomayor, joined by Justices Breyer and Elena Kagan, dissented. Her primary and overarching point was that the Court had misapplied the compelled-identity-disclosure cases here because it did so without regard to any real concern about harassment or retaliation resulting from such disclosures. Justice Sotomayor first pointed out that not every disclosure regime will have the same impact on the privacy of those whose identities are disclosed. Rather, the Court's prior decisions

¹²⁰ *Id.* at 2388–89.

¹²¹ *Id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment).

¹²² *Id.*

¹²³ *Id.* at 2390–91.

¹²⁴ *Id.* at 2391 (Alito, J., concurring in part and concurring in the judgment).

¹²⁵ *Id.*

¹²⁶ *Id.* at 2392.

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required plaintiffs to demonstrate that a disclosure law “is *likely* to expose their supporters to concrete repercussions in order to establish an actual burden.”¹²⁷ Only if that level of impact is demonstrated, she wrote, should the Court apply any form of heightened scrutiny.¹²⁸ Such harassment from disclosure is more likely, she pointed out, where a group has “dissident beliefs.”¹²⁹ But the Court’s opinion, she contended, meant that any disclosure law would be subject to heightened scrutiny whenever a person subject to that law had “a subjective preference for privacy.”¹³⁰

She also interpreted the Court’s exacting scrutiny standard to require flexibility such that the more serious the burden on First Amendment rights, the stronger the government’s interest and the tighter the fit between the means and ends that must be shown to justify that burden.¹³¹ Where there is only a limited burden, she argued that the law only demands that the government show that the “means achieve its ends,”¹³² essentially a rational basis standard.

Justice Sotomayor suggested that California would easily meet this lenient standard in defending its disclosure regime. First, she argued that the state clearly had significant interests in detecting charitable fraud and that the Court had understated the importance of the disclosure requirements.¹³³ She also concluded that the disclosure requirements were “properly tailored” to advance those interests.¹³⁴

To illustrate the point, she compared the Court’s decisions in *Shelton v. Tucker* and *Doe v. Reed*. In *Shelton*, the case where the state required all public school teachers to disclose all organizations to which they recently belonged or contributed, the record showed a “significant risk” that the information would be publicly disclosed and that there would be pressure on school boards to fire teachers who belonged to unpopular organizations.¹³⁵ Concerns about repercussions from the disclosures were heightened, she argued, because of the asymmetry in

¹²⁷ *Id.* at 2394 (Sotomayor, J., dissenting) (emphasis added).

¹²⁸ *Id.*

¹²⁹ *Id.* at 2393.

¹³⁰ *Id.* at 2395.

¹³¹ *Id.* at 2396.

¹³² *Id.* at 2400 (citing *Doe v. Reed*, 561 U.S. 186, 201 (2010)).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 2397.

power between teachers and those in charge of hiring them.¹³⁶ The Court therefore required that the law must “narrowly achieve” the state’s interests.¹³⁷ In contrast, in *Doe*, the Court found “scant evidence” that the disclosure of petition signers’ names would lead to any type of negative consequences.¹³⁸ Justice Sotomayor argued that because of the limited burdens imposed by the State of Washington in *Doe*, the Court “required a correspondingly modest level of tailoring” and rejected the facial challenge to the law’s disclosure requirement.¹³⁹

To underscore her argument that not all people subject to disclosure requirements are likely to have their associational rights chilled, Justice Sotomayor contended that “[t]he average donor is probably at most agnostic about having their information confidentially reported to California’s attorney general.”¹⁴⁰ She also pointed to research that suggests that most donors actually prefer to publicize their charitable contributions.¹⁴¹

Finally, Justice Sotomayor’s dissent disputed the Court’s conclusion that the California disclosure law was facially unconstitutional, arguing instead that the impact on the association rights of most organizations was purely speculative.¹⁴² Because there was some evidence that the challengers in this case had been subject to harassment, she said she would have been “sympathetic” to a ruling that invalidated the law as applied to them (though she still would have disagreed).¹⁴³

III. Doctrinal Significance and Ideological Implications

A. Refinement of First Amendment Doctrine

Both of the Court’s major free speech decisions in the October 2020 Term altered First Amendment doctrine in important ways, though *AFP* will probably have a larger impact for reasons discussed below. After discussing the doctrinal significance of each case, I return to the question of ideological drift in First Amendment law and discuss whether either

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 2398.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2403.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 2405.

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of these decisions can be confidently classified as more beneficial to progressive or conservative speakers or contribute to a trend toward either.

In purely doctrinal terms, the Court's decision in *Mahanoy* about student speech is fairly narrow. Given that Justice Breyer wrote the opinion, it is unsurprising that the Court stayed away from bright line rules, instead favoring a nuanced, balancing approach.¹⁴⁴ There were already a large number of contexts in which schools could regulate student speech when their expression was connected to school activities but not physically on campus, and that has been broadened by the expansion of digital communication technologies. For example, the advent of remote learning during the COVID-19 pandemic meant that students were routinely at home while speaking "at" school. It is therefore hard to fault the Court for failing to come up with a more rigid categorical rule.¹⁴⁵ Even if it had affirmed the Third Circuit and held that all off-campus student speech is protected as if the speakers were any other person, there would continue to be disputes about when the speech was truly off-campus. This means that there is likely to continue to be lots of student speech litigation in the lower courts, but at least the Court has made it fairly clear that it is skeptical about school regulation of off-campus speech and that schools will bear a "heavy burden" to justify regulation of student speech that is political or religious.¹⁴⁶ And despite their attempts to distinguish their approaches from the majority's, neither Justice Alito's concurrence nor Justice Thomas's dissent articulated a bright line rule defining off campus speech, either. While lacking certainty, the Court's opinion continues to support *Tinker's* distinction between speech that actually disrupts the school environment and political expression that only mildly upsets others.

The Court's decision in *AFP* is more doctrinally significant in that it modifies the standard for evaluating the constitutionality of compelled-identity-disclosure laws. The battle here was over the meaning of the

¹⁴⁴ See generally Mark Tushnet, *Justice Breyer and the Partial De-Doctrinalization of Free Speech Law*, 128 HARV. L. REV. 508 (2014).

¹⁴⁵ Though Catherine Ross has argued that the decision left too many questions unanswered, this may have been precisely what the Court wanted, preferring the doctrine to be sorted out in the lower courts based on the many different student speech scenarios that might arise. See Catherine J. Ross, *One "Vulgar" Cheerleader Vindicated – But Other Students May Still Face Discipline for Off-Campus Speech*, FIRST AMENDMENT WATCH (July 6, 2021).

¹⁴⁶ *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

so-called “exacting scrutiny” standard, which is different from the traditional tiers of strict and intermediate scrutiny the Court uses in other First Amendment cases where the government is regulating, rather than compelling, speech. As articulated by Chief Justice Roberts, the test has two components. First, the state must show that there is “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.”¹⁴⁷ Although the “substantial relation” language in other cases *already* refers to the fit between the means chosen by the state and serving its interests, the Court added that such laws also must be “narrowly tailored to the government’s asserted interest,” though they need “not [be] the least restrictive means of achieving that end.”¹⁴⁸ To those familiar with tiers of constitutional scrutiny, requiring that the law must be narrowly tailored appears superfluous to the requirement that it be substantially related to the state’s interests. What could the Court have meant?

The roots of the confusion over language may be found in other First Amendment contexts, where the Court has invoked “narrow tailoring” language under both strict and intermediate scrutiny. In cases involving government restrictions on speech that are either viewpoint-based or content-based, the Court demands that the law be “narrowly tailored” to serve a “compelling government interest.”¹⁴⁹ In that context, narrowly tailored also means that there must be no less discriminatory or restrictive alternatives to serving the state’s goals.¹⁵⁰ That is clearly not what *AFP* requires.

But under the Court’s intermediate scrutiny cases—for example, when it assesses content-neutral restrictions on speech in a public forum—it also requires that the law be “narrowly tailored,” though here it must be tailored to serve a “significant government interest,” and the government must leave open “ample, alternative channels of communication.”¹⁵¹ In *Ward v. Rock Against Racism*, the Court clarified that narrow tailoring under intermediate scrutiny does not mean that the challenged law has to be the least restrictive means of carrying

¹⁴⁷ *AFP*, 141 S. Ct. at 2383.

¹⁴⁸ *Id.* at 2383–84.

¹⁴⁹ *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

¹⁵⁰ *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000).

¹⁵¹ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

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out the government's interest.¹⁵² However, the law's means must be "not substantially broader than necessary to achieve the government's interest."¹⁵³ What that has come to mean in subsequent applications of the intermediate-scrutiny doctrine is that while the government does not have to show that its chosen means of regulation is the least restrictive alternative, narrow tailoring nonetheless requires that the government show that it at least *considered* other less restrictive measures. As the Court held in *McCullen v. Coakley*, also written by Chief Justice Roberts, in intermediate scrutiny cases "the government *must demonstrate that alternative measures* that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier."¹⁵⁴ In *AFP*, the Court appears to be invoking this understanding of the narrow tailoring standard because it did not require that the law be the least restrictive alternative, but faulted the state for not "even consider[ing] alternatives to the current disclosure requirement."¹⁵⁵ As the Court concluded, the state "*must instead demonstrate its need for universal production in light of any less intrusive alternatives.*"¹⁵⁶

For supporters of robust disclosure laws, the Court's decision is surely frustrating, but it's important to note that only three justices voted that the exacting-scrutiny standard applies to all government-disclosure laws. Justice Thomas dissented, arguing that the Court should apply strict scrutiny,¹⁵⁷ and Justices Alito and Gorsuch would not have reached the issue in this case.¹⁵⁸ Needless to say, a strict-scrutiny requirement would lead to the invalidation of many, if not most, disclosure laws. The third position, embraced by the three dissenters, argued that exacting scrutiny should apply only where the law "is likely to expose their supporters to concrete repercussions in order to establish an actual burden."¹⁵⁹ Doctrinally, then, there is actually a three-three-one split (with two undecided) on the Court about the appropriate First Amendment standard, leaving ongoing uncertainty for the lower courts.

¹⁵² *Id.* at 798.

¹⁵³ *Id.* at 799.

¹⁵⁴ *McCullen v. Coakley*, 573 U.S. 464, 495 (2014) (emphasis added).

¹⁵⁵ *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2386 (2021).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 2390 (Thomas, J., concurring in part and concurring in the judgment).

¹⁵⁸ *Id.* at 2392 (Alito, J., concurring in part and concurring in the judgment).

¹⁵⁹ *Id.* at 2394 (Sotomayor, J., dissenting).

The biggest fear of pro-disclosure advocates was that *AFP* would depart from the Court's prior tolerance for disclosure laws in the campaign-contribution context. But the Court did not overtly signal its views on future challenges to such disclosure laws. Rather, it appeared to embrace the idea that exacting scrutiny applies to all government-disclosure laws. Given the fact that the exacting scrutiny standard originated in *Buckley v. Valeo*, a campaign donor disclosure case, *AFP* did not alter the standard in that context. However, as just discussed, the Court's opinion does add a burden on the government to show that it considered alternative measures under exacting scrutiny, which could make it slightly harder for the government to defend campaign-disclosure laws. But the distinction between the campaign-disclosure cases and other right-of-association cases has typically been not in the applicable standard of review, but in the Court's conclusion that campaign disclosures serve important interests in the electoral context (as even the Law Center conceded).¹⁶⁰ If the majority of the Court modifies its view on the importance of such interests, that would be a more critical development than any produced by *AFP*.

Finally, the Court made it clear that the same First Amendment standard applies to disclosure laws that affect the associational rights of the wealthy and powerful as to those that affect the marginalized and dissident. The dissenters made clear that they believe the right of association is more important for dissident groups.¹⁶¹ The failure to address that distinction certainly supports the concerns of some of the scholars who are worried about ideological drift. One might argue that powerful people are less susceptible to intimidation resulting from public disclosure of their associations with unpopular political causes than the average person and therefore need less constitutional protection for their activities. On the record developed in the district court, there was evidence of actual harassment targeted at *AFP* and the Law Center that provided at least some support for their associational claims. But it should be noted that there was no connection mentioned between that past harassment and California's disclosure laws, which were not even being enforced until more recently. Both *AFP* and the Law Center often take public stances on controversial issues, making them potential

¹⁶⁰ *Id.* at 2383.

¹⁶¹ *Id.* at 2393 (Sotomayor, J., dissenting).

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targets of harassment even without disclosure of their donors' names. Then again, the central claim here was about their donors' rights of political association.

B. Ideological Implications

The doctrinal rulings in *Mahanoy* and *AFP* were important, but not dramatic. But as I often tell my students, most First Amendment decisions are only a little bit about the case at bar and a lot about how those decisions will play out in future cases. Returning to the topic of ideological drift, can we understand *Mahanoy* as protecting progressive or conservative speech interests? Considering what we might call traditional progressive policy concerns, we can imagine that an aggressively pro-speech decision could be worrisome to those who would like schools to be able to protect marginalized persons from bullying, sexual harassment, and identity-based hate speech, which are surely valid concerns.¹⁶² Conservatives, on the other hand, might be more inclined to desire a First Amendment doctrine that was sufficiently protective of conservative student speakers who might engage in speech that might be considered racially insensitive, in favor of robust Second Amendment rights, or critical of social welfare policies. Justice Alito's concurring opinion could be viewed as an attempt to bolster the free-speech standard lest schools engage in the much bemoaned "cancel culture" of conservative students for their expression.¹⁶³ Furthermore, it doesn't take much imagination to foresee an ideologically charged debate over school curriculums, as the recent controversies surrounding the teaching of critical race theory (or what legislators believe to be critical race theory) in public schools has already exhibited.¹⁶⁴ Student speech on such matters could trigger many concerns about censorship going forward.

But it's hard to predict how free speech doctrine might affect speakers of different ideological valences, because the doctrine itself is at least formally committed to requiring viewpoint and content neutrality

¹⁶² Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, Pew RESEARCH CTR. (Sept. 27, 2018).

¹⁶³ On the origins and definition of cancel culture, see Danielle Kurtzleben, *When Republicans Attack 'Cancel Culture,' What Does It Mean?* NPR (Feb. 10, 2021) (quoting a linguistics professor as saying that "'cancel' refers to a pretty unremarkable concept . . . It is used to refer to a cultural boycott.").

¹⁶⁴ See, e.g., IDAHO CODE ANN. § 33–138 (West 2021). See also Adrian Florido, *Teachers Say Laws Banning Critical Race Theory Are Putting a Chill on Their Lessons*, NPR (May 28, 2021).

on the government's part. While we might have a guess about how a Supreme Court decision might play out in future litigation, the truth is that the rules emerging from one case might easily be applied to protect the speech of someone at the other end of the ideological expression in the next. Furthermore, there may be temporal variations in how speech cases apply. The First Amendment was routinely invoked to protect the rights of protestors during the civil rights movement from hostile audiences and law enforcement officials indifferent, or even worse, toward protecting those protestors. But those same cases and principles might today be invoked to protect the speech rights of white supremacists (at least where their protests remain nonviolent). The natural impulse of most people, including government officials, is to want robust speech protection for those who agree with your position, but be less enthusiastic about protecting the expression of those with whom you vehemently disagree.¹⁶⁵

How did such impulses play out in *Mahanoy*? One way to assess this is to look at the positions of groups of differing ideologies in a particular case. Though there is nothing scientific about this, it at least signals what groups' public positions are on a particular dispute. There were thirty-four amicus briefs on the merits filed in the Supreme Court in the *Mahanoy* case, nine in support of the school district, one in support of neither party, and twenty-four in support of Levy.¹⁶⁶ In support of the school's efforts to discipline Levy were two briefs from what would likely be considered progressive groups—The Cyberbullying Research

¹⁶⁵ Strossen, *supra* note 6, at 16–17 (reporting polling data showing that while people favor free speech in the abstract, many also support censorship of particularly controversial views); see also NAT HENTOFF, *FREE SPEECH FOR ME – BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER* (1992).

¹⁶⁶ *Mahanoy Area School District v. B.L. Case Page*, SCOTUSBLOG (last visited Sept. 27, 2021). Not surprisingly, a number of interest groups representing school boards and school administrators filed briefs supporting the school district. Multiple government entities, including the United States, twenty-two states and the District of Columbia also supported the school, whereas nine states filed an amicus on behalf of Levy. The majority of voters in all nine states that supported Levy voted for Donald Trump in the 2020 Presidential election, while voters in nineteen of the twenty-two states supporting the school district voted for Joe Biden. Two exceptions were Iowa and North Carolina. Maine also joined these states' amicus brief but split its electoral votes between Trump and Biden. Different groups of academics filed amicus briefs in support of both sides. Finally, the sole amicus brief filed in support of neither party was from the conservative American Center for Law and Justice.

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Center and the National Education Association.¹⁶⁷

Multiple interest groups of different ideological stripes filed amicus briefs in support of Levy, who was directly represented by the ACLU, an organization most commonly associated with the Left. In support of the students' right to free speech were nine conservative groups or coalitions, four progressive groups or coalitions, and the Foundation for Individual Rights in Education (FIRE), which identifies itself as a nonpartisan group and has advocated for both conservative and progressive speakers.¹⁶⁸ It should be noted that one can't simply tally the number of briefs filed, as many of them were submitted on behalf of larger numbers of ideologically allied groups.

A sampling of some of the briefs provides a window into the concerns of various ideologically diverse groups. For example, one of the progressive-side briefs supporting Levy was filed on behalf of the Advancement Project, a civil rights advocacy group, the Juvenile Law Center, and thirty-eight other organizations.¹⁶⁹ This brief expressed concerns about the expansion of school discipline to students engaged in off-campus speech. As they argued, "Expanding the authority of schools to regulate off-campus student speech has 'ominous implications' for students of color and other marginalized student groups who already face disproportionate and excessive discipline, particularly for so-called 'infractions' that permit discretion and invite subjective interpretation."¹⁷⁰ They expressed concerns about the subjective nature of *Tinker's* material-and-substantial-interference standard in the hands of powerful school administrators.¹⁷¹ At the same time, they noted that this case did not involve threats of violence or harassment of others, suggesting that their concerns in such cases would be different.

On the same side were the conservative Alliance Defending Freedom

¹⁶⁷ In an admittedly imprecise methodology, I classified groups as conservative or progressive depending on their historical reputations and the descriptions cited in the Interests of Amici sections of their briefs. This process is likely imperfect, but I believe the labels are pretty accurate.

¹⁶⁸ *About FIRE*, FIRE, (last visited Sept. 27, 2021).

¹⁶⁹ Brief of Advancement Project, Juvenile Law Center, and 38 Other Organizations as Amici Curiae in Support of Respondent, *Mahanoy Area Sch. Dist. v. B.L.* 141 S. Ct. 2038 (2021) (No. 20–255).

¹⁷⁰ *Id.* at 2 (citation omitted).

¹⁷¹ *Id.*

and the Christian Legal Society.¹⁷² Their amicus brief expressed fears that schools would take action against student speakers who engaged in off-campus religious expression that others might find objectionable or offensive, particularly if such speech included comments that expressed religious objections to the LGBTQ community, abortion, or other sensitive subjects.¹⁷³ Interestingly, their brief also sought to distinguish regulation of valuable religious speech from harassment. They wrote that “[p]rivate conversations—either on or off campus—are also not harassment where a student advocates for her religious beliefs or encourages others to follow religious principles.”¹⁷⁴

Perhaps the cross-ideological groups that filed briefs in support of *Levy* reflect that students’ concerns about school censorship of their speech are highly contextual. They may be contingent on local politics and whether the school boards are controlled by more progressive or more conservative members. Or, ultimately, they may reflect that giving broad discretion to school officials to impose speech restrictions can be problematic because, like other government officials, they may enforce those restrictions in part based on their own political proclivities.

Moving on to *AFP*, it’s not difficult to foresee the potential ideological implications of that decision. The conventional wisdom from the immediate commentary on the case seems to be that the Court in this case split along pure ideological lines, with the six conservative members voting to strike down California’s disclosure law and the three more liberal members dissenting.¹⁷⁵ Conservatives may hail the decision first as preventing the targeting of wealthy and powerful interests that support their causes to the disclosure of their identities and association with such causes that might result in not just “harassment,” but protests and boycotts that could affect them economically. Thus, there is certainly here, as in *Mahanoy*, an echo of concerns about so-called “cancel culture.” Conservatives have complained about large-scale boycotts of

¹⁷² Brief of Alliance Defending Freedom and Christian Legal Society as Amici Curiae in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021) (No. 20–255).

¹⁷³ *Id.* at 3–6.

¹⁷⁴ *Id.* at 31.

¹⁷⁵ Ian Millhiser, *The Supreme Court Just Made Citizens United Even Worse*, Vox (July 1, 2021).

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corporations because of their political views or associations,¹⁷⁶ though they have increasingly turned to boycotts of businesses for their liberal political views in recent years.¹⁷⁷ Disclosure laws, of course, can expose the views of individuals and organizations and subject them to such responses.

But probably of even greater value to conservatives further down the road is the possibility that *AFP* would open the door to reconsideration of the constitutionality of many campaign-finance reporting laws. The Roberts Court has already made substantial inroads to pushing back against government efforts to regulate campaign finance laws.¹⁷⁸ In recent years, there have been strong legislative pushes to force more disclosure of so-called “dark money” in political campaigns—financial support that comes from organizations that do not have to disclose their donors.¹⁷⁹ *AFP* could potentially make it easier to challenge efforts to make such organizations report more information about the source of their funding, though even the challengers to the California disclosure regime appeared to concede that in the electoral context, the government’s interests are stronger than in the case of charitable organization regulation.¹⁸⁰ As discussed earlier, whether *AFP* leads to reconsideration of that view would be critical to the future of campaign finance disclosure laws.

But if these concerns are realistic, why did so many progressive organizations support the *AFP*’s claims in this case? As the Court pointed out:

The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as amici curiae in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist

¹⁷⁶ Joseph Zeballos-Roig & Walt Hickey, *Conservatives Absolutely Hate It When People Boycott Businesses Over Politics, but 67% of Liberals Think It’s Fair Game*, BUSINESS INSIDER (Aug. 30, 2019).

¹⁷⁷ Gabby Orr & Meridith McGraw, *Republicans Want to Make ‘Woke’ Corporations Pay—Literally*, POLITICO (Apr. 5, 2021).

¹⁷⁸ *See, e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

¹⁷⁹ Millhiser, *supra* note 175.

¹⁸⁰ *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021).

Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno.¹⁸¹

Thus, as in *Mahanoy*, amicus briefs were submitted in support of the AFP and the Law Center from groups at both ends of the political spectrum.¹⁸²

First, of course, the case from which these challenges originate was *NAACP v. Alabama*,¹⁸³ where the government's disclosure law was a thinly disguised effort to expose NAACP members to harassment and violence. Though progressives may wish to pare the doctrine back, particularly as applied to wealthy and powerful interests, it is unlikely that they would want to go so far as to overrule that seminal decision or to have the Court relax the standard of review in ways that would diminish the right of association.

For example, an amicus brief by the progressive Council on American-Islamic Relations (CAIR) argued that the Ninth Circuit's decision applied too lax of a standard to the California charitable contributions disclosure law.¹⁸⁴ CAIR argued that in its legal challenges to the placement of innocent Americans on terrorist watch lists were based on the constitutional right to association. It asserted that

the federal government's various watchlist programs label thousands of innocent Americans as known, suspected, or potential terrorists. Once subjected to this stigmatizing label, individuals, their families, and their associates experience intrusive scrutiny. Adverse consequences of designation include surveillance, border detentions, interrogations about religious practices, denials of employment credentials, and electronic device searches.¹⁸⁵

Consistent with the AFP's arguments, CAIR contended that the right of association was not dependent on "any risk of public disclosure or public

¹⁸¹ *Id.* at 2388.

¹⁸² *Americans for Prosperity Foundation v. Bonta Case Page*, SCOTUSBLOG (last visited Sept. 27, 2021).

¹⁸³ *NAACP v. Alabama*, 357 U.S. 449 (1958).

¹⁸⁴ Brief of Amicus Curiae Council on American-Islamic Relations in Support of Petitioner, AFP, 141 S. Ct. 2373 (No. 19-251 & 19-255).

¹⁸⁵ *Id.* at 2.

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harassment.¹⁸⁶

Another amicus brief was filed by the ACLU, the NAACP Legal Defense and Educational Fund, and other progressive groups (ACLU amici).¹⁸⁷ The emphasis in their brief was, similarly, that the Ninth Circuit had applied a lax standard of review that, if adopted across the nation, would undermine the associational interests of many groups, and dissident groups in particular.¹⁸⁸ Like the AFP, the ACLU amici contended that on the evidentiary record there was evidence of a strong risk of public disclosure, noting that if there had not been, the state's interests might have been sustainable.¹⁸⁹ But it is from that public disclosure that the real threat of harassment arises. Notably, the ACLU amici took care to distinguish the type of disclosure mandated by the state in *AFP* from disclosures required by many campaign finance regulations. Though it argued that exacting scrutiny should still apply to such laws, they cautioned the Court against making a broad pronouncement that would risk their invalidation. They argued that “public-disclosure requirements serve especially compelling interests in the context of electoral campaigns, where transparency furthers the interest in ‘curbing the evils of campaign ignorance and corruption.’”¹⁹⁰

It's worth noting that while these briefs argued in support of the exacting scrutiny standard, it was the version of that standard the Court had relied on in *Doe v. Reed*. In order to be upheld, a compelled-identity-disclosure law must be substantially related to a sufficiently important interest, and the strength of the state's interest must reflect the seriousness of the actual burden on First Amendment rights.¹⁹¹ Not surprisingly, since this element had not really appeared in earlier decisions, these briefs did not discuss the additional narrow-tailoring requirement articulated in the Court's opinion.

¹⁸⁶ *Id.*

¹⁸⁷ Brief of Amici Curiae the American Civil Liberties Union, Inc., American Civil Liberties Union Foundation, Inc., NAACP Legal Defense and Educational Fund, Inc., Knight First Amendment Institute at Columbia University, Human Rights Campaign, and Pen American Center, Inc., in Support of Petitioners, *AFP*, 141 S. Ct. 2373 (Nos. 19-251 & 19-255).

¹⁸⁸ *Id.* at 7.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 15.

¹⁹¹ *Id.* at 12–13 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

For at least two reasons, however, there is cause for progressive groups to embrace the narrow-tailoring requirement. First, because the position of those groups was generally in favor of the exacting-scrutiny requirement where disclosure laws affected marginalized persons, imposition of a heavier burden on the government should be welcome. Second, the incorporation of the idea that narrow tailoring requires the state to demonstrate that it considered other alternatives before implementing the law enhances intermediate scrutiny in all First Amendment cases. There had long been a complaint that the Court's intermediate-scrutiny standard had been watered down so much that it did not have teeth. Specifically, critics argued that the narrow-tailoring component of intermediate scrutiny was too deferential to the government, essentially moving First Amendment scrutiny toward a rational basis standard.¹⁹² But the Roberts Court, beginning with its decision in *McCullen v. Coakley*, has reinvigorated First Amendment intermediate scrutiny by infusing the narrow-tailoring standard with the requirement that the government show that it considered alternative regulatory options before enacting the law in question.¹⁹³ Its decision in *AFP* extends that requirement to freedom-of-association claims.

This tougher standard already has been invoked by advocates in the lower courts in support of First Amendment speech claims for progressive causes, and there have been recent lower-court decisions that have incorporated this into their analysis. For example, the *McCullen* standard has been used in the U.S. Court of Appeals for the Tenth Circuit to invalidate local ordinances that restricted the ability of homeless persons to solicit money on public sidewalks¹⁹⁴ and imposed burdensome parade permit requirements on environmental groups.¹⁹⁵

Will this heightened form of intermediate scrutiny benefit conservative groups as well? Undoubtedly. But paring the standard back to a weaker form will adversely affect speech, and the burdens of those types of regulations will almost always fall more heavily

¹⁹² See, e.g., G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509, 1548–49 (1993); David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 149 (1992).

¹⁹³ *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

¹⁹⁴ *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1073 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 1738 (2021).

¹⁹⁵ *iMatter Utah v. Njord*, 774 F.3d 1258, 1266 (10th Cir. 2014).

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on marginalized speakers. Accordingly, it is worth it to progressive groups to consider whether their best long-term interests are served by attempting to dilute the standard in the first instance.

To be sure, the fact that progressives sometimes support conservative speech claims and vice-versa in particular cases does not completely rebut sophisticated ideological-drift claims, which are premised on broader structural changes in free speech doctrine. But the fact that many cases are complicated to assess from an ideological perspective at the microlevel does suggest that ideological-drift claims are complicated and difficult to measure. The consequences of doctrinal choices made by the Court today are too difficult to project over the long run. In that regard, this Term's First Amendment decisions are no different.

***Cedar Point Nursery v. Hassid* and Judicial Expansion of the Takings Clause**

Brianne J. Gorod* & Dayna J. Zolle**

Corporate America has been remarkably successful under the Roberts Court, and this past Term proved no exception. As our colleague Brian Frazelle, senior appellate counsel at the Constitutional Accountability Center (CAC), has pointed out, corporate America won “the vast majority of its cases, consistently reversing lower-court wins for plaintiffs or the government.”¹ One of those lower-court reversals was in *Cedar Point Nursery v. Hassid*, which involved a challenge to a California regulation that granted labor organizers limited access to private farmland to solicit union support.² Although the U.S. Court of Appeals for the Ninth Circuit had rejected a claim by two agricultural corporations that the regulation amounted to a per se physical taking of property, or an appropriation of property requiring compensation under the Fifth Amendment’s Takings Clause,³ the majority of the U.S. Supreme Court disagreed in an opinion that continued a decades-long conservative project to rewrite the meaning of the Takings Clause. Indeed, while Justice Brett Kavanaugh’s concurrence lauded the majority opinion for “carefully adher[ing] to constitutional text, history, and precedent,”⁴ the majority in fact adhered to none of the three.

To be clear, the majority’s opinion—which invoked “[t]he Founders” while casually sweeping aside their understanding of the Takings

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¹ Brian Frazelle & Elizabeth Wydra, *Quick Take: The Chamber of Commerce at the Supreme Court, 2020–2021*, CONST. ACCOUNTABILITY CTR. (July 1, 2021).

² *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2066 (2021).

³ See *id.* at 2070, 2072.

⁴ *Id.* at 2080 (Kavanaugh, J., concurring).

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Clause⁵—was not originalist. Instead, it is a prime example of what CAC calls “fauxriginalism”—the practice of claiming the mantle of originalism in judicial opinions and legal arguments without faithfully engaging with what the text and history of the whole Constitution actually show.⁶ When it comes to the Takings Clause, constitutional text and history show that the clause guarantees compensation only for actual, physical appropriations of property, not regulations allowing limited access to property like the one at issue in *Cedar Point*.⁷ Indeed, as Justice Antonin Scalia once recognized, “early constitutional theorists did not believe the Takings Clause embraced regulations of property at all.”⁸ To be sure, beginning in the late 1800s, the Supreme Court held that the Takings Clause may also apply in cases involving the functional equivalent of a direct physical appropriation of property. Yet even in those cases, the Court was careful to cabin the clause’s application to regulations that could reasonably be considered tantamount to the sorts of direct expropriations that were within the scope of the clause’s original meaning.⁹

A more fundamental change in the Court’s Takings Clause jurisprudence occurred in the late twentieth century, and it was the culmination of a concerted conservative effort to transform the meaning of the clause. Beginning in the 1980s, Richard A. Epstein, a professor at the University of Chicago Law School, posited that the Takings Clause could be used as a tool to curb federal regulations during the Reagan administration.¹⁰ And Justice Scalia, despite his self-professed commitment to originalism, answered that call.¹¹ CAC, and its precursor, Community Rights Counsel, worked tirelessly to combat this deliberate distortion of

⁵ See *id.* at 2071.

⁶ See Praveen Fernandes, *Originalism, Fauxriginalism, and Embracing the Constitution*, CONST. ACCOUNTABILITY CTR. (Feb. 7, 2019).

⁷ See generally Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondents, *Cedar Point Nursery*, 141 S. Ct. 2063 (No. 20-107). The discussion in Part II is substantially drawn from this amicus brief. For an additional discussion of this point, see Bethany R. Berger, *Eliding Original Understanding in Cedar Point Nursery v. Hassid*, YALE J.L. & HUMANS. (forthcoming) (manuscript at 3) (“Although *Cedar Point v. Hassid* wraps itself in a façade of originalism, it violates this tradition.”).

⁸ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

⁹ *Id.* at 1014.

¹⁰ See generally Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

¹¹ *Lucas*, 505 U.S. at 1015, 1017.

the original meaning of the Takings Clause and expansion of its scope.¹² Thanks in part to those efforts, even though the Court expanded the scope of the clause, it repeatedly made clear that the clause’s original meaning still helped provide an outer limit on its application and that only permanent physical invasions of property and regulations that render property economically valueless qualify as per se takings.

Yet the Court’s decision in *Cedar Point* went even further than these earlier cases, holding that the California regulation was a per se taking even though it allowed for only limited, temporary access to property and even though it did not diminish the property’s value. In doing so, the decision potentially called into question “virtually every government-authorized invasion”¹³—no small thing given that, as the Court has recognized, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”¹⁴

In sum, this was a deeply troubling decision—both because it demonstrated the majority’s willingness to flout constitutional text, history, and precedent to rule for corporate interests and because, in doing so, it could produce severe consequences for workers, the right to organize, and state regulatory efforts in a number of areas.

I. Background

Since 1975, California law has permitted labor organizers to visit agricultural employers’ property during non-work time on a limited number of days to “talk[] with employees and solicit[] their support.”¹⁵ Cedar Point Nursery, a strawberry grower in northern California, and Fowler Packing Company, a Fresno-based shipper of grapes and citrus, challenged California’s access regulation in 2016 by filing suit against several members of California’s Agricultural Labor Relations Board in their official capacity.¹⁶ The agricultural corporations argued that California’s access regulation violated the Takings Clause of the Fifth

¹² COMM. RIGHTS COUNSEL, *THE TAKINGS PROJECT: USING FEDERAL COURTS TO ATTACK COMMUNITY AND ENVIRONMENTAL PROTECTIONS* (1998).

¹³ *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2081 (2021) (Breyer, J., dissenting).

¹⁴ *Id.* at 2087 (Breyer, J., dissenting) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

¹⁵ CAL. CODE REGS., tit. 8, § 20900(e) (1975).

¹⁶ *Cedar Point Nursery*, 141 S. Ct. at 2069–70.

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Amendment, which provides that private property shall not “be taken for public use, without just compensation.”¹⁷ The district court, however, rejected the corporations’ argument that the access regulation constituted a per se physical taking, reasoning that the regulation did not “allow the public to access their property in a permanent and continuous manner for whatever reason.”¹⁸ The court denied the corporations’ motion for a preliminary injunction and granted the Board’s motion to dismiss.¹⁹ The Ninth Circuit affirmed, holding that the challenged regulation does not effect a per se taking of property within the meaning of the clause.²⁰ The Supreme Court agreed to take up that question.

On June 23, 2021, the Court issued a 6–3 decision, reversing the Ninth Circuit.²¹ In an opinion authored by Chief Justice John Roberts, the Court held that California’s access regulation amounted to a per se physical taking requiring compensation under the Takings Clause.²² It began by stating generally that “[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom.”²³ It then discussed the Court’s jurisprudence regarding both physical takings and “use restrictions that go ‘too far’” and therefore constitute “regulatory takings.”²⁴ But the Court indicated that “that label can mislead” because “[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation.”²⁵ The Court determined that, under its precedent, all “government-authorized invasions of property . . . are physical takings requiring just compensation.”²⁶ Thus, it concluded that “[w]henever a regulation results in a physical appropriation of property, a per se taking has occurred,” regardless of the duration of access or any economic effects.²⁷

¹⁷ U.S. CONST. amend. V.

¹⁸ *Cedar Point Nursery v. Gould*, No. 1:16-cv-00185-LJO-BAM, 2016 WL 1559271, at *5 (E.D. Cal. Apr. 18, 2016) (emphasis omitted).

¹⁹ *Cedar Point Nursery*, 141 S. Ct. at 2070.

²⁰ *Id.*

²¹ *Id.* at 2080.

²² *Id.* at 2072.

²³ *Id.* at 2071.

²⁴ *Id.* at 2072 (quoting *Horne v. Dep’t of Agriculture*, 576 U.S. 350, 360 (2015); *Yee v. Escondido*, 503 U.S. 519, 527 (1992)).

²⁵ *Cedar Point Nursery*, 141 S. Ct. at 2072.

²⁶ *Id.* at 2074.

²⁷ *Id.* at 2072.

Applying that rule to the California regulation at issue, the Court held that “[t]he access regulation appropriates a right to invade the growers’ property and therefore constitutes a per se physical taking.”²⁸ It emphasized that “[t]he right to exclude is ‘one of the most treasured’ rights of property ownership,”²⁹ and it concluded that “the regulation appropriates for the enjoyment of third parties the owners’ right to exclude” and also “appropriates a right to physically invade the growers’ property—to literally ‘take access.’”³⁰

Finally, the Court rejected the notion that its decision might threaten a litany of state and federal government activities for three reasons. First, it explained that isolated physical invasions would still be assessed as individual trespassing torts rather than as takings.³¹ Second, it stated that “many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights.”³² Third, the Court explained that the government can avoid implicating the Takings Clause by conditioning the receipt of certain benefits on the provision of a right of access to property.³³ The Court explained that “[u]nder this framework, government health and safety inspection regimes will generally not constitute takings.”³⁴

Justice Kavanaugh concurred and wrote separately to explain that, in his view, the Court’s holding in *NLRB v. Babcock & Wilcox Co.* “strongly support[ed]” the Court’s decision in *Cedar Point*.³⁵ In *Babcock*, the National Labor Relations Board asserted that several employers had violated the National Labor Relations Act, which protects employees’ rights to self-organization, by unreasonably restricting union organizers’ access to company-owned parking lots, where the organizers sought to distribute union literature.³⁶ The Court held that an employer can “validly post his property against nonemployee distribution of union

²⁸ *Id.*

²⁹ *Id.* (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)).

³⁰ *Id.* at 2074 (quoting CAL. CODE REGS., tit. 8 § 20900(e)(1)(C)).

³¹ *Id.* at 2078.

³² *Id.* at 2079.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 2080 (Kavanaugh, J., concurring) (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)).

³⁶ *Babcock*, 351 U.S. at 106.

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literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution."³⁷ That case did not involve a direct Takings Clause challenge, but the companies argued that the Board's reading of the Act would infringe their Fifth Amendment property rights, urging that Congress "has at no time shown any intention of destroying property rights secured by the Fifth Amendment, in protecting employees' rights of collective bargaining under the Act."³⁸

Justice Kavanaugh noted that the Court in *Babcock* had "agreed with the employers' argument that the Act should be interpreted to avoid unconstitutionality."³⁹ He then reasoned that "*Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a 'necessity' exception similar to that noted by the Court today."⁴⁰ Thus, in Justice Kavanaugh's view, "*Babcock* strongly supports the growers' position in [*Cedar Point*] because the California union access regulation intrudes on the growers' property rights far more than *Babcock* allows."⁴¹

In dissent, Justice Stephen Breyer, writing also for Justices Elena Kagan and Sonia Sotomayor, criticized the majority's determination that "virtually every government-authorized invasion is an 'appropriation,'" emphasizing that the California regulation "does not 'appropriate' anything; it regulates the employers' right to exclude others."⁴² He observed that "the regulation before us allows only a *temporary* invasion of [an owner's] property" and that the Court's "prior cases make clear that . . . this kind of temporary invasion amounts to a taking only if it goes 'too far.'"⁴³ He explained that the regulation did not "directly appropriate[] private property for its own use,"⁴⁴ nor did it "cause[] a *permanent* physical occupation of private property."⁴⁵ He concluded,

³⁷ *Id.* at 112.

³⁸ *Cedar Point Nursery*, 141 S. Ct. at 2080 (Kavanaugh, J., concurring) (citation omitted).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2081 (Breyer, J., dissenting).

⁴³ *Id.*

⁴⁴ *Id.* at 2082 (emphasis added) (quoting *Horne v. Dep't of Agriculture*, 576 U.S. 350, 357 (2015)).

⁴⁵ *Id.*

“Th[e] issue is whether a regulation that *temporarily* limits an owner’s right to exclude others from property *automatically* amounts to a Fifth Amendment taking. Under our cases, it does not.”⁴⁶

Justice Breyer also expressed skepticism regarding the Court’s assertion that its decision would still permit certain government-authorized invasions of private property, stating, “I suspect that the majority has substituted a new, complex legal scheme for a comparatively simpler old one.”⁴⁷ Although he acknowledged that it can be difficult to determine whether a regulation is “temporary” or “permanent” or goes “too far,” he explained that he would have stuck with the Court’s existing approach because he did “not believe that the Court has made matters clearer or better.”⁴⁸ He concluded that a regulation granting a temporary right of access should not “automatically” be considered a taking.⁴⁹

II. Rewriting the Takings Clause

A. The Original Meaning of the Takings Clause

The Fifth Amendment provides that “private property [shall not] be taken for public use, without just compensation.”⁵⁰ By its terms, the scope of the Takings Clause, which applies to the states through the Fourteenth Amendment, “is quite narrow: it applies only when the government takes private property, and it does not prevent such takings but rather requires the government to provide just compensation when those takings occur.”⁵¹ While the Constitution does not define the term “takes,” a “taking” “most naturally means an expropriation of property, such as when the government exercises its eminent domain power to acquire private property to build a road, a military base or a park.”⁵²

This plain-language interpretation of the clause is consistent with the Framers’ understanding that the Takings Clause would prohibit

⁴⁶ *Id.* at 2083.

⁴⁷ *Id.* at 2088.

⁴⁸ *Id.* at 2089 (“I would stick with the approach that I believe the Court’s case law sets forth. ‘Better the devil we know’”).

⁴⁹ *Id.* at 2089–90.

⁵⁰ U.S. CONST. amend. V.

⁵¹ Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 515 (1998); *see also* First English Evangelical Lutheran Church of Glendale v. City of Los Angeles, 482 U.S. 304, 314–15 (1987).

⁵² *See* Kendall & Lord, *supra* note 51, at 515.

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only actual appropriations of private property.⁵³ Significantly, prior to the ratification of the Fifth Amendment, “there was no [federal] rule requiring compensation when the government physically took property or regulated it. The decision whether or not to provide compensation was left entirely to the political process.”⁵⁴ Thus, during the Revolutionary War, the military regularly seized private goods without providing compensation.⁵⁵

Indeed, “[o]nly two foundational documents of the colonial era provided even limited recognition of a right to compensation” for the taking of private property, and both covered only physical appropriations of property.⁵⁶ First, the Massachusetts Body of Liberties, adopted in 1641, imposed a compensation requirement that applied only to the seizure of personal property: “No mans Cattell or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford.”⁵⁷ Likewise, the 1669 Fundamental Constitutions of Carolina, which were drafted by John Locke and never fully implemented, would have mandated compensation for the direct seizure of real property.⁵⁸ These documents sought to authorize public construction of buildings and highways, so long as “[t]he damage the owner of such lands (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint.”⁵⁹ Although colonial governments commonly regulated land

⁵³ See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (“[T]he Takings Clause and its state counterparts originally protected property against physical seizures, but not against regulations affecting value.”).

⁵⁴ *Id.* at 783 (“[T]he framers did not favor absolute protection of property rights.”).

⁵⁵ See 1 WILLIAM BLACKSTONE, COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 305–06 (St. George Tucker ed., 1803) (statement by Tucker); *Respublica v. Sparhawk*, 1 Dall. 357, 363 (Pa. 1788) (upholding uncompensated seizure of provisions from private citizens during the war).

⁵⁶ Treanor, *supra* note 53, at 785.

⁵⁷ MASS. BODY OF LIBERTIES § 8 (1641), reprinted in SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 149 (Richard L. Perry & John C. Cooper eds., 1959) (hereinafter SOURCES OF OUR LIBERTIES).

⁵⁸ Treanor, *supra* note 53, at 785–86.

⁵⁹ *Id.* at 786 (quoting FUNDAMENTAL CONSTS. OF CAROLINA art. 44 (1669), reprinted in 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 115 (1971)).

use and business operations,⁶⁰ no colonial charter required compensation for property owners affected by those regulations—not even when the regulations affected a property’s value.⁶¹

After the American Revolution, most state constitutions echoed their colonial predecessors in this respect, as “[n]one of the state constitutions adopted in 1776 had just compensation requirements” for physical takings or for regulations that affected property rights.⁶² As state constitutions later began to provide compensation for the taking of property, those protections applied only to physical appropriations of property.⁶³ The Vermont Constitution, for example, provided that “whenever any particular man’s property is taken for the use of the public, the owner ought to receive an equivalent in money.”⁶⁴ Similarly, the Massachusetts Constitution of 1780 stated that “whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.”⁶⁵ Further, the Northwest Ordinance of 1787 stated that “should the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same.”⁶⁶ Significantly, “[i]n each case, a plain language reading of the text indicates that it protected property only against physical confiscation, and the early judicial decisions construed them in this way.”⁶⁷

Ultimately, when the Framers adopted the federal Takings Clause, “the right against physical seizure received special protection . . .

⁶⁰ See *id.* at 789 (collecting examples).

⁶¹ *Id.* at 788–89; see John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1100 (2000) (“American legislatures extensively regulated land use between the time America won its independence and the adoption of the property-protecting measures of the Constitution and the Bill of Rights.”).

⁶² Treanor, *supra* note 53, at 789.

⁶³ See *id.* at 791.

⁶⁴ VT. CONST. of 1777, ch. I, art. II, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3740 (Francis N. Thorpe ed., 1909) (hereinafter THE FEDERAL AND STATE CONSTITUTIONS).

⁶⁵ MASS. CONST. of 1780, part I, art. X, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 64, at 1891.

⁶⁶ NW. ORDINANCE of 1787, art. 2, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 57, at 395.

⁶⁷ Treanor, *supra* note 53, at 791 (collecting cases).

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because of the framers' concern with failures in the political process."⁶⁸ Significantly, the statements of James Madison, who drafted the Takings Clause, "uniformly indicate that the clause only mandated compensation when the government physically took property."⁶⁹ Madison believed that physical property needed special protection in the form of a compensation requirement "because its owners were peculiarly vulnerable to majoritarian decisionmaking."⁷⁰ Madison wrote, for instance, of the need for a means to protect physical property ownership separate from the political process because, "[a]s the holders of property have at stake all the other rights common to those without property, they may be the more restrained from infringing, as well as the less tempted to infringe the rights of the latter."⁷¹ He described "[t]he necessity of . . . guarding the rights of property," a matter that he observed "was for obvious reasons unattended to in the commencement of the Revolution."⁷² Thus, Madison was concerned that the political process would be insufficient to preserve physical property rights, and he drafted the Takings Clause to protect against political-process failures.⁷³

The drafting history of the Takings Clause is also consistent with its limited scope. As originally drafted, the clause read, "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."⁷⁴ Although no legislative history exists that explains why a select committee, of which Madison was a member, altered the wording before the amendment's adoption,

⁶⁸ *Id.* at 784, 827, 829–30.; (explaining how Vermont's Takings Clause and other state analogues were "designed to provide security against the type of process failure to which majoritarian decisionmaking processes were peculiarly prone"—namely "real property interests").

⁶⁹ *Id.* at 791; see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1057 n.23 (1992) (Blackmun, J., dissenting) ("James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government."); Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 OKLA. L. REV. 417, 420 (1994).

⁷⁰ Treanor, *supra* note 53, at 847.

⁷¹ James Madison, *Note to His Speech on the Right to Suffrage* (1821), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 450–51 (Max Farrand ed., 1911).

⁷² James Madison, *Observations on the "Draught of a Constitution for Virginia"* (Oct. 15, 1788), in 11 THE PAPERS OF JAMES MADISON 287 (Robert A. Rutland et al. eds., 1977).

⁷³ See Treanor, *supra* note 53, at 854.

⁷⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992) (quoting James Madison, *Speech Proposing Bill of Rights* (June 8, 1789), in 12 J. MADISON, THE PAPERS OF JAMES MADISON 201 (C. Hobson et al. eds., 1979)).

“[i]t is . . . most unlikely that the change in language was intended to change the meaning of Madison’s draft Takings Clause.”⁷⁵

As one scholar has argued, “[t]he substitution of ‘taken’ for Madison’s original ‘relinquish’ did not mean that something less than acquisition of property would bring the clause into play,”⁷⁶ because Samuel Johnson’s *Dictionary*—a prominent Founding-era dictionary—defined “to take” in 1789 as, among other things, “[t]o seize what is not given”; “[t]o snatch; to seize”; “[t]o get; to have; to appropriate”; “[t]o get; to procure”; and “[t]o fasten on; to seize.”⁷⁷ Moreover, because no one besides Madison advocated for the inclusion of a Takings Clause in the Bill of Rights, and there is no record of anyone advocating to expand the scope of Madison’s original draft, there is no reason to think the final draft was meant to be more robust than the original.⁷⁸

Accounts from shortly after the adoption of the clause confirm that it was understood to apply only to physical appropriations. “[A]lthough ‘contemporaneous commentary upon the meaning of the compensation clause is in very short supply,’”⁷⁹ an 1803 treatise recognized that the clause “was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war.”⁸⁰ Another treatise writer observed in 1857 that “[i]t seems to be settled that, to entitle the owner to protection under [the Takings] [C]lause, the property must be actually taken in the physical sense of the word.”⁸¹

Moreover, the few Supreme Court decisions prior to 1870 interpreting the Takings Clause held that “acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held *not* to be a taking within the meaning of the

⁷⁵ Schwartz, *supra* note 69, at 420.

⁷⁶ *Id.*

⁷⁷ *Id.* at 420–21 (quoting 1–2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755–56)).

⁷⁸ See Treanor, *supra* note 53, at 834 (“Aside from Madison, there was remarkably little desire for any kind of substantive protection of property rights against the national government.” (footnote omitted)).

⁷⁹ *Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting) (quoting Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 58 (1964)).

⁸⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES, *supra* note 55, at 305–06.

⁸¹ THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 519–20 (1857).

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constitutional provision.”⁸² In fact, until the last few decades of the nineteenth century, the Court steadfastly refused to extend the clause beyond actual appropriations. In 1870, the Court affirmed that the Takings Clause “has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.”⁸³

B. Supreme Court Expansion of the Takings Clause

The notion that the Takings Clause might apply to government actions beyond the physical expropriation of property emerged gradually over the next century as the Court considered cases in which government action very closely resembled expropriations of property. But importantly, in all of these cases, the Court carefully limited the application of the clause to regulations that it viewed as tantamount to a direct appropriation of property.

The first of these cases, *Pumpelly v. Green Bay & Mississippi Canal Co.*, involved a state-authorized dam that flooded the petitioner’s property.⁸⁴ The Court noted that “[i]t would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it . . . can inflict irreparable and permanent injury to any extent,” or “in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.”⁸⁵ To avoid such a result, the Court held that, “where real estate is *actually invaded* by superinduced additions of water, earth, sand, or other material . . . so as to *effectually destroy or impair its usefulness*, it is a taking,

⁸² N. Transp. Co. v. City of Chicago, 99 U.S. 635, 642 (1878) (emphasis added).

⁸³ Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870); see Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 321 (2002) (“The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations . . .”).

⁸⁴ *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 167 (1871).

⁸⁵ *Id.* at 177–78.

within the meaning of the Constitution.”⁸⁶ The Court made clear, however, that “[b]eyond this we do not go, and this case calls us to go no further.”⁸⁷

Nearly fifty years later, in *Pennsylvania Coal Co. v. Mahon*, the Court again narrowly expanded the reach of the Takings Clause.⁸⁸ This time the clause was expanded to encompass regulations that the Court viewed as particularly oppressive. Yet the Court was once again careful to limit its newly recognized regulatory takings doctrine to instances in which the effect of a regulation is tantamount to the direct appropriation of property contemplated in the text of the Fifth Amendment.⁸⁹

Mahon involved a challenge to a Pennsylvania law that prevented coal companies from mining coal that formed the support for surface-level land.⁹⁰ Pennsylvania law recognized this support property as a distinct property interest, and the Court stated that the Act “purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate.”⁹¹ The Court declared that the Pennsylvania law had “very nearly the same effect for constitutional purposes as appropriating or destroying [the estate],”⁹² and, again relying on this analogy to an expropriation of property, declared that a regulation can be considered a taking when it “goes too far.”⁹³ The Court concluded in *Mahon* that “[b]ecause the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the *complete destruction of*

⁸⁶ *Id.* at 181 (emphases added).

⁸⁷ *Id.*

⁸⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

⁸⁹ *Id.* at 415–16 (“The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle.”); see *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (noting that to bring a successful regulatory takings claim, a plaintiff must “identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain”).

⁹⁰ *Mahon*, 260 U.S. at 412, 415–16.

⁹¹ *Id.* at 414.

⁹² *Id.*

⁹³ *Id.* at 415; see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (reiterating the “oft-cited maxim” that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking” (quoting *Mahon*, 260 U.S. at 415)); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 325 n.21 (2002).

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rights claimant had reserved from the owners of the surface land . . . the statute was invalid as effecting a ‘taking’ without just compensation.”⁹⁴

Similarly, in *United States v. Causby*,⁹⁵ the Court held that the government had effected a taking by directing “frequent and regular flights of army and navy aircraft over respondents’ land at low altitudes” such that it “limit[ed] the utility of the land and cause[d] a diminution in its value.”⁹⁶ The Court held that the government had effectively “taken” property and needed to provide just compensation because “there was a diminution in value of the property and . . . the frequent, low-level flights were the direct and immediate cause.”⁹⁷

The task of determining what regulations were sufficiently akin to an expropriation to require compensation under the Takings Clause proved to be “a problem of considerable difficulty,” however, as the Supreme Court acknowledged in *Penn Central Transportation Co. v. City of New York*.⁹⁸ The Court explained that it relies primarily on a balancing of three factors: (1) the economic impact of the regulation, (2) the extent the regulation interferes with “distinct investment-backed expectations,” and (3) “the character of the governmental action.”⁹⁹ Under this balancing test, no one factor alone is determinative, and significant diminutions in property value are generally permissible without compensation.¹⁰⁰

In more recent years, the Court has continued to recognize that there are limits on applying the Takings Clause beyond direct appropriations of physical property. In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court held that “a permanent physical occupation of

⁹⁴ *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127–28 (1978) (emphasis added) (describing the holding in *Mahon*); cf. *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (holding that although “not every destruction or injury to property by governmental action has been held to be a ‘taking’ in the constitutional sense,” the government’s “total destruction” of the full value of certain liens constituted a “taking” (emphasis added)); *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (explaining that if the government were to limit the height of buildings in a city “so far as to make an ordinary building lot wholly useless,” such a limit would require compensation (emphasis added)).

⁹⁵ *United States v. Causby*, 328 U.S. 256 (1946).

⁹⁶ *Id.* at 262.

⁹⁷ *Id.* at 267; *id.* at 265, 267 (noting that the “continuous invasions” of the airspace “affect[ed] the use of the surface of the land itself.”).

⁹⁸ *Penn Cent. Transp. Co.*, 438 U.S. at 123; see also *id.* at 124 (“[T]his Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government.”).

⁹⁹ *Id.*

¹⁰⁰ See *id.* at 124–25.

property is a taking.”¹⁰¹ Importantly, the *Loretto* Court “underscore[d] the constitutional distinction between a permanent occupation and a temporary physical invasion.”¹⁰² Similarly, in *Nollan v. California Coastal Commission*, the Court held that a “permanent physical occupation” amounts to an unconstitutional taking “where individuals are given a *permanent and continuous* right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.”¹⁰³

In *Lucas v. South Carolina Coastal Council*, the Court explained that it has recognized two categories of regulations that are takings per se, regardless of the public interest furthered by the governmental action: (1) “regulations that compel the property owner to suffer a physical ‘invasion’ of his property,” “at least with regard to permanent invasions,” such as those requiring landlords to allow the permanent placement of cable facilities in their apartment buildings,¹⁰⁴ and (2) regulations that “den[y] *all* economically beneficial or productive use of land.”¹⁰⁵ The Court thus emphasized that “when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”¹⁰⁶ The Court in *Lucas* ultimately held that a South Carolina law that prevented the petitioner from erecting any permanent habitable structures on his land, rendering the parcels “valueless,”¹⁰⁷ “accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of ‘just compensation.’”¹⁰⁸

Thus, before *Cedar Point*, the Court had primarily applied the Takings Clause to prevent uncompensated expropriations of physical property,

¹⁰¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (emphasis added).

¹⁰² *Id.* at 434.

¹⁰³ *Nollan v. California Coastal Ass’n*, 483 U.S. 825, 832 (1987) (emphasis added).

¹⁰⁴ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (citing *Loretto*, 458 U.S. at 419).

¹⁰⁵ *Id.* (emphasis added) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan*, 483 U.S. at 834); *see also id.* at 1017 (suggesting that the justification for the latter rule might be “that *total deprivation* of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation” (emphasis added)).

¹⁰⁶ *Id.* at 1019.

¹⁰⁷ *Id.* at 1007 (citation omitted).

¹⁰⁸ *Id.* (quoting U.S. CONST. amend. V).

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and while it held that some regulations amount to takings per se, it was careful to limit that classification to regulations that are tantamount to direct expropriations because they either effect a permanent physical invasion of property (as in *Nollan* and *Loretto*) or render it valueless (as in *Mahon* and *Lucas*). Where a challenged regulation did not fit into either of these categories of takings per se, the Court generally applied the multifactor test articulated in *Penn Central*.¹⁰⁹ The Court recognized that, “[a]lthough [its] regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone,” as “[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹¹⁰

C. *Cedar Point* and the Takings Clause

The Court’s decision in *Cedar Point* departed from both the original meaning of the Takings Clause and the Supreme Court’s earlier precedents, which reflected an understanding that regulations could be considered takings per se only when they permitted a permanent and continuous invasion of property or deprived property of all economic value. The California regulation challenged in *Cedar Point* did neither.

First, the California regulation did not allow a permanent physical invasion of property, such as those requiring landlords to allow the permanent placement of cable facilities in their apartment buildings.¹¹¹ It also did not provide a “*permanent and continuous* right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises,” as the Court has recognized might signify a taking.¹¹² Far from it. The regulation at issue specifically limited who was allowed to visit the property (generally two labor organizers per work crew),¹¹³ when they could visit (one hour before work, one hour during lunch, and one hour after work for up to 120 days each year),¹¹⁴ where they

¹⁰⁹ See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

¹¹⁰ *Id.*

¹¹¹ See *Lucas*, 505 U.S. at 1015.

¹¹² *Nollan v. California Coastal Ass’n*, 483 U.S. 825, 832 (1987) (emphasis added).

¹¹³ CAL. CODE REGS., tit. 8, § 20900(e)(4)(A).

¹¹⁴ *Id.* § 20900(e)(1)(A)–(B), (e)(3)(A)–(B).

could go (only where “employees congregate before and after working” and where “employees eat their lunch”),¹¹⁵ why they could visit (only to “solicit[] . . . support” of employees),¹¹⁶ and what they could do while visiting (strictly no “conduct disruptive of the employer’s property or agricultural operations”).¹¹⁷

Moreover, unlike the “permanent and continuous” occupations that the Court had held amounted to takings in the past, the California regulation allowed an agricultural employer to retain the “right to possess the occupied space himself.”¹¹⁸ Nothing in the regulation required him to clear out of the property—or to stop using any part of it—to allow the labor organizers to enter. There was no “practical ouster of [the owner’s] possession.”¹¹⁹ And the regulation certainly did not “require . . . that the [property] owner permit another to exercise *complete* dominion” over his property, as did the action the Court held unconstitutional in *Loretto*.¹²⁰ Instead, the regulation was strictly cabined to preserve the owner’s property rights while allowing labor organizers to visit temporarily.

Second, the California regulation did nothing to diminish any economic interest or value in the property. While the Court had recognized that the “*total destruction*” of the full value of a property could constitute a taking under the Fifth Amendment,¹²¹ and that a regulation that rendered private property “*wholly useless*” could require compensation under the clause,¹²² the California regulation did not diminish the value of the property at all. It in no way interfered with agricultural employers’ ability to conduct business on their property, and the property therefore lost no value as a result of the regulation. In fact, the regulation expressly prohibited any visiting organizers

¹¹⁵ *Id.* § 20900(e)(3)(A)–(B).

¹¹⁶ *Id.* § 20900(e).

¹¹⁷ *Id.* § 20900(e)(4)(C).

¹¹⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

¹¹⁹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *N. Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1878)) (brackets in original).

¹²⁰ *Loretto*, 458 U.S. at 436 (emphasis added).

¹²¹ *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (emphasis added).

¹²² *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (emphasis added); *cf.* *Lucas*, 505 U.S. at 1015, 1017 (explaining that the Takings Clause covers regulations that “den[y] all economically beneficial or productive use of land” and suggesting that “*total deprivation* of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation” (emphasis added)).

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from engaging in “conduct disruptive of the employer’s property or agricultural operations.”¹²³ Before this case, the Court had recognized that a “deprivation of the right to use and obtain a profit from property . . . is clearly relevant” to the question whether a particular regulation effects a taking,¹²⁴ and in *Cedar Point*, there was no deprivation of the right to use and obtain a profit. And even if there were such a deprivation—which there plainly was not—that alone should have been insufficient to render the regulation unconstitutional.¹²⁵

In short, the text and history of the Takings Clause demonstrate that it was designed to apply only to actual physical appropriations of private property. Although the Court had previously held that the clause also covers regulations that are tantamount to a physical appropriation because they effect a permanent and continuous occupation or render private property valueless,¹²⁶ that was not the situation in *Cedar Point*. The Court therefore should have held that the challenged regulation did not effect a taking per se, as it allowed only the intermittent entry of certain individuals into designated areas and specifically did not disrupt business operations or devalue any property.

As the next section explains, however, the Court reached the opposite conclusion. And while it purported to apply an originalist methodology, its decision in fact cannot be reconciled with constitutional text or history, or with the Court’s precedents.

III. *Cedar Point*’s “Fauxoriginalism” and Distortion of Supreme Court Precedent

Although the Court’s decision in *Cedar Point* purported to ground its analysis in the Takings Clause’s text and history, it in fact did no such thing. Instead, it stretched the scope of the Takings Clause far beyond its original meaning and, indeed, even further than the Court had taken the clause before.

It first sought to ground its decision in the text of the clause, emphasizing that the California regulation itself expressly allows union organizers to “take access” to private property. Quoting a modern dictionary, it stated that “[i]n ‘ordinary English’ ‘appropriation’ means

¹²³ CAL. CODE REGS., tit. 8, § 20900(e)(4)(C).

¹²⁴ *Loretto*, 458 U.S. at 436.

¹²⁵ *See id.*

¹²⁶ *Lucas*, 505 U.S. at 1015.

‘taking as one’s own,’ and the regulation expressly grants to labor organizers the ‘right to *take* access.’”¹²⁷ Even in modern English, however, “taking access” to property is generally not the same as “taking as one’s own.” A sports fan with a ticket to a baseball game, for example, has been granted temporary access to a particular seat in a stadium, but she would likely be met with deep skepticism if she were to claim that she now effectively owned that seat—that she had taken it as her own. More to the point, the relevant definition of the word “take”—at least to a true originalist—is the one from the time of the Fifth Amendment’s ratification.¹²⁸ As discussed above, in 1789, “to take” was defined as, among other things, “[t]o seize what is not given”; “[t]o snatch; to seize”; “[t]o get; to have; to appropriate”; “[t]o get; to procure”; and “[t]o fasten on; to seize.”¹²⁹ A regulation that allows limited access onto private land for a particular purpose therefore can hardly be said to “take” anything, regardless of the Agricultural Labor Relations Board’s poor choice of wording in promulgating the regulation.¹³⁰ As Justice Breyer explained in his dissent, “The regulation does not *appropriate* anything. . . . It gives union organizers the right temporarily to invade a portion of the property owners’ land. It thereby limits the landowners’ right to exclude certain others. The regulation *regulates* (but does not *appropriate*) the owners’ right to exclude.”¹³¹

¹²⁷ Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2077 (2021) (quoting 1 OXFORD ENGLISH DICTIONARY 587 (2d ed. 1989); Cal. Code Regs., tit. 8 § 20900(e)(1)(C)).

¹²⁸ The Supreme Court has made clear that the Takings Clause, as incorporated against the states by the Fourteenth Amendment, should be analyzed in the same way as a Takings Clause claim against the federal government under the Fifth Amendment. *See, e.g.,* Nollan v. California Coastal Ass’n, 483 U.S. 825, 829 (1987) (considering a challenge to a California Coastal Commission decision that petitioners argued “violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment,” and treating the case just like any Takings Clause case against the federal government). Indeed, the meaning of the clause did not seem to have changed between the ratifications of the Fifth and Fourteenth Amendments. *See* THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 519–20 (1857); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870) (noting that the Fifth Amendment Takings Clause “has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.”).

¹²⁹ Schwartz, *supra* note 69, at 420–21 (quoting 1-2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755-56)).

¹³⁰ Cf. Nat’l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 564–65 (2012) (concluding that the constitutional question whether a provision of the Affordable Care Act imposed a tax for purposes of the Anti-Injunction Act “was not controlled by Congress’s choice of label.”).

¹³¹ Cedar Point Nursery, 141 S. Ct. at 2083 (Breyer, J., dissenting).

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The majority's meager attempt to ground the decision in the clause's history was equally flawed. Chief Justice Roberts stated, without further explanation, that "[t]he Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'"¹³² But, as explained above, the historical record is clear that, "[a]side from Madison, there was remarkably little desire for any kind of substantive protection of property rights against the national government,"¹³³ and Madison himself was singularly focused on protecting against direct appropriations of physical property.¹³⁴ The Court therefore sought to ground its decision in a history that did not exist.

Perhaps surprisingly, given all of its rhetoric about the Framers, the Court expressly acknowledged that "[b]efore the 20th century, the Takings Clause was understood to be limited to physical appropriations of property."¹³⁵ It explained that "[i]n *Pennsylvania Coal Co. v. Mahon*, however, the Court established the proposition that 'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'"¹³⁶ In other words, the Court recognized that it has, of its own volition, expanded the scope of the Takings Clause beyond how the clause was originally understood. Notably, the Court did not seem critical of this more recent history; instead, it continued that expansion.¹³⁷

Indeed, the Court's decision in *Cedar Point* was in no way compelled by precedent; instead, the Court extended the scope of the clause much further than it had before. In describing its precedents, the Court notably glossed over key details and distinguishing facts. In its discussion of *Nollan*, for instance, the Court failed to mention that that case had involved a permanent and continuous right of access to private property. It instead summed up *Nollan*'s holding as "reiterat[ing] that the appropriation of an easement constitutes a physical taking."¹³⁸ It gave no indication

¹³² *Id.* at 2071 (majority opinion) (alteration in original) (quoting John Adams, *Discourses on Davila*, in 6 WORKS OF JOHN ADAMS 280 (C. Adams ed., 1851)).

¹³³ Treanor, *supra* note 53, at 834 (footnote omitted).

¹³⁴ *See id.* at 847.

¹³⁵ *Cedar Point Nursery*, 141 S. Ct. at 2071.

¹³⁶ *Id.* at 2071–72 (citation omitted) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

¹³⁷ *See id.* at 2072.

¹³⁸ *Id.* at 2073.

that *Nollan* had in fact held that a “permanent physical occupation” amounts to an unconstitutional taking “where individuals are given a *permanent and continuous* right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.”¹³⁹

In a similar manner, the Court did not mention that *Causby*, another case where the Court had found an unconstitutional taking, had involved a significant devaluation of property. According to the Court in *Cedar Point*, it had held in *Causby* “that the invasion of private property by overflights effected a taking.”¹⁴⁰ The Court in *Cedar Point* stated that “[b]ecause the damages suffered by the Causbys ‘were the product of a direct invasion of [their] domain,’ we held that ‘a servitude has been imposed upon the land.’”¹⁴¹ But that only reflects half the story. In *Causby* itself, the Court made clear that the government had effected a taking not only because it directed “frequent and regular flights of army and navy aircraft over respondents’ land at low altitudes,”¹⁴² but because doing so had “limit[ed] the utility of the land and cause[d] a diminution in its value.”¹⁴³

By glossing over these key features of its prior decisions, the Court appears at first glance to be dutifully following its precedent. After summarizing *Nollan*, *Causby*, and other cases in this revisionist manner, it stated that “[t]he upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation.”¹⁴⁴ But the Court had adopted no such rule. As explained above, the rule that the Court had articulated and repeatedly refined leading up to *Cedar Point* was that two categories of regulations are considered takings per se: (1) “regulations that compel the property owner to suffer a physical ‘invasion’ of his property,” “at least with regard to permanent invasions,”¹⁴⁵ and (2) regulations that “den[y] *all* economically beneficial or productive use of

¹³⁹ *Nollan v. California Coastal Ass’n*, 483 U.S. 825, 832 (1987) (emphasis added).

¹⁴⁰ *Cedar Point Nursery*, 141 S. Ct. at 2073.

¹⁴¹ *Id.* (quoting *United States v. Causby*, 328 U.S. 256, 265, 267 (1946)).

¹⁴² *Causby*, 328 U.S. at 258.

¹⁴³ *Id.* at 262.

¹⁴⁴ *Cedar Point Nursery*, 141 S. Ct. at 2074.

¹⁴⁵ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

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land.”¹⁴⁶ And importantly, these categories “share a common touchstone,” as “[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.”¹⁴⁷

The rule that the Court announced in *Cedar Point*, therefore, was not dictated by precedent, and, indeed, by collapsing the distinction the Court had previously drawn between physical takings and regulatory takings that go “too far,”¹⁴⁸ it only drove the Court’s interpretation of the clause further from its original meaning. As Justice Breyer explained in his dissent, the Court’s decision could have severe repercussions in future cases, as “activities ranging from examination of food products to inspections for compliance with preschool licensing requirements” all “permit temporary entry onto (or an ‘invasion of’) a property owner’s land.”¹⁴⁹

* * *

There is no doubt that the Court’s *Cedar Point* decision is significant. At a minimum, it will, as one commentator put it, “hobble unions’ ability to help California’s agricultural workers, who toil in dangerous conditions, facing the persistent threat of illness and death, for rock-bottom wages.”¹⁵⁰ And its reach could potentially extend far more broadly, as Justice Breyer pointed out in his dissent.¹⁵¹ But *Cedar Point*’s significance is not limited to its practical consequences; it is also an important reminder that the Roberts Court’s originalism is far too often “fauxriginalism,” a distortion of the text and history of the Constitution in the service of conservative ideological goals.

¹⁴⁶ *Id.* (emphasis added); see also *id.* at 1017 (suggesting that the justification for the latter rule might be “that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation” (emphasis added)).

¹⁴⁷ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005).

¹⁴⁸ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

¹⁴⁹ *Cedar Point Nursery*, 141 S. Ct. at 2087 (Breyer, J., dissenting).

¹⁵⁰ Mark Joseph Stern, *The Supreme Court’s Latest Union-Busting Decision Goes Far Beyond California Farmworkers*, SLATE (June 23, 2021).

¹⁵¹ *Cedar Point Nursery*, 141 S. Ct. at 2087 (Breyer, J., dissenting).

Ford Motor Co.:

The Murky Doctrine of Personal Jurisdiction

Linda Sandstrom Simard,^{*} Charles W. “Rocky” Rhodes,^{**}
and Cassandra Burke Robertson^{***}

In *Ford Motor Co. v. Montana Eighth Judicial District Court*,¹ the U.S. Supreme Court upheld the assertion of personal jurisdiction over Ford by state courts seeking to adjudicate claims brought by forum citizens concerning Ford vehicles purchased secondhand in those states that were involved in accidents on forum roads. In many respects, this holding is unremarkable. Indeed, someone who lacks familiarity with the intricacies of personal jurisdiction doctrine might say the decision is common sense—as the Supreme Court acknowledged, each suit was brought in “the most natural State.”² Nevertheless, Ford argued that the assertion of jurisdiction in these cases violated its constitutional right to due process of law. Ford maintained that the long-standing bellwether for specific personal jurisdiction, the minimum contacts test, was not satisfied because Ford’s admittedly substantial forum sales and marketing activities were not the proximate cause of the accidents at issue, since the plaintiffs’ vehicles were not designed, manufactured, or originally sold within the forum states. In rejecting Ford’s argument, the Court did not adopt a new interpretation of due process or articulate a new doctrinal test. It instead repeated its typical formulation that specific jurisdiction requires that “[t]he plaintiff’s claims . . . ‘must arise out of

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¹ *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 141 S. Ct. 1017 (2021).

² *Id.* at 1031; *cf. id.* at 1033 (Alito, J., concurring in the judgment) (describing the “common-sense relationship” between Ford’s activities and plaintiffs’ suits).

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or relate to the defendant's contacts' with the forum."³ Because "Ford had systematically served" the markets in the forum states for the same models that plaintiffs alleged malfunctioned and injured them, the Court held that the necessary specific jurisdiction "relationship among the defendant, the forum, and the litigation" existed.⁴

Despite its seeming obviousness, the decision is significant on several fronts. From a doctrinal perspective, the Supreme Court, for the first time, explicitly approved the exercise of jurisdiction where the plaintiff's claim "related to," as opposed to "arose from," the defendant's forum conduct. While some prior decisions had hinted in dicta that a strict causal requirement was not necessary for specific jurisdiction,⁵ the Court had previously declined to squarely address this issue, despite two earlier opportunities.⁶ Yet, although *Ford* held "some relationships will support personal jurisdiction without a causal showing," the Court cautioned that "does not mean anything goes," as "the phrase 'relate to' incorporates real limits, as it must to adequately protect defendants foreign to a forum."⁷ The Court's opinion, however, was reticent in defining the characteristics of these "some relationships" supporting jurisdiction and the "real limits" imposed, thereby leaving substantial unanswered questions on the decision's scope that will be the subject of litigation and scholarly debate for years to come.

This debate's resolution will be critical for access to justice. Prior Roberts Court jurisdictional decisions had all found in favor of the defendants, either tightening prior jurisdictional requirements or discarding accepted interpretations by lower courts. These defendant-friendly holdings had jettisoned decades of lower-court jurisdictional decisions that "continuous and systematic" forum business contacts of a substantial nature sufficed for general jurisdiction,⁸ tightened the requirement for purposeful conduct by the defendant itself rather

³ *Id.* at 1025 (quoting *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017)).

⁴ *Id.* at 1028 (quoting *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

⁵ See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

⁶ See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Helicopteros*, 466 U.S. at 415 n.10.

⁷ *Ford*, 141 S. Ct. at 1026.

⁸ See *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

than reliance on the actions of the plaintiff or an intermediary,⁹ limited the amenability of foreign manufacturers employing independent distributors to serve the U.S. market,¹⁰ and prohibited nonresident consumers from joining a pharmaceutical-liability action with resident plaintiffs when the drug had not been developed or manufactured in the forum and the nonresidents did not purchase, ingest, or suffer injuries from the drug in the forum state.¹¹ While *Ford* halts any additional upheaval in jurisdictional doctrine for now, it is not clear whether the decision merely represents a synthesis of prior decisional law, or if it signals robust forthcoming changes favoring court access.

Part of the difficulty in discerning future jurisdictional roads stems from the Court's typical divides on constitutional interpretive methodologies. While the eight justices hearing the case (Justice Amy Coney Barrett did not participate) agreed unanimously that *Ford* was amenable to jurisdiction in the forum states, the justices split on reasoning, rationales, and constitutional approaches. Justice Elena Kagan cobbled together a majority opinion, joined by Chief Justice John Roberts and Justices Stephen Breyer, Sonia Sotomayor, and Brett Kavanaugh, which predominantly relied on the Court's past precedents as defining the rationales underlying and the bounds imposed on a state court's power to exercise jurisdiction over a nonresident defendant by the Fourteenth Amendment's Due Process Clause. But this fragile majority—comprised of justices that had been on opposite sides in previous jurisdictional decisions¹²—likely confronted challenges in proffering meaningful guidance for future cases, prompting the minimalist holding that leaves much unanswered. Justice Samuel Alito concurred separately, focusing more on his interpretation of the policies underlying prior decisions and quibbling with the majority's gloss on language contained in prior opinions. Justice Neil Gorsuch, joined by Justice Clarence

⁹ See *Walden v. Fiore*, 571 U.S. 277 (2014).

¹⁰ See *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

¹¹ See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

¹² In *Nicastro*, Chief Justice Roberts joined Justice Kennedy's plurality opinion, Justice Breyer concurred separately joined by Justice Alito, and Justices Sotomayor and Kagan joined Justice Ginsburg's dissenting opinion. *Nicastro*, 564 U.S. at 876. Justice Sotomayor had also disagreed with several other of the Court's jurisdictional holdings in separate concurrences and dissents. See *Bristol-Myers*, 137 S. Ct. at 1784 (Sotomayor, J., dissenting); *BNSF*, 137 S. Ct. at 1560 (Sotomayor, J., concurring in part & dissenting in part); *Daimler*, 571 U.S. at 142 (Sotomayor, J., concurring in the judgment).

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Thomas, also concurred separately, lamenting the disconnect between the Court's modern jurisdictional decisions and the original meaning of the Due Process Clause as a restraint on judicial power but concluding that Ford was amenable to jurisdiction in any event.

This essay analyzes the various *Ford* opinions and their doctrinal significance in Part I before highlighting examples of the significant unresolved issues that will arise in the future in Part II. This uncertainty stems both from the minimal guidance provided by the Court for future cases and its potential carve-out of cases involving the internet from its overarching jurisdictional doctrine.

I. The *Ford* Opinions

The Supreme Court historically has struggled in resolving jurisdictional questions arising in products-liability cases. The Court splintered hopelessly in 1987 on the quantum of in-state conduct necessary to support jurisdiction for allegedly defective products placed in the stream of commerce.¹³ And when the Roberts Court returned to those unresolved issues in 2011, it once again failed to produce a majority opinion.¹⁴ Achieving a majority opinion in *Ford* is thus progress. But the cost of this achievement was an opinion signed onto by five justices with divergent perspectives on the scope of adjudicative power that left unresolved many underlying questions and leaves judges and litigants to guess how the Court might come out in the disputes currently wending through the courts. These complexities are exacerbated by the separate writings of Justices Alito and Gorsuch, which evidence additional fault lines among the justices on the due process limitations on personal jurisdiction.

A. The *Ford* Majority

In delivering the opinion of the Court, Justice Kagan relied on precedent that has defined the constitutional limits of personal jurisdiction for the last seventy-five years. The opinion highlights the “canonical decision” in *International Shoe Co. v. Washington*¹⁵ and articulates the constitutional framework for personal jurisdiction: “[A]

¹³ *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102 (1987).

¹⁴ *Nicastro*, 564 U.S. at 876.

¹⁵ *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

tribunal's authority depends on the defendant's having such 'contacts' with the forum State that 'the maintenance of the suit' is 'reasonable, in the context of our federal system of government' and 'does not offend traditional notions of fair play and substantial justice.'"¹⁶ Within this constitutional framework, specific personal jurisdiction allows a state to exercise jurisdiction when a plaintiff's claims arise out of or relate to the defendant's purposeful contacts with the forum, or, stated differently, when an affiliation exists between the forum and the underlying controversy, which principally involves in-state activities or occurrences subject to state regulation. According to the Court, "[t]hese rules derive from and reflect two sets of values—treating defendants fairly and protecting 'interstate federalism.'"¹⁷ While *International Shoe* rooted specific jurisdiction in the concept of reciprocity, later cases supplemented this concept with the idea of fair notice—a defendant should not be subject to jurisdiction without fair warning that particular conduct in a forum state will subject it to a state's judicial power. These values—treating defendants fairly and protecting interstate federalism—are oftentimes intertwined, such that when a state's exercise of jurisdiction is reasonable, it will likely also be predictable.

Ford nonetheless argued here that, since it did not design, manufacture, or sell the vehicles at issue in either of the forum states, the exercise of jurisdiction was unconstitutional because the plaintiffs' claims did not causally arise from its forum conduct. The Court unequivocally rejected Ford's argument. A "causation-only approach finds no support in this Court's requirement of a 'connection' between a plaintiff's suit and a defendant's activities," as the typical formulation merely "demands that the suit 'arise out of or relate to the defendant's contacts with the forum.'"¹⁸ This "relate to" alternative "contemplates that some relationships will support jurisdiction without a causal showing."¹⁹ A state may therefore have jurisdiction outside the causal chain "because of another 'activity [or] occurrence' involving the defendant" taking place within the forum state.²⁰

¹⁶ Ford Motor Co. v. Montana Eighth Judicial Dist. Court, 141 S. Ct. 1017, 1025 (2021).

¹⁷ *Id.*

¹⁸ *Id.* at 1026 (emphasis in original) (quoting *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1776, 1780, (2017) and *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)).

¹⁹ *Id.*

²⁰ *Id.* (quoting *Bristol-Myers*, 137 S. Ct. at 1780–81, and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

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This was satisfied in these cases when Ford was serving the markets for its vehicle models in the forum states, and these models allegedly malfunctioned within these states. The Court emphasized dicta that has “appeared and reappeared” in Supreme Court cases many times over the last four decades²¹:

if the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of a manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.²²

Here, Ford’s substantial forum business—a “veritable truckload of contacts” —indicated that the exercise of jurisdiction in these cases was fair and reasonable.²³ Notwithstanding the absence of strict causal links between the plaintiffs’ claims and Ford’s forum contacts, the Court found a “strong ‘relationship among the defendant, the forum and the litigation.’” In each case, the resident-plaintiff alleged that a defective Ford vehicle model regularly sold in the forum state caused an accident in the forum. Ford sought to engage in extensive business in the forum states, and as such enjoyed the benefits of government protection if and when needed. In exchange for these benefits, Ford’s reciprocal obligation was to ensure that the models of its vehicles marketed in the forum were safe for forum citizens to use there. In light of this arrangement, it was hardly unreasonable or unpredictable to allow the forum state courts to enforce their state’s safety regulations when those vehicles were allegedly unsafe. Indeed, the assertion of jurisdiction was so reasonable, it was also predictable, as an automaker regularly marketing its vehicles within the forum has clear notice of its amenability to suit. Ford had the ability to structure its conduct to lessen the costs of litigation in the forum state, but it chose to continue its business and accept the risk of litigation.

Yet precisely because the case was, in the Court’s own words, “a paradigm example” of specific jurisdiction’s operation, the Court’s

²¹ *Id.* at 1027.

²² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980).

²³ *Ford*, 141 S. Ct. at 1030–31.

guidance for future cases was wanting. The Court declined to address even slight modifications to the presented facts, such as if Ford had marketed the particular models at issue only in areas or regions outside the forum states. The Court specified that its holding did not support “that any person using any means to sell any good in a State is subject to jurisdiction there if the product malfunctions after arrival,” as its decisions “have long treated isolated or sporadic transactions differently,” and internet transactions may raise unique questions.²⁴ But the Court never explained the doctrinal sources for any such differential treatment, so it is not clear whether any such divergence arises under the specific jurisdiction prongs for purposeful availment, adequate relationship, fairness check, or perhaps some combination thereof. The only other clues in the opinion are that the relationship requirement incorporates the typical jurisdictional values of “treating defendants fairly and protecting ‘interstate federalism,’”²⁵ and that, unlike in some of its prior decisions, the Court reasoned that the forum selected by each of the plaintiffs in these cases was “the most natural State” rather than a product of forum shopping.²⁶ But these hints leave much unsettled regarding the “real limits” the Court insisted the relationship requirement imposes, as both concurring opinions protested.

B. The Separate Concurrences and the Court’s Fault Lines

The two separate writings in *Ford* provide insights into some of the underlying fault lines among the justices and therefore may assist in predicting the doctrine’s future directions.

Justice Alito penned a short concurrence, not joined by any other justice, while Justice Gorsuch penned a longer one joined by Justice Thomas. Both concurrences quoted *Reiter v. Sonotone Corp.*, within the first pages of their analysis, criticizing the majority opinion for parsing the language of earlier personal jurisdiction case law “as though we were dealing with language of a statute.”²⁷ Personal jurisdiction, after all, is at its heart a constitutional doctrine that has been developed through

²⁴ *Id.* at 1028 n.4.

²⁵ *Id.* at 1025 (quoting *World-Wide Volkswagen*, 444 U.S. at 293).

²⁶ *Id.* at 1031.

²⁷ *Id.* at 1033 (Alito, J., concurring in the judgment); *id.* at 1034 (Gorsuch, J., concurring in the judgment) (both quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)).

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more than a century of case-law development. By emphasizing the quote from *Reiter*, the concurring justices suggest that they are unwilling to be boxed in by the language used in earlier cases and have some discomfort with the majority's articulation of personal jurisdiction doctrine. At that point, however, the two concurring opinions diverge, with Justice Alito's opinion underscoring the policy interests supporting personal jurisdiction doctrine, and Justice Gorsuch's opinion raising questions concerning the original underpinning of the doctrine.

1. Justice Alito's "Rough Causal Connection"

In Justice Alito's view, the result in *Ford* flows naturally from both *International Shoe* and *World-Wide Volkswagen Corp. v. Woodson*.²⁸ He notes that Ford has substantial contacts in both Minnesota and Montana and that both states have a strong interest in the lawsuits, pointing out that "[t]heir residents, while riding in vehicles purchased within *their* borders, were killed or injured in accidents on *their* roads."²⁹ He rhetorically continues: "Can anyone seriously argue that requiring Ford to litigate these cases in Minnesota and Montana would be fundamentally unfair?" He answers that "Ford makes that argument" and "would send the plaintiffs packing to the jurisdictions where the vehicles in question were assembled (Kentucky and Canada), designed (Michigan), or first sold (Washington and North Dakota) or where Ford is incorporated (Delaware) or has its principal place of business (Michigan)."³⁰

Yet Justice Alito's summation of Ford's argument here is not quite accurate—Ford conceded that the "fairness factors" were satisfied in the case while arguing that the Court's own language in earlier cases limited jurisdiction to forums where the defendant's in-state conduct gave rise to the particular claims at issue. In Justice Alito's view, however, the fairness analysis cannot wholly be separated from the rest of the jurisdictional analysis. He concludes that "[t]he common-sense relationship between Ford's activities and these suits, in other words, is causal in a broad sense of the concept, and personal jurisdiction can rest on this type of link without strict proof of the type Ford would require."³¹

²⁸ *World-Wide Volkswagen*, 444 U.S. at 286.

²⁹ *Ford*, 141 S. Ct. at 1032 (Alito, J., concurring in the judgment) (emphasis in original).

³⁰ *Id.*

³¹ *Id.* at 1033.

In his concluding paragraph, Justice Alito sets out his concern for future cases. That is, although there was a “common-sense” basis for jurisdiction over Ford, he is concerned that requiring a looser standard of connection between the forum state and the defendant could give rise to a “potentially boundless reach” of state courts. Requiring only a loose “related to” standard for jurisdiction would give too much power to trial courts, in his view, because “everything is related to everything else.” He sees a need for “real limits” on jurisdiction over out-of-state defendants and concludes that requiring causation, even a “sort of rough causal connection,” is the best way to ensure such limits.³²

2. Justice Gorsuch’s Search for the Constitution’s Original Meaning

Justice Gorsuch’s concurring opinion, joined by Justice Thomas, was nearly three times the length of Justice Alito’s. Where Justice Alito offered a narrow path, Justice Gorsuch roamed broadly, openly “struggl[ing] . . . with making sense of our personal jurisdiction jurisprudence.”³³ Justice Gorsuch questioned the entire basis of modern personal jurisdiction doctrine, but ultimately did not set out a clear path to reform, as he ended “with more questions than [he] had at the start.”³⁴

Justice Gorsuch traces his dissatisfaction with the Court’s personal jurisdiction doctrine all the way back to *International Shoe*,³⁵ where the Court first moved away from a territorial conception of personal jurisdiction (“depend[ing] on the defendant’s presence in, or consent to, the sovereign’s jurisdiction”)³⁶ and into a more nuanced analysis focused on “traditional notions of fair play and substantial justice.”³⁷ In a broad sweep, Justice Gorsuch questions whether “all of the Court’s efforts since *International Shoe*” are at their heart really just restatements of the old “consent” and “presence” evaluations. It is an interesting question, but ultimately one that he does not delve into in any detail, as he handwaves aside the nearly eighty years of doctrinal development—including

³² *Id.* at 1033–34.

³³ *Id.* at 1039 (Gorsuch, J., concurring in the judgment).

³⁴ *Id.*

³⁵ *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³⁶ *Ford*, 141 S. Ct. at 1036 (Gorsuch, J., concurring in the judgment).

³⁷ *Id.* at 1038.

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numerous Roberts Court cases—that ultimately influenced modern doctrine more than *International Shoe* itself.³⁸

But what Justice Gorsuch’s opinion lacks in precision, it makes up for in its willingness to directly confront the difficult questions and to search for firmer constitutional grounding. Justice Gorsuch raises hypothetical questions not answered by the majority opinion. For example, could the plaintiffs in *Ford* have chosen to sue in the state of first sale (here, North Dakota or Washington)? Those states are undoubtedly part of the causal chain of events, and, as Justice Gorsuch points out, have a “strong interest in ensuring they don’t become marketplaces for unreasonably dangerous products.”³⁹ On the other hand, the Roberts Court has repeatedly expressed discomfort with plaintiffs’ forum shopping. And of course, as long as multiple potential forums are available, plaintiffs will always seek the most favorable. As a result, the broader the courts’ power to exercise personal jurisdiction, the more possibilities there will be for forum shopping. Historically, personal jurisdiction protected against only the oppressive or vexatious forum—other doctrines, like venue in the federal system, did more to steer litigation to the most convenient forum. As Justice Gorsuch notes, the *Ford* opinion leaves open questions about just how much “connection” is needed to a potential forum and whether this is a relative analysis when multiple states have a potentially sufficient connection to the lawsuit.

Justice Gorsuch also points out that traditional doctrine struggles to handle modern commerce. He explains that a defendant’s choice to avail itself of a state’s marketplace in the middle of the last century required a great deal of effort, whereas modern technology today makes it easy for sellers to exploit distant markets.⁴⁰ Under current doctrine, even a sporadic contact could give rise to jurisdiction if it directly causes harm in the forum. But Justice Gorsuch notes the Court’s discomfort with the idea, discussed at oral argument and mentioned in a footnote to the majority opinion, that a small-time crafter (here, “an individual retiree carving wooden duck decoys in Maine”) could be haled into a distant forum when a product sold into a distant state causes harm.

³⁸ See Charles W. “Rocky” Rhodes, *The Roberts Court’s Jurisdictional Revolution within Ford’s Frame*, 51 *STETSON L. REV.* n.152 (forthcoming 2021) (explaining that “*International Shoe* and its progeny, at least as interpreted by the lower federal and state courts before the Roberts Court’s revolution, are the wrong villain for his musings.”).

³⁹ *Ford*, 141 S. Ct. at 1035 (Gorsuch, J., concurring in the judgment).

⁴⁰ *Id.* at 1038.

Of course, perspective matters here—perhaps the justices’ discomfort would evaporate if the perspective was flipped, and the question was whether a family could sue in their home forum when their child was poisoned by the lead paint on a wooden toy they bought online and had mailed to their house. Should they have to travel to Maine to file suit? Or, perhaps even more commonly in today’s world, should they have to sue in China? In any case, Justice Gorsuch is right that under *International Shoe’s* approach, the family would be allowed to sue in their home state, given that “the plaintiff’s injuries arguably arose from (or were caused by) the product he sold there,”⁴¹ at least as long as the seller purposefully mailed the product into the buyer’s state. The majority’s unwillingness to commit to an answer about whether that is still the case leaves open significant uncertainty about just how far the Court has gone in re-shaping jurisdictional doctrine.

Finally, Justice Gorsuch criticizes the majority opinion for its reluctance to engage with “the Constitution’s original meaning,” suggesting that the Court’s failure to do so stems from a fear that “corporations might lose special protections.”⁴² Justice Gorsuch has a valid point. Current personal jurisdiction doctrine, especially as interpreted by the Roberts Court, has restricted courts’ ability to exercise jurisdiction over out-of-state corporate defendants. A decision in favor of *Ford* would have gone even further down the road of “limit[ing] corporate accountability and undercut[ing] the well-accepted traditional understandings of the adjudicative authority of sovereign states,” but even though the Court did not go that far, it had already traveled a good way down that road.⁴³ Although Justice Gorsuch joined some of those earlier opinions, it appears that he is now reconsidering the Court’s constitutional authority to limit state courts’ authority over out-of-state corporate defendants doing business in the forum state. He acknowledges that he is left with more questions than answers after the *Ford* case, thus giving litigants plenty of room to craft arguments in future cases.

⁴¹ *Id.*

⁴² *Id.* at 1039 n.5.

⁴³ See Charles W. “Rocky” Rhodes, Cassandra Burke Robertson & Linda Sandstrom Simard, *Ford’s Jurisdictional Crossroads*, 109 GEO. L.J. ONLINE 102, 114 (2020).

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C. The Post-Ford Doctrinal Landscape

Ford's impact on jurisdictional doctrine going forward is uncertain. The case is undoubtedly significant as the first time the Supreme Court has expressly upheld the exercise of specific personal jurisdiction where a plaintiff's claim is related to, but does not arise from, the defendant's forum conduct.⁴⁴ *Ford's* position was that its jurisdictional exposure only extended to claims that were causally related to its forum conduct, as a causal test both "furthers fairness" and is "linked to the State's interest in regulating the defendant's actions,"⁴⁵ such that no balancing of the state's interest and the defendant's interest was required under the fairness factors.⁴⁶ In this manner, *Ford* sought to bypass the state's and the plaintiff's strong interests by arguing that causation is a *sine qua non* for jurisdiction and, without it, any additional factors are irrelevant. In rejecting *Ford's* argument, Justice Kagan employed a holistic analysis that included the state's interest and the plaintiff's interest into the relatedness question, thus defining the scope of specific jurisdiction more broadly than a strict causal standard would have allowed and obviating the doctrinal bottleneck that *Ford* had sought to exploit. This has expanded jurisdiction in this context, albeit in a manner comporting with earlier dicta, but it is uncertain what it means for jurisdictional doctrine more broadly.

One perspective is that *Ford* did not change much else in the familiar three-part jurisdictional test for specific jurisdiction. Specific jurisdiction still requires three separate elements: (1) the defendant's purposeful forum activities, (2) an affiliation or relationship between the defendant's forum activities and the lawsuit, and (3) the fairness or

⁴⁴ The cases in which the Court has previously upheld specific jurisdiction did not involve challenges to the scope of specific jurisdiction, apparently because the plaintiff's claims clearly arose from the defendant's forum conduct. *See, e.g.*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

⁴⁵ Brief for Petitioner at 24–26, *Ford*, 141 S. Ct. 1017 (No. 19-368).

⁴⁶ *Burger King*, 471 U.S. at 476–77 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' Thus courts in 'appropriate [cases]' may evaluate 'the burden on the defendant,' the forum State's interest in adjudicating the dispute, 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.'") (citations omitted).

reasonableness check to ensure that the jurisdictional assertion does not violate traditional notions of fair play and substantial justice. Under this view, all *Ford* did was to confirm what has long been hinted at—that a nonresident defendant’s substantial efforts to serve the market in the forum state for its products are sufficiently connected to a lawsuit in the forum based on an in-state injury suffered from one of its allegedly defective products. To the majority, this was because “relate to” was a separate method to establish the required affiliation, while Justice Alito believed a rough causal connection existed between the defendant’s activities and the plaintiff’s claims. Yet, other than the Court’s explicit clarification of the scope of the affiliation requirement in this context, specific jurisdiction’s typical three-prong analysis might be thought to proceed largely as before, which appears at this very early juncture to be the prevailing position of the lower courts.⁴⁷

But there are possible readings of *Ford* that might signal a new jurisdictional direction, with a greater emphasis on the “fairness” of the jurisdictional assertion to the defendant in light of the state’s comparative interest in adjudicating the dispute. The majority opinion tells us that the relationship requirement incorporates the values of “treating defendants fairly and protecting ‘interstate federalism,’”⁴⁸ and the majority, when distinguishing its prior decisions, considered that the forum selected by each of the plaintiffs in these cases was “the most natural State” rather than a product of forum shopping, which arguably was a key factor in evaluating whether the relationship requirement was satisfied.⁴⁹ The Court could readily build on this analysis and retreat from the formalism that has infused its recent jurisdictional decisions. The Roberts Court’s past decisions have strictly categorized jurisdictional power into either general or specific jurisdiction, with inflexible prerequisites that do not account for the overall reasonableness of the plaintiff’s forum choice in light of the defendant’s burdens.⁵⁰

⁴⁷ See, e.g., *Rogers v. City of Hobart, Ind.*, 996 F.3d 812 (7th Cir. 2021); *Ex parte TitleMax of Ga., Inc.*, No. 1200128, 2021 WL 2024678 (Ala. May 21, 2021); *Luciano v. SprayFoamPolymers.com, LLC*, 65 S.W.3d 1 (Tex. 2021).

⁴⁸ *Ford*, 141 S. Ct. at 1025 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980)).

⁴⁹ *Id.* at 1031.

⁵⁰ See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

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Such a refashioning might perhaps include eliminating a separate consideration of the fairness factors as a check only after the plaintiff establishes the formal jurisdictional prerequisites, instead incorporating the state's interest (which oftentimes subsumes the plaintiff's interest, state substantive social policies, and litigation efficiency) into the analysis of purposeful availment and the required connection or affiliation for jurisdiction.

Or maybe not. *Ford* repeatedly referred to specific jurisdiction as requiring some "affiliation" between the forum and the lawsuit's underlying controversy, which principally is an in-state activity or occurrence subject to the state's regulation.⁵¹ This might be a formalistic prerequisite that must be satisfied before turning to the underlying jurisdictional policies. Such a perspective interprets *Ford* as turning to these policies only after finding the appropriate affiliation when a Ford vehicle malfunctioned in the forum state. But such policies would not assist a forum resident attempting to sue at home when there was no such affiliation with the state, such as in a case where the resident did not purchase the vehicle new in the state, the injury did not occur in the state, and the vehicle was not designed or manufactured in the state.⁵² Such a reading would be informed by the Roberts Court's prior formalism in jurisdictional doctrine—as well as in constitutional law more generally. Although three members of the *Ford* majority, including the opinion's author, have often decried this formalism, in both jurisdictional and other areas of constitutional doctrine, Chief Justice Roberts and Justice Kavanaugh have embraced it. Consequently, unless Justice Gorsuch finds that a balancing approach was part of the original meaning of the due process limitations on personal jurisdiction (a highly doubtful proposition in light of the formalism of that era and Justice Gorsuch's methodological preferences), five votes may not be there for such a recalibration. Also, such a move would at least undercut some of the Roberts Court's jurisdictional precedents, which may not even accord with Justice Kagan's uber-adherence to principles of stare decisis in recent constitutional cases.

As a result, the future roads of jurisdictional doctrine after *Ford* are simply unclear; indeed, the three of us all have slightly different takes.

⁵¹ See *Ford*, 141 S. Ct. at 1025, 1026–27, 1031.

⁵² Cf. *Bristol-Myers*, 137 S. Ct. at 1781.

Although we all would prefer a less formalistic and more policy-based approach, we differ on the extent to which *Ford* marks a step in this direction outside its particular factual context.

But one thing is clear—this doctrinal and normative uncertainty has deleterious consequences in achieving the predictability that is so vital to a defendant’s “fair warning” regarding its amenability to suit in a forum. We now turn to the difficulties that will plague the lower courts in ascertaining the permissible scope of personal jurisdiction “on the ground” in future cases.

II. The Uncertain Future Jurisdictional Roads

In the aftermath of *Ford*, lower courts will be challenged to resolve the many ambiguities left unanswered. These ambiguities stem both from the minimal guidance provided by the Court for future cases, as well as the Court hinting at the possibility of a carve-out for cases involving the internet. We first explore a relatively simple hypothetical case that illustrates the numerous questions that will likely be the subject of future litigation. We then proceed to address the Court’s reluctance to announce that its typical jurisdictional rules apply to internet activities.

A. A Simple Hypothetical—and Many Unanswered Questions

To illustrate some of the questions that are likely to be the subject of future litigation, imagine a small, closely held business that sells diamond engagement rings. The business is incorporated in New York, has its principal place of business in Manhattan and has a second retail location in Paramus, New Jersey. A New Jersey consumer purchases a diamond ring from the jeweler in Manhattan and returns to his home in New Jersey where he later learns that the diamond is a fake. If the consumer files suit against the corporation in New Jersey, *Ford* will provide both sides fertile ground to argue both for and against the exercise of specific jurisdiction.

The plaintiff will argue that the exercise of jurisdiction is constitutional because the plaintiff’s claim relates to the defendant’s ongoing and continuous conduct in New Jersey. The defendant purposefully avails itself of the privilege of conducting business in New Jersey and, in exchange for enjoying the benefits and protection of New Jersey law, the defendant submits to the state’s power to “hold

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the company to account for related misconduct.”⁵³ Relying upon *Ford*, the plaintiff will assert that this litigation is related to the defendant’s New Jersey jewelry business because the defendant sells diamond engagement rings in New Jersey that are similar in all material respects to the ring that is the subject of the litigation. While diamond rings are not categorized according to a standard model or design, the defendant should not be shielded from jurisdiction merely because each product has some unique qualities. Most products, even those that share a common design, incorporate unique features. For example, Ford Explorers share many defining characteristics, but they vary in many respects as well, i.e., color, engine size, and add-on packages. Similarly, diamond engagement rings share defining characteristics even though every diamond has unique qualities. The plaintiff will contend that the issues in this litigation do not concern the features that distinguish one diamond from another diamond; rather, the suit concerns the difference between a real diamond and a fake diamond. The plaintiff will argue this suit is not an example of forum shopping, as he filed suit in his home forum where he suffered injury upon discovering the alleged fraud. While the defendant’s forum contacts may not equal the “veritable truckload of contacts” in *Ford*, they are far more than “isolated or sporadic contacts” that the Court has suggested would be insufficient to ground specific jurisdiction.⁵⁴

The exercise of jurisdiction, the plaintiff here would continue, is fair and reasonable notwithstanding the fact that the diamond ring at issue in this litigation is not identical to the many diamond rings sold by the defendant in New Jersey. The State of New Jersey has a strong interest in adjudicating this dispute to protect its citizens from fraud and to provide a convenient forum for its citizens to seek redress. The defendant had fair warning that it could be haled into court in New Jersey to defend an action alleging fraud in the sale of a diamond engagement ring.

The defendant, on the other hand, will argue that the exercise of jurisdiction is unconstitutional because the plaintiff’s claim does not arise from or relate to any conduct that occurred in New Jersey. Although the defendant purposefully avails itself of the privilege of conducting activities in New Jersey and enjoys the benefits and protection of New

⁵³ *Ford*, 141 S. Ct. at 1025.

⁵⁴ *Id.* at 1028, 1028 n.4.

Jersey laws, the allegation of fraud in this case arises from a sale that occurred in New York, not New Jersey. This claim, the defendant will maintain, does not have the necessary “affiliation” with New Jersey, as the relevant activities or occurrences alleged in the lawsuit all occurred in New York—the ring was not purchased, assembled, or delivered in the forum state.

The defendant will also seek to distinguish *Ford*, where the Court emphasized that the same model vehicles that were the subject of the lawsuits were sold by Ford in both forum states and suggested that this gave the defendant fair warning that it could be sued in the forum if these products malfunctioned there. Although the Court declined to address the jurisdictional consequences if Ford had not sold the same model vehicle in the forum states, the Court highlighted such a case was distinguishable.⁵⁵ Here, unlike automobiles of the same model that are virtually indistinguishable from one another, diamonds are inherently unique. No two diamond rings are the same because each client chooses their preferred setting for their unique diamond, creating a custom product that is unlike any other in the world. The defendant does not sell the same product in New Jersey and therefore there is no relationship among the defendant, the forum, and the litigation that supports the exercise of jurisdiction.

Moreover, the defendant will argue that, unlike in *Ford*, the product did not malfunction in the forum state or subject any other forum citizens to potential harm. Rather, the alleged injury occurred in New York at the place of sale. The defendant may argue that *Walden v. Fiore* held that the mere fact the plaintiff resides in the forum is insufficient to justify the exercise of jurisdiction where the plaintiff’s claim does not arise out of or relate to the defendant’s purposeful forum conduct,⁵⁶ and that *Bristol-Myers Squibb Co. v. Superior Court* requires that the lawsuit concerns some activity or occurrence subject to the state’s regulation.⁵⁷ The defendant would urge that it would be unreasonable to anticipate being haled into court in New Jersey to defend an action based on a product that it sold in New York. Allowing jurisdiction in this case would be unfair because the defendant has far fewer contacts with New Jersey

⁵⁵ *Id.* at 1028.

⁵⁶ *Walden v. Fiore*, 571 U.S. 277 (2014).

⁵⁷ *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

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than the “veritable truckload of contacts” that Ford had in Montana and Minnesota,⁵⁸ and any reciprocal obligations that arise from its sale of jewelry in New Jersey are unrelated to the sale of this particular ring in New York. The state’s interest in adjudicating this dispute, the defendant would continue, is *de minimis* because there is no affiliation between the litigation and the forum state that is based on an activity or occurrence in New Jersey subject to the state’s regulation.⁵⁹ Finally, the defendant would maintain that principles of interstate federalism do not support jurisdiction in this case. Even if New Jersey has an interest in providing its citizen with a convenient forum for redressing alleged fraud inflicted by out-of-state actors, in this case the state’s interest is overshadowed by the comparatively stronger interests of the State of New York, where the incident occurred.

How the lower courts will resolve these many ambiguities is yet to be determined. In the meantime, many cases will challenge the contours of specific personal jurisdiction when a plaintiff’s claims allegedly relate to a defendant’s purposeful forum conduct. These cases are likely to involve all types of disputes, not just disputes involving defective products, and will require lower courts to extrapolate the reasoning of *Ford* to very different factual and legal contexts. But a further complexity for the lower courts is that many of these cases will also involve the internet—and the Court once again has left open the possibility that different jurisdictional rules apply in the virtual world.

B. The Court Again Dodges Internet Jurisdiction

The Supreme Court dodged questions of how internet-based contacts fit into the justices’ doctrinal model of personal jurisdiction, explaining only in a footnote that “we do not here consider internet transactions, which may raise doctrinal questions of their own.”⁶⁰

Unlike the Supreme Court, litigants and lower courts will not be able to avoid these issues. After all, internet communications and commerce permeate modern society and are therefore enmeshed in the disputes

⁵⁸ *Ford*, 141 S. Ct. at 1029 (“In conducting so much business in Montana and Minnesota, Ford ‘enjoys the benefits and protections of [their] laws’—the enforcement of contracts, the defense of property, the resulting formation of effective markets.”).

⁵⁹ *Id.* at 1025.

⁶⁰ *Id.* at 1028 n.4.

that arise from everyday business and life. Defamation cases arise from social media communications and online forums.⁶¹ Intellectual-property infringement actions and trade-secret cases may involve online sales, contracts, and communications.⁶² Disputes over data management and privacy will arise almost exclusively online, perhaps involving databases maintained in the cloud.⁶³ Without guidance from the Supreme Court, state and federal courts have struggled to apply jurisdictional doctrine to cases involving internet contacts.⁶⁴

It is possible that the Court prefers to leave questions of internet jurisdiction to percolate in the lower courts, benefitting from factual development and argument before the Court addresses issues arising from online communication and commerce.⁶⁵ But while this percolation approach works well to carve out discrete questions of law that can be separately litigated, it is more problematic when the Court attempts

⁶¹ Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 UC DAVIS L. REV. 1301, 1349–50 (2012) (“Recent defamation suits over online consumer reviews evidence just such an attempt to crack down on allegedly wrongful speech. But if such speech is chilled, the public forum will suffer.”); Sarah H. Ludington, *Aiming at the Wrong Target: The “Audience Targeting” Test for Personal Jurisdiction in Internet Defamation Cases*, 73 OHIO ST. L.J. 541 (2012).

⁶² Marketa Trimble, *Copyright and Geoblocking: The Consequences of Eliminating Geoblocking*, 25 B.U. J. SCI. & TECH. L. 476, 497 (2019) (“Faced with the inevitability of global licensing and with no backing from large corporations, some copyright owners might decline to make their works available to the public on the internet (or at all)”); Robin J. Effron, *Trade Secrets, Extraterritoriality, and Jurisdiction*, 51 WAKE FOREST L. REV. 765, 777 (2016) (“[I]t is unclear. . . that downloading computer information from a corporation in a given jurisdiction is, without other contacts, enough to constitute an express targeting of the corporation where it is located. If a corporation’s servers or computers are located in a different forum, or if the defendant does not know where the corporation is located, the case for personal jurisdiction is markedly weaker.”).

⁶³ Damon C. Andrews & John M. Newman, *Personal Jurisdiction and Choice of Law in the Cloud*, 73 MD. L. REV. 313, 361 (2013) (“In the cloud, however, torts do not have to occur through any sort of website-host-consumer interaction.”).

⁶⁴ Derek E. Bambauer, *The MacGuffin and the Net: Taking Internet Listeners Seriously*, 90 U. COLO. L. REV. 475, 493 (2019) (“[S]ome courts have created Internet-specific (or, perhaps, Internet-peculiar) personal jurisdiction doctrine that is at best benignited and at worst unconstitutional.”).

⁶⁵ See, e.g., *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (declining to adopt nonmutual offensive collateral estoppel in cases against the government, as such a holding “would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.”).

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to carve out a major factual context that necessarily flows into the overarching doctrine.⁶⁶

Even in the short time since the *Ford* decision was released, courts have already had to apply its holding to internet-based conduct. In one case also involving a large car manufacturer (here, General Motors), plaintiffs alleged that the car company's website "captures website visitors' mouse clicks, keystrokes, names, zip codes, phone numbers, email addresses, IP addresses, and locations at the time of the visit."⁶⁷ They sued for "violations of the California Invasion of Privacy Act, for invasion of privacy under the California Constitution, for violation of the Federal Wiretap Act."⁶⁸ The plaintiffs argued that *Ford* supported personal jurisdiction in the case—after all, there was no doubt that General Motors "extensively marketed its products and services to Californians," that the plaintiffs suffered the alleged harm in California, that California had a strong regulatory interest in the data privacy of its citizens, and that it would not be unduly burdensome for a company as large as General Motors to defend the case in California.

In spite of these connections to California, the federal district court denied personal jurisdiction over General Motors. It relied on the fact that the Supreme Court had excluded internet contacts from its test, and it distinguished *Ford*'s physical injuries from the plaintiffs' more intangible harms.⁶⁹ The court held that the "relevant events and alleged injury all occurred online" and thus could not be tied to the defendant's in-state contacts; as a result, "GM's operation of broadly accessible websites does not constitute the type of minimum contacts with the forum needed for specific personal jurisdiction."⁷⁰ Because the case was filed in federal court, the court was able to transfer the case to the

⁶⁶ Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363, 388–89 (2021) ("Postponing Supreme Court resolution of a legal issue creates unpredictability for those seeking to comply with their legal duties. Moreover, the percolation process increases the costs of such compliance as well as the administrative costs of running the judicial system, particularly insofar as the percolation process by definition demands additional litigation.").

⁶⁷ *Massie v. Gen. Motors Co.*, No. 1:20-CV-01560-JLT, 2021 WL 2142728, at *1 (E.D. Cal. May 26, 2021).

⁶⁸ *Id.*

⁶⁹ *Id.* ("[I]n *Ford*, the Supreme Court stated that its holding, which involved physical purchases of cars, did not bear on the 'doctrinal questions' associated with personal jurisdiction in the online context.").

⁷⁰ *Id.* at *6.

District of Delaware (where General Motors would be subject to general personal jurisdiction) rather than dismissing the case. Nonetheless, the case resulted in an anomaly: Alleged violations of California's privacy laws could not be addressed by California courts. This result suggests that a state's legislative jurisdiction could frequently exceed its judicial jurisdiction, at least where internet activity is concerned.

The Supreme Court's decision to carve out internet contacts left room for the *General Motors* court to apply a much more restrictive personal jurisdiction standard that weighs state regulatory interests differently when addressing online activity. It is certainly reasonable for the Court to want to avoid speculating on cases or issues not currently before it. But by setting out a doctrinal model of personal jurisdiction only to acknowledge at the same time that the model may not fit common fact patterns, the Court undercut its own interest in doctrinal consistency. As other scholars have pointed out, "[t]he Internet is not exceptional for personal jurisdiction—it is a vital exemplar of deeper fissures in the doctrine that courts and scholars should address holistically."⁷¹ A test for personal jurisdiction that is not robust enough to incorporate common business and personal activity offers little guidance either for parties or for courts.

* * *

Oliver Wendell Holmes said, "hard cases make bad law."⁷² But the *Ford* case suggests that the corollary—that easy cases make good law—may not be true. This case was easy. The justices were unanimous in holding that the exercise of personal jurisdiction by Montana and Minnesota did not violate Ford's due process rights. Indeed, for the first time, a Court majority explicitly approved the exercise of jurisdiction where the plaintiff's claim "related to," as opposed to "arose from," the defendant's forum conduct. Yet, the majority and concurring opinions illustrate the fault lines among the justices' perceptions of where the doctrine should go from here. Time will tell if *Ford* signals

⁷¹ Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs"*, 100 CORNELL L. REV. 1129, 1190 (2015).

⁷² *N. Securities Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").

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a robust change in the landscape of personal jurisdiction that places greater emphasis on the “fairness” of the jurisdictional assertion to the defendant in light of the state’s comparative interest in adjudicating the dispute or if *Ford* is merely a temporary halt in the march toward a tighter, defendant-friendly personal jurisdiction doctrine that has been the hallmark of the Roberts Court up to this point. What is clear is that this case has piqued the interest of scholars, litigators, and judges because it evokes a multitude of unanswered questions that will surely be the subject of litigation in coming years, quite possibly decades.

Arthrex and Collins: The Roberts Court and Presidential Authority

Alan B. Morrison*

The U.S. Supreme Court decided two cases this term, *United States v. Arthrex, Inc.*¹ and *Collins v. Yellen*,² in which the Court followed the prior path set by Chief Justice John Roberts in which he enshrined into the Constitution his vision of the role of the president. In *Arthrex*, the Court concluded that administrative patent judges, who are inferior officers, cannot make final decisions in *inter partes* proceedings, but those rulings must come from an officer who is appointed by the president, confirmed by the Senate, and subject to removal by the president.³ In *Collins*, which followed last year's ruling in *Seila Law, LLC v. Consumer Financial Protection Bureau*,⁴ the Court, in an opinion by Justice Samuel Alito, held that the single head of the Federal Housing Finance Administration (FHFA) must also be subject to removal by the president at will. These rulings, issued under the banner of assuring accountability of agency officials and the president, may promise more than they can deliver in the real world. In addition, their applications to the wide variety of agency arrangements and duties are very much up in the air. The only certainty is that there will be much more litigation and many calls for congressional action, most of which are likely to go unanswered.

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¹ *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

² *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

³ *Arthrex*, 141 S. Ct. at 1985–86.

⁴ *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (holding that leadership by a single director removable only for inefficiency, neglect, or malfeasance violates the separation of powers).

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I. The Removal Limitations Cases

The constitutional provision underlying these cases is the Appointments Clause in Article II, section 2, which was the portion of the Constitution on which William Marbury relied in seeking to obtain his commission as a justice of the peace in *Marbury v. Madison*.⁵ Although its words have not been the focus of these recent decisions, they are worth quoting in full, largely because of what is not said there:

[The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Notice that there is no mention of removal in this clause, and its only appearance in the Constitution is in the Impeachment Clause in Article I, section 3, clause 7. Yet, both *Seila Law* and *Collins* held that the president had the power, under the Appointments Clause, to remove the officers at issue at will, despite the statutes which limited their removal except for cause.⁶

These cases were not the first ones in which the Court ruled on the extent of the power of Congress to limit the ability of the president to remove his appointees at will. The common law rule for all employees was that they could be discharged at will; thus, unless Congress imposed restrictions on the president's removal authority, the presumption was that he could dismiss his appointees whenever he chose.⁷ In *Myers v. United States*,⁸ Chief Justice William Howard Taft, himself a former president, ruled that the statute that prevented the president from removing First Class Postmaster Myers, unless he first obtained the consent of the Senate,

⁵ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁶ *Collins*, 141 S. Ct. at 1784 (citing *Seila Law*, 140 S. Ct. at 2192).

⁷ For a brief overview of this history, see *Myers v. United States*, 272 U.S. 52, 118 (1927) ("In the British system, the crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words 'executive power' as including both.").

⁸ *Id.* at 52.

was unconstitutional. The exhaustive opinion had much in it that would support the conclusion that any limitations on the president's removal power would be held unconstitutional. But less than a decade later, the Court decided *Humphrey's Executor v United States*,⁹ which upheld a statute that limited the ability of the president to remove members of the Federal Trade Commission except for certain specified causes.¹⁰

The next time that the Court faced the question of whether the Constitution permitted restrictions on the power of the president to remove federal officers was in *Bowsher v Synar*,¹¹ a challenge to the role that the comptroller general (CG), as head of the General Accounting Office (as it was then known), was assigned to implement the Gramm-Rudman-Hollings Act. The CG could only be removed if both houses of Congress concurred, which meant that the president had essentially no ability to remove him. The law also limited the president's choices to fill a vacancy in the office to a list of individuals proposed by Congress, and in addition, as the concurring opinion of Justice John Paul Stevens pointed out, the CG had been viewed by everyone as working for Congress rather than the president.¹² Thus, it was not necessary to revisit *Humphrey's Executor* in order to conclude that, as a matter of separation of powers, the CG could not serve as an executive-branch official who was executing the law.

Of course, *Myers* was not really (and certainly not only) about postmasters, because Congress had imposed similar Senate-consent requirements for removal of many high-ranking officials, and it would be intolerable if the Senate could block the president from deciding that he no longer wanted to keep his secretary of state or attorney general. But that was not the stated basis of the actual ruling in *Myers*, and so the Court in *Humphrey's Executor* had to find another rationale to uphold the limitation, which it did by reaching the dubious conclusion that a Federal Trade Commission (FTC) commissioner is someone "who

⁹ *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

¹⁰ Congress has not been consistent in its description of what constitutes cause for removal, and some litigants have argued for narrower constructions of some for-cause provisions. The Court has not accepted those arguments, and so this essay will treat all for-cause removal limitations as if they are identically worded. *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2206 (2020).

¹¹ *Bowsher v. Synar*, 478 U.S. 714 (1986).

¹² *Id.* at 737 (Stevens, J., concurring).

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occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.”¹³ The uneasy tension between at least the rationales of the two cases, if not their holdings, was at issue in *Morrison v. Olson*,¹⁴ where the Court upheld the Independent Counsel Act that limited the ability of the attorney general (and the president) to remove an independent counsel except for cause. In his opinion for the Court, Chief Justice William Rehnquist expressed his view that *Myers* was about Senate interference with executive functions¹⁵ and that *Humphrey's* statements regarding whether the FTC was part of the Executive Branch may not have been entirely accurate.¹⁶ In any event, the Court's bottom line was that excluding the president from choosing independent counsels (a special court did that) and from removing them (only the attorney general could do and even then only for cause) did not interfere with constitutional principles of accountability and separation of powers.

The next case in which limits on removal of a federal officer were challenged, and the first under Chief Justice Roberts, was *Free Enterprise Fund v. Public Company Accounting Oversight Board*.¹⁷ Enacted in the wake of the Enron and other accounting scandals, the law created a board, under the Securities and Exchange Commission (SEC), that had the authority to issue accounting rules and bring enforcement actions against those responsible for corporate financial statements that violated those rules. The Board was appointed by the SEC, and its members could only be removed for cause. The Board's decisions were subject to review by the SEC and then in the courts of appeals. The members of the SEC were appointed by the president and confirmed by the Senate and, like the members of the FTC, could also only be removed for cause.¹⁸

The *Free Enterprise* lawsuit was a broad challenge to the Board's powers, with only one portion focused on the limits on removal, but that is where the chief justice found a constitutional flaw. Relying on the principle of presidential accountability, the Court concluded that double for-cause removal restrictions violated that principle—whose source in

¹³ *Humphrey's Ex'r*, 295 U.S. at 628.

¹⁴ *Morrison v. Olson*, 487 U.S. 654 (1988).

¹⁵ *Id.* at 686.

¹⁶ *Id.* at 689–90.

¹⁷ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

¹⁸ *Id.* at 484–87.

the words of the constitution was unstated—and so the Court struck the for-cause removal limitation as applied to the board.¹⁹

The next case, *Lucia v. SEC*,²⁰ was more important for what it did not decide—whether the limit to for-cause removals for administrative law judges (ALJs) at the SEC unconstitutionally interfered with the president’s ability to carry out the duties of his office. The principal issue in the case was whether the ALJs were inferior officers, who had to be appointed by the SEC itself, or were employees, who could be (and were) selected by the Commission staff. The Court held that the ALJs were inferior officers, and since they had not been properly appointed, it required the SEC to give Lucia a new hearing before a properly appointed ALJ.²¹ The solicitor general had also asked the Court to strike down the removal restrictions, but the Court declined to reach this second issue.²²

Then came *Seila Law*, where the Court held that, as applied to the Consumer Financial Protection Bureau, which is headed by a single director, the for-cause restrictions interfere with the ability of the president “to take care that the laws be faithfully executed” under Article II and undermined his accountability to the people who have elected him.²³ The majority declined to “revisit” *Humphrey’s Executor* and limited its removal holdings to agencies headed by a single director,²⁴ whereas Justices Clarence Thomas and Neil Gorsuch would have extended the ruling to multi-member agencies such as the FTC.²⁵

This past term, the Court in *Collins* was faced with similar restrictions on another single member agency—the Federal Housing Finance Administration (FHFA)—and it found *Seila Law* to be “all but dispositive” but provided no independent rationale for setting aside the removal limitation there.²⁶ That was not the end of *Collins*. That

¹⁹ *Id.* at 497–98.

²⁰ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

²¹ *Id.* at 2055.

²² *Id.* at 2050 n.1.

²³ *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203–04 (2020) (quoting U.S. CONST. art. II, § 3, cl. 3). Although I find the dissent of Justice Elena Kagan to be more persuasive, this essay focuses more on the question of whether the chief justice’s removal rulings in fact lead to presidential accountability.

²⁴ *Id.* at 2206.

²⁵ *Id.* at 2211–19 (Thomas, J., dissenting).

²⁶ *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021).

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lawsuit was brought by shareholders of Fannie Mae and Freddie Mac to set aside an administrative order by the FHFA that had vastly reduced the value of their holdings. Their first step, on which they succeeded, was to obtain a ruling, similar to that in *Seila Law*, that undermined the power of the head of the FHFA to issue the order in question because he could not be removed at will by the president. But there was a further barrier: Although the initial order was said to be invalid, it was subsequently affirmed by a successor who held the position on an acting basis, which meant that he could be removed at will by the president. According to the Court, that ratification by an acting director eliminated the unconstitutional cloud on the director's status, and therefore the provisions to which the shareholders objected were valid.²⁷ I return to this conclusion below.

II. What About Constitutional Avoidance in Difficult Constitutional Cases?

Collins and *Seila Law* decided a constitutional issue of great importance, but could and should the Court have avoided deciding the question in both cases? There are two reasons to support such a conclusion. First, on what basis did the plaintiffs have standing to claim that the inability of the president to fire the agency head injured them and gave them standing to raise the constitutional questions?

Standing was not an issue in *Myers* or *Humphrey's Executor* because the president had fired both of the plaintiffs, and he claimed that the restrictions on those actions were unconstitutional.²⁸ Standing to raise the removal issue was not challenged in *Bowsher*, but if it had been, the removal objection was only part of a broader challenge to the authority of the comptroller general who was a congressional officer assigned to carry out executive functions, a clear violation of the separation of powers that went to the validity of the order being challenged. Similarly, in *Morrison*, the removal objection was closely tied to the appointment problems, and the president had entered the case to oppose all aspects of the law, which explains, if it does not justify, why no one raised the

²⁷ *Id.* at 1775–78, 1787.

²⁸ *Myers v. United States*, 272 U.S. 52, 107–08 (1927); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 609 (1935).

standing issue regarding the limits on removal. And in *Free Enterprise*, the standing issue does not appear to have been raised.²⁹

However, standing was raised by several amici in *Seila Law*,³⁰ and the Court treated the removal claim as an objection to the power of the agency to issue the order in question, much like a flaw in the director's appointment. But there was no question that the director of the CFPB had been validly appointed—unlike *Lucia* and *Morrison*, where that was the basis of the legal challenge. There is also no doubt that had the president fired either official, the president would have had standing to raise the defense that the restrictions on removal were unconstitutional. But it is hard to understand why a private party has standing to object to the inability of the president to remove the agency head.

In response, this is what the Court said:

Petitioner is compelled to comply with the civil investigative demand and to provide documents it would prefer to withhold, a concrete injury. That injury is traceable to the decision below and would be fully redressed if we were to reverse the judgment of the Court of Appeals and remand with instructions to deny the Government's petition to enforce the demand.³¹

The opinion then cited *Free Enterprise* and *Bowsher* to support standing, even though standing was not raised in either case. The Court then observed that there were “real world consequences to this case because although the parties agreed on the constitutional issue, petitioner and the Government disagree about whether petitioner must comply with the civil investigative demand.”³² None of that, in my view, explains how the private law firm was injured by the inability of the president to fire the director who issued the investigative demand to it, at least in the absence of a plausible claim that the president opposed the order. For a Court

²⁹ See generally *Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson*, 487 U.S. 654 (1988); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

³⁰ Brief of Amicus Curiae Alan B. Morrison in Support of Neither Party at 7–16, *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (No. 19–7); Brief For Court-Appointed Amicus Curiae in Support of Judgment Below at 21–24, *Seila Law*, 140 S. Ct. 2183 (No. 19–7); Brief of Amicus Curiae the United States House of Representatives in Support of the Judgment Below at 3, *Seila Law*, 140 S. Ct. 2183 (No. 19–7).

³¹ *Seila Law*, 140 S. Ct. at 2196.

³² *Id.*

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that has otherwise been very hard on standing in many other contexts,³³ a cynic might suggest that standing is not a barrier when the Court wants to reach the merits.³⁴

In *Seila Law*, the government argued that the orders at issue had been ratified by an officer who was removable at will by the president, and thus the order was enforceable despite the removal flaw. The Court declined to decide that question, because it had not been passed on below (the court of appeals had rejected the constitutional objection), but it left the question open on remand from its constitutional ruling.³⁵ On remand, the court of appeals held that a ratification of the purely prospective order after the Supreme Court's decision eliminated any objection, and therefore it did not have to decide whether an earlier ratification by an acting director sufficed.³⁶ As a result, in a case where the standing of the private party was far from clear, the Court could have avoided deciding a difficult and important constitutional question, as it was specifically asked to do by the court-appointed amicus and by the amicus House of Representatives. Instead, it chose to reach out and rule on the merits. It is especially hard to see why the Court was justified in doing that because the Obama-appointed head of the CFPB remained in office for ten months after Donald Trump became president and no effort was made to remove him during that period.³⁷

In *Collins*, the Supreme Court struck down the restriction on the removal of the head of the FHFA, but that same opinion upheld the order at issue on the ground that an acting official had made the actual decision being challenged. That was acceptable, according to the Court, because the acting official could be removed by the president at will.³⁸

³³ See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013).

³⁴ In his concurring opinion in *Collins*, Justice Thomas questioned whether the shareholder plaintiffs there had shown any unlawful act that adversely affected them, which might also suggest that they lacked standing, but that was not the basis of his concurrence. *Collins v. Yellen*, 141 S. Ct. 1761, 1789–99 (2021) (Thomas, J., concurring).

³⁵ *TransUnion LLC*, 141 S. Ct. at 2211.

³⁶ *Consumer Fin. Prot. Bureau v. Seila Law LLC*, 984 F.3d 715, 717 (9th Cir. 2020). Rehearing en banc was denied, with four judges dissenting. *Consumer Fin. Prot. Bureau v. Seila Law LLC*, 997 F.3d 837 (9th Cir. 2021). As of mid-September 2021, a petition for certiorari had not been filed.

³⁷ Then-CFPB Director Richard Cordray resigned in November 2017, over ten months after Donald Trump became president. Adam Edelman, *Consumer Financial Watchdog Cordray Resigns*, NBC NEWS (Nov. 15, 2017).

³⁸ *Collins v. Yellen*, 141 S. Ct. 1761, 1783–84 (2021).

I return below to the question of whether an acting official, who is not a principal officer, can constitutionally make such a decision, but for now I observe only that the Court should have invoked the doctrine of constitutional avoidance and not reached the removal issue, but instead upheld the order on acting-director rationale which it subsequently employed in that opinion.

III. *Arthrex* and More Presidential Accountability

In 2011, Congress passed the America Invents Act which provides for an alternative means—*inter partes* review—by which a person accused of patent infringement could challenge the validity of the patent, instead of litigating that defense in federal court. That option allows any person to petition the Patent and Trademark Office (PTO) to hear the challenge to these often very valuable patents, with the administrative patent judges (APJs) who make up the Patent Trial and Appeal Board given the authority to decide whether to grant the request. If the request is granted, the case is heard by a panel of at least three (and usually no more) APJs, with one side arguing for the patent’s validity and the other taking the contrary position. The statute provides for no further internal agency review, but the losing party has a right to an appeal on the legal issues to the U.S. Court of Appeals for the Federal Circuit, which is where infringement cases decided in district courts would be heard.³⁹ The director of the PTO is a principal officer, having been appointed by the president and confirmed by the Senate, whereas the APJs, who now number more than two hundred, are inferior officers.⁴⁰ The appointments of APJs are vested in the secretary of commerce, who is the head of the department in which the PTO is lodged. APJs are not removable from their office by the secretary except for cause that would promote the efficiency of the service, and such actions are subject to review by the Merits System Protection Board (as are the appeals of many other federal employees).⁴¹

The issue presented in *Arthrex* was whether these adversary adjudications performed by APJs could properly be done by inferior

³⁹ 35 U.S.C. §§ 311 *et seq.*

⁴⁰ 35 U.S.C. § 3(a)(1).

⁴¹ 35 U.S.C. § 3(c) (providing APJs with civil service protections outlined in 5 U.S.C. § 7513); 35 U.S.C. § 6(a) (concerning the appointment of APJs).

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officers or whether a principal officer's involvement was required. The United States defended the statute, arguing that the director, while having no authority to overturn a decision by an APJ panel, had other sufficient supervisory authority over their work so that their decisions were, in effect, his decisions. While not purporting to lay down a rule applicable to all administrative agency decisions, the Court held that decisions made by APJs could not be made by APJs alone, because no principal officer adequately supervised the actual rulings.⁴² Once again, in reaching the conclusion that the APJ decisions at issue were invalid, the chief justice gave great weight to the necessity of assuring presidential accountability, which he argued could only be achieved if the decisions were made by principal officers who are directly accountable to the president, which APJs are plainly not.⁴³

That left open the question of remedy. The Federal Circuit concluded that APJs could take on the duties of principal officers, despite their lack of presidential appointment and Senate confirmation, by eliminating the for-cause removal protection.⁴⁴ The Trump administration embraced that approach, because it would have, in essence, given them the victory on the issue of restrictions on ALJ removal that the Court refused to reach in *Lucia*. But the majority on that issue—which included three of the justices who dissented on the merits—took a different approach. They applied the principle of severability and struck the provision that limited the power of the PTO director to review APJ decisions on the merits, thus adding a new level of potential review by a principal officer.⁴⁵ The Court did not require the director to rehear every case in the future, but it did

⁴² *United States v. Arthrex, Inc.*, 141 S. Ct. 1779, 1781–86 (2021).

⁴³ *Collins*, 141 S. Ct. at 1779–84. Alternative views on why the existing supervision of APJs satisfy the Appointments Clause are set forth in the various amicus and party briefs filed in *Arthrex*. In an amicus brief in which I was joined by four other law professors, we argued that Congress should be given substantial leeway in deciding whether an officer was “inferior,” in large part because the text of the Appointments Clause gives Congress considerable discretion through its phrase “as they think proper” in describing how inferior offices are to be created. Brief of Amicus Curiae Administrative, Constitutional, and Intellectual Property Law Professors Urging Reversal and Supporting Petitioners, *Arthrex*, 141 S. Ct. 1779 (Nos. 19–1434 & 19–1452) [hereinafter Law Professors’ Amicus Brief in *Arthrex*]. In the opening portion of Justice Stephen Breyer’s opinion dissenting on the merits and concurring on the remedy, which was joined by Justices Sonia Sotomayor and Elena Kagan, he supported that approach, and then pointed out other reasons why the majority was in error. *Arthrex*, 141 S. Ct. at 1794 (Breyer, J., dissenting).

⁴⁴ *Arthrex*, 141 S. Ct. at 1778.

⁴⁵ *Id.* at 1787.

require him to consider rehearing the ruling in this case, and presumably others in which this type of challenge was made.⁴⁶ There are open question as to how often the director will choose to grant rehearings, and whether the Court will be satisfied if he rehears only a handful of cases each year out of the five hundred APJ decisions issued annually.⁴⁷ Moreover, the Court's solution is at most temporary, as Congress can amend the statute by creating an appellate board comprised of principal officers, or it could make APJs principal officers and eliminate other internal agency review.⁴⁸

IV. The Next Cases

In the wake of these Supreme Court cases, there is the question of what comes next. But there is no doubt here that there will be similar litigation in the future, quite likely involving the PTO, as well as other federal agencies. Indeed, there are already a number of cases in which the issue is whether ALJs at the Social Security Administration (SSA) are acting unconstitutionally as inferior officers because they were not appointed in the manner required by the Appointments Clause.⁴⁹ As a prelude to deciding that issue, this Term the Court also decided that the failure of SSA disability claimants to raise their constitutional claim at the administrative level did not result in a forfeiture of their right to raise it in court.⁵⁰

There are about 1,420 ALJs at SSA who rule on disability and other claims.⁵¹ By statute, they were chosen by a merit selection process conducted by the Office of Personnel Management, not by the agency

⁴⁶ *Id.*

⁴⁷ PATENT TRIAL AND APPEAL BD., U.S. PATENT AND TRADEMARK OFF., PTAB TRIAL STATISTICS: FY20 END OF YEAR OUTCOME ROUNDUP IPR, PGR, CBM 4 (2021).

⁴⁸ The director has issued interim rules to deal with the pending cases: *See USPTO Implementation of an Interim Director Review Process Following Arthrex*, U.S. PATENT AND TRADEMARK OFF. (June 29, 2021). According to a recent survey taken by the Federal Circuit in an effort to get a handle on its post-*Arthrex* docket, a significant percentage of the parties who could seek rehearing before the director chose not to do so. John C. Evans & David M. Maiorana, *Most Arthrex Challenges Say "No Thanks" to Director Remand*, JONES DAY (July 19, 2021). Whether this scenario will apply only to cases already on appeal, or whether it will hold when the case is still at the PTO, remains to be seen.

⁴⁹ *See Carr v. Saul*, 141 S. Ct. 1352, 1357 (2021) (collecting cases).

⁵⁰ *Id.* at 1352.

⁵¹ *Annual Statistical Supplement, 2020*, SOC. SECURITY OFF. OF RET. & DISABILITY POLICY (last visited Sept. 1, 2021).

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head, which would be required if they are inferior officers.⁵² Shortly after *Lucia* was decided, the Trump administration issued an Executive Order proclaiming that all ALJs were inferior officers,⁵³ and in response, the commissioner of SSA, who holds a Senate-confirmed position, reappointed all of the agency's ALJs as inferior officers, which solves the *Lucia* problem going forward.⁵⁴ But there are thousands of cases like *Carr* still in court in which the ALJ decision was made before the reappointment, and, even though their decisions are subject to further review within SSA, that does not, as it did not in *Lucia*, save them from challenge.

There are, however, two related grounds on which *Lucia* can be distinguished that may be a proper basis for concluding that the ALJs at SSA are employees rather than inferior officers. In contrast to the proceedings at issue at the SEC in *Lucia*, in which the agency sought to impose significant penalties and an injunction against the private party, SSA proceedings are non-adversarial, in which the payment of government benefits is at stake.⁵⁵ Thus, if every action in which a federal agency denied anyone a federal benefit had to be done by an inferior officer, there would be little left that employees could do. Moreover, in contrast to *Arthrex*, all ALJ decisions at SSA are subject to further internal agency review below the department-head level, and on that basis the Court should sensibly conclude that the ALJs at SSA are employees, not inferior officers.

But now there is also an *Arthrex* issue at SSA because final adverse decisions there are not made by the commissioner or any other principal officer. Instead, a claimant who objects to an ALJ decision is required to ask the Appeals Council at SSA to review the decision before they can sue in district court.⁵⁶ There are approximately seventy-one members of the Appeals Council who appear to be inferior officers.⁵⁷ If they are,

⁵² See generally, 5 U.S.C. § 1302; 5 C.F.R. Pt. 302 (2020).

⁵³ Exec. Order 13843, § 3(a), Schedule E, 83 C.F.R. § 32755 (2018).

⁵⁴ *Carr*, 141 S. Ct. at 1357. The blanket treatment for all ALJs may have been motivated in large part by the Trump administration's desire to prevent ALJs from having a union on the theory that, if they are officers, not employees, they are not eligible to be in a union. It is not clear that, even if ALJs are inferior officers, that would preclude them from being in a union, but that question is beyond the scope of this essay.

⁵⁵ *Id.* at 1359–60. Moreover, disability cases are not like the *inter partes* reviews in *Arthrex*, in which private parties were battling over the validity of very valuable patents. Compare *id.* at 1357 with *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

⁵⁶ 20 C.F.R. §§ 404.968, 404.981, 416.1468 (2020).

⁵⁷ 85 Fed. Reg. 73138, 73144 (2020).

their rulings are subject to an *Arthrex* objection because the final agency determination is not made by, or even subject to review by, a principal officer at SSA—unless the non-adversarial nature of these proceedings excludes them from the scope of *Arthrex*.

However, there is no SSA statute standing in the way of solving that problem, as the operative provision broadly assigns all duties at SSA to the commissioner, who has delegated the responsibility to decide disability claims to the agency's ALJs and Appeals Council.⁵⁸ In that sense, the fix is easier than in *Arthrex*: "All" the commissioner has to do is to make final Appeals Council decisions subject to review by the commissioner, as the Court did in *Arthrex*. That would still leave open the questions of whether the theoretical possibility of commissioner review will suffice for the approximately one-hundred thousand adverse Appeals Council rulings issued each year, and how many cases must the commissioner actually review to satisfy the Court. I am unaware of any SSA cases raising the *Arthrex* issue, but there are sure to be some, especially if the ALJs are held not to be inferior officers. But prudence dictates that the commissioner should change the agency's regulations immediately to provide for the right to seek commissioner review, which is a necessary and perhaps sufficient remedy for any *Arthrex* problem.⁵⁹

The other major agency for which *Lucia* and *Arthrex* present problems is the Department of Justice, and in particular the Executive Office of Immigration Review (EOIR). That office adjudicates all cases in which the government is seeking to remove (deport) an alien or in which the alien is seeking asylum or other adjustments of status.⁶⁰ There are many different ways in which the issues arise, but for simplicity, here I will discuss the most common proceeding in which the government has located an alien who it alleges is subject to deportation, and the alien contests the allegations. The case is assigned to one of over five-hundred or so immigration judges (IJs) who are appointed by the Department

⁵⁸ 42 U.S.C. § 902(a)(4), (7).

⁵⁹ Relying on *Seila Law*, President Biden has removed the SSA commissioner and his deputy, who are the only Senate-confirmed officers at the agency. Nicole Ogrysko, *Biden Fires Saul as SSA Commissioner*, FED. NEWS NETWORK (July 9, 2021).

⁶⁰ Exec. Off. For Immigration Rev., *About the Office*, UNITED STATES DEP'T OF JUSTICE (last visited Sept. 1, 2021).

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but are not ALJs.⁶¹ Although removal proceedings are not formal adjudications like those at the SEC, they are adversarial, in contrast to those at SSA.⁶² Based on the nature of these IJ adjudications, it is unclear whether the Court would conclude that IJs are inferior officers who must be appointed by the attorney general.

There is another basis on which the Court might conclude that IJs are employees, not inferior officers. In contrast to the SEC, where decisions are appealable only to the agency itself, adverse rulings by IJs are appealable to three-judge panels of the Board of Immigration Appeals (BIA), whose twenty-three members are inferior officers, appointed by the attorney general.⁶³ There is also a further possibility of agency review by the attorney general, which can occur if he takes a case *sua sponte*, or if the BIA, or in some situations the Department of Homeland Security, refers a decision for attorney-general review.⁶⁴ It is possible that the Court would conclude that review of IJ decisions by the inferior officers at the BIA is a further reason why IJs are not inferior officers.

But a holding that IJs are not inferior officers does not solve the problem of whether decisions of the BIA are invalid because they are made by inferior, not principal, officers. As was true for decisions of APJs prior to *Arthrex*, there is no formal means by which aliens, in contrast to the government, can seek attorney-general review of a decision adverse to them. And even then, attorney-general review is a rarity. According to a recent study, attorney-general review was almost never used until the Trump administration, where the attorney general reviewed twelve cases, all of which were undertaken to issue broad decisions designed to make it more difficult for aliens to prevail.⁶⁵

⁶¹ Exec. Off. For Immigration Rev., *Office of the Chief Immigration Judge*, UNITED STATES DEP'T OF JUSTICE (last visited Sept. 1, 2021) (there are 535 immigration judges nationwide); 8 C.F.R. § 1003.10 (2020) (outlining the appointment process for immigration judges).

⁶² For an overview of immigration proceedings, see Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1641–45 (2010). See also 20 C.F.R. § 404.900 (2020) (describing SSA adjudication conducted in “an informal, non-adversarial manner.”).

⁶³ 8 C.F.R. § 1003.1(a)(1) (2020). There are some proceedings, such as those in which an IJ rejects a claim that an alien lacks a credible fear of prosecution, in which there is no appeal (by express statutory preclusion) to the BIA/attorney general. They raise distinct problems and may require a different solution than that proposed in the text. *Id.* § 1003.1(b).

⁶⁴ *Id.* § 1003.1(h)(i)-(iii).

⁶⁵ David Hausman et al., *Executive Control of Agency Adjudication: Capacity, Selection and Precedential Rulemaking* 7 (Apr. 30, 2021) (Unpublished manuscript) (on file with Soc. Sci. Research Network).

Following *Arthrex*, there would seem to be a strong argument that every alien who loses before the BIA must be entitled to seek review by a principal officer. For now, that would have to be the attorney general, but it might also be other Senate-confirmed officers such as the deputy or associate attorneys general. Even if that avenue were open, the issue would still be whether the possibility of that review, even if it were almost never realized, would suffice. One way to avoid that problem would be for Congress to provide that the BIA (or a subset of it), must be appointed as principal officers and then take the attorney general out of the review process entirely.

The current process for deciding immigration cases is also subject to a different challenge. Because IJs and members of the BIA have no for-cause removal protection, they lack the independence that basic fairness and due process require. In 2019, the Federal Bar Association drafted a bill to create an independent Article I immigration court, like the Tax Court.⁶⁶ It could easily be structured to comply with *Arthrex*, and it would eliminate the problem that the attorneys who prosecute those cases for the government and the attorneys who judge them all work for the attorney general and serve at his pleasure.

V. Reassessing Presidential Accountability in the Context of *Arthrex* & *Collins*

With the impact of these decisions in mind, both for the cases themselves and for those that are likely to follow, it is time to look at the premise of presidential accountability which undergirds them. The Appointments Clause expressly requires Senate confirmation for principal officers and requires Congress to enact a law to create an inferior office, which may be filled only by one of three approved methods.⁶⁷ By contrast, the Appointments Clause says nothing to support the Court's conclusion that all (significant) decisions made by agencies must have been approved by (or had the opportunity to be reviewed by) a principal officer. Rather, the textual source for that conclusion seems to be the Take Care Clause, which vests in the president the power—or, as some read it, the duty—to “take care that the laws be faithfully

⁶⁶ *FBA Model Legislation Establishing an Article I Immigration Court*, FED. BAR ASSOC. (July 16, 2019).

⁶⁷ U.S. CONST. art. II, § 2, cl. 2.

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executed,” but says nothing about a presidential removal power.⁶⁸ The Appointments Clause makes clear that the president was never expected to act on his own in carrying out that responsibility, and there is nothing else in the text of the Constitution that compels the conclusion that Congress cannot vest in inferior officers the power to make decisions under laws created by Congress, in contrast to those decisions that are inherent in the role of the president.

Even accepting that the president must have, as *Seila Law* holds, the power to remove at least the heads of agencies with a single director, that alone does not preclude Congress from allowing inferior officers to have the final administrative say on a matter, especially when the ruling will be subject to full judicial review in a federal court. In other words, the result in *Arthrex* is based on a very muscular theory of presidential power, sometimes going by the name of the unitary executive.⁶⁹ As the prior discussion shows, that theory will have significant implications for the administration of the laws assigned by Congress to federal agencies for implementation. Thus, *Arthrex* is likely either to require the appointment of many more principal officers who will have final agency decisional authority, or to require the heads of departments or other principal officers, who already have more than full plates, to take on the additional duty of reviewing administrative adjudications.

There are further objections to the Court’s theory of presidential accountability for agency adjudications generally. The theory assumes that the principal officer, who is responsible to the president, actually makes these decisions. We do not know what the director of the PTO will do with his new-found power to review APJ decisions, but we do know that there are hundreds of *inter partes* rulings each year, that the issues are complex and very significant to the parties and often to others, and that the director had a full-time job before these new duties were thrust on him by the Court—with no opportunity to debate alternatives or to

⁶⁸ *Id.* art. II, § 3, cl. 3.

⁶⁹ For a discussion of *Arthrex* and the unitary executive theory, see Michael C. Dorf, *The Hidden Ideological Stakes of SCOTUS Patent Case*, VERDICT (Mar. 3, 2021).

explain what a burden this will be.⁷⁰ Of course, he can hire staff to help him decide which cases to review in full and help him decide how to decide them. That will permit him to put his name on the final ruling and avoid any problem under the *Morgan* line of cases,⁷¹ but no one who pays the slightest attention will think that the decisions are his, except for the very few cases the director accepts for full review on the merits. To this observer, adding a layer of possible director review does not add much (if any) accountability simply because a very busy PTO director might reconsider a few rulings a year made by full-time, independent APJs.

If the Court is serious that the person in the executive branch who has the final decisional authority must be a principal officer subject to removal by the president at will, then the result in *Edmond v. United States*,⁷² will be called into question. At issue there was whether the civilian members of the Coast Guard Court of Military Review were inferior officers, with the Court agreeing that they were. Their decisions were subject to review only in the United States Court of Appeals for the Armed Forces, which is part of the Defense Department and whose members are appointed for fifteen-year terms and confirmed by the Senate.⁷³ But, with limited exceptions, review in that court is

⁷⁰ In support of its director-review remedy, the Court cites the recent amendment to the trademark law under which the director can review decisions of the trademark panels that are the equivalent to the panels conducting *inter partes* review of patents. *United States v. Arthrex*, 141 S. Ct. 1970, 1987 (2021). The fact that Congress chose to limit the director's review to trademark cases might also suggest that it did not want to extend that approach to patent cases, for a variety of reasons, such as their greater numbers, their greater complexity, or the desire to see how the experiment worked before extending it further. In that connection, there are only twenty-five trademark judges who issue two hundred decisions annually that are comparable to the five hundred rulings issued by over two hundred APJs. *TTAB Incoming Filings and Performance Measures for Decisions*, U.S. PATENT AND TRADEMARK OFF. (last visited Aug. 31, 2021) (providing statistics on trademark decisions by fiscal year). On the issue of workload, *Arthrex* dealt only with *inter partes* decisions, but APJs and other officials at the PTO make many other decisions, some of which may come within the rationale of *Arthrex*, thus potentially further burdening the director. A substantial percentage of requests for *inter partes* review are denied, and it is unclear if the director must review them also.

⁷¹ *Morgan v. United States*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Morgan*, 307 U.S. 183 (1939); *United States v. Morgan*, 313 U.S. 409 (1941).

⁷² *Edmond v. United States*, 520 U.S. 651 (1997).

⁷³ *Id.* at 653, 666; *Welcome*, U.S. COURT OF APPEALS FOR THE ARMED FORCES (last visited Aug. 31, 2021) ("The Court is composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate.").

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discretionary, and in 2019, that court reviewed 425 petitions and granted only fifty-two, or 12.2%.⁷⁴ In terms of accountability and fairness to the parties, it is by no means clear why, per *Edmond*, discretionary review by military judges in the executive branch, who cannot be removed except for cause, was constitutionally sufficient to supervise the courts of military review, but mandatory review by an Article III court for decisions of APJs in *Arthrex* was not.⁷⁵

A further flaw in the presidential-accountability theory is that no one—well, perhaps almost no one—will likely, or even conceivably, think that the president is responsible for an erroneous decision by the director who reviews an APJ panel decision. Yet that seems to be the Court’s animating theory. Assigning responsibility to the president is even less likely when, as is almost certain to be the result, the director declines to review the vast majority of panel decisions. In assessing the likelihood of the president being held accountable for an erroneous decision by a director, a knowledgeable observer would also factor in the right of a losing party to seek judicial review in the Federal Circuit of questions of law (which are what the panels are directed to decide) to assure adherence to the requirements of patentability that Congress has enacted.⁷⁶ Indeed, it is not as though the president has the authority to override the APJs or the director in a particular case. At most, he can remove the director because of the way in which he reviews or does not review APJ rulings generally or even in specific cases. But even that seems highly unlikely to occur, both because the director has many other duties on which his performance is being judged and because the president will then have to find a replacement and obtain Senate approval of him or her.

There is another way to consider presidential accountability, but it also does not support the outcome in *Arthrex*. Presidents are held responsible when big things go wrong during their administrations, such as the failure to get Covid under control, the failure to stem the flood of aliens at the border, the bills that the president cannot persuade

⁷⁴ See Law Professors’ Amicus Brief in *Arthrex*, *supra* note 43, at 19–20.

⁷⁵ Compare *Edmond*, 520 U.S. at 664, 666, with *United States v. Arthrex*, 141 S. Ct. 1970, 1985 (2021).

⁷⁶ See 35 U.S.C. § 141(a) (“An applicant who is dissatisfied with the final decision in an appeal to the Patent Trial and Appeal Board . . . may appeal the Board’s decision to the United States Court of Appeals for the Federal Circuit.”).

Congress to enact, or major foreign policy forays that he undertakes like the war in Iraq or the inability to evacuate all of Afghan citizen who helped the United States when we pulled out of that country. Even then, the president serves a four-year term and cannot serve more than two of them.⁷⁷ Thus, other than the possibility of impeachment, elections—his or her own as well as that of any successor and perhaps those of his party in Congress—are the only formal ways by which the people can hold the president accountable. Does anyone think that more than a handful of voters will even be aware of bad decisions by the PTO director, let alone connect them to the president, or that such awareness will ever change a single vote in a presidential or other election? If the answer to that question is no, as I believe, then it is very hard to see how any notion of presidential accountability can support the result in *Arthrex*.

On top of these serious questions about the application of the theory of presidential accountability, one must add the Court's willingness in *Collins* to allow those who are acting in the place of principal officers to perform their duties, even if the acting person has not been appointed by the president and confirmed by the Senate.⁷⁸ That willingness raises two questions, one of which was raised by Justice Thomas in a recess appointment case that was resolved adversely to the agency on statutory grounds: "Whether directing Lafe Solomon to serve as acting general counsel of the National Labor Relations Board (NLRB or Board), without the advice and consent of the Senate, complied with the Constitution."⁷⁹ In other words, are the laws providing for the filling of vacancies at federal agencies constitutional if the office being filled is a principal one, and the acting person has not been appointed by the president and confirmed by the Senate?

That constitutional objection would be strengthened by the existence of the Recess Appointment Clause, from which it could be argued that the Framers were aware of the potential problems with vacancies and that recess appointments were their sole solution.⁸⁰ To be sure, the Court has recognized that there may be an emergency exception to the

⁷⁷ U.S. CONST. amend XXII.

⁷⁸ *Collins v. Yellen*, 141 S. Ct. 1761, 1783–84 (2021).

⁷⁹ *N.L.R.B. v. SW General, Inc.*, 137 S. Ct. 929, 945–949 (2017) (Thomas, J., concurring).

⁸⁰ U.S. CONST. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.").

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mandates of the Appointments Clause,⁸¹ and not every action taken by a principal officer needs to be taken by someone who has been Senate-confirmed, although neither of those rationales would support allowing an acting head of FHFA to make the momentous decision at issue in *Collins*. Even then, as Justice Thomas also recognized in his concurrence, this constitutional limit on the filling of vacancies would raise many practical problems in many agencies. However, in departments such as Justice, State, and Defense, where there are many Senate-confirmed officers, they could satisfy the Constitution even if they were not confirmed for the position that is vacant. Despite the ruling in *Collins* approving the action of the acting director, this issue is likely to be raised in future cases, including in the cases to be remanded under *Arthrex* unless the vacant PTO director position is promptly and properly filled, because there is no other Senate-confirmed officer at the PTO. Indeed, it is possible that this argument remains open for the plaintiffs in *Collins* because the Court did not rule on that specific claim.

The second question is not a legal one, but asks whether, in effect, accountability is a one-way street. According to the Court, the doctrine, which is found nowhere in the Constitution, forbids Congress from allowing officers not subject to presidential at-will removal from taking significant agency action. Yet, the Court is perfectly comfortable with allowing acting officials, who have not been appointed under the express terms of the Appointments Clause, to perform the very acts that the duly confirmed officers, like the director of the FHFA, or properly appointed inferior officers, like APJs, are forbidden from doing.⁸² The requirement of Senate confirmation is to provide a check on the president's appointment power, yet the Court has allowed him to make vacancy appointments for principal offices that, effectively, do an end run around that process. From the perspective of the public and the goal of holding the president and the Senate accountable, it seems far preferable to have these decisions made by duly appointed officers, regardless of their removability than it does to allow the president to fill a vacancy with a person who has never been approved by the Senate.

⁸¹ *United States v. Eaton*, 169 U.S. 331 (1898) (holding that the Appointments Clause allows Congress to vest power in the president to appoint vice-consuls to fill the office of consul in case of disability or absence without the advice and consent of the Senate).

⁸² Compare *id.* with *Collins*, 141 S. Ct. at 1783–84.

* * *

Stated in the abstract, the idea of greater presidential accountability may not rank up there with motherhood and apple pie, but it comes fairly close. Yet, when that notion is translated into constitutional mandates as applied to agencies created by Congress to implement the laws that it has enacted, and it is used to overturn the means that Congress has chosen to carry out those laws, its application is very dubious, and the result looks more like what five justices would like our government to look like and less like what the Constitution requires.

***Nestlé USA, Inc. v. Doe* and *Cargill, Inc. v. Doe*: The Twists and Turns of the Alien Tort Statute**

Oona A. Hathaway*

For four decades now, the Alien Tort Statute (ATS) has been one of the most important tools for pursuing justice for human rights victims in the United States. The statute, enacted by the First Congress in 1789, states, “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹ Fewer than two dozen published opinions were issued in cases brought under the statute before 1980, when the U.S. Court of Appeals for the Second Circuit awarded a ten-million-dollar judgment against former Paraguayan official Américo Norberto Peña-Irala in an ATS suit brought against him for his role in the kidnapping and torture of the son of a political dissident in *Filártiga v. Peña-Irala*.² The decision ignited a new era in human rights advocacy, giving advocates a law that allowed them to sue in U.S. courts for human rights violations the world over.

Since then, the ATS has come before the U.S. Supreme Court four times. Beginning with its decision in *Sosa v. Alvarez Machain* (2004),³ through *Kiobel v. Royal Dutch Petroleum* (2013),⁴ and then *Jesner v. Arab*

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¹ 28 U.S.C. § 1350.

² *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). The case was the twenty-fourth brought under the statute to result in a published opinion—and the first one that was successful. This is calculated from the ATS Database, described *infra* note 80.

³ *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004).

⁴ *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013). As explained in more detail below, the case was argued before the Court twice. See *infra* notes 12–13 and accompanying text.

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Bank, PLC (2018),⁵ the Court chipped away at the scope of the ATS. In each case, the death of the statute was prophesied, and in each case, the Court pulled back at the last moment, unwilling to deal the coup de grâce that would finally bring an end to the hopes of human rights victims seeking justice in U.S. courts.

The statute's latest trip to the Supreme Court came in the October Term 2020 in a pair of cases: *Nestlé USA, Inc. v. Doe* and *Cargill, Inc. v. Doe*, which were brought by former child slaves trafficked from Mali to Côte d'Ivoire to work on cocoa plantations.⁶ The Court granted certiorari to consider whether the ATS could be used to seek compensation from corporations. The decision, issued in June 2021 in the final weeks of the Term, never reached the issue. The Court held instead that the plaintiffs inappropriately sought to apply the ATS extraterritorially.⁷

After providing some background on the cases, this essay will address three key issues that arose in the Court's decision in the cases. First, it will consider the fight over *Sosa*'s legacy illuminated in an exchange between the opinion authored by Justice Clarence Thomas and the opinion authored by Justice Sonia Sotomayor. Second, it will examine the surprise win for the plaintiffs on the question of corporate liability. Third, it will examine the likely impact of the Court's decision on extraterritorial application of the ATS. And, finally, it will argue that it is time for Congress to legislate to ensure accountability for human rights violations carried out by U.S. citizens and corporations even if carried out beyond the territory of the United States.

I. Background

Child slavery has long plagued the cocoa sector in West Africa. A BBC documentary first aired in 2000 documented the abuses of the industry.⁸ In 2005, in an effort to stave off legislation, the Chocolate Manufacturers Association issued a voluntary Protocol (known as the "Harkin-Engel Protocol") for the growing and processing of cocoa beans

⁵ *Jesner v. Arab Bank, PLC* 28 S. Ct. 1386 (2018).

⁶ The author of this article co-authored an amicus brief in the case in support of Respondents. Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Respondents, *Nestlé USA, Inc. v. Doe*, *Cargill Inc. v. Doe*, 141 S. Ct. 1931 (2021) (No. 19–416 & 19–453).

⁷ *Nestlé*, 141 S. Ct. at 1931.

⁸ Liz Blunt, *The Bitter Taste of Slavery*, BBC News (Sept. 28, 2000).

and their derivative products, that aimed to eliminate the “worst forms of child labor.”⁹ Human rights advocates denounced the commitments as insufficient, and on July 14, 2005, the International Labor Rights Fund filed a class action suit under the ATS on behalf of three former child slaves against American chocolate companies Nestlé, Cargill, and Archer Daniels Midland (ADM). The suit alleged that the companies had aided and abetted the trafficking of children, including the plaintiffs, from their home in Mali to the Ivory Coast. There they were put to work on Ivorian cocoa farms, where they were subject to forced labor, slavery, and torture.¹⁰ In depositions, the plaintiffs described being “beaten with whips and tree branches” and forced to work “twelve to fourteen hours per day, at least six days per week” without pay.¹¹

Fifteen years into the litigation, after a settlement between the plaintiffs and ADM removed that company from the suit, the Supreme Court granted certiorari to consider whether the ATS could be used to seek compensation from corporations. This was the same question the Court had promised to answer when it granted certiorari in *Kiobel v. Royal Dutch Petroleum* almost a decade earlier. Then, it had failed to reach the issue, deciding after ordering reargument on the extraterritorial application of the ATS that the situation at issue in the case did not sufficiently “touch and concern” the United States and thus was an inappropriate application of the statute to extraterritorial conduct. In *Nestlé* and *Cargill*, the majority opinion again failed to reach the issue on which the Court had granted certiorari. It again decided that the plaintiffs sought inappropriately

⁹ CHOCOLATE MFR. ASSOC. PROTOCOL FOR THE GROWING AND PROCESSING OF COCOA BEANS AND THEIR DERIVATIVE PRODUCTS IN A MANNER THAT COMPLIES WITH ILO CONVENTION 182 CONCERNING THE PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR (2000). The Protocol was called the “Harkin-Engel Protocol” after Congressman Eliot Engel (D-NY) and Senator Tom Harkin (D-IA), who had been working on legislation to develop a “no child slavery” label for chocolate products sold in the U.S. and who agreed to drop the legislative reform and replace it with the voluntary protocol. TIAJI SALAAM-BLYTHER ET AL., CONG. RESEARCH SERV., RL 32990, CHILD LABOR IN WEST AFRICAN COCOA PRODUCTION: ISSUES AND U.S. POLICY 1 (2005).

¹⁰ Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1063 (C.D. Cal. 2010). The plaintiffs also alleged violations of the Torture Victim Protection Act (“TVPA”) and California state law claims, with human rights group Global Exchange joining as an additional plaintiff only on the state law claims. *Id.*; see also Lise Colyer, *Class Action Against Chocolate Giants Could Win Damages For 50,000 Child Slaves*, QUOTA (Mar. 4, 2021).

¹¹ Brief in Opposition on Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit at 3, *Nestlé*, 141 S. Ct. 1931 (Nos. 19–416 & 19–453).

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to apply the ATS extraterritorially.¹² While the decision was not as bad for either the individual plaintiffs or future ATS suits against corporate defendants as some had expected, commentators lamented that the decision could have broad implications for both the future of the ATS and for the extraterritoriality doctrine more broadly.¹³

II. The Fight Over *Sosa*'s Legacy

When advocates of the ATS first opened the decision in *Nestlé* and *Cargill* and saw that Justice Thomas was the author of the majority opinion, their hearts undoubtedly sank. After all, Justice Thomas has consistently voted against plaintiffs in the ATS suits that have reached the Court, and he has voted in every case to restrict the statute's scope. Perhaps, however, his strong views got the better of him, for even as he was assigned the majority opinion, he retained the majority only for Part I—which describes the facts and background of the case—and Part II—which spends just over two pages concluding that that respondents improperly sought extraterritorial application of the ATS. He lost the majority for Part III, retaining only two votes other than his own and provoking a powerful rebuke from an equal number of justices in a concurrence authored by Justice Sotomayor.

In Part III, Justice Thomas argues that the suit should fail not only because it is an improper extraterritorial application of the ATS, but also because “[w]e cannot create a cause of action that would let them sue petitioners.”¹⁴ Justice Thomas grounds his argument in a narrow reading of the Court's opinion in *Sosa*. There, the Court determined that the ATS is a jurisdictional statute, but it nonetheless concluded that courts could exercise common-law authority to create private rights of action under the ATS. The Court outlined a two-part test for determining whether a claim is actionable: First, when considering ATS claims “based on the present-day law of nations,” a court must determine that the claim “rest[s] on a norm of international character accepted by the civilized world” that is defined with the same specificity as claims accepted at the

¹² *Nestlé*, 141 S. Ct. at 1936.

¹³ See, e.g., William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA., Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (June 18, 2021).

¹⁴ *Nestlé*, 141 S. Ct. 1937 (plurality opinion).

time of the ATS's inception.¹⁵ The international norm at issue must be "specific, universal, and obligatory."¹⁶ Second, a court must determine whether recognizing the claim is a proper exercise of judicial discretion, looking to the "practical consequences of making that cause available to litigants in the federal courts."¹⁷

Justice Thomas argues that the *Sosa* Court only acknowledged three violations of international law recognized in 1789: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."¹⁸ Since then, he notes, the Court has not created any new cause of action under the ATS. The allegations in the current case, aiding and abetting forced labor and child slavery, fall outside those three violations. Hence, he concludes, the case does not meet the first step of the *Sosa* test because the plaintiffs' claims do not fit within the narrow set of international law violations for which there is a cause of action under the ATS. For good measure, he concludes that the case does not meet the second step of *Sosa* either, for it has foreign policy implications that counsel against creating a cause of action. Specifically, "the allegations here implicate a partnership (the Harkin-Engel Protocol and subsequent agreements) between the Department of Labor, petitioners, and the Government of Ivory Coast."¹⁹

Justice Sotomayor writes separately to express her disagreement with Part III of the opinion, which she notes "would overrule *Sosa* . . . in all but name."²⁰ She points out that "the domestic and international legal landscape has changed in the two centuries since Congress enacted the ATS."²¹ *Sosa* had not limited claims under the ATS to the three historical torts it specifically mentioned. Rather, those law-of-nations violations provide a reference point. *Sosa* explained that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."²²

¹⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

¹⁶ *Id.* at 732 (citing *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

¹⁷ *Id.* at 732–33.

¹⁸ *Nestlé*, 141 S. Ct. at 1937 (plurality opinion) (quoting *Sosa*, 542 U.S. at 724).

¹⁹ *Id.* at 1939.

²⁰ *Id.* at 1944 (Sotomayor, J., concurring in part and concurring in the judgment).

²¹ *Id.*

²² *Id.* at 1945 (quoting *Sosa*, 542 U.S. at 725).

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Justice Thomas's reading, Justice Sotomayor explains, is accordingly much too narrow.

The same is true, Justice Sotomayor argues, of Justice Thomas's interpretation of *Sosa*'s second step. Congress was concerned with avoiding democratic strife, yes, but the strife it feared was strife that could be "best avoided by providing a federal forum to redress those law-of-nations torts that, if not remedied, could bring international opprobrium upon the United States."²³ Hence, the *Sosa* Court concluded that the statute "is best read as having been enacted on the understanding that the common law would provide a cause of action" for widely recognized torts in violation of "the law of nations."²⁴ Justice Thomas's extraordinarily narrow reading of the ATS, she explains, is not consistent with the First Congress's legislative determination that "a remedy should be available under the ATS to foreign citizens who suffer 'tort[s] . . . in violation of the law of nations.'"²⁵ Indeed, she argues, Justice Thomas "misconceives the judicial task in asking whether courts may 'create' causes of action under the ATS."²⁶ Their task is more "modest": "Courts must, based on their interpretation of international law, identify those norms that are so specific, universal, and obligatory that they give rise to a 'tort' for which Congress expects federal courts to entertain 'causes'—or, in modern parlance, 'civil action[s],' 28 U.S.C. § 1350—for redress."²⁷ She concludes that because Justice Thomas applies "the wrong standard" at *Sosa*'s second step, he arrives at the wrong answer.²⁸

Perhaps what is most notable about this exchange is that there are three justices favoring each position, and three justices sitting it out. Justice Thomas is joined in Part III by just Justices Neil Gorsuch and Brett Kavanaugh. In his concurring opinion, joined in part by Justice Kavanaugh, Justice Gorsuch further elaborates, making clear that he would endorse overturning *Sosa* (decided before he and Justice Kavanaugh joined the Court): He acknowledges that the *Sosa* Court held that "the door is still ajar subject to vigilant doorkeeping."²⁹ But he

²³ *Id.*

²⁴ *Id.* at 1946 (quoting *Sosa*, 542 U.S. at 719).

²⁵ *Id.* (quoting 28 U.S.C. § 1350).

²⁶ *Id.* at 1947.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1943 (Gorsuch, J., concurring) (internal quotation marks omitted) (quoting *Sosa*, 542 U.S. at 729).

would reverse course: “[T]he truth is this is a door *Sosa* should not have cracked.”³⁰ On the other side of the debate, Justice Sotomayor is joined by Justices Stephen Breyer and Elena Kagan. Three justices, meanwhile, declined to join either side: In his dissenting opinion, Justice Samuel Alito expressly declines to reach the issues.³¹ Chief Justice John Roberts and Justice Amy Coney Barrett, meanwhile, declined to join Part III of Justice Thomas’s opinion without explanation.

III. The Question of Corporate Liability

The Court granted certiorari to consider whether the ATS could be used to seek compensation from U.S. corporations. When the Court agreed to hear the case, many expected that it did so to finish the job it began in *Jesner v. Arab Bank, PLC*.³² There, a majority of the Court held that the ATS does not permit lawsuits against foreign corporations. While that decision formally addressed only the question of foreign corporate liability, language in the majority opinion indicated a clear reluctance to apply the ATS to corporations at all. Justice Anthony Kennedy, writing for the majority, stated that “*Sosa* is consistent with this Court’s general reluctance to extend judicially created private rights of action. . . . This caution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations.”³³ He further explained that, “Whether corporate defendants should be subject to suit was ‘a question for Congress, not us, to decide.’”³⁴ He concluded, “absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.”³⁵

³⁰ *Id.*

³¹ *Id.* at 1951 (Alito, J., dissenting) (“To be sure, Part III of Justice Thomas’s opinion and Part II of Justice Gorsuch’s opinion make strong arguments that federal courts should never recognize new claims under the ATS. But this issue was not raised by petitioners’ counsel, and I would not reach it here.”). His reluctance is a bit of a surprise given that he called *Sosa* into question in *Jesner*: “For the reasons articulated by Justice Scalia in *Sosa* and by Justice Gorsuch today, I am not certain that *Sosa* was correctly decided.” *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1409 (2018) (Alito, J., concurring in part and concurring in the judgment).

³² *Jesner*, 138 S. Ct. at 1386.

³³ *Id.* at 1402 (Justice Kennedy wrote the opinion for the Court, joined by Chief Justice Roberts and Justices Thomas, Alito, and Gorsuch).

³⁴ *Id.* at 1403 (quoting *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001)).

³⁵ *Id.*

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It was something of a surprise, then, that although the Court granted certiorari in *Nestlé* and *Cargill* to address the question of domestic corporate liability under the ATS, the majority opinion authored by Justice Thomas dodged the issue, deciding instead on the grounds that the ATS did not extend to extraterritorial conduct. (More on that below.) Nonetheless five justices—a majority of the Court—expressed a view on the matter. And all five made clear that they would *reject* corporate immunity from liability under the ATS—a surprise win for ATS advocates.

Let's begin with Justice Gorsuch. In something of an about-face, given that he joined the majority in *Jesner*,³⁶ Justice Gorsuch sides squarely with the plaintiffs on the issue of corporate liability. In Part I of his opinion, in which he is joined by Justice Alito (who was also in the majority in *Jesner*), he explains: "Nothing in the ATS supplies corporations with special protections against suit."³⁷ The statute specifies who may sue ("aliens"), and the claims they can bring (torts in "violation of the law of nations or a treaty of the United States") but it does not specify or otherwise limit who may be sued.³⁸ There's no reason to think, he notes, that the First Congress meant to exclude corporations. Generally speaking, "the law places corporations and individuals on equal footing when it comes to assigning rights and duties," and that was true even before the ATS was adopted.³⁹ That is also true in the specific context of the ATS: "Congress enacted the statute as part of a comprehensive effort to ensure judicial recourse for tortious conduct that otherwise could have provided foreign nations 'with just cause for reprisals or war.'"⁴⁰ Such violations could be committed not just by individuals but also by corporations. As Justice Gorsuch puts it, "If early Americans assaulted or abducted the French Ambassador, what difference would it have made if the culprits acted individually or corporately?"⁴¹ Either way, there would have been just cause for war against the United States, if the United States did not repair the damage.

³⁶ Justice Gorsuch also wrote separately in *Jesner*, primarily to express the view that the Court should not create new causes of action under the ATS. *Id.* at 1412 (Gorsuch, J., concurring in part and concurring in the judgment).

³⁷ *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1831, 1941 (2021) (Gorsuch, J., concurring).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (quoting Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 476–77 (2011)).

⁴¹ *Id.*

“All of which underscores,” Justice Gorsuch emphasizes, “the ATS has never distinguished between defendants.”⁴²

Justice Sotomayor, joined by Justices Breyer and Kagan, agrees. She addresses the issue only in a footnote but is nonetheless clear about her view. She begins by pointing out that Justice Thomas’s opinion does not answer “the question this Court granted certiorari to address, i.e., whether domestic corporations are immune from suit under the ATS.” For reasons she explained at length in her dissent in *Jesner v. Arab Bank, PLC*,⁴³ she would answer the question “in the negative.” To foot stomp the point, she states, “So would four other Justices.”⁴⁴ She then endorses Justice Gorsuch’s explanation that “there is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons.”⁴⁵

Hence on the question on which the Court granted certiorari—the question of corporate liability under the ATS—*five* justices make clear their view that corporations *can* be held liable under the ATS, and the other four are silent on the issue.⁴⁶ It’s a significant about-face for a Court that only three years earlier ruled against foreign corporate liability and cast serious doubt on corporate liability altogether.

IV. The Holding on Extraterritoriality

This brings us to the main holding of the case, one joined by eight of the nine members of the Court: The U.S Court of Appeals for the Ninth Circuit erred in allowing the case to proceed because “respondents improperly seek extraterritorial application of the ATS.”⁴⁷

In failing to address the question presented—the question of corporate liability under the ATS—and choosing instead to decide the case on the ground that the ATS does not extend extraterritorially, the majority

⁴² *Id.* at 1942.

⁴³ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1419 (2018) (Sotomayor, J., dissenting).

⁴⁴ *Nestlé*, 141 S. Ct. at 148 n.4 (Sotomayor, J., concurring in part and concurring in the judgment) (Justice Sotomayor, joined by Justice Breyer and Justice Kagan, states that she and “four other Justices” would reject corporate immunity).

⁴⁵ *Id.*

⁴⁶ In addition to joining Justice Gorsuch on the relevant portion of his concurring opinion, Justice Alito separately writes to say, “I would hold that if a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation.” *Id.* at 1950.

⁴⁷ *Id.* at 1936.

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opinion follows a playbook the Court first used in 2013 in *Kiobel v. Royal Dutch Shell*.⁴⁸ In *Kiobel*, the Court had granted certiorari on the question of corporate liability and then ordered reargument on the question of extraterritoriality, the grounds on which it ultimately decided the case.⁴⁹ In *Nestlé*, the Court did not order new briefing on extraterritoriality, because, unlike in *Kiobel*, the issue was briefed by the parties.⁵⁰

In *Kiobel*, the Court held that courts could not give extraterritorial reach to a cause of action judicially created under the ATS.⁵¹ The majority applied a presumption against extraterritoriality and concluded that it was not rebutted because “nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach.”⁵² It found, moreover, that “the historical background against which the ATS was enacted” also did not overcome the presumption.⁵³ Hence it concluded, “On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”⁵⁴ This came to be known as the “touch and concern” test.⁵⁵

The decision in *Kiobel* slammed the door on “foreign cubed” cases—cases in which there was a foreign plaintiff suing a foreign defendant for acts committed on foreign soil. But there remained the possibility that it might leave the door open to “foreign squared” cases—cases in which the defendant is a U.S. national or the harm occurred on U.S. soil.⁵⁶ *Kiobel*, after all, involved a foreign defendant as well as a foreign forum—making it more likely that “far from avoiding diplomatic strife, providing such a cause of action could have generated it.”⁵⁷ Yet observers

⁴⁸ *Kiobel v. Royal Dutch Petroleum Co*, 569 U.S. 108 (2013).

⁴⁹ *Id.* at 108.

⁵⁰ Brief of Respondents at 31, 34, *Nestlé*, 141 S. Ct. 1931 (No. 19–453); Reply Brief for Petitioner Cargill, Inc. at 3, *Nestlé*, 141 S. Ct. 1931 (Nos. 19–416 & 19–453); Reply Brief for Petitioner Nestlé USA, Inc. at 3, *Nestlé*, 141 S. Ct. 1931 (Nos. 19–416 & 19–453).

⁵¹ *Kiobel*, 569 U.S. at 108.

⁵² *Id.* at 118.

⁵³ *Id.* at 109.

⁵⁴ *Id.* at 124–25.

⁵⁵ See, e.g., Rodger Alford, *Kiobel Inst-Symposium: Interpreting “Touch and Concern,”* OPINION JURIS (Apr. 13, 2019).

⁵⁶ Oona Hathaway, *Kiobel Commentary: The Door Remains Open to “Foreign Squared” Cases*, SCOTUSBLOG (Apr. 18, 2013).

⁵⁷ *Kiobel*, 569 U.S. at 124.

hoped that the Court might later find that the same concerns would not arise if the United States was holding a U.S. corporation responsible for its actions abroad.

The *Nestlé* Court dashed those hopes. Justice Thomas, writing for eight justices (only Justice Alito declined to join), did not apply the “touch and concern” test from *Kiobel*, but instead relied on an intervening decision, *RJR Nabisco, Inc. v. European Community*,⁵⁸ in which the Court articulated a two-step framework. First, “we presume that a statute only applies domestically” and ask “‘whether the statute gives a clear, affirmative indication’ that rebuts this presumption.”⁵⁹ Second, where the statute does not overcome the presumption against extraterritorially, “plaintiffs must establish that ‘the conduct relevant to the statute’s focus occurred in the United States.’”⁶⁰ Here, Justice Thomas writes, the statute does not apply extraterritorially, so the question is whether the conduct meets the second step of *RJR*. Justice Thomas, joined by seven other justices, says no: “Nearly all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast.”⁶¹ The Ninth Circuit had allowed the case to proceed because plaintiffs—respondents here—pleaded that “every major operational decision by both companies is made in or approved in the U.S.”⁶² But “general corporate activity—like decisionmaking—cannot alone establish domestic application of the ATS.”⁶³ In *Kiobel*, the Court had held that it was not enough to simply allege “mere corporate presence.” Here, Justice Thomas writes, “Pleading general corporate activity is no better.”⁶⁴ He elaborates, “generic allegations of this sort do not draw a sufficient connection between the cause of actions respondents seek—aiding and abetting forced labor overseas—and domestic conduct.” He concludes, “To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity.”⁶⁵

⁵⁸ *RJR Nabisco, Inc. v. European Cmty.*, 579 U. S. 325, 337 (2016).

⁵⁹ *Nestlé U.S.A., Inc. v. Doe*, 141 S. Ct. 1931, 1936 (2021) (quoting *RJR Nabisco*, 579 U. S. at 337).

⁶⁰ *Id.* (quoting *RJR Nabisco, Inc.*, 136 S. Ct. at 2090).

⁶¹ *Id.* at 1937.

⁶² *Id.* (citation omitted).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

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Now, what are we to make of this explanation? The entire discussion of extraterritoriality spans no more than two and half pages of the opinion.⁶⁶ The many possible meanings of those two and a half pages may help explain why that part of Justice Thomas's opinion garnered eight votes.

William Dodge, writing shortly after the Court decided *Nestlé*, observes that "the decision has potentially broad implications for ATS suits against individuals and for the extraterritorial application of federal statutes in other areas."⁶⁷ The language in *RJR* about "conduct relevant to the statute's focus" was dictum.⁶⁸ The *Nestlé* Court's reliance on it, he notes, gives that dictum the stamp of a majority on a matter decisive to the outcome of the case. Dodge worries that this could have broad implications not just for ATS cases, but for extraterritoriality more generally.⁶⁹ To begin with, cases against individual perpetrators for violations outside the United States will almost certainly fail the *Nestlé* test. The *Filártiga* case, for example, might have met the "touch and concern" test but "seems unlikely to satisfy *Nestlé*'s requirement of relevant conduct in the United States."⁷⁰

Dodge is clearly right about cases in the *Filártiga* model. After all, few individuals plan their foreign law of nations violations in the United States. That loss, however, is dampened by the availability of the Torture Victim Protection Act, which provides federal courts with subject matter jurisdiction over claims against individuals for extraterritorial torture or extrajudicial killing,⁷¹ and the Trafficking Victims Protection Reauthorization Act, which provides jurisdiction over claims of extraterritorial trafficking and forced labor.⁷²

But what about corporate cases? It's possible that the Court means exactly what it says—it's not enough to assert "general corporate activity." Instead, the pleadings should have done more to connect the dots between the human rights violations that took place in Ivory Coast

⁶⁶ *Id.* at 1936–37.

⁶⁷ Dodge, *supra* note 13.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Torture Victim Protection Act, Pub. L. No. 102–256, 106 Stat. 73 (March 3, 1992) (codified as amended at 28 U.S.C. § 1350 note).

⁷² 18 U.S.C. § 1596 (providing jurisdiction over both individuals and corporations).

and the corporate decisions made in the United States. An exchange in oral argument between respondents' attorney Paul Hoffman and Justice Alito supports this view. Justice Alito asked questions that reflected skepticism that the complaint had made allegations sufficient to support aiding and abetting liability. The complaint, he pointed out, alleges the defendants "not only purchased cocoa from farms and/or farm cooperatives which they knew or should have known relied on forced child labor."⁷³ But "should have known" is "basically recklessness," Justice Alito argued. In response, Hoffman pointed out that the Ninth Circuit had found the complaint satisfied both knowledge and purpose standards. That did not satisfy Justice Alito, who asked, "So, after 15 years, is it too much to ask that you allege specifically that the—the defendants involved—the defendants who are before us here specifically knew that forced child labor was being used on the farms or farm cooperatives with which they did business?"⁷⁴

Some or all of the justices (though, interestingly, not Justice Alito himself) may have come away from this exchange convinced that the pleadings were not sufficiently specific to establish that corporate conduct that supported aiding and abetting liability took place in the United States. If that is correct, then the impact of *Nestlé* might be less significant, at least for corporate cases. It would simply mean that plaintiffs must more specifically allege that the corporate conduct in the United States specifically aided and abetted the human rights violations abroad. Indeed, the respondents' lawyers have already stated their intention to amend their complaint and continue to litigate the case under the ATS.⁷⁵ As a press statement explains, "Plaintiffs maintain that virtually all specific decisions that established, maintained, supported, and preserved Nestlé and Cargill's system of cocoa production that is dependent upon the cheap labor of child slaves were made at the company's corporate offices in the United States."⁷⁶ This reading seems to be supported by the concurrence in this part of Justice Thomas's opinion of Justices Sotomayor, Breyer, and Kagan.⁷⁷ Indeed, Justice Breyer's

⁷³ Transcript of Oral Argument at 62, *Nestlé, U.S.A., Inc. v. Doe*, 141 S. Ct. 1931 (2021).

⁷⁴ *Id.* at 64.

⁷⁵ Press Release, Int'l Rights Advocates, U.S. Supreme Court Dismisses Claims Against Nestlé and Cargill and Remands to Trial Court (June 17, 2021).

⁷⁶ *Id.*

⁷⁷ See generally *Nestlé*, 141 S. Ct. at 1931, 1936–37.

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concurrence in *Kiobel*, which Justices Kagan and Sotomayor joined, endorsed the result in *Kiobel* but not the majority's reasoning. There, Justice Breyer embraced a less constrained view of extraterritoriality.⁷⁸ That he joined the majority opinion in *Nestlé* suggests that the narrower reading of the *Nestlé* ruling may be the more plausible one.

Moreover, it's far from clear that the differences between *Kiobel* and *RJR* are so stark. The *RJR* Court itself attempted to reconcile the *Kiobel* decision, noting that it did not reach the "focus" step in *Kiobel* only because "'all the relevant conduct regarding those violations 'took place outside the United States.'"⁷⁹ Moreover, *Kiobel*'s "touch and concern" test has already been devastating to ATS cases. An analysis of all published opinions issued in ATS suits after 2013 shows that over forty percent of those that failed cited *Kiobel*'s "touch and concern" test as a reason the case could not proceed.⁸⁰ This far overshadowed every other reason given by courts for those years—including immunity bars, failure to establish an international law violation, political question doctrine, and aiding and abetting. Whether *Nestlé*'s endorsement of *RJR* makes matters worse or not, the situation was already quite dire indeed.

V. Time for Congress to Act

The ATS has long been a statute of last resort for people seeking justice for human rights violations. Even before *Nestlé* and *Cargill*, access to U.S. courts for such claims had already declined as a result of the Court's earlier ATS decisions, especially *Kiobel*, and other decisions that restricted access to U.S. courts for human rights violations committed abroad.⁸¹ These decisions already caused ATS suits to tumble from a high of forty published decisions in 2009 to four in 2020, the lowest number since 1995.⁸² *Nestlé* and *Cargill* might serve as the final blow.

⁷⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 127 (2013) (Breyer, J., concurring in the judgment).

⁷⁹ *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016) (quoting *Id.* at 126 (Alito, J., concurring)).

⁸⁰ Calculated from Oona A. Hathaway et al., *ATS Database* (unpublished database) (September 1, 2021).

⁸¹ Particularly *Daimler AG v. Bauman*, 571 U.S. 117 (2014), which held that a court cannot exercise jurisdiction over a foreign company based on the fact that a subsidiary of the company acts on its behalf in the forum state.

⁸² Oona A. Hathaway, Chris Ewell & Ellen Nohle, *Has the Alien Tort Statute Made a Difference? A Historical, Normative, and Empirical Assessment*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 15–16).

It is time for Congress to step in, as it did in 1991 in enacting the Torture Victim Protection Act and in 2000 in enacting the Trafficking Victims Protection Act,⁸³ to ensure basic protections for victims of human rights. There are a number of options that Congress could consider.⁸⁴

A narrow, simple, and straightforward fix would be to amend the ATS to expressly provide for extraterritorial reach. Congress could use the language it enacted in the 2008 amendment of the Trafficking Victims Protection Reauthorization Act (the “TVPRA”). The amendment reads, “In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under [the Act’s provisions]” if an offender is either a U.S. national, resident alien, or located in the United States regardless of nationality.⁸⁵ Indeed, the amendment could be included in the renewal of the TVPRA, which is expected to proceed in fall 2022. Such legislative action would overrule the limitations placed on the ATS in *Kiobel*⁸⁶ and reaffirmed in *Nestlé*.⁸⁷ Courts have uniformly upheld the extraterritorial application of the TVPRA for cases involving corporate defendants

⁸³ Torture Victim Protection Act, Pub. L. No. 102–256, 106 Stat. 73 (March 3, 1992) (codified at 28 U.S.C. § 1350 note § 2(a), et seq.); Trafficking Victims Protection Act, P.L. No. 106–386, 114 Stat. 1466 (Oct. 28, 2000) (codified as amended at 22 U.S.C. § 7101–14). The law was first enacted in 2000 and has been reauthorized repeatedly since then. *See generally* 22 U.S.C. § 7101 notes.

⁸⁴ In addition to these direct ATS fixes and substitutes, there are a range of other possible reforms discussed in Hathaway, Ewell & Nohle, *supra* note 82 (manuscript at 61–78). In addition, there has been a proposal for a Crimes Against Humanity Act under discussion since at least 2010. That proposed Act provides for criminal liability for crimes against humanity and would amend the TVPA to expand its reach. *See, e.g.*, Beth Van Schaack, CRIMES AGAINST HUMANITY: REPAIRING TITLE 18’S BLIND SPOTS IN ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS (Margaret M. deGuzman & Diane Marie Amann, eds. 2017).

⁸⁵ 18 U.S.C. § 1596(a)(1)–(2). *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, 122 Stat. 5067, 5071, § 223 (Dec. 23, 2008), amended by Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114–22, 129 Stat. 247, 247, § 120 (May 29, 2015).

⁸⁶ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115–17 (2013).

⁸⁷ *Nestlé U.S.A., Inc. v. Doe*, 141 S. Ct. 1931, 1936–37 (2021). A similar approach would be to tie subject matter jurisdiction to personal jurisdiction, providing: “(b) Extraterritorial Jurisdiction.—In addition to any domestic or extraterritorial jurisdiction otherwise provided by law, the district courts of the United States have extraterritorial jurisdiction over any tort described in subsection (a) if a defendant is subject to personal jurisdiction in the United States.”

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as well as individuals,⁸⁸ in accordance with the clear language of the statute.⁸⁹ As the District Court for the Central District of California explained in *Ratha v. Phatthana Seafood Co., Ltd.*, “Section[1596] use[s] the term ‘person’ which, like ‘offender,’ indisputably applies to both corporate and natural persons.”⁹⁰ It therefore agreed with “the overwhelming majority of courts and concludes that Section 1596 of the TVPA applies to corporations.”⁹¹

Congress could also amend the TVPA to expand the international law violations covered under that Act. The TVPA, at present, gives rights to U.S. citizens and non-citizens to bring claims against natural persons for torture and extrajudicial killing committed in foreign countries.⁹² That could be amended to include liability for the crime of genocide, slavery, war crimes, and crimes against humanity. This would not be a complete replacement for the ATS, however. TVPA claims may only be brought against natural persons acting under actual or apparent authority of a foreign nation. Hence all private conduct—including

⁸⁸ See, e.g., *Aguilera v. Aegis Commc’ns Grp.*, 72 F. Supp. 3d 975, 979 (W.D. Mo. 2014); *Jean-Charles v. Perlitz*, 937 F. Supp. 2d 276, 288–89 (D. Conn. 2013); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 679, 684 (S.D. Tex. 2009).

⁸⁹ 18 U.S.C. § 1596(a)(1)–(2).

⁹⁰ *Ratha v. Phattana Seafood Co., Ltd.*, No. CV 16-4271-JFW, 2016 WL 11020222, at *6 (C.D. Cal. Nov. 9, 2016).

⁹¹ *Id.* While courts have upheld the applicability of § 1596 to corporations in general, whether the requirement that “an alleged offender is present in the United States,” 18 U.S.C. § 1596(a)(2), necessitates that a foreign corporation be physically present in the United States rather than merely have minimum contacts with the United States in order for U.S. courts to exercise jurisdiction over their extraterritorial conduct has been a subject of contention. Two courts have held that the “present in the United States” language requires physical presence for the courts to exercise subject matter jurisdiction over the defendant. *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 WL 4511354, at *9 (S.D. Tex.); *Ratha*, No. 16-4271-JFW, 2017 WL 8292922 at *4–7. *Ratha* has been appealed, but a decision has not been issued. *Ratha*, No. 16-4271-JFW, 2017 WL 8292922., *appeal docketed*, No. 18–55041 (9th Cir. Dec. 3, 2018). One court has tied the extraterritoriality provision in § 1596 to personal jurisdiction. *C.T. v. Red Roof Inns, Inc.*, No. 2:19-CV-5384, 2021 WL 602578, at *4 (S.D. Ohio 2021) (“Section 1596(a) allows foreign plaintiffs to bring suit for conduct occurring outside of the United States, so long as a court has personal jurisdiction over the defendants, as shown by ‘minimum contacts’ with the United States.”).

⁹² *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012) (holding that the TVPA applies exclusively to natural persons and does not impose liability against any organizational entity).

corporate conduct—would be free from liability.⁹³

While the safest bet with Congress is that it will not act to correct errors made by the courts, this might prove a rare exception. The *Nestlé* and *Cargill* decisions threaten to leave the courts unable to reach human-rights violations carried out by domestic corporations outside the United States. This conflicts with a growing trend around the world in which states are increasingly taking to hold their domestic corporations accountable for the harms they do abroad.⁹⁴ It's time for the United States to join them.

⁹³ There are other limitations to the TVPA that do not apply to the ATS: Those seeking redress under the TVPA must also exhaust all "'adequate and available' remedies in the country where the offense occurred." 28 U.S.C. § 1350 note § 2(b). In addition, the TVPA requires *foreign* state action. *Id.* § 1350 note § 2(a).

⁹⁴ See Hathaway, Ewell & Nohle, *supra* note 82 (manuscript at 64–69) (describing new foreign case law on corporate accountability and the emerging effort in Europe to require corporations to exercise due diligence to ensure no human-rights violations take place in their supply chains).

The Computer Fraud and Abuse Act After *Van Buren*

Paul Ohm*

In *Van Buren v. United States*,¹ the U.S. Supreme Court at long last waded into a decade-plus-old circuit split it had previously declined to take up. The dispute focused on a core definition at the heart of the Computer Fraud and Abuse Act (CFAA), a federal law criminalizing certain acts by so-called computer hackers.² Originally enacted in 1984, the CFAA is without a doubt the most important federal law outlawing hacking, viruses, and ransomware, making it a key weapon in our national arsenal for protecting cybersecurity. The breadth and open-textured language of the law, as well as the fact that it provides civil liability in addition to criminal penalties, has unfortunately also made it a tool for interfering with business competitors, squelching journalists, impeding researchers, and silencing whistleblowers, meaning the ongoing uncertainty created by the circuit split had put a cloud over vital speech, research, and competition online.

The Court brought some clarity to the confusion but stopped short of completely resolving the circuit split. In a 6–3 opinion authored by Justice Amy Coney Barrett, the Court held that an employee who has been given access to a computer system by an employer does not violate the CFAA—in the parlance of the statute, they do not “exceed[] authorized access”—when they access the computer system for a purpose prohibited by an employment policy.³ A human resources manual alone does not a criminal computer hacker make, the opinion clarifies. Instead, an employer needs to close a metaphorical “gate” on

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¹ *Van Buren v. United States*, 141 S. Ct. 1648 (2021).

² 18 U.S.C. § 1030.

³ *Van Buren*, 141 S. Ct. at 1662 (quoting 18 U.S.C. § 1030(a)(1)).

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the area of the computer it wants to declare off-limits to a particular user before the CFAA will have anything to say about the conduct.⁴

Quite importantly, the Court has erased one common path to CFAA liability: purpose-based restrictions. Many courts have found CFAA liability and criminal culpability when employees or computer users have taken steps they were authorized to take by their computers' operators but for prohibited purposes.⁵ In these cases, the CFAA would in essence turn on the thought an individual was thinking when they clicked a mouse button or typed on the keyboard. No longer. Despite protests to the contrary from the government and the dissent, the Court has made clear that purpose-based restrictions do not fit within the meaning of the statute, implicitly overruling many lower court opinions and ridding the statute of one of its most problematic features.⁶

The opinion stopped short of embracing what some amici and scholars had long urged, a more complete so-called "code-based" interpretation of "exceeds authorized access," under which the CFAA prohibits only activity that circumvents a technological measure such as a password.⁷ Lingering uncertainty remains about whether non-code-based methods for restricting access, such as cease-and-desist letters or terms-of-service restrictions, can close a CFAA gate.

The Court's refusal to limit the statute to code has frustrated some CFAA-watchers, particularly those who advise journalists and academic researchers about their research methods and worry that the ongoing uncertainty chills important speech and conduct online. As one who routinely engages in these kinds of methods (and has taught scores of students to do the same), I understand these concerns but find less to

⁴ *Id.* at 1658–59.

⁵ For citations to the circuit split that existed prior to the Court's decision in *Van Buren*, see *infra* note 15.

⁶ *Van Buren*, 141 S. Ct. at 1659 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)) (noting that the government's purpose-based reading of the statute creates "'inconsisten[cies] with the design and structure'" of the CFAA).

⁷ Orin Kerr was the first legal scholar to introduce and advocate for a code-based interpretation to the CFAA's authorization-related terms, Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1649 (2003) [hereinafter Kerr, *Scope*], although he later advocated for a norms-based approach instead. Orin S. Kerr, *Norms of Computer Trespass*, 116 COLUM. L. REV. 1143, 1164 (2016) [hereinafter Kerr, *Norms*]. Many other legal scholars and advocates have argued in favor of a code-based interpretation since. *E.g.*, Patricia L. Bellia, *A Code-Based Approach to Unauthorized Access Under the Computer Fraud and Abuse Act*, 84 GEO. WASH. L. REV. 1442, 1475–76 (2016).

worry about after *Van Buren*. The reasoning of the opinion suggests that the Court's gate metaphor will be read narrowly, and lower courts are likely to read *Van Buren* to rule out problematic examples of CFAA liability triggered by terms of service, for example.

Although *Van Buren* answers many questions about the CFAA, several remain. One is, does an operator of a publicly accessible computer, such as a website, trigger CFAA liability by sending a cease-and-desist letter to a user engaging in unwelcome conduct instructing them to stop? Many scholars, advocates, and amici decry this possibility, but I offer a novel defense of it, out-of-step with the weight of the commentary: We shouldn't limit the CFAA to code-based measures alone, lest we unwittingly embrace an unhealthy libertarian misconception about the nature of code, one that treats software like a naturally occurring phenomenon, entitling it to special treatment under the law. If the CFAA gives legal force to passwords, as the code-based approach would allow, it should give the same legal force to cease-and-desist letters, if only we can see past the libertarian fallacy.

The rest of this essay proceeds in three parts. Part I summarizes the *Van Buren* case and opinion. Part II predicts how *Van Buren* will be used by the lower courts, explaining the longstanding debates the opinion has resolved and the others that remain unanswered. Finally, Part III will look beyond *Van Buren*, considering the problematic libertarian argument embedded in the code-based theory and offering proposals for Congress to amend the CFAA after *Van Buren*.

I. The Opinion

The Court ruled 6–3 in favor of a criminal defendant, a former police sergeant in Georgia named Nathan Van Buren, who had been convicted by a jury of violating a provision of the CFAA by “exceed[ing] authorized access” to a computer system.⁸ Van Buren violated the statute, according to federal prosecutors, when he searched through a police database for the identity of the person connected to a license plate. Although his employer had granted him the ability to search through this database, by policy it had prohibited access for “an improper purpose.”⁹ Rather than engaging in official police business, Van Buren had conducted the search

⁸ *Van Buren*, 141 S. Ct. at 1649 (quoting 18 U.S.C. § 1030(a)(2)).

⁹ *Id.* at 1653.

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at the request of a notorious local figure, a person Van Buren had been warned to avoid, and one whom Van Buren did not know was working with the police to see how far Van Buren would go.¹⁰ This confidential informant had asked Van Buren to find out if the owner of the fictitious license plate was an undercover cop, imbuing the request with a whiff of potential violence that any law-abiding police officer would have recoiled against. The record established that Van Buren had been trained about the computer-use policy and “therefore knew that the search breached” his employer’s rules due to his improper purpose.¹¹

By taking this case, the Court waded into a two-decades-plus running interpretative puzzle at the heart of the CFAA: the meaning of the phrase “exceeds authorized access.”¹² In many CFAA cases, there is no doubt that the defendant acts “without authorization,”¹³ for example, in the paradigmatic case of an identity thief who steals a password and then uses it to access information or a system he otherwise is not entitled to access. Much more controversial have been cases committed by insiders, faithless employees, or other people entitled by policy, contract, or terms of service to use a system for some purposes but not for others. These users cannot be said to be “without authorization,”¹⁴ so their legal fate turns on whether they have acted in excess of authorized access. Often the line between criminal and non-criminal behavior has been drawn by an employment policy like the one in *Van Buren*, instead of a technological barrier like a password. In recent years, the circuit courts had split in cases like these, with the Second, Fourth, and Ninth Circuits holding that an employment policy is not enough for CFAA liability or culpability; and the Fifth, Seventh, and Eleventh Circuits holding, to the contrary, that the violation of an employee policy could a CFAA violator make.¹⁵

Writing for a six-justice majority, Justice Barrett held that the police department’s employment policy alone was not enough to find that Van

¹⁰ *Id.*

¹¹ *Id.*

¹² 18 U.S.C. § 1030(e)(6).

¹³ *Id.* § 1030(a)(1).

¹⁴ *Id.*

¹⁵ *United States v. Valle*, 807 F.3d 508 (2d Cir. 2015); *WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 202, 207 (4th Cir. 2012); *United States v. Nosal*, 676 F.3d 854, 862–63 (9th Cir. 2012) (en banc); *United States v. John*, 597 F.3d 263, 272 (5th Cir. 2010); *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010); *Int’l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420–21 (7th Cir. 2006).

Buren had exceeded his authorized access by searching for a license plate for an improper purpose. The opinion turned primarily on a detailed (I'd go so far as to say tedious) textualist discussion of the phrase "entitled so to" access within the definition of "exceeds authorized access."¹⁶ The government had argued that the word "so" should decide the case in its favor. Although Van Buren was "entitled" to access this database for some purposes, the access in question was not one he was "entitled so" to access, given his improper purpose, it argued. The majority refused to read "so" that expansively, finding instead that the "so" in the definition ought to refer back to some other part of the statutory text.¹⁷ Moving beyond the text, the majority found support for its interpretation in the structure and legislative history of the act, rebuffing various arguments from the government and dissent, authored by Justice Clarence Thomas.¹⁸

The opinion thus resolves at least part of the circuit split, announcing that an employment policy prohibiting the use of a system for limited purposes is not enough to criminalize an employee's use of a system to which they have been granted access for other purposes and implicitly overruling opinions that held to the contrary.¹⁹ Given the large number of CFAA cases that have centered on employees, this holding brings welcome clarity to the statute.²⁰

II. Extending the *Van Buren* Reasoning

CFAA watchers hoping for a decisive end to the confusion about "exceeds authorized access" have concluded that the *Van Buren* opinion

¹⁶ In the CFAA, "the term 'exceeds authorized access' means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not *entitled so to* obtain or alter." 18 U.S.C. § 1030(e)(6) (emphasis added).

¹⁷ Specifically, the majority adopted the defendant's construction of "so" as referring to the definition's requirement that the information be obtained through use of a computer. In other words, Congress inserted "so" for the narrow purpose of preventing an insider from asserting a defense that the digital file he stole he could have been legitimately obtained without a computer, for example by making a physical, Xerox copy or a hard-copy equivalent. *Van Buren v. United States*, 141 S. Ct. 1648, 1656 (2021).

¹⁸ *Van Buren*, 141 S. Ct. at 1648, 1659–61; *id.* at 1662 (Thomas, J. dissenting).

¹⁹ Compare *id.* at 1661 with *United States v. John*, 597 F.3d 263, 272 (5th Cir. 2010); *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010); *Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420–21 (7th Cir. 2006).

²⁰ Jonathan Mayer, *Cybercrime Litigation*, 164 U. PA. L. REV. 1453, 1480 (2016) (finding fifty percent of civil CFAA lawsuits filed through 2012 to be suits by employers against employees or former employees).

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does not quite get us there.²¹ United in the understanding that the Court did not bring perfect clarity to the core puzzle in the CFAA, commentators differ in their assessment of how much the opinion nevertheless cleans up the mud. To distill a large amount of prior legal commentary, two important questions have swirled around CFAA cases for the past twenty years. First, will the CFAA recognize any purpose-based restrictions on computer authorization? In other words, would the CFAA recognize restrictions of the sort: You are authorized to access this information for purpose X, but you exceed your authorized access if you act for purpose Y? Second, can restrictions on authorization be conveyed through non-technical measures such as employment policies, terms-of-service rules, or cease-and-desist letters?

Van Buren clearly and decisively answers the first question with a resounding “no.” Purpose-based restrictions cannot strip users of authorization for purposes of the CFAA, the Court has declared.²² As to the second question, the Court said much less and sowed additional confusion with a footnote.²³ We simply still do not know if non-code-based restrictions suffice under this law. I predict, however, that the core reasoning of the opinion will lead lower courts to conclude that restrictions found in terms-of-service and employment contracts alone cannot support CFAA liability or culpability. Cease-and-desist letters are more complicated, a topic I take up in the final part of this essay.

A. The End of Purpose-Based and Circumstance-Based Restrictions

The majority opinion unequivocally sweeps away purpose-based or circumstance-based limitations to computer access under the CFAA. The core reasoning of the opinion focuses judicial attention on the *parts* of a computer an accused was entitled to access rather than the *purposes* for

²¹ 18 U.S.C. § 1030(a)(1), (e)(6). Orin Kerr, *The Supreme Court Reins in the CFAA in Van Buren*, LAWFARE (June 9, 2021) (“In the end, *Van Buren* doesn’t answer everything. But it answers a lot.”)

²² *Van Buren*, 141 S. Ct. at 1662–63.

²³ *Id.* at 1659 n.8 (“For present purposes, we need not address whether this inquiry turns only on technological (or ‘code-based’) limitations on access, or instead also looks to limits contained in contracts or policies .”). Kerr, *supra* note 21 (expressing “puzzlement” at trying to reconcile the opinion’s stance against using the policy to determine liability with footnote eight.).

which access was permitted or the *circumstances* under which the access was accomplished:

In sum, an individual “exceeds authorized access” when he accesses a computer with authorization but then obtains information located in *particular areas of the computer—such as files, folders, or databases—that are off limits to him*. The parties agree that Van Buren accessed the law enforcement database system with authorization. *The only question is whether Van Buren could use the system to retrieve license-plate information*. Both sides agree that he could. Van Buren accordingly did not “excee[d] authorized access” to the database, as the CFAA defines that phrase, even though he obtained information from the database for an improper purpose.²⁴

This crucial paragraph of *Van Buren* has a spatial focus. In the Court’s explanation—informed by technical dictionary definitions of the word “access”²⁵—computers have “areas,” akin to physical spaces, some of which you can enter and others of which are “off limits.”²⁶ The owner of a shared computer delineates those spaces by using mechanisms (which remain unspecified) to exclude some users from certain “files, folders or databases.”²⁷ An excluded user who nevertheless finds their way into an off-limits space exceeds authorized access and is thus subject to CFAA’s criminal and civil prohibitions.

In contrast, users do not violate the CFAA when they access a file just because they harbor an improper purpose. *Van Buren* declares that the CFAA “does not cover those who . . . have improper motives for obtaining information that is otherwise available to them.”²⁸ The Court repeatedly rebuffs the government’s and dissent’s various arguments in

²⁴ *Van Buren*, 141 S. Ct. at 1652 (emphasis added).

²⁵ *Id.* at 1657 n.6.

²⁶ *Id.* at 1652, 1662 (“This provision covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend.”).

²⁷ *Id.* at 1662.

²⁸ *Id.* at 1652.

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favor of a purpose-based or circumstance-based test.²⁹ Once a computer owner gives a user access to a file for a single purpose, that user can access that file for any purpose. “The only question is whether” the user can access the specific space.³⁰

This is a significant clarification, one with the potential to dramatically decrease the number of CFAA cases brought on both the civil and criminal sides. It removes a significant source of uncertainty about the legality of journalism and academic research. Computer users with legitimate access to a system no longer need to worry about facing federal prosecution or civil liability for using the system for a disfavored purpose. The computer owner can bar you from “areas” of the computer, but once they admit you, they cannot limit the purposes for which you can access any particular area if they expect to harness the CFAA.³¹

B. Whither Terms-of-Service Provisions and Employment Contracts?

Although the Court cleared up significant confusion about the scope of restrictions on access that might give rise to CFAA liability, it said far less about the methods a computer user can use to convey and enforce these restrictions. Must restrictions on access be implemented in software, for example, in the form of a password? Can they instead (or in addition) be communicated through an employment policy, terms-of-service provision, or cease-and-desist letter?

The Court stopped short of embracing what many scholars and advocates had pressed, namely that the text of the CFAA should be interpreted to require the imposition of a code-based or technological barrier—such as a password—as a necessary precondition on liability

²⁹ *Id.* at 1656–57 (critiquing the dissent’s “circumstance dependent” approach); *id.* at 1660–61 (contrasting an earlier version of the statute, which did focus on the “purposes to which such authorization does not extend”); *id.* at 1660 n.11 (rejecting the dissent’s “circumstance-specific approach”); *id.* at 1662 (criticizing how a purpose-based construction of the CFAA would “stake[] so much on a fine distinction controlled by the drafting practices of private parties”).

³⁰ *Id.* at 1662.

³¹ *See id.*

and culpability.³² The majority expressly refused to go this far in footnote eight: “For present purposes, we need not address whether this inquiry turns only on technological (or ‘code-based’) limitations on access, or instead also looks to limits contained in contracts or policies.”³³

Although the case involved an employment policy, we should not read *Van Buren* to expressly rule out finding CFAA gates in computer access restrictions found in employment policies; none of the Court’s reasoning turns on the fact that an employment policy was involved. Nor does the Court pay any attention to the form or efficacy of the policy, as the Court simply assumed, based on the record, that *Van Buren* was aware of the policy’s rules.³⁴

It would be shortsighted, however, to say that *Van Buren* says nothing about the appropriate mode or method of a CFAA-worthy restriction. Although the picture is still murky, there are reasons to believe that lower courts will read the opinion to cut back on the use of terms-of-service provisions and employment contracts for CFAA purposes, as so many have urged.

First, the Court specifically rejects (albeit in dicta) premising liability or culpability on certain types of terms-of-service provisions.³⁵ The Court decries construing the statute in a way that would “criminalize everything from embellishing an online-dating profile to using a pseudonym on Facebook.”³⁶ Without ruling out the use of terms of service to remove authorization under the law, it comes close.

Second, every terms-of-service case that has been brought in the

³² *Id.* at 1659 n.8. Scholars advocating for a code-based interpretation include: Bellia, *supra* note 7, at 1475–76 (2016); Kerr, *Scope*, *supra* note 7, at 1648–49 (2003); Nicholas R. Johnson, “I Agree” to Criminal Liability: Lori Drew’s Prosecution Under § 1030(a)(2)(C) of the Computer Fraud and Abuse Act, and Why Every Internet User Should Care, 2009 U. ILL. J.L. TECH. & POL’Y 561, 570; Cyrus Y. Chung, Note, *The Computer Fraud and Abuse Act: How Computer Science Can Help with the Problem of Overbreadth*, 24 HARV. J.L. & TECH. 233, 244–45 (2010); Katherine Mesenbring Field, Note, *Agency, Code, or Contract: Determining Employees’ Authorization Under the Computer Fraud and Abuse Act*, 107 MICH. L. REV. 819, 825–27 (2009). In addition to the petitioner, Professor Kerr as amicus called for a code-based resolution to the *Van Buren* case. *E.g.*, Brief of Professor Orin S. Kerr as Amicus Curiae in Support of Petitioner at 7, *Van Buren*, 141 S. Ct. 1648 (No. 19–783).

³³ *Van Buren*, 141 S. Ct. at 1659 n.8.

³⁴ *Id.* at 1653 (“[T]rial evidence showed that *Van Buren* had been trained not to use the law enforcement database for ‘an improper purpose,’ defined as ‘any personal use.’ *Van Buren* therefore knew that the search breached department policy.”).

³⁵ *Id.* at 1661.

³⁶ *Id.*

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past or hypothesized as a possible CFAA violation by scholars or amici has advanced a “purpose-based” or “circumstance-based” theory of CFAA liability, the kind of authorization that the *Van Buren* Court has rejected. The “embellishing an online-dating profile” hypothetical is a repeatedly invoked example.³⁷ Litigated CFAA cases involving terms-of-service restrictions have focused on provisions preventing reusing information to build a competing service³⁸ or collecting information “using automated means.”³⁹ These all seem to be the kind of purpose-based or circumstance-based restrictions that *Van Buren* has declared extra-statutory. There is simply no precedent for a terms-of-service case in which the terms of service provide, “you are not permitted to access this file, folder, or database.” So even though terms-of-service restrictions remain available in theory, in practice, they are not likely often (if ever) to be encountered.

Third, although it is conceivable that a website will draft a term of service that reads, “you may not access this part of our website” categorically, perhaps to squeeze within *Van Buren*’s reasoning, I predict that, after *Van Buren*, courts will scrutinize whether CFAA mechanisms communicate the restriction to the user. Consider the metaphor the Court introduced to describe the kind of steps that deserve CFAA attention: “gates-up-or-down.”⁴⁰ The next phase of CFAA commentary and litigation will abound with scholarly disquisitions on gates. I think that the concrete and visceral image of a gate will drive lower courts to read “exceeds authorized access” not to extend to obscure provisions buried in unread terms of service. Gates evoke solidity, clarity, and visibility. Gates are open or shut and their state of openness or shut-ness is visible at a distance and not up for nuanced debate. A computer owner who announces a “you shall not pass” restriction by burying it in paragraph seventeen of mind-numbing legalese will be hard pressed to explain to a Court that this constitutes the kind of gate that *Van Buren* requires.

³⁷ See e.g., *id.*; *United States v. Nosal*, 676 F.3d 854, 861 (9th Cir. 2012) (en banc).

³⁸ *Craigslist, Inc. v. 3 Taps, Inc.*, 942 F. Supp. 2d 962, 977 (N.D. Cal. 2013) (“Any access to or use of craigslist to design, develop, test, update . . . or otherwise make available any program, application, or service [relating to] craigslist . . . is prohibited.”) (internal quotation marks omitted).

³⁹ *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08–05780 JW, 2010 WL 3291750, at *7 (N.D. Cal. July 20, 2010).

⁴⁰ *Van Buren*, 141 S. Ct. at 1659.

For these three reasons, I predict that lower courts will rarely, if ever, find CFAA liability or culpability based only on “gates” lowered solely through provisions in terms-of-service documents or employment policies.⁴¹ The hypothetical possibility remains that one of these methods might someday be deemed enough to trigger the CFAA, but it’s likely we’ll never encounter that hypothetical. Those who police the security of computer systems should find other ways to lower gates on the unauthorized if they hope to use the CFAA as a punishment or deterrent for those they wish to exclude.

C. *Van Buren* Has Significantly Narrowed the CFAA

United in concluding that the Court did not bring perfect clarity to the CFAA, commentators differ in their assessment of how much the opinion nevertheless cleans up the mud. Although initial hot takes on Twitter ranged from frustrated by what the Court left undecided⁴² to more optimistic assessments that much had been clarified,⁴³ the weight of expert commentary following the opinion seems to conclude that the opinion has significantly clarified the law.⁴⁴

I agree that much has been clarified. Although footnote eight might initially embolden plaintiffs and prosecutors to argue that not much has changed, once lower courts dig into the opinion, I predict they will find that the reasoning guides them to a far narrower—and thus less troublesome—version of the CFAA. *Van Buren* does away with one of the horsemen of the CFAA apocalypse, purpose-based / circumstance-based restrictions. It also gestures to the end of terms-of-service and

⁴¹ Other experts have made the same prediction. See Eric Goldman, *Do We Even Need the Computer Fraud & Abuse Act?*, TECH. & MKTG. BLOG (June 9, 2021) (“I think courts will reference the majority’s policy discussion to conclude that TOS terms can’t delimit CFAA access.”).

⁴² Daphne Keller (@daphnekhk), TWITTER (June 3, 2021, 11:05 AM) (“Uh . . . so does *Van Buren* effectively fail to resolve the key question presented?”); Jeff Kosseff (@jksosseff), TWITTER (June 3, 1:30 PM) (commenting that the opinion hasn’t helped shrink the CFAA chapter in his textbook).

⁴³ Jonathan Mayer (@jonathanmayer), TWITTER (June 3, 2021, 10:54 AM) (celebrating the opinion’s “terrific implications for researchers, journalists, and others who use scraping methods”); James Grimmelmänn (@grimmelm), TWITTER (June 3, 2021) (calling the Court wise for adding footnote eight).

⁴⁴ Aaron Mackey & Kurt Opsahl, *Van Buren is a Victory Against Overbroad Interpretations of the CFAA, and Protects Security Researchers*, EFF BLOG (June 3, 2021); Goldman, *supra* note 41; Adi Robertson, *The Supreme Court Pared Down a Controversial Anti-Hacking Law*, VERGE (June 5, 2021).

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employment-policy restrictions, two other persistent fears. Journalists and researchers (and the lawyers who advise them) should feel more confident acting in ways that run afoul of purpose-based and other website restrictions.⁴⁵

Amidst all of this welcome clarity there remains an important little smudge of uncertainty: Even if terms-of-service documents and employment policies no longer demarcate the boundaries of the CFAA, what about a cease-and-desist letter? If the owner of a computer musters the time, effort, and legal fees to identify, locate, and contact an unwelcome user to let them know that their access is no longer authorized, will this trigger CFAA liability? The answer may be yes, and at the risk of putting me at odds with many other CFAA commentators, I think this might be a good thing. Let me explain.

III. Web Scraping and the Anti-Libertarian Project

Even if buried terms-of-service provisions can no longer render behavior in excess of authorization under the CFAA, can clearer, more obvious forms of contract or policy alone shut a CFAA gate?⁴⁶ Of most importance, consider the facts of another closely watched CFAA case, *hiQ Labs v. LinkedIn*,⁴⁷ for which the Supreme Court denied cert and remanded in the wake of *Van Buren*.

hiQ Labs is a data analytics company that analyzes data it copies from the service LinkedIn, the professional networking website. LinkedIn objects to hiQ's copying, although its motives are contested: LinkedIn claims it is defending the privacy of its users; hiQ claims that LinkedIn is acting anticompetitively, because it wants to be the sole source of analysis for LinkedIn data. In addition to taking code-based measures to prevent copying, LinkedIn sent hiQ a cease-and-desist letter, asserting that further copying would violate numerous laws including the CFAA. hiQ filed suit in federal court, seeking a declaratory judgment

⁴⁵ See Michael A. Specter (@mspecter), TWITTER (June 3, 2021, 11:09 AM) (“[I]f the *Van Buren* decision were made a year ago, I would have been far less stressed out over the elections systems vulnerability disclosures I had to go through. I have faith that this is going to massively decrease the chilling effects on security research.”).

⁴⁶ *Van Buren*, 141 S. Ct. at 1659 n.8 (declining to decide whether the CFAA inquiry “looks to limits contained in contracts or policies”).

⁴⁷ *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985 (9th Cir. 2019), *cert .granted, vacated and remanded* 2021 WL 2405144 (June 14, 2021).

that it was not violating the CFAA.⁴⁸ On remand from the Supreme Court, *hiQ Labs* poses the question: Is a user agreement backed by a cease-and-desist letter enough to shut a *Van Buren* gate?

A. Web Scraping and Cease-and-Desist Letters

The fact that *Van Buren* leaves open the possibility of building CFAA gates with cease-and-desist letters, rather than require them to be built solely of code, has been the source of criticism and consternation among prominent CFAA watchers.⁴⁹ They worry about the chilling effect the threat of CFAA liability imposes on heroic poster children such as journalists and researchers seeking to harvest information from publicly available websites to advance human knowledge and shine the light of transparency on the secret practices of powerful platforms. One tool used by these heroes has been a frequent target of CFAA litigation: web scraping.⁵⁰ Web scraping is web browsing with speed and at scale; automated computer programs use the same underlying technologies used by humans wielding web browsers, keyboards, and mice to systematically copy all of the content from the various pages of a website. Journalists and academic researchers scrape the web to shine valuable light on the online technologies driving modern society.

Every hero needs an anti-hero, and in this story it is Clearview AI, a company that has scraped millions of photos from social media sites in order to build a powerful, global facial recognition system, which it sells to law enforcement agencies.⁵¹ Of course, the lines between heroism and anti-heroism can blur, and some might celebrate the cold cases that Clearview's

⁴⁸ *Id.* at 989–92.

⁴⁹ Mukund Rathil & Kurt Opsahl, *EFF to Ninth Circuit: Recent Supreme Court Decision in Van Buren Does Not Criminalize Web Scraping*, EFF BLOG (July 19, 2021) (“Our brief explains that neither LinkedIn’s cease-and-desist letter to hiQ nor its attempts to block its competitor’s IP addresses are the kind of technological access barrier required to invoke the CFAA.”).

⁵⁰ Andrew Sellars, *Twenty Years of Web Scraping and the Computer Fraud and Abuse Act*, 24 B.U. J. SCI. & TECH. L. 372, 381–88 (2018) (providing a technical overview of web scraping).

⁵¹ Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, N.Y. TIMES (Jan. 18, 2020); Kashmir Hill, *What We Learned About Clearview AI and Its Secret ‘Co-Founder’*, N.Y. TIMES (March 18, 2021). The privacy and civil liberties implications of this profit-driven practice are numerous and far-reaching, but beyond the scope of this essay.

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technology has helped solve,⁵² just as others might decry the creepy data harvesting sometimes done in the name of academic research.⁵³

What unites many is the belief that the CFAA is the wrong tool to draw the lines between what we want to permit and what we want to prohibit when it comes to web scraping. It is too blunt a tool to proscribe the Clearview AIs of the world while also permitting journalists and researchers to do something similar for noble purposes. One way to narrow the CFAA is to limit it to acts that circumvent technological gates—such as passwords—but to refuse to extend it to acts that defy cease-and-desist-letters. To people advancing this argument, *Van Buren* sowed unnecessary confusion with footnote eight.

These arguments find their most persuasive presentation in an article by Professor Andy Sellars, writing before *Van Buren* was decided.⁵⁴ Sellars argues in special defense of web scraping. He celebrates web scraping and web scrapers, explaining how they help shine light in dark places, giving researchers, journalists, and ultimately the public information about the important activities of powerful corporations.⁵⁵

I am deeply sympathetic to these arguments, having first scraped a website more than twenty-five years ago, having scraped hundreds and maybe thousands of sites since, and having spent a career training hundreds of law students how to build web scrapers of their own to improve the efficiency of their work and to engage in the kind of acts of heroic transparency that Sellars celebrates.⁵⁶ I agree with Sellars that web scraping ought not to be treated as criminal conduct just because a buried term of service or obscure employment policy catches a programmer unawares, meaning I agree that many of the cases he criticizes are wrongly decided. As I have already argued, *Van Buren* seems to agree, silently disavowing terms-of-service gates, meaning lower courts going forward encountering CFAA web scraping cases

⁵² Kim Lyons, *Use of Clearview AI Facial Recognition Tech Spiked as Law Enforcement Seeks to Identify Capitol Mob*, VERGE (Jan. 10, 2021) (describing use by law enforcement agencies of Clearview AI service to identify Capitol insurrectionists).

⁵³ Matthew Rosenberg, *Professor Apologizes for Helping Cambridge Analytica Harvest Facebook Data*, N.Y. TIMES, (Apr. 22, 2018) (discussing the role of a Cambridge University professor in collecting information from unknowing users in Facebook/Cambridge Analytica scandal).

⁵⁴ Sellars, *supra* note 50, at 406–07.

⁵⁵ *Id.* at 372–75.

⁵⁶ See Paul Ohm, *The Philosophy of the Course*, COMPUTER PROGRAMMING FOR LAWS (Jan. 6, 2018).

should find plenty of ammunition to dismiss cases and charges, and fewer such cases should be brought in the first place.

B. Resisting the Libertarian Critique

But I am not sure I can follow Sellars in cases in which a website owner sends the web scraper a cease-and-desist letter. To Sellars, a cease-and-desist letter is at best a mixed message, telling a web scraper “no” with one hand while maintaining an inherently open website implying “yes” with the other.⁵⁷ Although my sympathies lie with Sellars and my fellow web scrapers, by connecting this argument with broader themes I have seen in many other tech law and policy disputes, I become uneasy with this line of argument.

These arguments, perhaps unknowingly, build on a deeply embedded and problematic attitude at the heart of tech law and policy, a pervasive libertarianism that criticizes any attempts to use governmental power to stem our online ills. This libertarian faith in the importance of preventing law from interfering with technological power has been an important driver for so much of what ails modern society: surveillance capitalism, unchecked misinformation and disinformation, income inequality, online hate speech, and more. We need to reassert the rule of law online, and one small step would be to refuse to grant coders special powers under the CFAA.

Is a well-founded cease-and-desist letter fundamentally different than a password? Both unambiguously tell a web scraper, “You shall not pass.” The cyberlibertarian impulse is to disagree, to naturalize the decisions of techies, treating technological choices as forces of nature with which we must cope rather than the collective decisions of teams of individuals supposedly subject to our laws and norms. The libertarians whine about barriers to “permissionless innovation,” by which they mean the laws and regulations enacted by society’s collective institutions,⁵⁸ but less rarely whine about parallel permission structures of code created by powerful private parties.

⁵⁷ Sellars, *supra* note 50, at 413 (“It is not clear whether courts have fully confronted conflicting authorization under the CFAA, and established a means of mitigating such authorizations.”).

⁵⁸ ADAM THIERER, PERMISSIONLESS INNOVATION: THE CONTINUING CASE FOR COMPREHENSIVE TECHNOLOGICAL FREEDOM (2016).

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This reeks of a macho, neo-Hobbesian view of the internet as a brutal landscape of all-against-all programmers, who should be left free to attack and counter-attack without being governed by preexisting norms or laws. Sometimes the good guys are winning—meaning more journalism, research, and transparency—and sometimes the bad guys are winning—meaning more opacity and facial recognition power—but the message to non-coders is, “We don’t recognize you as empowered combatants in the battle.” These wars have trapped the rest of us in the crossfire, creating an insecure, nonprivate, non-trustworthy internet.

When we write new laws and when we interpret preexisting laws, we need to act consciously and affirmatively to fight the bias of the subtle and pervasive libertarian ethos that has burrowed into our debates, adopting an affirmatively anti-tech-naturalization, anti-tech-determinism, anti-libertarian attitude, one which refuses to place the actions of coders on a pedestal or to treat their actions as more entitled to legal recognition than the actions of others. This attitude should incline judges to avoid interpreting statutes in ways that embed tech exceptionalism into unambiguously tech-neutral phrases such as “exceeds authorized access.”⁵⁹ There is nothing in that phrase that suggests it should recognize ten hours of coding effort but not ten hours of legal work. Giving statutory recognition to the former and not the latter without any textual justification unwittingly fuels the libertarian project. It ratifies a sub rosa Silicon Valley Supremacy Clause that favors the laws of code over the laws of society.⁶⁰ We need to reassert the power of the rule of law over the colonizing power of code, and *Van Buren*’s criticized footnote eight might be a welcome, if unwitting, step in that direction.

To be clear, I’m not arguing that courts ought to interpret the CFAA to treat all cease-and-desist letters as always sufficient to render conduct in excess of authorization. There might be situations when cease-and-desist letters simply ought not do, just as there might be situations in which code-based prohibitions ought not be enough, either. A cease-and-desist letter that states no legal basis (other than the CFAA itself) to support the command to cease scraping might be seen as nothing but empty words that courts ought not interpret to give rise to a federal crime. Similarly, several scholars have argued persuasively that we ought

⁵⁹ 18 U.S.C. § 1030(a)(1).

⁶⁰ See LARRY LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE 2.0* (2006).

not give CFAA-gate status to information locked behind user accounts and passwords on websites, if those user accounts are given away for free to anyone who requests one.⁶¹

C. Authorization, Consent, and Revocation

How then do we interpret the CFAA going forward? I start with James Grimmelmänn's argument that the CFAA should be seen as giving effect to online consent mechanisms, code-based or otherwise.⁶² Computer owners and operators can close a *Van Buren* CFAA gate on a previously authorized user only by unambiguously and conspicuously informing the user that they are no longer entitled to access the system or particular parts of the system ("files, folders, or databases"⁶³), in other words, by revoking their prior consent. After being so informed, a user acting in defiance of the gate should be found to "exceed authorized access."⁶⁴

The revocation must be clear and conspicuous, not implied or imputed. As Patricia Bellia argues, "the fact that the CFAA is a criminal statute means that the limits of that consent for purposes of CFAA liability ought to be conveyed clearly—even if other areas of the law might not demand the same degree of clarity."⁶⁵ Laurent Sacharoff makes a similar point based on the mens rea elements of the CFAA, which require that the violator accesses a system in excess of authorization "knowingly."⁶⁶

Under this approach, and embracing the anti-libertarian reasoning outlined above, a well-founded cease-and-desist letter is a perfectly

⁶¹ Thomas E. Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951, 990 (2021); Kerr, *Scope*, *supra* note 7, at 1646.

⁶² James Grimmelmänn, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1521–22 (2016).

⁶³ *Van Buren v. United States*, 141 S. Ct. 1648, 1657–58 (2021).

⁶⁴ 18 U.S.C. § 1030(a)(1).

⁶⁵ Bellia, *supra* note 7, at 1474.

⁶⁶ Laurent Sacharoff, *Criminal Trespass and Computer Crime*, 62 WM. & MARY L. REV. 571, 624 (2020).

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fine method for revoking consent to access a system.⁶⁷ A detailed cease-and-desist letter forbidding its recipient from accessing a computer or specified part of a computer sends a clear and unambiguous message and thus serves the same salutary purpose as a password-based gate and is equally consonant with the statute following *Van Buren*.⁶⁸

I understand that a code-based CFAA is a narrower CFAA than one that recognizes both code and cease-and-desist letters, and a narrower CFAA means less chill and deterrence for journalists and researchers. The desire for that noble outcome is not enough to justify embracing the libertarian project and reading code-based restrictions into a statute that lacks them. The post-*Van Buren* CFAA is already an extremely narrowed CFAA, and even with the prospect of giving additional power to cease-and-desist letters, the overall level of chill and deterrence is significantly reduced.

Empowering cease-and-desist letters also allows us to target companies like Clearview AI, attacking its immoral and harmful business model at its source. Many giant platforms, including Facebook, Twitter, and Google, have sent Clearview AI cease-and-desist letters, explaining that Clearview is taking advantage of personal data to develop new methods for abetting law enforcement surveillance, violating their terms of service in ways that are bad for society.⁶⁹ Lawyers have entered the neo-Hobbesian wasteland, and the CFAA should recognize the power they have been given by Congress to wield.

⁶⁷ For similar reasons, several scholars have argued against a purely code-based test pre-*Van Buren*. Grimmelmann, *supra* note 62, at 1511 (“[P]recisely because they convey meaning explicitly rather than implicitly like software, words will often provide the clearest indication of the uses to which the computer owner does and does not factually consent. There is no reason to disregard such probative evidence.”); Jonathan Mayer, *The “Narrow” Interpretation of the Computer Fraud and Abuse Act: A User Guide for Applying United States v. Nosal*, 84 GEO. WASH. L. REV. 1644, 1655–56 (2016) (“A mere breach of terms of service or a faithless act will not suffice to establish liability. Rather, a defendant must receive a letter that *entirely* revokes authorization, or must be terminated from employment such that he or she *entirely* loses authorized access.”); Sacharoff, *supra* note 66, at 618 (“A cease-and-desist letter, addressed to her, prohibiting further access, ensures she knows any such further access would be without authorization.”).

⁶⁸ Bellia, *supra* note 7, at 1475 (“The argument here is simply that in the context of a federal criminal statute, the law should require the sort of unambiguous signals of a lack of permission or approval that code-based restrictions convey.”).

⁶⁹ Kaixin Fan, *Clearview AI Responds to Cease-and-Desist Letters by Claiming First Amendment Right to Publicly Available Data*, HARV. JOLT DIG. (Feb. 25, 2020).

D. Amending the CFAA

I have focused until now on the proper interpretation of the CFAA given the current statutory text, legislative intent, computer technological state-of-the-art, and prior precedent. To the standard toolbox of statutory interpretation, I have proposed a new principle—an expressly anti-libertarian approach to combat the unhealthy tendency to undeservedly elevate the acts of technologists.

But I am far from embracing every potential outcome of the narrower, post-*Van Buren* CFAA from a policy perspective. My analysis to this point has been constrained by the statute Congress has written, and the CFAA leaves much to be desired. I will close with a few possibilities for amending the statute.

First, the CFAA has been weaponized by massive platforms as a means for protecting market power and punishing new entrants and competitors. Thomas Kadri offers numerous examples of Facebook, LinkedIn, Amazon, and others using CFAA lawsuits and threats to unreasonably protect monopoly power, persuasively highlighting the costs to society.⁷⁰ Although I endorse his argument, his specific proposal leaves me wanting, because it is not narrowly tailored. Rather than limit massive companies from using the CFAA in abusive ways, he would have Congress declare the entire public web a CFAA-free zone, echoing proposals from other scholars and advocates, and leaving us powerless against companies like Clearview AI.⁷¹ This again is online libertarianism run amok, and I would prefer an amendment tailored to the special problem of platform power.

Here's a narrower solution to address the same problem: To bring a civil suit under the CFAA, a party must demonstrate "loss," a term defined in the statute.⁷² One common way of establishing the requisite loss is by demonstrating \$5,000 in aggregated "reasonable cost[]" to any

⁷⁰ Kadri, *supra* note 61, at 970–87.

⁷¹ *Id.* at 990 (citing Kerr, *Norms*, *supra* note 7, at 1147); see also Sellars, *supra* note 50, at 412 (advocating for giving "greater scrutiny" to CFAA claims against those scraping "generally-public websites").

⁷² 18 U.S.C. § 1030(g), (e)(11) (authorizing civil lawsuits and defining "loss" as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service").

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victim,” a laughably microscopic injury threshold for a giant platform.⁷³ We might amend this provision to set the loss requirement for civil suit much higher for platforms with millions or billions of users, raising the entry stakes for our biggest online companies and making it more difficult for massive platforms to abuse the CFAA.⁷⁴

Second, although I have argued in favor of recognizing cease-and-desist letters as triggers for CFAA liability, not all cease-and-desist letters should be treated the same. Any lawyer can fire off a letter alleging a vague basis not grounded in law. Worse, lawyers engage in circular reasoning, alleging a potential violation of the CFAA itself as the basis for the letter! We might amend the CFAA to require cease-and-desist letters based in some independent area of law, for example an alleged contract breach, statutory injury, or tort. Congress could also provide a process for challenging cease-and-desist letters before a judge and provide sanctions for abusive letters.

Third, we should consider amending the CFAA to provide additional safe harbors for journalists and researchers. We might, for example, declare that journalists and researchers are immune from CFAA liability and prosecution, even in the face of cease-and-desist letters, at least for actions taken on publicly accessible websites. Or we might clarify that password gates are not sufficient to strip journalists and researchers of authorization when passwords are freely accessible to the general public, as others have argued.⁷⁵ Changes like these would recognize the important transparency and speech roles these actors play in the platform economy. It would be imperative, however, to define “journalists” and “academic researchers” precisely, to avoid letting the exception swallow the rule.

⁷³ *Id.* § 1030(e)(11); cf. Nilay Patel, *Facebook’s \$5 Billion FTC Fine is an Embarrassing Joke*, VERGE (July 12, 2019) (noting that “The largest FTC fine in the history of the country represents basically a month of Facebook’s revenue”).

⁷⁴ See Paul Ohm, *Regulating at Scale*, 2 GEO. L. TECH. REV. 546 (2018) (arguing that regulations should ramp up to account for massive platforms with billions of users).

⁷⁵ Kadri, *supra* note 61, at 990; Kerr, *Scope*, *supra* note 7, at 1646.

* * *

With *Van Buren*, the Court has, at long last, swept away much of the lingering confusion about the CFAA. Although it did not resolve every question about this important law, it cleared away a lot of the conceptual muck. It is a somewhat humbling reminder of the pecking order between legal scholars and Supreme Court justices that a compact judicial opinion has rendered dozens of articles and student notes a bit beside the point.

The Court left us with a CFAA that is easier to understand, smaller, less problematic, and more rationally structured. Most importantly, the Court unambiguously announced that purpose-based and circumstance-based limitations play no role in defining the scope of authorized access. Employees no longer need fear that their workplace IT departments wield the power of small legislatures, defining the scope of federal criminal law on the work network.

As lower courts elaborate the newly diminished CFAA after *Van Buren*, prosecutors and potential plaintiffs may ask Congress to intervene, restoring some of what has been lost, probably framing the opinion as a threat to cybersecurity at a time when ransomware attacks and massive data breaches rocket across the front page. It would be a mistake to recreate the confusion and ambiguity that predated *Van Buren*, but if Congress insists on revisiting the statute, it should consider refining it to prevent abuses of platform power and to protect the important transparency-enhancing work of journalists and academic researchers.

Constitutional Culture, Partisan Politics, and the Failed Campaign to Topple the Affordable Care Act

Nicholas Bagley*

The U.S. Supreme Court's 7–2 vote rejecting the latest effort to undo the Affordable Care Act (ACA) was so lopsided that it's tempting to think that the case's outcome was foreordained, even inevitable. *Of course* the plaintiffs did not have standing to challenge a supposedly coercive but completely unenforceable requirement to purchase insurance. *Of course* Congress did not transform the individual mandate into a command when it eliminated the penalty for going without insurance. *Of course* a zero-dollar mandate was not essential to the operation of the entire ACA.

The case that became *California v. Texas* was hopeless from the start, the story goes, its legal claims too tortured to be accepted even by an extremely conservative Supreme Court.¹ Overwrought fears of the ACA's elimination never had any basis in a hard-headed assessment of legal risk. Rather, they were opportunistically stoked by Democrats who hoped the threat of the ACA's elimination would drive voters to the polls in 2020. Seen this way, the case's outcome flatters the professional sensibilities of elite lawyers, Republican and Democrat alike, nearly all of whom scorned the lawsuit and insisted that the rule of law would prevail over partisanship. Bad arguments usually lose, and the plaintiffs' arguments were very bad. That's really all there is to say about the case.

There's a big element of truth to the story: The plaintiffs' arguments were, in fact, very bad. But the tidy narrative obscures something

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¹ *California v. Texas*, 141 S. Ct. 2104, 2114 (2021).

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important about the complex interplay between partisan politics and constitutional adjudication. The outcome at the Supreme Court may have been foreordained, but not only—not even primarily—because the plaintiffs made bad arguments. To the contrary, arguments were plausible enough to give the justices space to rule in the plaintiffs’ favor if that is what they had wished to do. Indeed, they were persuasive enough to convince a solid majority of the Republican-appointed jurists who heard the case, including two on the Supreme Court.

The root cause of the case’s failure runs deeper. In any constitutional culture, what counts as a reasonable argument depends on what other people think is reasonable. And people’s views about the merits of legal arguments are malleable. When the first cases challenging the individual mandate were filed back in 2010, the plaintiffs’ constitutional objections were initially derided as frivolous. Over time, however, sustained and coordinated efforts on the part of Republican officials, right-wing press outlets, and elite lawyers forged a new consensus among conservatives: Not only were the arguments plausible, they were correct. And so, a conservative Supreme Court came within one vote of eliminating the most significant piece of social legislation in fifty years.

The contrast with *California v. Texas* could not be more striking. Outside the Trump administration, which refused to defend the law and sided with the plaintiffs, most Republican officials tried to distance themselves from the case. Fresh off the collapse of their effort to repeal and replace the ACA, they feared that the public would blame them if the ACA was invalidated—and tens of millions of people lost coverage—with no viable replacement on the table. For skittish Republicans, the law was too entrenched to tolerate the political risk of its abrupt termination. The lack of support from the Republican establishment is what foreordained the outcome here. Because the work hadn’t been done to make the plaintiffs’ arguments seem reasonable, the Supreme Court would have looked both eccentric and nakedly partisan had it backed them. No wonder the justices balked.

As I aim to show below, however, the case might well have come out differently if Republicans had made a different political calculation. If I’m right about that, *California v. Texas* offers a sobering lesson of what to expect when the Supreme Court next encounters a constitutional challenge to controversial progressive legislation. As with *NFIB v.*

Sebelius, Republicans are likely to do everything they can to make whatever constitutional objections are most apt for the occasion seem reasonable to conservative jurists. That's not an indictment of Republicans: Democrats would do the same if the roles were reversed. But with a 6–3 majority on the Supreme Court, Republicans have a much better chance of seeing their arguments adopted as law.

In *California v. Texas*, the plaintiffs lost because Republicans did not really wish to win. Republicans are unlikely to be as ambivalent about future lawsuits. Neither is the Supreme Court.

I. Standing

The twenty red-state attorneys general who united to bring the lawsuit recognized early on that Article III standing could pose a problem. Their legal claims were premised on Congress's elimination of the tax penalty for going without insurance. Without a tax penalty, they argued, the ACA's instruction that people "shall" get insurance could no longer be construed, as the Supreme Court had construed it in *NFIB v. Sebelius*, as affording people "a lawful choice" between securing insurance and paying a tax.² "Shall" had to be read as imposing the kind of coercive command that the five conservative justices in *NFIB* had declared to be beyond Congress's power to impose.

The argument was clever, but it gave rise to two difficulties connected to standing. How could an unenforceable mandate ever cause the kind of injury that might serve as the foundation for Article III standing? And how could the states be harmed by a part of a law that applied only to *individuals*, not to *states*?

The plaintiffs responded in two ways. First, the red states amended their complaint to add new plaintiffs—two self-employed Texas consultants, John Nantz and Neill Hurley. The consultants swore in declarations that they felt "obligated" to buy insurance because they "believe that following the law is the right thing to do." Extrapolating from the consultants' arguments, the states claimed that they would suffer a pocketbook injury when people who felt similarly obligated secured state-financed insurance. Second, the red states argued that they were harmed by *other* ACA provisions that were inseverable from

² Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574 (2012).

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the mandate, like a requirement that the state provide comprehensive coverage to state employees or pay a penalty.

The lower courts bought the plaintiffs' first argument. As they saw it, the objection that a zero-dollar mandate did not compel anyone to do anything—that it was all in the consultants' heads—"conflates the merits of the case with the threshold inquiry of standing," which requires courts to assume that the plaintiffs will prevail on their legal claims.³ Indulging that assumption, both the district court and the U.S. Court of Appeals for the Fifth Circuit held that the Texas consultants had standing to sue.

This was not a strong argument. Even stipulating that the law imposed a technical obligation on the two consultants to buy insurance, being subject to an *unenforceable* legal command does not cause the kind of injury sufficient to ground standing. As I pointed out at the time, the Supreme Court has held that "a plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."⁴ It's not enough that you *feel* compelled; you must actually *be* compelled.

That's exactly what the majority concluded in *California v. Texas*. Because the mandate "has no means of enforcement," Justice Stephen Breyer wrote, the consultants could not show "that any kind of Government action or conduct has caused or will cause" them any injury.⁵ No harm, no foul. For the same reason, the states were wrong to assert that the "shall" language would cause them injury because it would induce more people to enroll in Medicaid or other state-financed forms of insurance. "A penalty might have led some inertia-bound individuals to enroll," Justice Breyer acknowledged. "But without a penalty, what incentive could the provision provide?"⁶

All of this is exactly right. Notice, though, that the case law on which Justice Breyer relied could easily have been distinguished away. Prior cases involving the absence of a realistic threat of enforcement tended to involve laws that, by dint of time and changing circumstances, had

³ Texas v. United States, 945 F.3d 355, 383 (5th Cir. 2019).

⁴ Nicholas Bagley, *The Texans Challenging Obamacare Have No Standing*, ATLANTIC (Dec. 18, 2018) (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

⁵ California v. Texas, 141 S. Ct. at 2114.

⁶ *Id.* at 2118.

been rendered dead letter. The 1961 case of *Poe v. Ullman*, for example, involved a challenge to a Massachusetts law prohibiting the use of birth control. Though technically still on the books, the law hadn't been enforced for seventy-five years and birth control was "commonly and notoriously" sold in the state.⁷ "This Court," the plurality declared, "cannot be umpire to debates concerning harmless, empty shadows."⁸ Arguably, the ACA's "shall" language hadn't been subject to the same kind of "undeviating policy of nullification." On the plaintiffs' theory of the case, Congress really wanted the "shall" language to coerce—and, according to the Texas consultants, the language actually had that effect. It wasn't a harmless, empty shadow at all. Or at least a sufficiently motivated jurist could have so concluded.

The red states' second claim to support their standing—that the ACA as a whole caused them injury—was both more ambitious and more difficult to dismiss. Even if the mandate caused them no direct harm, the states argued that it was an indispensable part of the broader statute, which undeniably burdened them in various ways. Because the mandate could not be severed from the rest of the law, the proper remedy for any constitutional defect in the mandate was the invalidation of the entire ACA. If the plaintiffs were right about that, a ruling in their favor would absolutely redress their injuries.

The argument presents a puzzle. In evaluating a plaintiff's standing, a court is supposed to assume that the plaintiff will prevail on her underlying legal claim. Does that rule apply to a plaintiff's severability argument? If so, a savvy plaintiff could challenge any law that harmed her by identifying a legal defect in some far-distant provision that did not even apply to her—and then allege that the provision was indispensable to the scheme that Congress created.

That kind of blunderbuss approach to standing seems inappropriate, as I argued when the lawsuit was filed.⁹ "[S]tanding is not dispensed in gross," the Supreme Court has said, and "a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that

⁷ *Poe v. Ullman*, 367 U.S. 497, 502 (1961) (plurality opinion).

⁸ *Id.* at 508.

⁹ Nicholas Bagley, *A Puzzle About Standing, Resolved*, *INCIDENTAL ECONOMIST* (June 26, 2018).

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is sought.”¹⁰ That principle wouldn’t count for much if a plaintiff could manufacture standing by making outlandish remedial claims. Indeed, allowing what Justice Clarence Thomas called “standing-through-inseverability” would seem to overstep the limits of Article III, which vests the judicial power—and not the power to weigh in on any question of public importance—in the federal courts.¹¹ That may explain why, on at least two occasions, the Court has rejected severability arguments in the course of evaluating a plaintiff’s standing.¹²

In *California v. Texas*, however, the seven-justice majority “decline[d] to consider” the argument, reasoning that it was “not directly argued by the plaintiffs in the courts below.”¹³ That’s wrong: The states made the argument explicitly. They told the Fifth Circuit that “[t]he ACA’s inseverable provisions deepen [their] pocketbook injury,” citing a litany of ACA provisions requiring them to shoulder regulatory burdens,¹⁴ and repeated that argument in their brief to the Supreme Court.¹⁵ The argument was not presented as crisply as it could have been, and the lower courts did not pass on it, which may explain the justices’ reluctance to consider it. But the Court could have addressed the argument had it wanted to.

Justice Samuel Alito wanted to. His dissent, which Justice Neil Gorsuch joined, turned on an examination of prior cases in which the Court seemed to implicitly accept claims premised on a standing-through-inseverability theory. It’s an awkward approach because the Supreme Court has cautioned that “drive-by jurisdictional holdings” have “no precedential effect.”¹⁶ But Justice Alito had a point: Several of the Court’s prior holdings arguably support some version of standing-

¹⁰ *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008) (citations omitted). For a forceful articulation of this view in the context of the first Obamacare lawsuit, see Kevin Walsh, *The Ghost That Slayed the Mandate*, 64 *STAN. L. REV.* 55, 75–77 (2012).

¹¹ *California v. Texas*, 141 S. Ct. 2104, 2122 (2021) (Thomas, J., concurring).

¹² *Heckler v. Mathews*, 465 U.S. 728 (1984); *INS v. Chadha*, 462 U.S. 919 (1983).

¹³ *California v. Texas*, 141 S. Ct. at 2116.

¹⁴ See Brief for State Appellees at 20, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (No. 19–10011).

¹⁵ See Brief for Respondent/Cross-Petitioner States at 27, *California v. Texas*, 141 S. Ct. 2104 (Nos. 19–840, 19–1019) (arguing that “the state respondents’ injury stems from the mandate and other provisions—all of which . . . were specifically designed to work in tandem.”).

¹⁶ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998).

through-inseverability.¹⁷ My own view is that Justice Alito reads too much into those cases,¹⁸ but his analysis is not outlandish.

The legal resources were thus available to the Supreme Court to hold that the plaintiffs had standing. That's not a surprise: Standing doctrine is notoriously malleable. But the doctrine's very malleability explains why it would be a mistake to assume that doctrine, by itself, drove the outcome. Standing was a ready tool to end a case that the justices wished to end for independent reasons.

II. The Merits

One of those reasons may have been that the plaintiffs' legal claims were weak to the point of frivolousness. If so, a dismissal for want of standing offered an appealing way to get rid of a hot-button political case that wasn't going anywhere.

There's something to this. The plaintiffs argued that Congress, when it wiped out the tax penalty for going without coverage, didn't mean to give people greater freedom to choose whether to buy insurance. Instead, they claimed that Congress meant to *keep* the mandate and

¹⁷ *California v. Texas*, 141 S. Ct. at 2131–34 (Alito, J., dissenting); see also Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735 (2017) (exploring the link between standing and severability).

¹⁸ Two of the cases Justice Alito discusses, for example, involved legal challenges to federal officers' removal protections. The plaintiffs in those cases were not themselves subject to removal protections, much as the individual mandate did not apply directly to the states. Nonetheless, the plaintiffs were allowed to challenge their constitutionality. See *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183 (2020) (a plaintiff challenged civil investigative demands issued by an officer who was protected by an unlawful removal restriction); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (similar). But the removal cases involved injuries arising from agency decisions that were themselves tainted because they were made by officers who were too insulated from political accountability. There's no argument that the individual mandate's supposed unconstitutionality taints other parts of the ACA in a comparably direct manner. Justice Alito also discusses *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), but because the Supreme Court ultimately rejected the plaintiffs' severability argument, it had no need to consider the plaintiffs' standing, implicitly or otherwise. (*Alaska Airlines* was decided before *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), which required courts to address standing before turning to the merits.) More to the point, the case involved a challenge to a legislative veto that gave either house of Congress the right to disapprove of the kind of agency rules that caused the plaintiffs' harm. Though the veto did not apply to plaintiffs, it allowed Congress to disapprove of rules that would have directly regulated the plaintiffs' conduct—again, the challenged provision was tightly linked to the plaintiffs' injury. *Alaska Airlines* is not good authority for the proposition that a plaintiff has standing to challenge the entirety of a sprawling, complex statute whenever it identifies a constitutional flaw in a discrete part.

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make it *more* coercive, even though Congress knew, after *NFIB v. Sebelius*, that a coercive mandate would be unconstitutional. More audaciously still, the plaintiffs argued that the constitutional defect rendered the *entire* ACA invalid on the theory that, had Congress known about the unconstitutionality of its zero-dollar mandate, it would have preferred to eliminate the entire law than to omit the mandate. This despite the fact that congressional Republicans spent most of 2017 trying—and failing—to repeal the law.

These are not good arguments, to put it mildly. And so there's a temptation to think that the outcome here was foreordained because the plaintiffs' claims didn't align closely enough with accepted legal principles, especially principles that appeal to conservative jurists. Jonathan Adler makes this point explicitly. Both *NFIB v. Sebelius* and *King v. Burwell*, he argues, "were grounded in foundational aspects of conservative legal jurisprudence (the notion of limited federal power and textualist statutory interpretation, respectively)." This latest case, in contrast, "is a too-clever attempt at legal jujitsu that requires discarding traditional conservative approaches to standing, statutory interpretation and severability."¹⁹

But Adler's characterization of the plaintiffs' arguments ("legal jujitsu") overlooks the extent to which they are continuous with an astringent, decontextualized strain of textualism that has taken root in the federal courts. Without doing violence to established modes of interpretation, the Supreme Court could have drawn on this strain of textualism to rule in the plaintiffs' favor.

Textualism rests on the unimpeachable insight that close attention to statutory text is the best way to discern a law's meaning. As sophisticated textualists understand, however, reading the text doesn't mean that interpreters ignore what Congress meant that text to accomplish. As Caleb Nelson (himself a textualist) has explained, "[J]udges whom we think of as textualists construct their sense of objective meaning from what the evidence that they are willing to consider tells them about the subjective intent of the enacting legislature."²⁰ Why does Congress's subjective intent matter? Because

¹⁹ Jonathan H. Adler, *On the Eve of Oral Argument in Texas v. U.S.*, VOLOKH CONSPIRACY (July 8, 2019).

²⁰ See Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 348 (2005).

language is an effort to communicate something to someone else. To understand what a speaker means, a listener must ask, “What did the speaker mean to say?” In conversation and in statutory interpretation, the literal content of a speaker’s words is almost always the best guide to what the speaker means to communicate. But it’s not the only guide. Contextual evidence can be persuasive, too.

What distinguishes staunch textualists from other interpreters is their reluctance to use legislative history—statements of legislators, committee reports, and the like—to inform the meaning that ought to be assigned to text. They also think it’s inappropriate to invoke a statute’s generic purpose (“Save the whales,” “Protect investors”) to twist its plain meaning. Most textualists, however, still examine statutory and contextual evidence to excavate “subjective intent”—to identify the problem that Congress meant to solve and the means it chose to solve it. “A fair reading of legislation,” Chief Justice John Roberts wrote in *King v. Burwell*, “demands a fair understanding of the legislative plan.”²¹

At the same time, a divergent strain of textualism—what I’ve taken to calling Know-Nothing Textualism—has taken hold in some quarters of the conservative legal movement. The Know-Nothing Textualist, like a 1970s French literary theorist, denies that we can ever know what Congress really means to do when it passes a law. The very question is incoherent: How can a multi-member body ever have a determinate intent? (“Congress is a they, not an it,” as the tired cliché has it.) Even if it could, why should we care? No amount of context can change the semantic meaning of the words on the page. And if assigning the most literal interpretation to a statute’s text subverts what Congress meant, so be it. The Know-Nothing judge consoles herself with the fable that all she’s doing is applying the law. She’s not an activist. You are.

This sort of blinkered Know-Nothingism was at the center of the plaintiffs’ argument in *California v. Texas*. When Congress repealed the mandate penalty, it left on the books a provision saying that most everyone “shall” secure coverage. And “shall” can only be read as a command to buy insurance, right? As one of the Fifth Circuit judges said at oral argument, “The only way to know what Congress intended”—the only way!—“is what they say through their legislation and they left

²¹ *King v. Burwell*, 576 U.S. 473, 498 (2015).

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in place the mandatory nature of the mandate.”²² Justice Alito wrote much the same in his dissent: “The text of the provision is clear. It states that every covered individual ‘shall ensure that the individual, and any dependent of the individual is covered under minimum essential coverage.’ ‘Shall’ typically means must, not should. . . . Because the individual mandate is, in fact, a mandate, it cannot be considered a mere suggestion to purchase insurance.”²³

Only a judge who was willfully blind to statutory context could say this. When the Supreme Court upheld the individual mandate back in 2012, it read the same word—“shall”—to afford people a “lawful choice” to either buy insurance or pay a penalty.²⁴ When Congress zeroed out the penalty, the natural inference is that Congress left the “lawful choice” in place. It’s fantasy to think that a Republican-controlled Congress in 2017 eliminated the penalty for going without insurance in order to coerce people into buying insurance.

Beyond that, the original text of the ACA confirms that Congress never imposed any mandatory obligation in the first place. After saying that everyone “shall” secure insurance, Congress exempted certain classes of people, including members of Indian tribes, from the penalty—but it didn’t exempt them from the “shall” command.²⁵ So were tribal members who went without insurance breaking the law without their knowledge? Of course not. Congress gave them a choice. Which is why, read in context, the “shall” can’t be understood as obligatory.

Know-Nothing Textualism was also the linchpin of the plaintiffs’ severability argument. Back in 2010, Congress made statutory findings that the individual mandate “is essential to creating effective health insurance markets.”²⁶ When Congress eliminated the tax penalty in 2017, it did not repeal those findings. From that failure to repeal, the plaintiffs drew the inference that Congress continued to believe, in 2017, that the requirement to secure insurance was still essential to the law, even as Congress eliminated the only means of enforcing that requirement. Justice Alito agreed. “Nothing has happened” since *NFIB*

²² Oral Argument, *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019) (No. 19–10011).

²³ *California v. Texas*, 141 S. Ct. 2104, 2137 (2021) (Alito, J., dissenting) (ellipses omitted).

²⁴ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012).

²⁵ 26 U.S.C. § 5000A(e) (listing exemptions).

²⁶ 42 U.S.C. § 18091(2)(I).

v. Sebelius, when he would have held that the individual mandate's unconstitutionality rendered the entire ACA invalid, "that calls for a different conclusion now."²⁷ He continued:

While the 2017 Act repealed the tax or penalty, it did not alter the statutory finding noted above, and the 2017 Act cannot plausibly be viewed as the manifestation of a congressional intent to preserve the ACA in altered form. The 2017 Act would not have passed the House without the votes of the Members who had voted to scrap the ACA just a few months earlier, and the repeal of the tax or penalty, which they obviously found particularly offensive, was their fallback option. They eliminated the tax or penalty and left the chips to fall as they might.²⁸

This is the apotheosis of Know-Nothing Textualism. How can we possibly know what Congress would have wanted if the mandate were struck down? Maybe some members thought the penalty-free mandate was no longer essential; other members disagreed; and still other members (those "who had voted to scrap the ACA just a few months earlier") hoped that the constitutional defect would take the law down ("left the chips to fall as they might"). It's all very confusing, so we've got to stick to the findings.

That's absurd, of course. We know for certain that Congress in 2017 believed it could safely ditch the mandate penalty and keep the rest of the ACA intact. We know because that's what Congress did. It's daft to think that Congress believed both that an *enforceable* mandate was no longer essential and that an *unenforceable* mandate was absolutely vital. As for the findings, they applied to a mandate backed by a penalty. It's irresponsible to conclude that Congress believed they applied with equal force to a mandate backed by nothing.²⁹

²⁷ *California v. Texas*, 141 S. Ct. at 2139 (Alito, J., dissenting).

²⁸ *Id.*

²⁹ See, e.g., *Dorsey v. United States*, 567 U.S. 260, 274 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified. And Congress remains free to express any such intention either expressly or by implication as it chooses.") (emphasis added).

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Justice Alito could reach the conclusion he did only by ignoring relevant statutory context. Literalism was his watchword. But Justice Alito wasn't the only judge to adopt this approach to severability. Justice Gorsuch agreed, as did Judge O'Connor, who heard the case in district court ("[Congress] intended to preserve the Individual Mandate because the 2017 Congress, like the 2010 Congress, knew that provision is essential to the ACA"³⁰). Though the Fifth Circuit equivocated on the severability question, it was open to the possibility that the whole law might have to be scrapped. As one of the judges asked at oral argument, "How do we know that some members of Congress didn't say, 'Aha, this is the silver bullet that's going to undo the ACA, or Obamacare. So we're going to go for this just because we know it's going to bring it to a halt.'"³¹

On both the merits and on severability, Justice Alito's Know-Nothing Textualism entailed no sharp break with accepted interpretive practices among conservative jurists. Rather, the approach is of a piece with Justice Gorsuch's opinion in *Bostock v. Clayton County*, which interpreted Title VII's prohibition on sex discrimination to prohibit discrimination against gay and transgender people ("Only the written word is the law, and all persons are entitled to its benefit").³² Both Justices Alito's and Gorsuch's opinions epitomize a style of formalistic textualism that, as commentators as diverse as Tara Leigh Grove, Victoria Nourse, and William Eskridge have noted, has become firmly established in the federal courts.³³ Its doctrinal acceptability helps explain why a solid majority of the nine Republican-appointed judges who heard the case sided with the plaintiffs (Justices Alito and Gorsuch, and Judges Elrod, Engelhardt, and O'Connor) and why one wrote separately to express sympathy with their underlying legal claims (Justice Thomas). No Republican-appointed judge ever issued an opinion rejecting the plaintiffs' arguments on the merits or on severability.

³⁰ *Texas v. United States*, 340 F. Supp. 3d 579, 617 (N.D. Tex. 2018).

³¹ Nicholas Bagley, *The Rise of the Know-Nothing Judge*, ATLANTIC (July 15, 2019).

³² *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020).

³³ See Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 268, 269 (2020) (arguing that "there are competing strands of textualism" and arguing that judges "should favor formalistic textualism."); Victoria Nourse & William N. Eskridge, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. (forthcoming 2021) ("[T]extualism is fracturing, dividing itself into camps.").

The plaintiffs' arguments were poor, but they were not so poor that extant legal principles required the justices to reject them. There is a deeper explanation for why the plaintiffs lost, one that does not turn on the niceties of standing doctrine or of statutory interpretation.

III. Politics

Roll the tape back to 2010. Minutes after President Barack Obama signed the Affordable Care Act into law, lawsuits were filed challenging the constitutionality of the individual mandate, the part of the law requiring people to secure insurance or pay a tax penalty. At the time, the cases were widely dismissed as constitutional stunts that stood no chance of success in the federal courts.

By the time the Supreme Court heard them in 2012, however, the cases had become nail-biters. That year, Jack Balkin took a hard look at how that happened.³⁴ His account of constitutional change didn't turn on nitty-gritty legal analysis. Instead, it hinged on the simple insight that "what people think is reasonable depends in part on what they think that other people think."³⁵

Supreme Court justices are people too. That's why winning a constitutional argument requires more than showing that the argument is legally defensible. The justices must be reassured that the argument has enough public support that they won't be written off as kooky for endorsing it. The Supreme Court came to find that the Constitution protected gay rights and gun rights, for example, only after those rights had become mainstream. A similar shift in public sentiment explains how the challenge to the individual mandate became plausible.

How exactly did the challengers manage it? It wasn't enough for conservative lawyers to make clever arguments, nor was it enough for Tea Party activists to crash town halls. For Balkin, the key to the campaign's success was the full-throated support of the Republican Party. It was harder for liberal lawyers to say that conservatives were just making stuff up about the Constitution when Republicans across the country, including local politicians, conservative judges, business

³⁴ Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012).

³⁵ *Id.*

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leaders, and the guy on the bar stool said otherwise. An argument can't be crazy if half the country buys it.

The Republican Party's political support was forthcoming because the legal challenge directly advanced the party's agenda. Republicans might cripple a law that they deplored; failing that, they could use the challenge to focus public outrage and mobilize voters. As it happened, the Supreme Court upheld the ACA by construing the individual mandate as an exercise of Congress's power to tax. But the political gambit worked: In 2010, Republicans made historic gains in both the House and the Senate. President Obama called it a "shellacking."³⁶

Strictly on the legal merits, this most recent challenge to the individual mandate is weaker than the first one. But the case's doctrinal weakness is not what most sharply distinguishes it from the first Obamacare suit. The biggest difference is that the conservative political establishment that did so much to make the two prior Obamacare cases seem reasonable did not lay the same groundwork here. *California v. Texas* stayed off the wall from start to finish.

The first sign that something was different about the case came in 2018, just months after it was filed. Instead of avoiding a debate over health reform, as they had before, Democratic Senate candidates used their opponents' support for the lawsuit as a cudgel. Senator Joe Manchin of West Virginia fired a shotgun at a copy of the complaint;³⁷ then-Senator Claire McCaskill of Missouri ran ads excoriating her opponent, Josh Hawley, for joining a case that would rip protections from people with preexisting conditions.³⁸

Hawley set the script for how Republicans would respond to these attacks.³⁹ They would ignore the lawsuit, not defend it, and press the misleading talking point that they supported protections for people with preexisting conditions. Protective of his Senate majority, Senator Mitch

³⁶ Liz Halloran, *Obama Humbled by Election 'Shellacking'*, NPR (Nov. 3, 2010).

³⁷ Kendall Karson, *Shotgun-toting Manchin Shoots Anti-Obamacare Lawsuit in New Ad for Re-election Bid in West Virginia*, ABC News (Sept. 10, 2018).

³⁸ Paulina Firozi, *The Health 202: Claire McCaskill's Promise to Save Preexisting Conditions Could Save Her Job*, WASH. POST (Oct. 2, 2018).

³⁹ Jessie Hellmann, *GOP Senate Candidate Says He Supports Pre-existing Conditions While Backing Lawsuit to End Them*, HILL (Sept. 25, 2018).

McConnell damned the lawsuit with faint praise, saying only that there was “nothing wrong with going to court. Americans do it all the time.”⁴⁰

The pattern held in the 2020 election cycle. Embattled Senator Cory Gardner of Colorado, for example, refused to say where he stood on the case.⁴¹ Instead, he released a campaign video promising to maintain preexisting-condition protections “no matter what happens to Obamacare.”⁴² (Gardner lost.) When Democrats forced a vote on whether to bar President Trump’s Justice Department from supporting the lawsuit, Senator Gardner and five other incumbents in close elections broke from their party to side with Democrats. Republicans didn’t run on their party’s support for the lawsuit. They ran away from it.

The only major exception was President Trump. Indeed, the White House’s surprise endorsement of the lawsuit in 2018 is probably best understood as a bid to get the rest of the Republican Party to back the case and put it on the wall. But that bid failed: The case was just too radioactive for most Republican officeholders. Even Attorney General Bill Barr urged the president to moderate his position.⁴³ A more prudent president probably would have listened.

If the lawsuit was such a political liability for Republicans, why was it brought in the first place? The answer is that what’s bad for the *party* may still be good for *some politicians*. Pretty much every red-state attorney general who joined the lawsuit has ambitions for higher office. But winning a gubernatorial race in Utah or Texas means winning a Republican primary, and the primary electorate in these states is much more conservative than the general electorate. It might be advantageous for those politicians to press a position that’s bad news for Republican incumbents.

But the case put Republican leaders in a bind. Without getting crosswise with the White House or their base, they spent much of 2020 and 2021 signaling that they would prefer the lawsuit to go away.

⁴⁰ Nathaniel Weixel, *McConnell Defends Trump-backed Lawsuit Against ObamaCare*, HILL (Oct. 18, 2018).

⁴¹ Jason Salzman, *Gardner Erases His Opposition to Obamacare from His Campaign Website*, COLO. TIMES RECORDER (Jan. 14, 2020).

⁴² Marshall Zelinger, *Truth Test: Claim from Gardner’s Mom About Pre-existing Conditions Leaves Out One Detail*, 9NEWS (Sept. 17, 2020).

⁴³ Susannah Luthi, *Trump Will Urge Supreme Court to Strike Down Obamacare*, POLITICO (May 6, 2020).

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That effort reached almost comic proportions during the confirmation hearings for Justice Amy Coney Barrett. Senator McConnell said that “no one believes the Supreme Court is going to strike down the Affordable Care Act.”⁴⁴ Senator Lindsey Graham, the chairman of the Judiciary Committee, emphasized that severability doctrine requires judges “to save the statute, if possible.”⁴⁵ Senator Chuck Grassley said that it was “outrageous” to think that Justice Barrett would invalidate the law, because, “as a mother of seven, [she] clearly understands the importance of health care.”⁴⁶

The Supreme Court got the message. During the first Obamacare case, groups affiliated with the Republican challengers filed fifty-nine amicus briefs, including one from the Chamber of Commerce and another on severability from Senator McConnell and dozens of Republican senators. In *California v. Texas*, only five amicus briefs were submitted to support the lawsuit, all from marginal players in the Republican political ecosystem. Senator McConnell sat it out.

Conservatives did not do the work to make the plaintiffs’ arguments seem reasonable, and they did not do the work because they did not want to win. That’s what foreordained the outcome here. The Supreme Court would have shredded its credibility with the American public if it had adopted what was still considered a wacky legal theory to invalidate a law extending insurance to tens of millions of people.

But imagine for a moment that *California v. Texas* had been brought in a different political environment—if, say, a Supreme Court with a six-justice conservative majority had heard this same challenge back in 2012, when Republicans were still pulling out all the stops to kill a law that had not been fully implemented. In that environment, arguments that today seem poor might have come to seem kind of reasonable, maybe even convincing. Perhaps it was the plaintiffs’ victory, not their defeat, that would have come to seem foreordained.

⁴⁴ Chandelis Duster, *McConnell Says ‘No One Believes’ Supreme Court Will Strike Down Obamacare Despite Barrett Confirmation*, CNN (Oct. 13, 2020).

⁴⁵ Adam Liptak, *‘Severability’ Could Save Health Law, Graham Says and Barrett Seems to Agree*, N.Y. TIMES (Nov. 3, 2020).

⁴⁶ Press Release, U.S. Senator Chuck Grassley, *Grassley Opening Remarks at Senate Judiciary Committee Hearing on the Nomination of Judge Amy Coney Barrett to Serve as Associate Justice of the Supreme Court* (Oct. 12, 2020).

* * *

My point is not that Supreme Court justices mechanically vote to advance the preferences of the political party with which they are aligned. They don't. Consistent with their role identities and jurisprudential commitments, they generally vote for the legal arguments they find convincing. My point, instead, is that what counts as convincing depends on what happens outside the courts. If enough people whom the justices regard as reasonable endorse an argument, it *becomes* more convincing, whatever its merits in the abstract. That's why the line separating politics from constitutionalism is thinner than lawyers are socialized to believe. And, as *California v. Texas* suggests, cases about statutory interpretation—which is a kind of constitutional law in action—often provide the setting in which that line is contested.

Consider Justice Gorsuch's opinion in *Bostock*, the Title VII case about gay and transgender discrimination. The opinion aligns with Justice Gorsuch's commitment to the highly formalistic style of textualism that characterized Justice Alito's dissent in *California v. Texas*. But the three liberal justices joined Justice Gorsuch's opinion, even though the opinion is difficult to reconcile with the contextually sensitive approach to statutory interpretation that they normally endorse. It just isn't the case that Congress, in 1964, meant to ban discrimination against gay and transgender people, much as it just isn't the case that Congress, in 2017, meant to adopt a coercive mandate to purchase insurance. Nonetheless, the Democratic coalition had done the work to make the Title VII argument seem respectable. The liberal justices wanted to get to yes, and they found a way to get there. In *California v. Texas*, Republicans wanted to get to no—and the justices found a way to get there too.

That should teach us something about the reception that major legislation passed by a Democratic Congress is likely to receive on a 6–3 Supreme Court. As in *California v. Texas*, conservative lawyers are sure to fashion clever arguments about the illegality of a new Voting Rights Act or Medicare for All or the Green New Deal. The Republican Party is equally sure to throw its support behind those arguments. The resulting mobilization will make the Supreme Court open to legal challenges

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that target those laws or frustrate their implementation. That does not mean the outcome of the next case is inevitable: A conservative majority upheld the ACA in 2012, notwithstanding a full-court press from Republicans. But the justices' views about what counts as reasonable, like anyone's, are products of the political debates of our time. In the years and perhaps decades to come, the views of two-thirds of the Supreme Court's justices will be powerfully shaped by the Republican Party, no matter how well Democrats perform at the ballot box.

That's not just a problem for Democrats. It's a problem for democracy.

The Radical Uncertainty of Free Exercise Principles: A Comment on *Fulton v. City of Philadelphia**

Ira C. Lupu** & Robert W. Tuttle***

As the Supreme Court's 2020–21 Term moved into mid-June, many lawyers, scholars, and concerned citizens waited anxiously for the Court's disposition of *Fulton v. City of Philadelphia*.¹ The case involved a conflict between Catholic Social Services (CSS) of Philadelphia and the City of Philadelphia, over whether CSS had a right under the Free Exercise Clause to refuse to evaluate same-sex married couples for eligibility to be foster parents. The contract between CSS and the city included requirements of non-discrimination with respect to sexual orientation of prospective foster parents. CSS objected to this requirement, claiming that the rule burdened its organizational religious beliefs that marriage is reserved for unions of one man and one woman.

The U.S. Court of Appeals for the Third Circuit ruled in favor of Philadelphia.² A central premise of its ruling was the ongoing validity of the Supreme Court's 1990 decision in *Employment Division v. Smith*,³ which held that the Free Exercise Clause does not confer rights to

* The authors filed an amicus brief in *Fulton*, along with two other religion-law scholars, Brief of Professors Ira C. Lupu, Frederick Mark Gedicks, William P. Marshall, and Robert W. Tuttle as Amici Curiae in Support of Respondents, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19–123). We were ably represented in the filing of this amicus brief by David Flugman, Caitlin Halligan, and other fine lawyers at the law firm of Selendy & Gay PLLC.

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¹ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021).

² *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019).

³ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

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religion-based exemptions from laws that are religion-neutral and generally applicable to the relevant parties. The Third Circuit agreed with the city that *Smith* precluded a constitutional right of exemption from its prohibition on discrimination against same-sex married couples, because all social welfare agencies (religious or not) in the foster care system had to abide by that prohibition.

In its *certiorari* petition,⁴ CSS explicitly urged the Court to consider whether *Smith* should be overruled, and the Court included that question in the grant of review. CSS asserted, as many lawyers had for years, that *Smith* had unconstitutionally left religious liberty at the mercy of legislators and government administrators. Courts, claimed CSS, should play a larger role.

The Supreme Court heard argument in *Fulton* on the day after Election Day, 2020, just a few days after Justice Amy Coney Barrett took the oath of her new office. Seven and half months later, the Supreme Court surprised every Court watcher with a unanimous decision in favor of CSS. The Court was not unanimous, however, on the issues involving the content of free exercise principles. Chief Justice John Roberts wrote the Court opinion for six justices, resting its holding on the narrow and questionable ground that Philadelphia’s non-discrimination policies were not “generally applicable,” and therefore were outside of the protective ambit of *Smith*.⁵ That conclusion led the Court to apply more rigorous scrutiny to the city’s treatment of CSS, and the Court determined, with almost no analysis, that the exclusion violated CSS’s free exercise rights.⁶

Over the course of two separate opinions, joined by all of them, three justices—Justices Samuel Alito, Neil Gorsuch, and Clarence Thomas—concurred in the judgment only. The Gorsuch opinion accused the majority of relying on disingenuous arguments to avoid the question of whether *Smith* should be overruled.⁷ And Justice Alito, in a sweeping seventy-seven pages, argued emphatically that *Smith* should indeed be overruled.⁸

⁴ Petition for Writ of Certiorari, *Fulton*, 141 S. Ct. 1868 (No. 19–123).

⁵ *Fulton*, 141 S. Ct. at 1877.

⁶ *Id.* at 1881–82

⁷ *Id.* at 1926 (Gorsuch, J., joined by Thomas and Alito, JJ., concurring in the judgment).

⁸ *Id.* at 1883 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment).

Justice Roberts's Court opinion offered no answer to Justice Alito's extended attack on *Smith*. The only answer from anyone in the Court's majority appeared in a very brief, concurring opinion by Justice Barrett.⁹ It was not a surprise that the appointment of Justice Barrett proved auspicious. Her predecessor, Justice Ruth Bader Ginsburg, had supported the decision in *Smith* throughout her tenure on the Court.¹⁰ Justice Barrett indeed diverged from the Ginsburg line, but not in the ways her supporters had hoped, or her opponents had feared.

Justice Barrett, joined by Justice Kavanaugh, leaned toward agreement that the text and structure of the Free Exercise Clause did not support *Smith*. But her opinion expressed doubt concerning Justice Alito's view of the history relevant to the Free Exercise Clause,¹¹ and identified a set of crucial questions, pointedly not answered by Justice Alito, about the uncertainty that would follow from overruling *Smith*.¹² Justice Barrett saw no reason to leap into the free exercise thicket in a case where all nine justices agreed that CSS should prevail.

Fulton invites consideration of virtually all the questions and nuances of free exercise law that have occupied judges, lawyers, and scholars for the past three decades. In the space we have here, we want to highlight several features of *Fulton*.

As widely noted, the Court was unanimous on the outcome in favor of CSS. Unanimity is rare in Religion Clause adjudication, and its causes and consequences deserve attention. Part I of this comment compares the last surprisingly unanimous Religion Clause decision, *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,¹³ with the decision in *Fulton*. As we will explain, unanimity in *Hosanna-Tabor* was wide, deep, and rooted in longstanding Religion Clause principles. In contrast, unanimity in *Fulton* was shallow, perhaps even pretextual, a mask incapable of hiding deep disagreements.

Part II explores the threads by which *Smith*'s future hangs. Part II.A. describes the hostile reaction to *Smith* over the past thirty years in legal, academic, religious, and political circles. This hostility manifested itself

⁹ *Id.* at 1882 (Barrett, J., joined by Kavanaugh, J., and in all but the first paragraph by Breyer, J., concurring).

¹⁰ See, e.g., *City of Boerne v. Archbishop Flores*, 521 U.S. 507 (1997).

¹¹ *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring).

¹² *Id.*

¹³ *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

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in the briefing in *Fulton* and appeared in full flower in Justice Alito's concurring opinion.

Part II.B. explains why Justice Alito's view of the text and history of the Free Exercise Clause is deeply wrong. The framers of the First Amendment designed the clause to protect religious communities from government interference with their worship practices. Justice Alito's far broader conception of the clause as protective of all religiously motivated practices is at the root of his mistakes.

Part II.C. explores the consequences of his mistaken view. If the Free Exercise Clause strenuously protects all religiously motivated practices, and if believers get to self-identify which of their practices are religiously motivated, the clause becomes a ticket to override virtually all government policy. Identifying Justice Alito's mistakes thus sheds light on why *Smith* was correct, and why so many people have trouble seeing that. Our critique of Justice Alito also helps explain why Justices Barrett and Kavanaugh drew back from embracing his view. Justices Barrett and Kavanaugh saw, perhaps through a glass darkly, that Justices Alito, Gorsuch, and Thomas had no answer to the questions that inevitably arise from such a broad constitutional conception of religious exercise. In that process of perception lies the salutary story of why the Court lacked five votes to overrule *Smith*, and the explanation of why the current law in some form remains likely to endure.

Part II.D., focusing on the Court's COVID-19 cases and *Fulton* itself, explores the apparent contraction of what qualifies as a law of general applicability. The questions here are subtle, and deserve attention, because these narrowing moves threaten to undermine the framework on which *Employment Division v. Smith* has been built.

I. Free Exercise of Religion and the Mysteries of Unanimity

Nine years ago, in *Hosanna-Tabor*, a fully unanimous Court embraced the "ministerial exception" to laws governing the employment relationship. The case involved a fourth-grade teacher, Cheryl Perich, who had a ministerial title and some responsibilities for teaching the faith. After being dismissed, Perich filed a lawsuit against her employer, alleging retaliation for seeking civil redress for discrimination based on disability. The context most assuredly invited a liberal critique of any legal theory that cut off civil-rights claims by employees.

Nevertheless, all nine justices agreed that Perich served a ministerial function within the school, and that both First Amendment Religion Clauses barred the claim against her employer. The decision rested on a longstanding principle, dating to the nineteenth century in American law,¹⁴ that courts are constitutionally incompetent to decide exclusively ecclesiastical questions. The fitness of a class of persons, or of a particular person, for ministry is such a question. Accordingly, once a court determines that an employee functions as a minister—that is, has substantial responsibility for teaching or communicating the faith—any inquiry into the wrongfulness of her dismissal must end. The matter is for the religious employer alone.

Every justice agreed to this basic account, and to the application of the relevant principles to Perich.¹⁵ Moreover, and crucial to our account of *Hosanna-Tabor*, the ministerial exception invites no balancing of interests.¹⁶ It operates just like other Establishment Clause limitations, such as the prohibition on public-school-sponsored prayer.¹⁷ No state interest, however important or precisely served, can overcome Establishment Clause limitations.

The refusal to balance interests in ministerial exception cases is made explicit in Chief Justice Roberts's opinion for the Court.¹⁸ This move is highly distinctive in Religion Clause adjudication. In Free Exercise cases, before and after *Smith*, the government's interest in imposing a restriction is always of relevance. And one can imagine that an interest-balancing approach would matter significantly in a ministerial exception case. In the case of Cheryl Perich, in particular, her responsibility for teaching the faith was relatively slight. She did not preach at large worship gatherings. The government's side of the ledger, had it counted, would register the strong interest in barring retaliation against employees who go to public agencies or courts with discrimination claims. Because some employees are in positions for which the ministerial character is uncertain, a ruling that they can be the

¹⁴ *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

¹⁵ We explore in depth what led to unanimity in *Hosanna-Tabor* in 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) [hereinafter Lupu & Tuttle, *The Mystery*].

¹⁶ *Id.* at 1276–77.

¹⁷ See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962).

¹⁸ *Hosanna-Tabor*, 565 U.S. at 196.

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subject of retaliatory firings deters their complaints and limits rightful enforcement of the law.

Hosanna-Tabor, therefore, involves unanimity at a level that is wide, deep, and heavily pedigreed. Its approach covers the adjudication of all exclusively ecclesiastical questions, whether they involve personnel, property,¹⁹ or internal structures of church governance.²⁰ Courts must abstain from adjudicating these disputes, and government interests, however strong, play no part in their resolution.²¹

This is not a doctrine of free exercise-based church autonomy, in which interests are uneasily balanced.²² It has a wider base than that—both Religion Clauses. It also has a narrower ambit—exclusively ecclesiastical questions, rather than the vaguer notion of internal church affairs.²³ And its methodology is categorical. Courts are wholly incompetent to decide those questions.

Contrast the situation in *Fulton*, which offers only the veneer of unanimity. First, the unanimity is in the result, not the reasoning. Six justices, represented in Chief Justice Roberts’s opinion for the Court, asserted that the relevant norms of non-discrimination were not generally applicable within the meaning of *Smith*. This conclusion rested on the spectacularly specious ground that the commissioner of social services had discretion, which his office had *never* exercised, to make exceptions to the city contract’s requirements of non-discrimination in

¹⁹ See, e.g., *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

²⁰ See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

²¹ The Court’s decision in *Jones v. Wolf*, 443 U.S. 595 (1979), offers an occasional counterweight to the broad idea of “ecclesiastical abstention” reflected in the ministerial exception. That decision permits courts to decide cases that may be resolved solely by “secular law.” In the context of employment disputes, the Supreme Court and lower courts have given little room for that alternative method of resolving cases. See *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020). One important exception to that trend are certain claims of a hostile work environment based on sex. For discussion, see Ira C. Lupu & Robert W. Tuttle, #MeToo Meets the Ministerial Exception: *Sexual Harassment Claims by Clergy and the First Amendment’s Religion Clause*, 25 WM. & MARY J. OF GENDER, RACE, AND SOC. JUST. 249 (2019). See also Rachel Casper, *When Harassment at Work is Harassment at Church: Hostile Work Environment and the Ministerial Exception*, 25 U. OF PA. J. L. & SOC. CHANGE (forthcoming 2021).

²² For discussion and critique of a variety of theories of church autonomy, see Lupu & Tuttle, *The Mystery*, *supra* note 15, at 1296–99, and sources cited therein.

²³ In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the Court divided 7–2 on application of the ministerial exception to particular elementary school teachers, but no justice rejected the basic principle on which the exception rests.

screening prospective foster parents. Even though the non-discrimination norms in fact had been uniformly and consistently applied to every social welfare agency, religious or secular, the majority hunted for a way to push the case out of the ambit of *Smith*.

Once that was done, the Court still had to determine whether the city's policy could survive the strict judicial review that followed. In a remarkably superficial passage, the majority reasoned that the very possibility of exceptions meant that the government's interest in denying exceptions could not be sufficiently important.²⁴ As anyone can see, it is utterly unpersuasive to diminish the city's interest in denying exceptions to non-discrimination norms by reference to the never-exercised power to grant such exceptions. Something explains this thin and weak reasoning, but none of the justices who joined the Court opinion makes the attempt.

The three justices who did not join the Court's opinion had a ready explanation for the Court's maneuvers. Justice Gorsuch, joined by Justices Alito and Thomas, attacked the majority's reasoning on the general applicability of Philadelphia's non-discrimination norms. He asserted, with good cause, that the majority had gone far beyond the bounds of normal legal reasoning to find a way not to address the attack on *Smith*, which the Court in its certiorari grant had agreed to entertain. Justice Alito, joined by Justices Gorsuch and Thomas, accepted the invitation with gusto, and concluded that *Smith* should be overruled.

So, unlike in *Hosanna-Tabor*, where all nine justices accepted the essential premises of ecclesiastical abstention and its lesser included element of the ministerial exception, *Fulton* revealed extreme tension among groups of justices about the basic premises that underlie the free exercise guaranty. Moreover, this unanimity of result, coupled with the obvious tension between the Alito-Gorsuch-Thomas group and all the others, has produced understandable speculation about the initial

²⁴ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881–82 (2021). For discussion of the superficiality of the Court's treatment of this question, see Holly Hollman, *Court Requires Religious Exemption But Leaves Many Questions Unanswered*, SCOTUSBLOG (June 22, 2021).

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assignment of the opinion, and possible migration of the justices during the opinion writing process.²⁵

We believe that the initial line-up of the justices contained three groups—three (Alito-Gorsuch-Thomas) who were eager to both overrule *Smith* and rule for CSS; three (Roberts-Kavanaugh-Barrett) who were willing to rule for CSS but reluctant or unwilling to overrule *Smith*; and three (Breyer-Kagan-Sotomayor) who were inclined to rule for the city under the existing case law. The questions from the justices at oral argument are consistent with this appraisal.²⁶ If these divisions held, there would have been no majority opinion. We would have had a splintered three-three-three ruling. CSS would have won, and the opinion for the Roberts group would have been the narrowest opinion in support of the result, and therefore would have been controlling.²⁷

All this suggests that somewhere along the way, a deal was struck to eliminate any dissenting opinions. In exchange, the likely dissenters got a very narrow Court opinion that resolved none of the deeper questions about conflicts between religious freedom and anti-discrimination law as it protects LGBTQ persons.

Highly questionable arguments drove the Court's decision that the city's policies were not generally applicable. The opinion refers to a provision (section 3.21) in the city's standard contract with agencies that provide foster care services to the effect that those agencies, including CSS, will not "reject . . . prospective foster parents . . . based on their race, ethnicity, color, sex, sexual orientation, gender identity, religion, [or] national origin unless an exception is granted by the Commissioner or the Commissioner's designee, in his/her sole discretion."²⁸ This grant of discretion, the Court reasons, invites case-by-case exceptions, and therefore destroys the general applicability of the anti-discrimination norm.²⁹

²⁵ See Josh Blackman, *Was There a Double Flip in the November Sitting*, VOLOKH CONSPIRACY (June 17, 2021) (speculating that the initial assignment of *Fulton* was to Justice Alito, and the initial assignment of *Texas v. California*, eventually authored by Justice Breyer, was to Justice Roberts).

²⁶ See Amy Howe, *Argument Analysis: Justices Sympathetic to Faith-Based Foster-Care Agency in Anti-Discrimination Dispute*, SCOTUSBLOG (Nov. 4, 2020) (analyzing the oral argument in *Fulton*).

²⁷ *United States v. Marks*, 430 U.S. 188 (1976) (when the Court lacks a majority opinion, the narrowest opinion in support of the result represents the controlling law of the case).

²⁸ *Fulton*, 141 S. Ct. at 1878; Supplemental Appendix to City Respondents' Brief on the Merits at SA16, *Fulton*, 141 S. Ct. 1868 (No. 19–123).

²⁹ *Fulton*, 141 S. Ct. at 1878.

Although *Smith* itself had suggested that, in the unemployment context, a regime of discretionary exceptions for “good cause” should not be viewed as generally applicable,³⁰ the unemployment context is one in which such exceptions are routine and on-going. Once “good cause” exceptions are made, the scheme no longer applies to all parties in the same way. In contrast, the city commissioner in Philadelphia had *never* made an exception under 3.21 for discrimination on forbidden grounds against prospective foster parents, and the city asserted that the commissioner lacked authority under other provisions of the contract and under local law to make such exceptions.³¹ So, as a matter of consistent practice, the city treated the non-discrimination norm with respect to prospective foster parents as generally applicable. Notably, this argument about discretion played almost no part in the presentation by CSS to the Court, and yet it wound up at the heart of the majority opinion.³²

The emphasis in the Court opinion on the contract, which Philadelphia can revise, reveals that unanimity in *Fulton* is Court-wide and an inch deep. The absence of any rigor in applying the standard of review confirms that assessment. Justices Sotomayor, Kagan, and Breyer may well have believed that the city’s interests in avoiding stigmatic injury to same-sex couples, and material injury to LGBTQ children in need of placement, were sufficiently compelling to justify denial of an exemption from conditions of public service. Obviously, they did not say so. On any plausible accounting of the concerns of individual justices, unanimity in *Fulton* is a translucent veneer.

³⁰ See *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990).

³¹ Brief for City Respondents at 31, *Fulton*, 141 S. Ct. 1868 (No. 19–123).

³² The other, even less plausible argument rested on the Court’s aggressive reconstruction of Philadelphia’s Fair Practices Ordinance, which prohibits discrimination in “public accommodations opportunities” based on (among other grounds) an individual’s sexual orientation, constituted a relevant, generally applicable law. *Fulton*, 141 S. Ct. at 1879–81. The Court construed the ordinance as not covering foster parenting as a “public accommodation,” because the relevant service of certification as a foster parent involved a high degree of selectivity. Whatever the merits of this reading, which we doubt, the Court’s adoption of it flew in the face of carefully reasoned contrary findings by both the U.S. District Court for the Eastern District of Pennsylvania and the U.S. Court of Appeals for the Third Circuit. Both had proximity to local law, and both had determined that the Fair Practices Ordinance does indeed cover the opportunity to serve as a foster parent. See *Fulton v. City of Philadelphia*, 320 F. Supp. 3d 661, 677 (E.D. Pa. 2018) (stating that “the Parties’ intent that the Fair Practices Ordinance apply to CSS’s services is manifest by the clear and unequivocal terms of the Services Contract”); *Fulton v. City of Philadelphia*, 922 F.3d 140, 148 (3d Cir. 2019) (applying the Fair Practices Ordinance to foster parents).

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II. The Struggle over First Principles of Free Exercise

It is easy to forget that the core protections of the Free Exercise Clause remain solid and unchallenged. The government may not target for regulation or prohibition the content of worship by a particular faith. That content, historically a feature of regulation in England,³³ involves exclusively ecclesiastical questions, about which a secular government has no legitimate interest.

The fights over free exercise rights in the twentieth and twenty-first centuries, however, are rarely about that core.³⁴ Instead, the fights are about general laws and policies that do not target specific faiths but have an impact on religiously motivated practices outside of worship.³⁵ *Fulton* presents a paradigm example. The City of Philadelphia did not direct the Archdiocese of Philadelphia to make available the sacrament of marriage to same-sex couples. Entitlement to that religious status is entirely within the province of each faith community. Rather, the city prohibited discrimination among lawfully married couples in the certification of potential foster parents. That is a public project, publicly regulated, and publicly financed. The city was advancing the interests of all of its people, not targeting Catholics or others for their view of marriage.

A. The Near-Silence in Defense of *Smith*

As Part I of this paper suggests, the fights within the Court over the past, present, and future of free exercise principles remain open and fierce. One puzzling aspect of these fights is the attitude of the current justices toward the correctness of *Employment Division v. Smith*. When Justice Anthony Kennedy retired, the last of the five justices who joined in *Smith* left the Court. We know that at least three current justices want to overrule it, and at least two more are somewhat skeptical of it. Of the other four, not one has publicly embraced *Smith*.

Moreover, the reticence on the Court to defend *Smith* is mirrored in

³³ See, e.g., Act of Uniformity, 14 Car. 2 c.4 (1662) (requiring all preachers, professors, and teachers to take an oath affirming the theology and liturgy of the Anglican Book of Common Prayer, on pain of losing their position).

³⁴ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), is a rare exception, because it involved a bundle of regulations that targeted the worship practice of animal sacrifice by the Santerians.

³⁵ *Smith* itself, as well as the RFRA decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), both involved generally applicable, non-targeted policies that had an impact on sacramental practices.

the larger society of scholars, lawyers, and concerned citizens. From the beginning, *Smith* has taken intense critical fire, on a variety of grounds.³⁶ The Court's most liberal members at the time, Justices William Brennan, Thurgood Marshall, and Harry Blackmun, vigorously dissented in *Smith*.³⁷ Critics have asserted that *Smith* is wrong as a matter of textual interpretation and original understanding.³⁸ They have offered versions of constitutional history to undermine it.³⁹ They assert that it cannot be squared with precedent, or with the Court's treatment of other First Amendment rights.⁴⁰ And they bewail the Court's pronouncement of the *Smith* rule without warning to litigants that the Court was considering a major departure from prior decisions.⁴¹

These criticisms originally came from the right, left, and center of the ideological spectrum. The coalition that organized the push for the Religious Freedom Restoration Act ("RFRA")⁴² included representatives from all of these perspectives and included the voice of highly respected civil liberties organizations.⁴³ Congress enacted RFRA in 1993 by a nearly unanimous vote. We have noticed over many years that political actors, like governors, state attorneys general, and city officials are reluctant or unwilling to defend *Smith*, because so many religious people and institutions have long criticized it.

In the period since about 2000, claims that religious freedom justifies refusal to serve same-sex couples have engendered tremendous and

³⁶ See, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990).

³⁷ *Employment Div. v. Smith*, 494 U.S. 872, 907–21 (1990) (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). In *Fulton*, Justice Alito's opinion canvasses the many justices who have expressed disagreement with *Smith*. *Fulton*, 141 S. Ct. at 1888–89 (Alito, J. concurring).

³⁸ See *Fulton*, 141 S. Ct. at 1900 n.34 (Alito, J. concurring).

³⁹ See *id.*

⁴⁰ See Stephanie Barclay & Mark Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. REV. 1595 (2018). Professor William Marshall was an early, contrary, and important voice in defending *Smith* on the grounds that it respected the equality of religious and non-religious speech. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991). Justice Alito made no effort to answer Professor Marshall's quite persuasive argument.

⁴¹ Laycock, *supra* note 36.

⁴² 42 U.S.C. § 2000bb, 2000bb-4.

⁴³ See Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 895–96 (1994); see also *Fulton*, 141 S. Ct. at 1893 (Alito, J., concurring) (noting then-Rep. Chuck Schumer's introduction of the bill that became RFRA and President Bill Clinton's signing of it).

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intense opposition,⁴⁴ but rarely has that opposition been framed as a defense of *Smith*. Instead, the arguments have taken the form of asserting that the government has a compelling interest in eradicating LGBTQ discrimination, and thus would prevail even if *Smith* were overruled.

Fulton proceeded in the Supreme Court along these lines. The grant of certiorari in *Fulton* explicitly invited the Court to revisit *Smith*. As one would expect, the briefs for Catholic Social Services and many of its amici strenuously urged the Court to overrule *Smith*. Nevertheless, the City of Philadelphia and many of its amici refused to address the merits of *Smith*. They argued instead that, even if *Smith* was wrong, courts should reject claims of religious freedom to discriminate based on sex or sexual orientation.⁴⁵

In the *Fulton* briefing, we were the voice that no one would admit they wanted to hear. Together with Professors William Marshall and Frederick Gedicks, we filed a brief on the side of the city, arguing that *Smith* is correct and should be reaffirmed.⁴⁶ All four of us understand that the regime of *Smith* can be insensitive to religious minorities, but we still believe that, all things considered, *Smith* is better than any other proposed approach to religious accommodations. By our count, there were only three other amicus briefs that explicitly argued for retention of

⁴⁴ The leading cases include *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2017); and *Arlene's Flowers v. Washington*, 443 P.3d 1203 (Wa. 2019), *cert. denied*, No. 19–333, 2021 WL 2742795 (July 2, 2021). See also *Brush & Nib Studio LLC v. City of Phoenix*, 247 Ariz. 269 (2019); 303 Creative LLC v. Elenis, No. 19–1413, 2021 U.S. App. LEXIS 22449 (10th Cir., July 26, 2021). For a sample of the commentary, pro and con, on the *Masterpiece Cakeshop* litigation and result, see *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, SCOTUSBLOG (last visited Sept. 30, 2021).

⁴⁵ Brief of City Respondents at 47, *Fulton*, 141 S. Ct. 1868 (No. 19–123). The city's brief devoted the bulk of its argument regarding *Smith* to the proposition that considerations of *stare decisis* favored retention of *Smith*. *Id.* at 48–52. The city offered not a single word in defense of *Smith*'s correctness.

⁴⁶ Brief of Professors Ira C. Lupu, Frederick Mark Gedicks, William P. Marshall, and Robert W. Tuttle as Amici Curiae in Support of Respondents, *Fulton*, 141 S. Ct. 1868 (No. 19–123).

Smith.⁴⁷ Among the forty-seven amicus briefs filed on behalf of the city,⁴⁸ the authors of forty-four chose to ignore that question.

Despite that overwhelming quantitative imbalance, the majority of the Court resisted the urging to overrule *Smith*. Thirty years of political and scholarly criticism, extended and repeated legislative efforts to overturn the decision, and briefing heavily stacked in one direction in *Fulton* convinced only three justices. Three justices expressed considerable reticence about replacing *Smith*, and three others remained silent on the question. Something, not yet in view, explains the reluctance or unwillingness of six justices to overrule *Smith*.

B. The Deep Flaws in Justice Alito's Critique of *Smith*

Justice Alito's opinion, which ranges over the entire waterfront of constitutional argument—text, structure of the First Amendment, nineteenth-century history of religious freedom in the U.S., and an evaluation of the relevant precedent—is riddled with false narratives, internal contradictions, and errors of history. No one on the Court tried to answer his opinion in full, but unanswered is not the same as correct.

From the outset, Justice Alito's aggressive effort to shape the narrative leads him astray. He promises a "fresh look at what the Free Exercise Clause demands."⁴⁹ In the slip opinion published on June 17, 2021, Justice Alito reviewed the law as it stood at the time of *Smith* (1990) and asserted that *Sherbert* (1963) "had been in place for nearly four decades when *Smith* was decided."⁵⁰ A page later, he re-asserted that the *Sherbert* test provided the governing rule in free exercise cases for "the

⁴⁷ Professor Eugene Volokh filed a brief on behalf of neither side. Brief of Professor Eugene Volokh as Amici Curiae in Support of Neither Party, *Fulton*, 141 S. Ct. 1868 (No. 19–123) (arguing that the Court should not overrule *Smith*, and applauding statutory schemes, such as RFRA, that authorize religious exemptions). On the side of Philadelphia, only two briefs besides ours urged a reaffirmation of *Smith*. One, from the National League of Cities and other organizations concerned with municipal government, stressed the detrimental impact on their operations that overruling would produce. Brief of the National League of Cities et al. as Amici Curiae in Support of Respondents, *Fulton*, 141 S. Ct. 1868 (No. 19–123). The other was from the Freedom from Religion Foundation and other atheist organizations. Brief of the Freedom from Religion Foundation, Center for Inquiry, and the American Humanist Association as Amici Curiae in Support of Respondents, *Fulton*, 141 S. Ct. 1868 (No. 19–123).

⁴⁸ See *Proceedings and Orders*, Docket No. 19–123, U.S. SUPREME COURT for all amicus briefs filed in *Fulton*.

⁴⁹ *Fulton*, 141 S. Ct. at 1889 (Alito, J., concurring).

⁵⁰ *Fulton*, No. 19–123, slip op. at 11–12 (June 17, 2021) (Alito, J., concurring).

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next 37 years.”⁵¹ We are certain his skill at arithmetic is better than this, but we cannot help but notice the direction of his error, exaggerating the *Sherbert* rule’s longevity.

More broadly, his focus on the period from *Sherbert* to the eve of *Smith* as the place to begin a “fresh look” at the demands of the Free Exercise Clause is highly revealing. He might logically have begun with the text and history of the clause. Or, he might have started with the Supreme Court’s first major engagement with the clause in *Reynolds v. United States*⁵² (1878), which rejected the idea that the clause privileged religiously motivated action (in that case, plural marriage). Instead, he emphasizes the period between 1963 and 1990 as a way to paint a narrative in which *Sherbert-Yoder* is normative, and *Smith* is an aberration.

His account, however, is quite backwards. Our amicus brief in *Fulton* more accurately described the flow of Free Exercise jurisprudence from 1878 onward.⁵³ The Court had consistently rejected claims of free exercise exemptions until the early 1960’s.⁵⁴ Only in the period from the early 1960’s to 1990 did the Court purport to apply the compelling interest test to any claims of religious exemption. Moreover, as we explain later in this section, even in that period the Court frequently worked around that test.

⁵¹ *Id.* at 13. See also *id.* at 1 (“in . . . *Smith*, [citation omitted], the Court abruptly pushed aside nearly 40 years of precedent . . .”). In the version of *Fulton* now posted on LEXIS, these three errors about the time gap between *Sherbert* and *Smith* have been corrected. *Fulton*, 141 S. Ct. at 1883, 1889–90. As of the date of publication, the errors remained in the slip opinion published at supremecourt.gov.

⁵² *Reynolds v. United States*, 98 U.S. 145 (1878). Although Justice Alito repudiates the Free Exercise approach taken in *Reynolds*, *Fulton*, 141 S. Ct. at 1913 (Alito, J., concurring), he coyly asserts that his “discussion does not suggest that *Reynolds* should be overruled.” *Id.* at 1913 n.75. Why not? What compelling interest is served by denying an exemption from anti-bigamy laws to consenting adults who enter a plural marriage for religious reasons? Moves like this are an excellent reminder of the endless possibility of manipulation of strict scrutiny in Free Exercise exemption cases.

⁵³ Brief for Professors Lupu et al., *supra*, note 46, at 7–16. For a related but not identical treatment of the arc of Free Exercise law, see James M. Oleske, *Free Exercise (Dis)honesty*, 2019 WISC. L. REV. 689 (2019).

⁵⁴ This rejection included *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), which denied a claim by Jehovah’s Witness children that the Free Exercise Clause entitled them to an exemption from the duty to salute the American flag in school. When *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) overruled *Gobitis*, it did so on the ground that the speech clause protected all school children from compulsion to salute the flag, regardless of their reason for objection. See *Barnette*, 319 U.S. at 634–35, 635 n.15. We put the flag salute story in a wider perspective in IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 183–87 (2014). In Justice Alito’s telling of the flag salute story, he distorts the narrative to make it seem as if *Barnette* rested on the religious beliefs of the children. *Fulton*, 141 S. Ct. at 1913 (Alito, J., concurring).

The most accurate description of free exercise exemption claims through history is that the Court denied all of them between 1878 and 1963; appeared occasionally sympathetic to them from 1963 through 1990; and then again repudiated them under the *Smith* rule from 1990 onward. By our count, that would be a total of 116 years in which free exercise exemptions were not constitutionally mandatory, and 27 years in which, quite sporadically, such claims succeeded. If we start counting from the ratification of the First Amendment in 1791, the count would be 203 years without any notion of free exercise exemptions, and 27 years of a doctrine ostensibly favorable to exemptions. The period of *Sherbert-Yoder* was the aberration. *Smith* returned the law of the Free Exercise Clause to normalcy.

Justice Alito's other errors are more subtle, but hardly less conspicuous to the careful reader. Time after time, his own footnotes contradict his assertions.

Start with his explanation of the text. Justice Alito claims that he will analyze the "normal and ordinary" meaning of the Free Exercise Clause.⁵⁵ One of his first moves in searching for that meaning is to claim that the word "religion" requires no discussion for purposes of this case.⁵⁶ At that point, he drops a quite extraordinary footnote, which reads: "Whatever the outer boundaries of the term 'religion' as used in the First Amendment, there can be no doubt that CSS's contested policy represents an exercise of 'religion.'"⁵⁷

The question in *Fulton*, however, is not whether the Catholic view of who qualifies for its sacrament of marriage is a matter of religion. No one disputes that. Rather, the question is whether the CSS policy of who may serve as a foster parent represents an "exercise of religion" in the constitutional sense. This policy is not a reflection of the internal judgment of the Church about its sacraments, a judgment that would exclude couples of other faiths. The policy is aimed at the general

⁵⁵ *Fulton*, 141 S. Ct. at 1895 (Alito, J., concurring). Alito has a lengthy footnote explaining broad judicial departures from the "normal and ordinary" meaning of the term "Congress" within the First Amendment. *Id.* at 1895 n.27 (noting that the Fourteenth Amendment makes the First Amendment applicable to all functions of state government, and the First Amendment applies to federal administration of the law as well as law-making by Congress). Apparently, "normal and ordinary" can become quite extraordinary and abnormal in judicial hands.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1895 n.29.

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population of Philadelphia, Catholic or not. Whether such a policy qualifies constitutionally as an exercise of religion is a matter open to serious historical doubt, as Justice Alito's own sources strongly indicate.

Justice Alito's turn to eighteenth-century dictionaries further illustrates the embarrassing gap between the text of the Free Exercise Clause and the citations he uses to support his interpretation of that text. He notes, with multiple sources, that the term "exercise" had both a broad primary definition ("[p]ractice" or "outward performance") and a narrower secondary one (an "[a]ct of divine worship whether publick or private").⁵⁸ Which of these should control the interpretation of the Free Exercise Clause? The first appears to be its non-specific use as "practice or performance," as in musical or physical exercise. The second definition, however, appears in explicit connection with religion and has a singular meaning: "Act of divine worship."⁵⁹ As we explain further below, this religion-centered definition coincides perfectly with what late eighteenth-century Americans understood as the exercise of religion.

How does Justice Alito escape the conclusion that a worship-centered definition of religious exercise should control the meaning of the Constitution? He turns, briefly and parenthetically, to precedent from the middle of the twentieth century—in particular, *Cantwell v. Connecticut*.⁶⁰ This is just sleight of hand. First, the *Cantwell* opinion, penned in 1940, makes absolutely no reference to the original meaning of the First Amendment. It thus carries no weight as an originalist interpretation. Second, the context of *Cantwell* is street preaching by members of the Jehovah's Witnesses. This is dissemination of the word of God and may fall within the original meaning of the Free Exercise Clause. Even if that conclusion is correct, however, it does not come close to proving that *all* religiously motivated conduct should qualify as religious exercise within the "normal and ordinary" meaning of the Free

⁵⁸ *Id.* at 1895 n.31.

⁵⁹ *Id.*

⁶⁰ *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In his *Fulton* opinion, Justice Alito writes, "The Court long ago declined to give the First Amendment's reference to 'exercise' this narrow reading. *See, e.g., Cantwell v. Connecticut*, 310 U. S. 296, 303–04 (1940)." *Fulton*, 141 S. Ct. at 1895 (Alito, J., concurring). This is the entirety of his explanation of why the original meaning of "free exercise of religion" extends beyond acts of Divine worship.

Exercise Clause. Justice Alito is cheating in his textualist story, and even the cheating does not get him where he wants to go.⁶¹

The best reading of Justice Alito's footnotes belies his assertion that CSS's practice involves the exercise of religion. On narrow, dictionary-driven textualist grounds, the phrase "Free Exercise of Religion" should be limited to acts of worship, and (as we explain below) the closely related practices of public preaching and proselytizing.

Justice Alito's analysis of constitutional history reveals the same tendentious qualities as his analysis of text. The relevant history fully supports the notion that "exercise of religion" referred to acts of worship, and certainly did not encompass all religiously motivated conduct. Once again, the footnotes sharply contradict Justice Alito's assertions in the text.

Justice Alito traces "free exercise" back to an act by the Maryland Assembly in 1649 and says that by 1789 "every State except Connecticut had a constitutional provision protecting religious liberty."⁶² On the sound assumption that the federal Free Exercise Clause reflects the widespread pattern of such protections,⁶³ Justice Alito's originalist argument rests on his reading of those state constitutional provisions.

Here, however, his argument goes off the rails. Instead of analyzing the content of religious liberty encompassed by those constitutional provisions, Justice Alito focuses solely on a limitation frequently imposed on that liberty. Many state constitutions expressly provided that the right of religious liberty does not protect conduct that would endanger "the public peace" or "safety."⁶⁴ "If, as *Smith* held," Justice Alito writes, "the free-exercise right does not require any religious exemptions from generally applicable laws, it is not easy to imagine situations in which a public-peace-or-safety carve out would be necessary."⁶⁵

⁶¹ *Cantwell* rests on freedom of speech, 310 U.S. at 307–11, as well as free exercise of religion, so it becomes less important to decide if street preaching is such an exercise. Jesse Cantwell would have been equally protected by the First Amendment if he had been engaged in political or social advocacy, unrelated to religion.

⁶² *Fulton*, 141 S. Ct. at 1900 (Alito, J., concurring) (citing Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1445 (1989)).

⁶³ Donald S. Lutz, *The State Constitutional Pedigree of the U.S. Bill of Rights*, 22 *PUBLIUS* 19, 19–20, 27–29 (1992).

⁶⁴ Justice Alito lists many such provisions in his *Fulton* concurrence. See *Fulton*, 141 S. Ct. at 1902 n.43 (Alito, J., concurring).

⁶⁵ *Id.* at 1903.

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Once again, Justice Alito goes out of his way to avoid the core question. Instead of stressing the importance of carve-outs, Justice Alito should first and foremost have attended to the substance of religious liberty itself. Even a cursory reading of Justice Alito's long footnote, cataloguing state constitutional guaranties in the founding period, shows that these provisions focused exclusively on freedom of worship and belief.⁶⁶

To take just one example, the 1780 Massachusetts Constitution reads: "It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the Great Creator and Preserver of the Universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the publick peace, or obstruct others in their religious worship."

The concern for public order in the 1780 Massachusetts Constitution derives from the threat of unruly forms of worship,⁶⁷ not from the broader category of all religiously motivated conduct. The Massachusetts provision echoes other state constitutions. All locate the right in worship, and many extend it to religious "profession or sentiments."⁶⁸

⁶⁶ *Id.* at 1902 n. 43. See Northwest Ordinance of 1787, 32 J. OF THE CONT'L CONG. 334 (July 13, 1787). The Northwest Ordinance enumerated fundamental rights that each territory must respect. Article One of these fundamental rights protects religious liberty. "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory." *Id.* at 340. See also JAMES H. HUTSON, CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 137 (2007) ("On one subject there was unanimity: Governments must not interfere in the spiritual realm, in men's beliefs and modes of worship.")

⁶⁷ The central challenge for church-state policies during this period arose from a half-century of exploding diversity within Protestantism. Evangelicalism—reflected in the "First Great Awakening"—challenged traditional forms of religiosity from New England's Congregationalists to Virginia's Anglicans. Evangelicalism focused on a religion of the heart, rather than one directed primarily at adherence to creeds or ritual practices. This shift splintered congregations and denominations, while creating or greatly expanding the reach of "dissenting" faith communities (Methodists and Baptists in particular). Although some clergy welcomed the religious vitality of this piety, many others expressed deep concern that its disdain for the settled religious order threatened the peace of the civil community. See generally, FRANCES FITZGERALD, THE EVANGELICALS: THE STRUGGLE TO SHAPE AMERICA 13–24 (2017); JAMES H. HUTSON, CHURCH AND STATE IN AMERICA: THE FIRST TWO CENTURIES 73–92 (2008); THOMAS S. KIDD, THE GREAT AWAKENING: THE ROOTS OF EVANGELICAL CHRISTIANITY IN COLONIAL AMERICA (2007); PATRICIA U. BONOMI, UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY AND POLITICS IN COLONIAL AMERICA 123–167 (REV. ED. 2003); MARK NOLL, THE RISE OF EVANGELICALISM: THE AGE OF EDWARDS, WHITEFIELD AND THE WESLEYS (2003).

⁶⁸ See *Fulton*, 141 S. Ct. at 1902 n.43 (Alito, J., dissenting).

The history of mid-eighteenth-century religious conflict in the colonies provides the context necessary to fully understand the references to peace and order. The First Great Awakening brought widespread religious revivals throughout the colonies.⁶⁹ Many of the revivalists were itinerant preachers who faced hostility from some “settled” clergy (those who had congregations) over doctrinal and practical differences.⁷⁰ These itinerant preachers, foremost among them George Whitefield, preached theatrical sermons, calling for believers to experience a “new birth” of Christ in their hearts. According to these preachers, this new birth is necessary to avoid the very real peril of hell, which they described in vivid detail.⁷¹ The sermons led some listeners to collapse, others to speak in tongues, and still others to cry out in fear for their souls. This type of worship stood in sharp contrast to the learned sermons and staid services of Congregationalist clergy in New England, or Anglican priests in the southern colonies.⁷²

Many ministers and others objected to the “wild” form of religiosity, which they found to be more spectacle than divine worship. Others feared that they would lose their congregants to the itinerant preachers. And still others resented the question from congregants or itinerant preachers about whether the settled ministers had received the “new birth.”⁷³

In the years before the Revolution, some colonial legislatures attempted to protect the interests of settled ministers by restricting the activities of itinerant ministers. Virginia made the most intense effort by requiring all preachers to obtain a license from a board of Anglican clergy.⁷⁴ James Madison wrote that he was greatly affected by the sight of Baptist evangelists jailed for violating the act.⁷⁵

Conflicts over these evangelical revivals fully explain the carve-outs that Justice Alito finds so important. Even if a state constitutional provision protected the right of itinerant preachers to offer a public

⁶⁹ See *supra* note 67.

⁷⁰ HUTSON, *supra* note 67; KIDD, *supra* note 67, *passim*; Bonomi, *supra* note 67, at 129–60; NOLL, *supra* note 67, at 128–32, 149–50.

⁷¹ KIDD, *supra* note 67, at chs. 4–5; BONOMU, *supra* note 67, at 157–59.

⁷² FITZGERALD, *supra* note 67, at 21; HUTSON, *supra* note 67, at 77–79; BONOMI, *supra* note 67, at 142, 150.

⁷³ KIDD, *supra* note 67, at ch. 5; NOLL, *supra* note 67, at 129–30 (on Rev. Gilbert Tennent, The Danger of an Unconverted Ministry, Considered in a Sermon on Mark 6:34 (1740)).

⁷⁴ HUTSON, *supra* note 67, at 82–89; BONOMI, *supra* note 67, at 181–84.

⁷⁵ HUTSON, *supra* note 67, at 90.

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worship service—often held outside, because towns or settled clergy regularly denied them the use of a church—the concern remained that worshippers might disturb public peace and order.⁷⁶

By focusing only on the carve-out, Justice Alito ignores the interpretive question at the heart of any serious textualist or originalist inquiry: What did the “free exercise of religion” mean at the Founding? Justice Alito simply assumes the conclusion he wants to reach and ignores obvious contradictory evidence. That evidence shows that the constitutional understanding of religious exercise, at the Founding, is far removed from the stance of CSS toward married same-sex couples as foster parents, no matter how religiously motivated the CSS policy may have been. Justice Alito’s stipulation that CSS’s policies are religious exercise, within the original meaning of the Free Exercise Clause, is wrong.⁷⁷

This is not the place to fully develop an alternative account of the textual and historical meaning of the “free exercise of religion.” We can, however, sketch one that is much more plausible than that offered by Justice Alito. This narrative starts with the 1689 Act of Toleration,⁷⁸ which granted most dissenting Protestant communities the right to worship and hold beliefs that differed significantly from the practices and doctrines of the Church of England. The Act required dissenting Protestants to take an oath of allegiance to the Crown and confirm their belief in certain doctrines of the faith, most prominently the Holy Trinity and the divine inspiration of the Bible. But it allowed them to worship in their own congregations and according to their own beliefs about baptism, communion, and church order—doctrines that had been at the heart of most disputes between the dissenters and the Church of

⁷⁶ KIDD, *supra* note 67, chs. 5–7; BONOMI, *supra* note 67, at 147–49.

⁷⁷ Legislatures remained free, at the time of the Founding and still today, to accommodate religious concerns that lay beyond the constitutional guaranty of free exercise of religion. The most famous and obvious example is that of the Quakers, who refused to swear oaths, and refused to bear arms in defense of themselves or their communities. Laws that excused Quakers from oath requirements, conscription, or militia duty recognized their concerns of religious conscience, but the constitutions (state and federal) did not require that. Justice Alito recites the story of legislative accommodations of Quakers and other sects, but he insists that these measures are evidence that the constitution required such exemptions. Justice Scalia correctly saw them as permissive, and not constitutionally mandatory. *City of Boerne v. Archbishop Flores*, 521 U.S. 507, 541 (1997) (Scalia, J., concurring).

⁷⁸ The Toleration Act, 1 W. & M. c 18 (1689). See HUTSON, *supra* note 67, at 48–56.

England.⁷⁹ The Act also denied protection to any worship that threatened public peace or order—a clause that many state constitutions retained after Independence.

During the eighteenth century, dissenting Protestant communities in the American colonies frequently invoked the rights granted by the Act of Toleration. Although many colonial governments complied with the provisions, or even offered much broader liberties for worship,⁸⁰ others resisted.⁸¹ At first, Massachusetts even refused to permit Anglican missionaries and churches, but the Crown soon ended that recalcitrance.⁸² Virginia proved the most obstinate opponent of the Act. As late as the Revolutionary Era, Virginia's government denied that the Act applied to the colony. Licensing authorities almost uniformly refused to permit dissenting ministers to preach or form congregations in Virginia.⁸³

The liberty sought by these dissenting Protestant faiths, then, focused on the rights of worship and public preaching.⁸⁴ As their rhetoric shifted from toleration to religious freedom, the groups sought equality with whatever denomination enjoyed favored status in the colony. Laws

⁷⁹ Notably, however, the Act required ministers of dissenting congregations to obtain licenses from the local magistrate, register their place of worship with the local Anglican bishop, and keep the doors to their place of worship open during any meetings of the congregation. The Act granted no right of religious liberty to Roman Catholics or Unitarians. And it required all subjects to attend some place of worship on the Sabbath. *Id.*; see ELLIS M. WEST, *THE FREE EXERCISE OF RELIGION: ITS ORIGINAL CONSTITUTIONAL MEANING* 44 (2019).

⁸⁰ Rhode Island (Roger Williams) and Pennsylvania (William Penn) were founded by strident advocates of religious liberty and incorporated general provisions for freedom of worship and belief into their founding documents. NICOLAS P. MILLER, *THE RELIGIOUS ROOTS OF THE FIRST AMENDMENT: DISSENTING PROTESTANTS AND THE SEPARATION OF CHURCH AND STATE* 60–63 (2012).

⁸¹ WEST, *supra* note 79, at 46; MILLER, *supra* note 80, at 101; HUTSON, *supra* note 67, at 79–81; BONOMI, *supra* note 67, at 66, 164–66.

⁸² In 1691, the Crown granted a new Royal Charter for Massachusetts, which incorporated the Act of Toleration. BONOMI, *supra* note 67, at 61. The colony, however, maintained a restrictive practice of funding for recognized religious congregations. HUTSON, *supra* note 67, at 81–82.

⁸³ HUTSON, *supra* note 67, at 82–90; BONOMI, *supra* note 67, at 181–85.

⁸⁴ HUTSON, *supra* note 67, at 90 (“Large numbers of Virginians . . . were comfortable with the definition of liberty of conscience that had been popularized by eighteenth-century British dissenters: freedom from forcible interference with public worship coupled with acquiescence in state intervention in other aspects of religion.”) (The quote focuses specifically on Presbyterians, however, who received significantly better treatment in Virginia than Baptists. See *id.* at 87.)

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that required licensing of dissenting clergy or registration of religious meeting houses failed the test of equality.⁸⁵

The debate over public funding for ministers or houses of worship is the closest potential analogy for modern arguments for religious exemptions. Opponents of such funding, particularly Baptists, argued that the imposition of religious taxation treated them unequally (because they refused to provide or receive any compelled support) and impermissibly involved the state in matters outside the scope of its temporal authority.⁸⁶ The dissenting arguments blocked efforts to impose religious taxes in some states (most notably Virginia⁸⁷) but failed in others (primarily Connecticut and Massachusetts⁸⁸).

Theophilus Parsons, a drafter of the Massachusetts Constitution, later justified the taxation of dissenters by distinguishing between the spiritual and civil functions of religion.⁸⁹ All are free to believe, worship, or publicly preach according to their faith. But state support for certain Protestant faiths is proper because instruction in core Protestant doctrines—especially belief in a future state of rewards and punishments—will produce citizens who are more likely to obey laws and public morality. Such funding serves the purely civil function of ensuring peace and order, and benefits even those who do not seek or qualify for state funding of their ministries.⁹⁰

The eighteenth-century history thus suggests (in accord with Justice Alito's citations) that "exercise of religion" focused on belief, worship, and public preaching. It does not support his conclusion that the "exercise of religion" encompasses any act that claimants believe is required by their faith. The Massachusetts example proves most telling: The law protects the "spiritual" domain, not a pluralistic idea of religiously motivated conduct in the civil or secular domain.⁹¹

⁸⁵ *Id.* at 91–92. *See also* WEST, *supra* note 79, at 85–86.

⁸⁶ MILLER, *supra* note 80, at 106–08.

⁸⁷ WEST, *supra* note 79, at 62–67; MILLER, *supra* note 80, at 144–47; Hutson, *supra* note 67, at 117, 121–25.

⁸⁸ *See* MASS. CONST. of 1780, arts. II, III.

⁸⁹ *Barnes v. Inhabitants of the First Church of Falmouth*, 6 Mass. 401 (1810).

⁹⁰ *Id.* at 408–10.

⁹¹ Our account of the eighteenth-century history and meaning of the Free Exercise Clause is buttressed by Professor Rakove's excellent recent study of the subject. JACK N. RAKOVE, *BEYOND BELIEF, BEYOND CONSCIENCE: THE RADICAL SIGNIFICANCE OF THE FREE EXERCISE OF RELIGION* (2020). *See especially* chaps. 2–3.

We recognize that this Protestant-centered view of the “exercise of religion” fails to respect the beliefs and practices of many religious adherents in our pluralist nation.⁹² We do not argue that this interpretation is the best normative reading of the Free Exercise Clause today.⁹³ Instead, the argument we are making is that the Constitution drafters of the eighteenth century understood the restriction on laws “prohibiting the free exercise [of religion]” as a barrier to government interference with worship, and perhaps with preaching the Word through religious instruction and proselytizing. The drafters’ meaning takes on immeasurably greater importance as the society became more religiously pluralistic. Reaching beyond the original constitutional limits to protect all religiously motivated conduct in a pluralistic society is unmanageable. As Justice Scalia in *Smith* explained: “because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”⁹⁴

Justice Alito makes yet one more, all-too-common mistake in his analysis. He complains that *Smith* made the Free Exercise Clause into “essentially an anti-discrimination provision.”⁹⁵ Although it is correct to

⁹² This failure simply demonstrates the inadequacy of originalist interpretation—and the inevitable temptation to shape that interpretation to support a desired outcome. Peter J. Smith, *Originalism and Level of Generality*, 51 GA. L. REV. 1, 10 (noting that in practice the application of originalism “appears ad hoc, largely unconstrained, and thus susceptible to the same kind of results-oriented decision-making that originalists have long decried”). The same should be said of the Court’s emphasis on “history and tradition” as the basis for denying that government displays and religious speech—which invariably reflect Christian beliefs—violate the Establishment Clause. *See, e.g.*, *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (upholding display of Latin Cross as a secular memorial to those who died serving the U.S. in World War I); *Town of Greece v. Galloway*, 572 U.S. 565 (2014) (upholding a pattern of predominantly Christian prayer to open Town Council meetings).

⁹³ *See generally* WEST, *supra* note 79 (arguing that the best originalist interpretation of the Free Exercise Clause limits the scope of its protection to a domain of “religious worship and practice” that is distinct from civil authority’s power over laws “protecting and promoting the earthly wellbeing of persons.” *Id.* at 197).

⁹⁴ *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990). This statement is followed by a long list of the categories of law that would be vulnerable to exemption claims under Justice Alito’s approach. *See id.* at 889.

⁹⁵ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1897 (2021) (Alito, J., concurring). Justice Barrett repeats this charge. *Id.* at 1883 (Barrett, J., concurring).

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say that both the Establishment Clause⁹⁶ and the Free Exercise Clause⁹⁷ have anti-discrimination components, *Smith* goes beyond this and recognizes the Free Exercise Clause as protecting the right to choose forms of worship. As Justice Scalia wrote, “It would doubtless be unconstitutional, for example, to ban the casting of ‘statues that are to be used for worship purposes,’ or to prohibit bowing down before a golden calf.”⁹⁸ The focus of these examples is not sectarian discrimination. Rather, they refer to direct regulation of worship qua worship, protected as such by the Free Exercise Clause.

C. The Consequences of Justice Alito’s Flawed Interpretation

Justice Alito’s overbroad reading of the Free Exercise Clause leads inexorably to a series of constitutional troubles, one piled on top of the other. First, it sweeps in a vast range of human behavior that is subject to law, including employment arrangements, family relations, and the duties of those who contract with the public. This range is expanded yet further by the recent tendency to advance claims of religious complicity, as a means of resisting duties to others who exercise privacy rights, reproductive rights, and marital rights in ways that some religious people oppose.⁹⁹ Complicity claims arise in relationships, and contemporary life is thick with relationships that invite one party to object to the behavior of others. *Masterpiece Cakeshop*,¹⁰⁰ *Burwell v. Hobby Lobby*,¹⁰¹ and *Fulton* all arose out of such claims of complicity.¹⁰²

Second, Justice Alito here and elsewhere subscribes to an extremely generous and subjective notion of what constitutes a substantial burden on religious exercise. If religious exercise is confined to worship

⁹⁶ Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687 (1994); *Larson v. Valente*, 456 U.S. 228 (1982).

⁹⁷ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

⁹⁸ *Smith*, 494 U.S. at 877–78.

⁹⁹ See generally Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2518–19 (2015) (analyzing the political and legal contexts in which people seek exemptions from laws that make “objectors complicit in the assertedly sinful conduct of others.”).

¹⁰⁰ *Masterpiece Cakeshop v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719 (2017).

¹⁰¹ *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014).

¹⁰² Robin West describes these claims as ways that dissenters from egalitarian and feminist norms seek to exit the social contract concerning equal opportunities for all. Robin West, *Freedom of the Church and Our Endangered Civil Rights: Exiting the Social Contract*, in *THE RISE OF CORPORATE RELIGIOUS LIBERTY*, (Zoe Robinson, Chad Flanders & Micah Schwartzman eds., 2015).

and preaching, courts can measure objectively the extent to which a government policy interferes with that exercise or imposes substantial costs on it.¹⁰³ In contrast, the notion of burden as an internal, subjective imposition on conscience cannot be second-guessed or measured. *Thomas v. Review Board*¹⁰⁴ pushed the idea of burden in this subjective direction, and Justice Alito's opinion in *Hobby Lobby* amplified it.¹⁰⁵ Other than an attack (rarely attempted by the government) on the sincerity of belief, the government has almost no way to successfully argue that an asserted burden on religious belief and practice is insubstantial.¹⁰⁶

Third, and directly related to the second, Justice Alito's opinion asserts that the standard of review for exemption claims that "comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest."¹⁰⁷ These requirements—compelling interests, and the demand for narrow tailoring—are independently difficult to satisfy. Interests of the government may be vital, yet may fail the compelling interest test by

¹⁰³ *Sherbert v. Verner*, 374 U.S. 398 (1963), involved just such a question. Justice Brennan describes the loss of unemployment compensation as a result of being unavailable for work on Saturday (Adele Sherbert's Sabbath day) as the conceptual equivalent of a fine imposed upon her for Saturday worship. *Id.* at 404.

¹⁰⁴ *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707 (1981).

¹⁰⁵ *Hobby Lobby*, 573 U.S. at 723–26 (accepting the assertion by the owners of Hobby Lobby that the contraceptive mandate substantially burdens their religious belief).

¹⁰⁶ This problem is well-analyzed in Frederick Mark Gedicks, *Substantial Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94 (2017); see also Ira C. Lupu & Robert W. Tuttle, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 241–44 (2014) (discussing how the ruling in *Thomas* effectively makes each religious exemption claimant a judge in her own cause).

¹⁰⁷ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1924 (2021) (Alito, J. concurring). He leaves open the possibility that "this test [might be] rephrased or supplemented with specific rules." *Id.* This is a neat invitation to weasel out of the test when it produces results with which a justice is unhappy, as so often happened under the *Sherbert-Yoder* regime. Moreover, Justice Alito ignores the fact that *Smith* replaced a bundle of standards, of which this was the among the strictest. Note as well that Justice Alito subtly shifts away from a test of "least restrictive means" to one of "narrow tailoring," even though RFRA (designed by Congress to reinstate pre-*Smith* law) uses the test of least restrictive means. 42 U.S.C. § 2000bb-1. The test of least restrictive means is even more difficult to satisfy than that of "narrow tailoring," because the government can always find a means, albeit more expensive or less efficient, less restrictive of religious liberty than the one challenged. See *Hobby Lobby*, 573 U.S. at 764–68 (Ginsburg, J., dissenting). See also Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J. L. & GENDER 35, 86–90 (2015) (analyzing treatment of "least restrictive means" in *Hobby Lobby* and elsewhere).

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falling just short,¹⁰⁸ or by being undercut by exceptions, however narrow, that weaken the government's claim about the weight of the interest.¹⁰⁹

Requirements of narrow tailoring likewise are difficult to satisfy because the government frequently has alternatives, albeit less efficient or more expensive, to accomplish its ends. At times, the broader alternative may be far more effective at achieving the government's goals. For example, a complete ban on importation of a prohibited substance, used in religious sacraments, is likely to work far better than monitoring by government agents of the actual deployment of the substance by the religious group.¹¹⁰

The combination of these three points—the breadth of what counts as an exercise of religion; the ease of satisfying the “substantial burden” test; and the difficulty of satisfying the tests of “narrow tailoring—compelling interest”—is what makes Justice Alito's approach so sweeping and unmanageable.

We know from extensive experience during the regime of *Sherbert-Yoder* that courts will not stay on this path, even if they pretend to do so. In the 1980s, faced with a doctrine that made it nearly impossible for the government to deny an exemption, the Court found multiple ways to work around the promise of presumptive immunity for religious claims. By 1990, the Court had worked around the *Sherbert-Yoder* standard far more often than it had applied that standard with the promised rigor.¹¹¹

¹⁰⁸ In *Hobby Lobby*, Justice Alito implies that only the interest in avoiding racial discrimination, and not other kinds of discrimination, is compelling. See *Hobby Lobby*, 573 U.S. at 733.

¹⁰⁹ For this kind of reasoning about the connection between under-inclusion and the weight of government interests, see *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432–33 (2006); *Hobby Lobby*, 573 U.S. at 727. Both are RFRA decisions, but the statutory standard under RFRA tracks the free exercise standard for which Justice Alito contends in *Fulton*.

¹¹⁰ See *O Centro*, 546 U.S. 418 (applying RFRA to exempt the group from a broad ban on importation of huasca tea, because the government could take the more narrowly tailored step of monitoring the group's use of the hallucinogenic substance).

¹¹¹ In the *Fulton* briefing, lawyers calling for *Smith* to be overruled conveniently ignored these work-around cases, because the pattern disturbs their preferred (but false) narrative that *Smith* abruptly abandoned a consistent posture of strict scrutiny of free exercise exemption claims. But we called attention to them in our amicus brief in *Fulton*, *supra* note 46, at 12–16. Justice Barrett (a former Justice Scalia clerk) was definitely attuned to them. *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring). For additional discussion, see Lupu, *supra* note 107, at 51–53; McConnell, *supra* note 36, at 1110 (describing Supreme Court's free exercise law on the eve of *Smith* as a “Potemkin doctrine.”).

The methods included weakening the doctrine in government-controlled enclaves such as prisons¹¹² and the military;¹¹³ refining the concept of burdens to exclude difficult cases, such as those brought by Native Americans with respect to sacred lands,¹¹⁴ and weakening the compelling interest test to make it easier to satisfy.¹¹⁵ Lower courts did likewise.¹¹⁶ All of these moves produced significant departures from rule-of-law values of consistency and predictability in application of the law. Why should we expect anything different now?

Fourth, Justice Alito's broad conception of free exercise, coupled with his assertion of a strict judicial standard to govern such claims, reveals the deep flaws in his structural argument about the constitutional treatment of speech, press, and association compared to religion. With respect to coverage, rights of speech, press, and association all relate to human activities of communication. This is a broad subject indeed, but it is miniscule when compared with the entire universe of human behavior, all of which may be touched by religious conviction.

When a news organization, for example, enters into employment relationships, or constructs a building in which to create its product, no one asserts that the First Amendment imposes strict standards on the government's regulation of such activity. With respect to such matters, if government regulates news organizations to the same extent as other, comparable entities—that is, if the regulations are speech-neutral and generally applicable—the First Amendment has no work to do. By contrast, those who want to overturn *Smith* in free-exercise cases assert that the incidental impacts of any regulation of religiously motivated actors must be justified under strict, government-limiting standards. If

¹¹² *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

¹¹³ *Goldman v. Weinberger*, 475 U.S. 503 (1986).

¹¹⁴ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); see also *Bowen v. Roy*, 476 U.S. 693 (1986); *Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985).

¹¹⁵ *United States v. Lee*, 455 U.S. 252 (1982); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). In both decisions, the Court failed to inquire into the availability of means less restrictive of religious liberty.

¹¹⁶ See James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1416–37 (1992). Indeed, with the benefit of hindsight, we can see that almost all of the successful free exercise exemption claims in this period involved both unemployment compensation and questions involving worship. *Yoder* and *Thomas* are the outliers. Both involve religiously motivated conduct outside of worship, and both have been the source of great controversy. Perhaps, intuitively, the Supreme Court was leaning toward a notion of free exercise as worship without ever so declaring.

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free exercise meant worship activities and not the entirety of religiously motivated acts, the structural gap between religion and other First Amendment-protected activity would shrink dramatically.

Furthermore, with respect to standards of review, no justice or scholar has ever contended that a single, highly potent review standard should govern every possible dispute arising from regulation of communicative activity. When government regulates the content of communication, it must answer to the highest constitutional concerns.¹¹⁷ In contrast, when government regulates the time, place, and manner of expression, the relevant standards are more relaxed.¹¹⁸ When the regulation takes the form of control of expressive conduct, and the government has an interest in the conduct independent of the message it sends, the standards are quite lenient indeed.¹¹⁹ Most generally, free speech principles do not protect speech against “incidental burdens” from generally applicable, speech-neutral laws.¹²⁰

These latter categories—regulation of conduct generally, speech-neutrally, and independent of the message it sends—is a precise analogue for generally applicable standards that apply to all behavior of a certain kind, religiously motivated or not. When Justice Alito and others call for strict scrutiny in such cases, they are demanding special treatment for religion, not treatment equal to that afforded other constitutional rights.¹²¹

Many of the concerns expressed in Justice Barrett’s brief concurring opinion can be instructively linked to one or more of the problems

¹¹⁷ See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010); *Boos v. Barry*, 485 U.S. 312 (1988).

¹¹⁸ See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

¹¹⁹ See *United States v. O’Brien*, 391 U.S. 367 (1968). In cases evaluating content-neutral restrictions on conduct that involves symbolic speech, the Court has consistently ruled that government actions were constitutionally permissible despite incidental limitations on some expressive activity. In addition to *O’Brien*, see, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 296 (2000).

¹²⁰ See, e.g., *Cohen v. Cowles Media*, 501 U.S. 663, 669–70 (1991) (“[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to collect and report the news.”) (collecting cases); *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972) (“It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.”).

¹²¹ The gap between protection of religious speech and all other speech under such an approach is constitutionally unacceptable. See William P. Marshall, *What is the Matter with Equality? An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193 (2000).

that emerge from Justice Alito's overbroad conception of what the Constitution means by the exercise of religion. Her opinion asks why the Free Exercise Clause, alone among First Amendment rights, should be limited to concerns about discrimination. The answer is that the clause is not so limited. It protects the activities of worship and preaching the Word as strenuously as it protects political advocacy, but it does not protect everything done in the name of religion.

Justice Barrett is "skeptical about swapping *Smith's* categorical antidiscrimination approach for an equally categorical strict scrutiny regime, particularly when this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced."¹²² This skepticism is appropriate, but far too weak, because Justice Alito's conception of the exercise of religion is so much broader than any judicial conception of what counts as the exercise of these other rights.¹²³

Justice Barrett goes on to raise a series of concerns, at least some of which arise entirely from unasked and unanswered questions about the breadth of free exercise rights. For instance, she asks whether "entities like Catholic Social Services—which is an arm of the Catholic Church—[should] be treated differently than individuals?"¹²⁴ A better understanding of the constitutional meaning of the exercise of religion would lead to a related, but different question—whether Catholic Social Services is exercising religion in the constitutional sense when it provides social services to the general public. Of course, CSS is motivated by religion, and understands itself in religious terms, but that cannot

¹²² *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Barrett, J., concurring).

¹²³ Several of her questions about review standards emerge from the same concern about whether courts will consistently ask the same, strict questions about regulatory impacts on religion: "What forms of scrutiny should apply? Compare *Sherbert v. Verner*, 374 U. S. 398, 403 (1963) (assessing whether government's interest is 'compelling'), with *Gillette v. United States*, 401 U.S. 437, 462 (1971) (assessing whether government's interest is 'substantial')" and "Should there be a distinction between indirect and direct burdens on religious exercise? Cf. *Braunfeld v. Brown*, 366 U. S. 599, 606–07 (1961) (plurality opinion)." *Fulton* 141 S. Ct. at 1883 (Barrett, J., concurring).

¹²⁴ Justice Barrett added the citation: "*Cf. Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171 (2012)." *Id.* As we discuss in Part I, *Hosanna-Tabor* does not declare a general doctrine of privilege or autonomy for religious entities. See *supra* notes 13–25 and accompanying text. Rather, the decision reinforces the concept of judicial abstention on exclusively ecclesiastical questions. Perhaps Justice Barrett intends the "Cf." signal as a very shorthand way to communicate that distinction.

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transform all of its daily activities into the kind of religious exercise protected by the First Amendment.¹²⁵

Justice Barrett’s final question about review standards is especially pointed: “[I]f the answer is strict scrutiny, would pre-*Smith* cases rejecting free exercise challenges to garden-variety laws come out the same way?”¹²⁶ This question is telling, in two respects. First, she is acknowledging—as Justice Alito, CSS, and its amici do not—the pervasive pattern of work-arounds in pre-*Smith* law. Second, her reference to “garden variety laws” shows an acknowledgment of the scope of exemptions encompassed by Justice Alito’s broad notion of free exercise. They would include generally applicable tax laws, labor laws, social welfare policy, land use control, and other areas of regulation not aimed at the experience of worship.

Justice Alito’s opinion invited these questions, and Justices Barrett, Kavanaugh, and Breyer deserve praise for raising them. The opinion of Justice Barrett, who is a former clerk for Justice Scalia, builds on the legacy of his opinion in *Smith*. As a result, and despite the few lonely voices speaking up in defense of *Smith*, its principles endure. The lower courts remain bound by it. The Supreme Court has neither the incentive nor sufficient interest among the current justices to take it up again quickly.¹²⁷ Without a workable alternative, the *Smith* framework for adjudication of free exercise cases will remain in place. And if religious exercise is understood in Justice Alito’s broad terms, there is no workable alternative.

¹²⁵ Religiously affiliated hospitals, serving the general public and heavily supported by public money, are in the same boat as religious charities. They should not be free to claim mandatory free exercise clause protection for their refusal to provide necessary services to women or to transgender patients. Their status may soon get tested in the Supreme Court. See *Dignity Health v. Minton*, 39 Cal. App. 5th 1155 (Cal. App. 1 Dist., 2019), petition for cert. filed (U.S. Mar. 13, 2020) (No. 20–1135). For a sophisticated discussion of related issues, see Elizabeth Sepper, *Zombie Religious Institutions*, 112 Nw. U. L. Rev. 929 (2018).

¹²⁶ “See *Smith*, 494 U. S., at 888–889.” *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring). At the cited pages from *Smith*, Justice Scalia listed the many free exercise work-around cases from the 1980s.

¹²⁷ Soon after *Fulton*, the Court denied certiorari in two cases that had raised the issue of overruling *Smith*. *Ricks v. Idaho Contractors Bd.*, 435 P.3d 1 (Idaho 2018) cert. denied, No. 19–66, 2021 WL 2637837 (June 28, 2021); *Arlene’s Flowers, Inc. v. Washington*, 441 P.3d 1203 (Wash. 2019), cert. denied, No. 19–333, 2021 WL 2742795 (July 2, 2021). Justices Alito, Gorsuch, and Thomas noted that they would grant certiorari in *Arlene’s Flowers*.

D. The Scope of “General Applicability”

The one major inroad into the regime of *Smith* is the apparent narrowing of what counts as a generally applicable law. Two major developments point in this direction: (1) the Court’s treatment, in its emergency docket, of orders limiting attendance at houses of worship during the COVID-19 pandemic; and (2) the Court’s analysis in *Fulton* of the role of administrative discretion in undermining the general applicability of the law. Taken to their logical ends, these developments suggest that the category of generally applicable laws will shrink to the vanishing point, and *Smith* will become irrelevant.¹²⁸ The experience of courts with the pre-*Smith* law, however, suggests a different fate.

The COVID cases and the significance of secular exceptions. As recently as the summer of 2020, the Court’s most prominently expressed view about the concept of general applicability remained its opinion in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*.¹²⁹ Failures of general applicability were to be found only in invidious and hostile departures from even-handed treatment of all religions and their secular counterparts. Such departures demonstrate deliberate discrimination against religion generally, or (as in *Lukumi*) a particular religion.

When the first COVID cases arising from state limitations on attendance at houses of worship appeared at the Court in July of 2020, a narrow majority led by Chief Justice Roberts adhered to the *Lukumi* approach. In *South Bay United Pentecostal Church v. Newsom*,¹³⁰ the Court refused to issue an emergency stay of court orders imposing a limit on attendance, on the ground that the state had treated houses of worship the same as the appropriate comparators. As Chief Justice Roberts explained, the right comparators included “lectures, concerts, movie showings, spectator sports and theatrical performances, where large groups of people gather in close proximity for extended periods of time.”¹³¹ And, as Chief Justice Roberts continued, “the Order exempts or treats more leniently only dissimilar activities, such as operating grocery

¹²⁸ Linda Greenhouse, *What the Supreme Court Did for Religion*, N.Y. TIMES (July 1, 2021).

¹²⁹ *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

¹³⁰ *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).

¹³¹ *Id.* at 1613 (Roberts, C.J., concurring).

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stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.”¹³² The notions of similarity and dissimilarity were driven, quite appropriately, by the state’s expert assessment of public health risks.

By November of 2020, however, Justice Ginsburg had passed away and had been replaced by Justice Barrett. The 5–4 majority that had controlled the outcome in the summer of 2020 became a 5–4 majority in support of a far more aggressive attitude toward rejecting findings of general applicability. In *Roman Catholic Diocese of Brooklyn v. Cuomo*,¹³³ and later in *Tandon v. Newsom*,¹³⁴ the new majority asserted that religious gatherings had a presumptive right to be treated as well as the state treated the most favored secular gatherings, such as retail establishments and factories. The state’s justifications for the different treatment, grounded in expert opinion on the risk of spreading COVID-19, vanished in this approach.

This new formulation of what constituted a failure of general applicability threatened the *Smith* regime. If any secular exception, however well-grounded in considerations of policy or legislative decisions about coverage of a law, undermines general applicability, religious claimants would be able to successfully seek exemptions from a wide variety of laws of many different kinds.¹³⁵

It is far too soon to know whether this “most favored nation” approach to general applicability will take firm hold across the entire range of religious exemption claims, but we see reasons to be skeptical of that likelihood. First, and true to our conviction that restrictions on

¹³² *Id.*; see also *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (upholding similar Nevada orders with respect to gatherings at houses of worship).

¹³³ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

¹³⁴ *Tandon v. Newsom*, 141 S. Ct. 1294 (2021).

¹³⁵ For defense of the “most favored nation” theory, see, e.g., Douglas Laycock & Steven T. Collis, *Generally Applicable Law and the Free Exercise of Religion*, 95 NEB. L. REV. 1 (2016). For critique of this approach, see James Oleske, *Lukumi at Twenty: Legacy of Uncertainty for Religious Liberty and Animal Welfare Laws*, 19 ANIMAL L. REV. 295 (2013). For a constitutionally expansive and more mixed evaluation of the approach, see Nelson Tebbe, *The Principle and Politics of Equal Value*, 121 COLUM. L. REV. (forthcoming 2021). See also Christopher G. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J. L. & PUB. POL’Y 627 (2003).

worship are at the core of the free exercise guaranty, the COVID-19 cases all involve limitations on group worship, and therefore implicate the most acute constitutional concern.¹³⁶ Second, as a matter of process, the COVID-19 cases all arose in the Court's emergency docket, and so were not subject to full briefing and oral argument. This may help explain why none of the justices who joined in the Court's opinion in *Fulton*, including Justices Kavanaugh and Barrett, even mentions the COVID decisions in *Fulton*.

More substantively, note that where strict review of religious exemption claims is triggered by the presence of a secular exception, the government will inevitably lose. The very presence of any exception demonstrates that the government interest in denying a religious exception falls short of compelling.¹³⁷ Perhaps the majority in *Fulton*, determined to avoid overruling *Smith*, chose not to advance a theory of general applicability that would make *Smith* mostly irrelevant, and simultaneously tilt the constitutional scales heavily toward every religious claimant.

Fulton and the relevance of administrative discretion. If we have correctly sized up the silence in *Fulton* with respect to the "most favored nation" approach to general applicability, what is to be made of the *Fulton* Court's reliance on administrative discretion as the factor that undermines general applicability in this case? As we discussed in Part I, the discretion on which the Court relies in *Fulton* had never been exercised in the context of permitting social welfare agencies to refuse to screen particular classes of prospective foster parents. Such agencies, for

¹³⁶ Note the Court's treatment of the decision in *Danville Christian Academy, Inc. v. Beshear*, 981 F.3d 505 (6th Cir. 2020), which involved restrictions on in-person attendance at elementary and secondary schools, religious and secular. The state had not imposed equally demanding restrictions on pre-schools or institutions of higher education, so a "most favored nation" argument was available in this case, but the Court did not deploy it. *Danville Christian Academy Inc. v. Beshear*, 141 S. Ct. 527 (2020).

¹³⁷ *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881–82 (2021). In *O Centro*, a RFRA case, the Supreme Court used this move, in which underinclusive coverage of a policy is fatal to the government's case for compelling interest when the policy is challenged for not exempting religiously motivated conduct. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006). For discussion of why the Court did not rely on this argument in *Hobby Lobby*, despite its availability, see Lupu, *supra* note 107, at 82–86.

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example, could not screen only parents whose faith matched the agency's faith commitments, although such preferences are not uncommon.¹³⁸

The analogy on which the Court relies in *Fulton* is to the unemployment compensation context. In *Sherbert v. Verner*, the state agency was engaged in making decisions about whether a claimant had “good cause” to refuse available work. As the Court in *Smith* viewed that context, it lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment. . . . [O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of “religious hardship” without compelling reason.¹³⁹

The system in *Fulton* looked nothing like the system described in *Sherbert*. Philadelphia had no process in place for evaluating the reasons why private contracting agencies might want exceptions from non-discrimination requirements. The city had created no such exceptions as a matter of substance. The contractual reference to the “Commissioner's discretion” appeared to be a piece of administrative boilerplate, not a product of a policy judgment about the possibilities of “good cause” to ignore anti-discrimination rules that govern the screening of prospective parents.

As we argued in Part I, *Fulton's* treatment of this grant of discretion was a convenience, a way to allow the Court to rule in favor of CSS without addressing the question of whether *Smith* should be overruled. But this move, if not cabined, threatens to do as much harm as that overruling might do. In the world of administrative agencies—especially

¹³⁸ See *Rogers v. U.S. Dept. of Health & Human Servs.*, 466 F. Supp. 3d 625 (D.S.C. 2020). In *Rogers*, the plaintiffs claimed that the federal and state defendants violated the Establishment Clause by contracting with a faith-based foster care agency that refused to place children in any homes that did not conform to the requirements of the agency's religious beliefs and practices. The court denied defendants' motions to dismiss the case and the matter remains in discovery. Although federal and state laws and regulations prohibit contractors from discriminating based on religion, the then-Secretary of HHS and Governor of South Carolina granted waivers to permit the contract at issue. For further discussion of *Rogers*, including the impact of *Fulton* on the litigation, see Robert W. Tuttle, *Foster Care and the Unsettled Religion Clauses*, 60 FAM. CT. REV. (forthcoming 2022).

¹³⁹ *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990).

at the state and local level—the use of waivers, enforcement discretion, and other ways of creating exceptions to policy is commonplace.¹⁴⁰ Indeed, if enforcement discretion alone undermines general applicability, the entirety of the criminal law will no longer qualify as generally applicable.¹⁴¹

In addition, large bodies of law administered by judges, rather than agencies, similarly incorporate devices for the exercise of discretion as a way of mitigating harsh, unjust, or constitutionally troubling results. Such discretion may operate to reinforce general legal principles of fairness, or to protect important interests, some secular and others religious. For example, judges may choose to construe statutes in ways that avoid conflicts with religion,¹⁴² and they may similarly choose to apply general doctrines of equity to avoid hardships produced by religious beliefs, especially in matters involving care and custody of children.

At times, and quite appropriately, administrative and judicial discretion may be exercised in favor of claims of religious accommodation. Accepting an absence from school or work on grounds of religious obligation, for example, may be fair and appropriate. Constitutional norms do not preclude such recognition when they are not designed to advance particular faiths and when they cause no significant harm to others.¹⁴³

But treating every grant of discretion, whether or not exercised, as fatal to a claim of general applicability turns the possibility of permissive religious accommodation into a surprise mandate of accommodation. In *Fulton*, the Court treated the grant of discretion to the commissioner

¹⁴⁰ In the context of anti-discrimination laws, we urge drafters of policy instruments to remove, and to explicitly renounce, the possibility of discretionary exceptions. Leaving such discretion in place invites a replay of *Fulton*.

¹⁴¹ In *303 Creative LLC v. Elenis*, 6 F.4th 1160 (10th Cir. 2021), *petition for cert. filed*, 2021 WL 4459045 (U.S. Sept. 24, 2021) (No. 21–476), Chief Judge Tymkovich argued in dissent that the discretion lodged in the Colorado Civil Rights Commission by its processes of enforcement and adjudication made the state’s law not “generally applicable.” *Id.* at 1206–09 (Tymkovich, C.J., dissenting). The discretion to which he pointed was no more than the agency’s normal process of investigating and adjudicating claims, finding some but not others to be violations of the state’s anti-discrimination laws.

¹⁴² See, e.g., *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (construing National Labor Relations Act to exclude jurisdiction over church-operated schools that teach secular and religious subjects).

¹⁴³ See, e.g., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (recognizing duty of religious accommodation in the private workplace under Title VII of the 1964 Civil Rights Act, so long as the accommodation produces no more than *de minimis* harm to employer or other employees).

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as the beginning and end of the case in favor of CSS. The mere existence of discretion supposedly made the norm of non-discrimination not generally applicable, and simultaneously defeated any argument from the city that it had a compelling interest in denying the sought-after religious exemption. This was a way for the Court to put *Fulton* behind it, but its circularity is obvious, and should not be a general and frequent basis for free exercise adjudication going forward.

* * *

Fulton is a signal to lower court judges and litigants that the regime of *Smith*, in general terms, survived challenge and remains intact. If judges see it in that light, they will be loath to make *Smith* disappear through the device of finding most laws and regulations not generally applicable. To be sure, free exercise claimants will aggressively push these theories. Judges will occasionally find cases that seem sympathetic on the side of free exercise claimants, and search for ways to make use of such devices in order to rule in favor of religion. We expect that many of these cases will involve clashes between conservative religious groups or individuals, and those who assert rights of LGBTQ equality, a context in which both *Masterpiece Cakeshop* and *Fulton* unfortunately have created licenses to lean towards religious claims.

But judges will also see many religious claims that they do not find sympathetic, as well as cases in which the risk of materially undermining important government interests will loom large. These cases will appear in the context of criminal law, tort law, child welfare law, marriage and divorce law, labor and employment law, and administrative regulation of almost every kind. This is the state of affairs against which Justice Scalia warned in *Smith*, a warning to which Justices Barrett, Kavanaugh, and Breyer appeared sensitive in *Fulton*.

Lower courts, and the Supreme Court itself, repeatedly worked around this threat in the years between *Yoder* and *Smith*. This time around, we expect that lower courts will find ways to resist the move toward shrinking the category of generally applicable laws, because the alternative will be to allow religious claimants to be, again and again, a law unto themselves. We recognize the instability of the current moment in free exercise jurisprudence, but we remain confident that wiser heads, whether or not more plentiful, will continue to prevail.



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